INDEX

THE FOLLOWING MATERIALS FROM THE RECORD APPEAR HEREINAFTER IN LOGICAL SEQUENCE:

Item No.	*Description*	*Page*
1.	Docket Entries in CA-3-3690-B	1
2.	Docket Entries in CA-3-3691-C	4
3.	Order by Chief Judge of the United States Court of Appeals for the Fifth Circuit, Convening a Statutory Three-Judge Court in CA-3-3690-B, Filed March 18, 1970	6
4.	Order by Chief Judge of the United States Court of Appeals for the Fifth Circuit, Convening a Statutory Three-Judge Court in CA-3-3691-C, Filed March 30, 1970	8
5.	Plaintiff's First Amended Complaint in *Roe* v. *Wade,* CA-3-3690-B (N.D. Tex., Filed Apr. 22, 1970)	10
6.	Plaintiffs' First Amended Complaint in *Doe* v. *Wade,* CA-3-3691-C (N.D. Tex., Filed Apr. 22, 1970)	15
7.	Plaintiff-Intervenor Hallford's Application for Leave to Intervene in *Roe* v. *Wade,* Filed March 19, 1970	22

Item No.	Description	Page
8.	Plaintiff-Intervenor Hallford's Original Complaint, Filed March 23, 1970	24
9.	Order of District Court Granting Application for Leave to Intervene, Filed March 23, 1970	36
10.	Defendant Wade's Original Answer in *Roe* v. *Wade*, Filed March 23, 1970	37
11.	Motion of Defendant Wade to Dismiss Complaint of John and Mary Doe, Filed March 24, 1970	40
12.	Defendant Wade's Answer to Plaintiff-Intervenor Hallford's Original Complaint, Filed March 26, 1970	42
13.	Motion of the State of Texas to Dismiss All Complaints, or in the Alternative for Judgment on the Pleadings, Filed April 30, 1970	47
14.	Motion of Plaintiffs' Jane Roe, John Doe, and Mary Doe for Summary Judgment in *Roe* v. *Wade*, and *Doe* v. *Wade*, Filed May 21, 1970	50
15.	Affidavit of Paul Carey Trickett, M.D., in Support of Plaintiffs' Motion for Summary Judgment in *Roe* v. *Wade*, and *Doe* v. *Wade*, Filed May 21, 1970	51
16.	Affidavit of Jane Roe in Support of Plaintiffs' Motion for Summary Judgment in *Roe* v. *Wade*, and *Doe* v. *Wade*, Filed May 21, 1970	56

Item No.	Description	Page
17.	Motion of Plaintiff James Hubert Hallford, M.D., for Summary Judgment in *Roe* v. *Wade*, and *Doe* v. *Wade*, Filed April 20, 1970	59
18.	Affidavit of Plaintiff-Intervenor James Hubert Hallford, M.D., in Support of Motion for Summary Judgment in *Roe* v. *Wade*, and *Doe* v. *Wade*, Filed April 20, 1970	61
19.	Transcript of Oral Argument Before Statutory Three-Judge United States District Court for the Northern District of Texas, Filed July 30, 1970	75
20.	Opinion of the District Court, Filed June 17, 1970	111
21.	Judgment of the District Court, Filed June 17, 1970	124
22.	Notice of Appeal by Plaintiffs Jane Roe, John Doe, Mary Doe, and James Hubert Hallford, M.D., From the Judgment of the District Court to the Supreme Court of the United States, Filed With the District Court August 17, 1970	127
23.	Notice of Appeal by Defendant State of Texas From the Judgment of the District Court to the Supreme Court of the United States, Filed With the District Court August 17, 1970	130

Item No.	*Description*	*Page*
24.	Notice of Appeal by Plaintiff Jane Roe From the Judgment of the District Court to the United States Court of Appeals for the Fifth Circuit, Filed With the District Court July 24, 1970	133
25.	Notice of Appeal by Plaintiff-Intervenor James Hubert Hallford, M.D., From the Judgment of the District Court to the United States Court of Appeals for the Fifth Circuit, Filed With the District Court July 23, 1970	134
26.	Notice of Appeal by Defendant Wade From the Judgment of the District Court to the United States Court of Appeals for the Fifth Circuit, Filed With the District Court July 10, 1970	135
27.	Motion of Plaintiffs Roe, Doe, and Hallford to Hold Appeal to Fifth Circuit by Defendant Wade in Abeyance Pending Decision by the Supreme Court of the United States, Filed October 13, 1970	136
28.	Order of United States Court of Appeals for the Fifth Circuit Granting Motion of Plaintiffs Roe, Doe, and Hallford to Hold Appeal by Defendant Wade in Abeyance Pending Decision by the Supreme Court of the United States, Filed October 29, 1970	139

Docket Entries in CA-3-3690-B

DATE	PROCEEDINGS
1970	
Mar. 3	Filed Plaintiff's Original Complaint and issued Summons.
Mar. 16	Filed Return on Summons executed 3-3-70 by serving District Attorney of Dallas by delivering to Henry Wade. (MD-19900)
Mar. 18	Filed Order designating Judges Hughes, Taylor & Goldberg.
Mar. 19	Filed Application for Intervention of James Hubert Hallford, M.D.
Mar. 23	Filed Order granting James Hubert Hallford's Application for Intervention. (Signed Mar. 20, 1970) Notices mailed 3-24-70.
Mar. 23	Filed Intervenor and Plaintiff Hallford's Original Complaint.
Mar. 23	Filed Defendant's Original Answer.
Mar. 26	Filed Defendant's Answer to Intervenor Hallford's Original Complaint.
Mar. 27	Filed Notice to Take Deposition of Jane Roe, April 11, 1970 at the office of the District Attorney of Dallas County, Tex.
Apr. 13	Filed Brief of Pltf., James Hubert Hallford, M.D.
Apr. 20	Filed plf's Hallford Motion for summary judgment & Affidavit of James Hubert Hallford, M.D.

DATE	PROCEEDINGS
1970	
Apr. 22	Filed Pltf's First Amended Complaint
Apr. 22	Filed Defendant's Demand for Jury Trial.
Apr. 23	Filed plaintiff's Brief.
Apr. 30	Filed by State of Texas, Motion to Dismiss or in the alternative Motion for judgment on the pleadings pursuant to Rule 12.
May 18	Filed Deft's Brief.
May 18	Filed Request for leave to file Amicus Curiae brief by Dallas Legal Services.
May 20	Filed by plf Dr. James H. Hallford, Reply Brief.
May 21	Filed Plaintiffs' Motion for Summary Judgment. Affidavits of Dr. Trickett and Jane Roe are attached.
June 17	Filed Opinion of the Three Judge Court. Copies mailed to all counsel
June 17	Filed Judgment, the complaint of John & Mary Doe is dismissed; the Texas Abortion Laws are declared void on their face for unconstitutional overbreath & for vagueness. Plf's application for injunction is dismissed. Copies mailed to all counsel by Mrs. Graul.
July 10	Filed Deft's Notice of Appeal. (Wade is notifying other parties) (Copy of all sent to Crt of Appeals)
July 23	Filed Intervenor's Notice of Appeal. (atty. is notifying other parties) (copy sent to Court of Appeals)

DATE	PROCEEDINGS
1970	
July 24	Filed Jane Roe's Notice of Appeal (copy sent to Crt. of Appeals, and attny. notifying other parties)
July 30	Filed Transcript of Proceedings held May 22, 1970.
Aug. 5	Mailed original record with Transcript to Court of Appeals.
Aug. 17	Filed Notice of Appeal to the Supreme Court of the U.S. by State of Texas
Aug. 17	Filed Notice of Appeal to the Supreme Court of the U.S. by the Intervenor
Oct. 29	Filed certified copy of Order from Court of Appeals Granting appellees' motion to hold appeal in abeyance pending decision of the U.S. Supreme Court.

Docket Entries in CA-3-3691-C

DATE	PROCEEDINGS
1970	
Mar. 3	Filed Plaintiffs' Original Complaint and issued Summons.
Mar. 16	Filed Return on Summons executed 3-3-70 by serving Henry Wade, District Attorney of Dallas Co. (MD-19901)
Mar. 24	Filed Defendant's Motion to Dismiss for failure to present an actual, justifiable controversy.
Mar. 24	Filed Brief in Support of Defendant's Motion to Dismiss.
Mar. 30	Filed Order designating Judge Taylor (*sic* [Hughes]) and Judge Goldberg as members of 3 Judge Court with Judge Taylor.
Apr. 20	Filed in CA 3-3690, by plf Hallford, Motion for summary judgment and Affidavit of James Hubert Hallford, M. D.
Apr. 22	Filed Pltfs' First Amended Complaint
Apr. 22	Filed Defendant's Demand for Jury Trial.
Apr. 23	Filed in CA 3-3690, plaintiffs Brief
May 18	Filed in CA-3-3690, deft's Brief.
June 17	Filed Copy of opinion of the Three Judge Court.
June 17	Filed Judgment, the complaint of John & Mary Doe is dismissed; the Texas Abortion Laws are declared void on their face for unconstitutional

DATE	PROCEEDINGS
1970	
	overbreath & for vagueness. Plf's application for injunction is dismissed. Copies mailed to all counsel by Mrs. Graul.

[The original complaints of Jane Roe, John Doe, and Mary Doe are not included in this printed Appendix, but may be found with the certified record.]

Order by Chief Judge of the United States Court of Appeals for the Fifth Circuit, Convening a Statutory Three-Judge Court in CA-3-3690-B, Filed March 18, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

Civil Action No. 3-3690-B

JANE ROE,

—v.—

HENRY WADE.

---

(1) Requesting Judge: Honorable SARAH T. HUGHES, Northern District of Texas.

(2) District Judge: Honorable W. M. TAYLOR, Northern District of Texas.

(3) Circuit Judge: Honorable IRVING L. GOLDBERG.

(4) Date of Order: 3-16-70.

The Requesting Judge (1) above named to whom an application for relief has been presented in the above cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and

District Judge (2) named above to serve with the Requesting Judge (1) as members of, and with him to constitute the said Court to hear and determine the action.

This designation and composition of the three-Judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-Judge rather than a one-Judge court. This is a matter best determined by the three-Judge Court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both. The parties will be afforded the opportunity to brief and argue all such questions before the three-Judge panel either preliminarily or on the trial of the merits, or otherwise, as that Court thinks appropriate. See Jackson v. Choate, 5 Cir., 1968, 404 F.2d 910, Jackson v. Department of Public Welfare of the State of Florida, S.D. Fla., 1968, 296 F.Supp. 1341; City of Gainesville, Georgia v. Southern Railway Company, N.D. Ga., 1969, 296 F.Supp. 763; Smith v. Ladner, S.D. Miss., 1966, 260 F.Supp. 918; Hargrave v. McKinney, M.D. Fla., 1969, 302 F.2d 1381; Langford v. Barlow [No. 26770], 5 Cir., 1969, 417 F.2d 628, Langford v. Barlow, W.D. Tex., 1969, 304 F.Supp. 657.

JOHN R. BROWN
Chief Judge
Fifth Circuit

Order by Chief Judge of the United States Court of Appeals for the Fifth Circuit, Convening a Statutory Three-Judge Court in CA-3-3691-C, Filed March 30, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

No. 3-3691-C

JOHN DOE and MARY DOE,

—v.—

HENRY WADE, District Attorney of Dallas County.

---

(1) Requesting Judge: Honorable W. M. TAYLOR, JR., Northern District of Texas.

(2) District Judge: Honorable SARAH T. HUGHES, Northern District of Texas.

(3) Circuit Judge: Honorable IRVING L. GOLDBERG.

(4) Date of Order: March 26, 1970.

The Requesting Judge (1) above named to whom an application for relief has been presented in the above cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and

District Judge (2) named above to serve with the Requesting Judge (1) as members of, and with him to constitute the said Court to hear and determine the action.

This designation and composition of the three-Judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-Judge rather than a one-Judge court. This is a matter best determined by the three-Judge Court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both. The parties will be afforded the opportunity to brief and argue all such questions before the three-Judge panel either preliminarily or on the trial of the merits, or otherwise, as that Court thinks appropriate. See Jackson v. Choate, 5 Cir., 1968, 404 F.2d 910, Jackson v. Department of Public Welfare of the State of Florida, S.D. Fla., 1968, 296 F.Supp. 1341; City of Gainesville, Georgia v. Southern Railway Company, N.D. Ga., 1969, 296 F.Supp. 763; Smith v. Ladner, S.D. Miss., 1966, 260 F.Supp. 918; Hargrave v. McKinney, M.D. Fla., 1969, 302 F.2d 1381; Langford v. Barlow [No. 26770], 5 Cir., 1969, 417 F.2d 628, Langford v. Barlow, W.D. Tex., 1969, 304 F.Supp. 657.

JOHN R. BROWN
Chief Judge
Fifth Circuit

Plaintiffs' First Amended Complaint in *Roe* v. *Wade*, CA-3-3690-B (N.D. Tex., Filed Apr. 22, 1970)

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action No. CA-3-3690

JANE ROE, suing on behalf of herself and all others similarly situated,

Plaintiff,

—v.—

HENRY WADE, District Attorney of Dallas County,

Defendant.

I. PARTIES

1. Plaintiff, Jane Roe, is a citizen of the State of Texas, and a resident of Dallas County.

2. Defendant Henry Wade is the District Attorney of Dallas County, Texas, charged with the enforcement and administration of the criminal laws of the State of Texas in Dallas County.

II. JURISDICTION

1. Plaintiff invokes the jurisdiction of this Court under the First, Fourth, Fifth, Eighth, Ninth and Fourteenth

Amendments to the United States Constitution; and under Title 28, United States Code, Sections 1331 and 1343, 2201 and 2202, and 2281 and 2284; Title 42 United States Code, Section 1983.

2. Plaintiff seeks (a) a declaratory judgment that Articles 1191, 1192, 1193, 1194, and 1196 of the Texas Penal Code (hereinafter sometimes collectively referred to as the Texas Abortion Laws) are unconstitutional on their face; and (b) a permanent injunction against the future enforcement of these statutes.

III. Facts

1. Plaintiff, Jane Roe, is an unmarried pregnant woman.

2. Because of the economic hardships and social stigmas involved in bearing an illegitimate child, Plaintiff wishes to terminate her pregnancy by means of an operation, generally referred to as an abortion (within the meaning of Article 1191 of the Texas Penal Code), performed by a competent, licensed physician, under safe, clinical conditions.

3. Plaintiff's life does not appear to be threatened by the continuation of her pregnancy.

4. Plaintiff has been unable to secure a legal abortion in Dallas County because of the existence of the Texas Abortion Laws.

5. Her inability to obtain an abortion has caused Plaintiff to suffer emotional trauma.

6. Plaintiff cannot afford to travel to another jurisdiction to seek to secure a legal abortion under safe, clinical conditions.

7. An abortion performed by a competent, licensed physician, under hospital or clinic conditions is a safe and simple procedure which presents less danger to the pregnant woman, particularly in the first trimester of pregnancy, than ordinary childbirth.

8. An abortion performed outside of the clinical setting by unqualified personnel is extremely dangerous and often results in death, maiming, sterility, or serious infection.

9. This is a proper case to be heard by a Three-Judge Court in that Plaintiff is challenging State statutes as invalid on their face under the United States Constitution, and is seeking an injunction against the enforcement of the statutes.

10. Plaintiff sues on behalf of herself and all other women who have sought, are seeking, or in the future will seek to obtain a legal, medically safe abortion but whose lives are not critically threatened by the pregnancy. The number of members of the class is large and joinder of all members is impractical; there are questions of law and fact common to each class; the claims of Plaintiff are typical of the claims of such class; and the named Plaintiff will fairly and adequately protect the interests of the class.

IV. Causes of Action

1. The Texas Abortion Laws are unconstitutionally vague and uncertain on their face.

2. Said statutes deprive women and their physicians of rights protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments, in that the statutes are neither narrowly drawn nor supported by any overriding and compelling state interest.

(i) They infringe upon Plaintiff's right to safe and adequate medical advice pertaining to the decision of whether to carry a given pregnancy to term.

(ii) They deprive Plaintiff of the fundamental right of all women to choose whether and when to bear children.

(iii) They infringe upon Plaintiff's right to personal privacy.

(iv) They infringe upon Plaintiff's right to privacy in the physician-patient relationship.

3. Said statutes on their face infringe upon Plaintiff's right to life and liberty in violation of the Due Process Clause of the Fourteenth Amendment.

4. Said statutes on their face violate the First Amendment's prohibition against laws respecting an establishment of religion.

5. Said statutes on their face deny Plaintiff the equal protection of the laws.

V. Relief Requested

1. Plaintiff prays that a Three-Judge Court be convened to hear this cause.

2. Plaintiff prays that a declaratory judgment be issued holding the Texas Abortion Laws to be unconstitutional on their face.

3. Plaintiff further prays for a permanent injunction restraining Defendant, his agents, and successors from enforcing the challenged statutes, that costs be taxed against the Defendant and for such further relief, at law or in equity, as Plaintiff may be entitled to receive.

SARAH WEDDINGTON
3710 Lawton
Austin, Texas 78731

LINDA N. COFFEE
2130 First Nat'l Bank Bldg.
Dallas, Texas 75202

Attorneys for Plaintiff

[Certification of service omitted in printing.]

Plaintiffs' First Amended Complaint in *Doe* v. *Wade*, CA-3-3691-C (N.D. Tex., Filed Apr. 22, 1970)

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action No. CA-3-3691

JOHN DOE and MARY DOE, suing on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

HENRY WADE, DISTRICT ATTORNEY OF DALLAS COUNTY,

Defendant.

I. PARTIES

1. Plaintiffs, John and Mary Doe, are citizens of the State of Texas, and residents of Dallas County.

2. Defendant Henry Wade is the District Attorney of Dallas County, Texas, charged with the enforcement and administration of the criminal laws of the State of Texas in Dallas County.

II. JURISDICTION

1. Plaintiffs invoke the jurisdiction of this Court under the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth

LEED THROUGH

Amendments to the United States Constitution; and under Title 28, United States Code, Sections 1331 and 1343, 2201 and 2202, and 2281 and 2284; and Title 42, United States Code, Section 1983.

2. Plaintiffs seek (a) a declaratory judgment that Articles 1191, 1192, 1193, 1194, and 1196 of the Texas Penal Code (hereinafter sometimes collectively referred to as the Texas Abortion Laws) are unconstitutional on their face; and (b) a permanent injunction against the future enforcement of these statutes.

III. Facts

1. Plaintiffs John and Mary Doe are a childless married couple.

2. Plaintiff Mary Doe is presently suffering from a neural-chemical disorder. Her physician has advised her to avoid pregnancy until such time as her condition has materially improved, (although a pregnancy at the present time would not present a serious risk to Mary Doe's life).

3. In view of the medical advice received from Mary Doe's physician, Plaintiffs feel that it is inadvisable for them to become parents unless and until Mary Doe's condition has improved. For other highly personal reasons Plaintiffs do not wish to become parents at any time in the near future.

4. Also pursuant to medical advice, Plaintiff Mary Doe has discontinued use of the most effective means of contraception, the birth control pill. Plaintiffs are now conscientiously practicing an alternative method of contracep-

tion, but understand that there is nevertheless a significant risk of contraceptive failure.

5. Plaintiffs fear that due to contraceptive failure, they may face the prospect of becoming parents before they are properly prepared to accept the responsibilities of parenthood and before Mary Doe is able to undergo pregnancy without suffering considerable harm to her health and well-being. In such event, Plaintiffs would want to terminate the pregnancy by means of an operation, generally referred to as an abortion (within the meaning of Article 1191 of the Texas Penal Code), performed by a competent, licensed physician, under safe, clinical conditions.

6. Plaintiffs could not at the present time obtain a legal abortion in Dallas County, or anywhere else in Texas, in view of the Texas Abortion Laws which appear to limit legal abortions to those performed under medical advice in order to preserve the mother's life.

7. Should Mary Doe become pregnant, Plaintiffs' only alternative in Texas to carrying an unwanted pregnancy to term would be to secure an illegal abortion. Plaintiffs fear that the latter alternative would expose Mary Doe to an unnecessarily high risk of death, maiming, sterility, or serious infection. In addition, Plaintiffs would thereby suffer the extreme humiliation of participating in a furtive act, declared by the Texas Legislature to be a felony offense. And John Doe might risk prosecution under Article 70 of the Texas Penal Code as an accomplice to the crime of abortion.

8. Should Mary Doe become pregnant and Plaintiffs decide to secure a legal abortion, Plaintiffs would be forced

to undergo the emotional trauma of contacting numerous persons to ascertain jurisdictions where they could meet the legal requirements, to contact a doctor or clinic at the expense of long distance calls to make arrangements for the operation, and to expend considerable sums in travel, etc. Further, by the time Plaintiffs ascertained the fact of pregnancy, made the medical arrangements, arranged for time off from work, and gathered the necessary funds, in all likelihood the first trimester of pregnancy would have passed and the operation would then involve considerably greater risk to Mary Doe's health and require a lengthier recuperation.

9. The possibility of having to choose between the above-mentioned alternatives is presently having a detrimental effect upon Plaintiffs' marital happiness.

10. Since the birth control methods available to plaintiffs involve a risk of pregnancy, the Texas Abortion Laws, by eliminating the possibility of obtaining an abortion with reasonable ease, force upon Plaintiffs the choice of refraining from normal sexual relations or of endangering Mary Doe's health through a possible pregnancy.

11. In addition, Plaintiffs want to actively participate in various organizations, the activities of which include the giving of advice and counseling to both married and unmarried pregnant women, including the giving of information to assist in securing abortions, if desired.

12. Plaintiffs fear that any participation on their part in the above-mentioned organizational activities might subject them to prosecution under either (a) Article 70 of the Texas Penal Code, as accomplices to the crime of Abortion;

or (b) Article 1628 of the Texas Penal Code for conspiring to commit the crime of abortion. Therefore, Plaintiffs have refrained from participating in these activities.

13. This is a proper case to be heard by a Three-Judge Court in that Plaintiffs are challenging State Statutes as invalid on their face under the United States Constitution, and are seeking an injunction against the enforcement of the statutes.

14. Plaintiffs sue on behalf of themselves and all couples similarly situated, where they would seek an abortion were the woman to become pregnant and where the pregnancy would not constitute a critical threat to the woman's life. The number of members of the class is large and joinder of all members is impractical; there are questions of law and fact common to each class; the overall claims of Plaintiffs are typical of the claims of the class; and the named Plaintiffs will fairly and adequately protect the interests of the class.

IV. Causes of Action

1. The Texas Abortion Laws are unconstitutionally vague and uncertain on their face.

2. Said statutes deprive plaintiffs and their physicians of rights protected by the First, Fourth, Fifth, Ninth and Fourteenth Amendments, in that the statutes are neither narrowly drawn nor supported by any overriding and compelling state interest.

(i) They infringe upon Plaintiffs' right to safe and adequate medical advice pertaining to the decision of whether to carry a given pregnancy to term.

(ii) They infringe upon Plaintiffs' right to choose whether and when to have children.

(iii) They infringe upon Plaintiffs' right to privacy in the physician-patient relationship.

(iv) They infringe upon Plaintiffs' right to personal and marital privacy.

3. Said statutes on their face infringe upon Mary Doe's right to life and liberty in violation of the Due Process Clause of the Fourteenth Amendment.

4. Said statutes on their face violate the First Amendment's prohibition against laws respecting an establishment of religion.

5. Said statutes on their face deny Plaintiffs the equal protection of the laws.

V. Relief Requested

1. Plaintiffs pray that a Three-Judge Court be convened to hear this cause.

2. Plaintiffs pray that a declaratory judgment be issued holding the Texas Abortion Laws to be unconstitutional on their face.

3. Plaintiffs further pray for a permanent injunction, restraining Defendant, his agents and successors from enforcing the challenged statutes; that costs be taxed against the Defendant; and for such further relief, at law or in equity, to which Plaintiffs may be entitled.

LINDA N. COFFEE
2130 First Nat'l Bank Bldg.
Dallas, Texas 75202

SARAH WEDDINGTON
3710 Lawton
Austin, Texas 78731

Attorneys for Plaintiffs

[Certification of service omitted in printing.]

Plaintiff-Intervenor Hallford's Application for Leave to Intervene in *Roe* v. *Wade*, Filed March 19, 1970

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action No. CA-3-3690-B

JANE ROE,

Plaintiff,

—v.—

HENRY WADE, District Attorney of Dallas County,

Defendant.

To the Honorable Judges of Said Honorable Court:

COMES NOW James Hubert Hallford, M.D., a licensed physician under the laws of Texas since 1958, and moves for leave to intervene as plaintiff in this action, in order to assert the claim set forth in plaintiff's Hallford original complaint which is filed herein, on the ground that he fears prosecution under the Texas Abortion Laws (Articles 1191 thru 1196 of the Texas Penal Code) as he currently stands charged with violating said articles in the following causes now pending in the Criminal District Court of Dallas County, Texas to wit: the State of Texas vs. James H. Hallford No. C-69-5307-IH and the State of Texas vs.

James H. Hallford No. C-69-2524-H and he feels that the present plaintiff (and the plaintiff in Civil Action No. CA-3-3691-C) does not fairly and adequately protect the interest of himself and the class of people who are physicians, licensed to practice medicine under the laws of the State of Texas and who fear future prosecution under said statutes and the present plaintiff does not fairly and adequately protect the interest of the class of people who are his patients and the patients of other practicing physicians. James Hubert Hallford further prays for an order permitting him to adopt the complaint of plaintiff, Jane Roe, insofar as the allegations contained therein are applicable to himself, as his own with like effect, as if fully repeated.

Respectfully submitted,

JAMES HUBERT HALLFORD, M.D.

[Certificate of Service omitted in printing.]

Plaintiff-Intervenor Hallford's Original Complaint, Filed March 23, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action No. CA-3-3690-B

[TITLE OMITTED IN PRINTING]

I. PARTIES

1. Plaintiff, James Hubert Hallford, M.D., is a citizen of the State of Texas, and a resident of Dallas County, and is engaged in the active practice of medicine in the County of Dallas.

2. Defendant, Henry Wade, is the District Attorney of Dallas County, Texas, charged with enforcement and administration of the criminal laws of the State of Texas in Dallas County.

II. JURISDICTION

1. Plaintiff invokes the jurisdiction of this Court under the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution; Title 28, U.S. Code, Sections 1331 and 1343; the Declaratory Judgment Act, Title 28, United States Code, Sections 2201 and 2202; the three-Judge Court Statute, Title 28, United

States Code, Sections 2281 and 2284; and Title 42, Section 1983.

2. Plaintiff seeks a declaratory judgment that Articles 1191, 1192, 1193, 1194, and particularly 1196 of the Texas Penal Code (hereinafter sometimes collectively referred to as the Texas Abortion Laws) are unconstitutional on their face; and a permanent injunction against the enforcement of these statutes. The plaintiff expressly reserves the right to apply for a temporary restraining order, in the future, under Title 28, United States Code, Section 2284, if such action is necessary to prevent irreparable damage to him.

III. Statutes

1. The provisions of the Texas Penal Code, concerning the laws of abortion, being Articles 1191 through 1196 provide for and read as follows:

> Article 1191—"If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubted. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused. Acts 1907, p. 55."
>
> Article 1192—"Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice."

Article 1193—"If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars."

Article 1194—"If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder."

Article 1195—"Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years."

Article 1196—"Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

2. The above abortion laws do not define the meaning of "for the purpose of saving the life of the mother," nor the meaning of "an abortion procured or attempted by medical advice." Furthermore, the case law of the State of Texas as reflected in the opinions of the Texas Court of Criminal Appeals does not define the meaning of said phrases.

3. The abortion laws do not establish a formal administrative mechanism for interpreting and enforcing its provisions.

4. The abortion laws in effect create a presumption that any abortion performed by a licensed practicing medical

doctor is illegal and unlawful and the physician has the burden of proving the lawfulness of the abortion if he is arrested or charged with violating the Texas Abortion Laws. In this regard, there are no provisions in the Texas Abortion Laws which require the State to rebut any medical opinion justifying an abortion and a Judge or Jury may convict a defendant under the Texas Abortion Laws simply because they do not believe the testimony of the defendant and/or any other expert opinion offered on his behalf.

5. The Texas Abortion Laws do not elaborate on their applicability or lack of same to the common situation in which a patient seeks an abortion, such as psychiatric indications, cardiac complications, kidney disease, rape, German measles, contraceptive failure, genetic complications, gastrointestinal diseases, neurologic diseases, diabetes, pulmonary disease, cancer, exposure to radiation, and socio-economic conditions such as those encountered by parents who have neither the means nor the desire to have more children, but the wife is pregnant.

IV. Facts

1. A therapeutic abortion performed under hospital or clinic conditions is a safe and simple procedure which presents less danger to the pregnant woman, particularly in the first trimester of pregnancy, than ordinary childbirth.

2. An abortion performed outside of the clinical setting by unqualified personnel is extremely dangerous to a woman, and may result in death, maiming, sterility or serious infection.

3. The threat and uncertainty of the Texas Abortion Laws are a principal deterrent to physicians and patients which delimits the number of therapeutic hospital and clinical abortions.

4. The plaintiff is not able to treat his patients according to the high standards of medical practice because of the uncertainty, potential sweep, and application of the challenge laws.

5. Pregnant women patients thereupon seek abortion outside of the hospital and clinical setting, risking their lives and health.

6. Hospitals in Dallas County treat numerous cases each year of women who have had septic, incomplete, and badly bungled abortions at the hands of unqualified, often non-medical abortionists.

7. The plaintiff in his regular practice as a physician receives, on a frequent and recurring basis, appeals from pregnant women who desire a therapeutic abortion in safe hospital or clinical surroundings.

8. Plaintiff must, in each case, decide whether and how he can advise and treat these patients in light of their overall physiological, psychological, and other personal needs.

9. Plaintiff's prospective patients come within a wide variety of conditions, which have included in the past and will include in the future the following:

(a) Serious danger of death to the woman unless an abortion is performed within a short period of time;

(b) Serious danger of suicide;

(c) Possible danger of suicide;

(d) Uncertain danger of suicide;

(e) Pregnancy caused by rape or incest;

(f) Patient ill with cancer;

(g) Patient had been infected with German measles in early pregnancy and would not like to risk the danger that continued pregnancy would lead to a serious malformed and sick infant;

(h) Patient would prefer to postpone pregnancy to a later date for a wide variety of reasons, including contraceptive failure, extreme youth, and others;

(i) Uncertain danger of death to the woman unless an abortion is performed within a short period of time;

(j) Possible danger of death to the woman unless an abortion is performed within a short period of time.

10. Plaintiff is not able to ascertain in a vast majority of cases whether the challenge laws prohibit advice and medical treatment, because the statutes do not in any way correlate with the regular and recurring medical indications present in his patients.

11. Plaintiff is deterred, hindered, chilled, and hampered in advising and treating his patients as a direct consequence of the statutes involved.

12. There is no medical committee, administrative agency or any other group that the plaintiff can apply to for an approval to perform a therapeutic abortion so that

he can be sure that his patient comes within the medical exceptions to the Texas Abortion Law or whether or not he has complied with Article 1196 in performing an abortion.

13. If the plaintiff was not subject to the threat of the vague and sweeping statutes challenged here, the medical practice of the plaintiff and other similar situated would be better able to serve the health needs of large numbers of women who are also affected by the statutes.

14. The plaintiff in the past has been arrested for violating the Texas Abortion Laws and at the present time stands charged by indictment with violating said laws in the Criminal District Court of Dallas County, Texas to-wit: (1) The State of Texas vs. James H. Hallford, No. C-69-5307-IH, and (2) The State of Texas vs. James H. Hallford, No. C-69-2524-H. In both cases the defendant is charged with abortion and the indictment does not allege that the defendant does not come under the protection of Article 1196 of the Texas Penal Code nor does the indictment set out any facts which would negate the exceptions provided by Article 1196 of the Texas Penal Code and under the laws of the State of Texas the defendant has the burden of proving that he comes under the vague, ambiguous and indefinite provisions of Article 1196 of the Texas Penal Code, and furthermore, under the laws of the State of Texas even if the defendant offers testimony from himself and other physicians that the alleged abortion comes under the exception set out by Article 1196, the Judge and/or Jury may simply disbelieve such testimony without any expert medical opinion being offered to the contrary and convict the defendant.

V. Causes of Action

1. The Texas Abortion Laws and in particular Article 1196 are unconstitutionally vague and uncertain on their face, and in violation of the specificity requirements of the Fourteenth Amendment to the United States Constitution.

2. Said laws, on their face and as applied, deprive plaintiff and his patients of the right to privacy in the physician-patient relationship, as protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.

3. Said laws, on their face and as applied, deprive plaintiff of the right to practice medicine according to the highest standards of medical practice, as guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.

4. Said laws, on their face and as applied, deprive plaintiff's patients of "the fundamental right of a woman to choose whether to bear children . . . " *People* v. *Belous,* 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969), as protected by the Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution.

5. Said laws, on their face and as applied, infringe upon plaintiff's patients' right to safe and adequate medical advice and treatment pertaining to the decision of whether to carry a given pregnancy to term, in violation of the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution.

6. Said laws, on their face and as applied, infringe upon the stated constitutional rights of plaintiff and his patients, because said rights are protected and fundamental, and no compelling or overriding justification can be offered for the potentially drastic sweep of the laws.

7. Said laws, on their face, and as applied, deprive plaintiff and his patients of the equal protection of the laws, by treating similarly situated classes differently with no compelling justification for classification.

8. Said laws, on their face and as applied, violate the First Amendment free speech guarantee in their broad and indiscriminate sweep which deters and chills discussion and advice pertaining to abortion.

9. Said laws, on their face and as applied, violate the First Amendment prohibition against laws respecting an establishment of religion, in that the challenged statutes have no independent and compelling secular justification.

10. Said laws violate the Eighth Amendment in that they operate to impose a cruel and unusual punishment upon women by forcing them to bear each child they conceive, regardless of other surrounding circumstances short of immediate and obvious death if an abortion is not performed.

11. The enforcement of the said laws places the physician and this plaintiff in a position of decision-making beset with such inherent possibility of bias and conflict of interest as to deprive the plaintiff and his patients of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

12. The abortion laws and in particular Article 1196 are unconstitutional in that they provide no exceptions or justifications for abortions performed by a licensed physician wherein the plaintiff's patients are suffering from any one of the following:

(a) Pregnancy caused by rape or incest;

(b) Pregnancy complicated by various physiological and psychological conditions;

(c) Patients infected with German measles in early pregnancy and would not like to risk the prospect of serious and permanent fetal deformatives;

(d) Patients being the victims of contraceptive failure and for other medical reasons than have been set out above, highly likely or in all probability likely to bear serious and permanent fetal deformatives;

(e) Patients who for psychological or physiological reasons are in some danger of death if an abortion is not performed but where the risk or immediacy of such is not so great that it can medically or legally be said that the abortion is "for the purpose of saving the life of the mother;"

13. The Texas Abortion Laws create a legal and factual presumption that any abortion performed by a licensed physician is unlawful and place upon the defendant physician the burden of showing privilege or a lawful abortion was performed and the presumption of guilt created by the Texas Abortion Laws is in violation of the laws and the Constitution of the United States of America.

14. The language in Article 1196 reciting that "nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother" is unconstitutionally vague and uncertain on its face and forbids the doing of an act in terms so vague that the plaintiff physician and others similarly situated must necessarily guess at its meaning and differ as to its application.

VI. Relief Requested

1. Plaintiff prays that a three-Judge Court be convened to hear this cause.

2. Plaintiff prays that a declaratory judgment be issued holding the Texas Abortion Laws to be unconstitutional on their face.

3. Plaintiff prays for a permanent injunction, restraining defendant, his agents, and successors, from enforcing the challenged statutes.

4. Plaintiff reserves the right to make application for and pray for an interlocutory injunction granting a temporary restraining order to prevent irreparable damage, i.e., the actual trial of the felony cases now pending against this plaintiff in the Criminal District Court of Dallas County, Texas, because such a trial would cause irreparable damage to the plaintiff.

5. The plaintiff further prays that costs be taxed against the defendant; and for such further relief, at law or in equity to which plaintiff may be entitled.

Respectfully submitted,

By Fred Bruner

By Roy L. Merrill, Jr.
Daugherty, Bruner, Lastelick
& Anderson
1130 Mercantile Bank Building
Dallas, Texas 75201 742-3941

Attorneys for Plaintiff

Order of District Court Granting Application for Leave to Intervene, Filed March 23, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

CA-3-3690-B

[TITLE OMITTED IN PRINTING]

On the 20 day of March, 1970, came on to be heard in the above cause, the Application for Intervention filed by James Hubert Hallford, M.D., who fears future prosecution under the Texas Abortion Statutes (Articles 1191 thru 1196 of the Texas Penal Code) and,

IT IS, THEREFORE, ORDERED that said Applicant be allowed to intervene as plaintiff in this action.

Signed this the 20 day of March, 1970.

SARAH T. HUGHES
United States District Judge

Defendant Wade's Original Answer in *Roe* v. *Wade*, Filed March 23, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action No. CA-3-3690-B

[TITLE OMITTED IN PRINTING]

To the Honorable Judge of Said Court:

Now comes HENRY WADE, defendant in the above entitled and numbered cause, and makes this his answer herein, and would show the Court:

1.

Defendant is the Criminal District Attorney of Dallas County, Texas.

2.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the following averments in Plaintiff's Original Complaint:

a.) That plaintiff is an unmarried pregnant woman;

b.) That plaintiff wishes to terminate her pregnancy, if any;

c.) That plaintiff is under any economic hardship or social stigma;

d.) That plaintiff's life is not threatened by continuation of her pregnancy, if any;

e.) That plaintiff cannot secure a legal abortion in Dallas County, Texas;

f.) That plaintiff cannot afford to travel to another jurisdiction to secure an abortion;

g.) That an abortion under clinical conditions is safer than ordinary childbirth.

3.

Defendant denies that this is a proper case to be heard by a Three-Judge Court because plaintiff is without standing to maintain it, in that the statutes complained of operate only against persons who perform an abortion, not against pregnant women upon whom abortions are performed.

4.

Defendant denies that there is no state forum in which plaintiff's federal constitutional rights can be determined.

5.

Defendant denies that the statutes complained of are unconstitutionally vague and uncertain on their face.

6.

Defendant denies that the said statutes are unconstitutionally broad on their face for any of the reasons alleged in Plaintiff's Original Complaint.

7.

Defendant denies that the said statutes infringe upon plaintiff's right to life.

8.

Defendant denies that the said statutes violate the constitutional prohibition against laws respecting establishment of religion.

9.

Defendant denies that the said statutes deny plaintiff the equal protection of the law.

10.

Defendant affirmatively says that if plaintiff is in fact an unmarried pregnant woman she has assumed the risk attendant upon such condition.

WHEREFORE, defendant prays that all relief requested by plaintiff be denied, that this cause be dismissed for plaintiff's lack of standing to maintain it, and that defendant recover from plaintiff his costs in this behalf expended.

JOHN B. TOLLE
Assistant District Attorney
Dallas County Courthouse
Dallas, Texas 75202

[Certification of Service omitted in printing.]

Motion of Defendant Wade to Dismiss Complaint of John and Mary Doe, Filed March 24, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action No. CA-3-3691-C

JOHN DOE and MARY DOE,

Plaintiffs,

v.

HENRY WADE, District Attorney of Dallas County,

Defendant.

To the Honorable Judge of Said Court:

NOW COMES HENRY WADE, Criminal District Attorney of Dallas County, Texas, Defendant herein, and moves the Court to dismiss this action for the reason that plaintiffs have no standing to maintain their suit against this Defendant because of their failure to present an actual, justiciable controversy.

WHEREFORE, Defendant prays that all relief requested by plaintiffs be denied, that this cause be dismissed for

the foregoing reasons, and that Defendant recover from plaintiffs his costs in this behalf expended.

Respectfully submitted,

WILSON JOHNSTON
Assistant District Attorney
Dallas County, Texas
Attorney for Defendant,
Henry Wade

[Certificate of Service omitted in printing.]

Defendant Wade's Answer to Plaintiff-Intervenor Hallford's Original Complaint, Filed March 26, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action No. CA-3-3690-B

JANE ROE,

Plaintiff,

v.

HENRY WADE, District Attorney of Dallas County,

Defendant.

To the Honorable Judge of Said Court:

Now comes HENRY WADE, defendant in the above entitled and numbered cause, and makes this his answer to Intervenor Hallford's Original Complaint herein, and would show the Court:

1.

Defendant is the Criminal District Attorney of Dallas County, Texas.

2.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the following averments in Intervenor's Original Complaint:

a) That intervenor is a citizen of the State of Texas, or a resident of Dallas County, Texas;

b) That intervenor is licensed to practice medicine in the State of Texas, or that intervenor is engaged in the practice of medicine in Dallas County, Texas;

c) That a therapeutic abortion performed under clinical conditions presents less danger to the pregnant woman than ordinary childbirth;

d) That intervenor is not able to treat his patients, if any, according to the high standards of medical practice because of the Texas Abortion Laws;

e) That pregnant women thereupon seek abortions outside the hospital or clinical setting, risking their lives and health;

f) That hospitals in Dallas County treat women each year who have had septic or incomplete abortions at the hands of unqualified abortionists;

g) That intervenor, if he is a physician, in his regular practice, if any, receives frequent appeals from pregnant women who want an abortion;

h) That intervenor must decide whether and how he can treat these patients, if any;

i) That intervenor's patients, if any, come within the variety of conditions set out in paragraph 9, subparagraphs (a) through (j) on page 5 of Intervenor's Original Complaint;

j) That intervenor is not able to ascertain whether the challenged laws prohibit advice and medical treatment in a vast majority of cases, if any;

k) That intervenor is deterred, hindered, chilled, and hampered in advising and treating his patients, if any, as a direct consequence of the statutes involved;

l) That there is no medical committee or other group to which intervenor can turn for advice;

m) That intervenor would be better able to serve the health needs of large numbers of women but for the statutes of which he complains;

n) That intervenor is one and the same JAMES H. HALLFORD indicted in cause numbers C-69-2524-H and C-69-5307-IH in the Criminal District Court of Dallas County, Texas;

o) That intervenor fears future prosecution under the Texas Abortion Laws.

3.

Defendant denies that the statutes complained of are unconstitutionally vague and uncertain on their face, and in violation of the requirements of the Fourteenth Amendment.

4.

Defendant denies that the statutes complained of deprive intervenor and his patients, if any, of the right to privacy in the physician-patient relationship, without admitting the existence of any physician-patient privilege.

5.

Defendant denies that the said statutes deprive intervenor of the right to practice medicine according to the highest standards of medical practice, and denies that such

right is protected or guaranteed by the United States Constitution.

6.

Defendant denies that the said statutes deprive any pregnant woman of the "fundamental right to choose whether to bear children", and without admitting the existence of such right, defendant says that intervenor has no standing to assert it.

7.

Defendant denies that the statutes complained of deprive pregnant women of any of their constitutional rights, and says that intervenor has no standing to assert any of such rights.

8.

Defendant denies that the said statutes violate the First Amendment right of free speech or the prohibition against laws respecting the establishment of a religion.

9.

Defendant denies that the said statutes violate the Eighth Amendment prohibition against cruel and unusual punishment.

10.

Defendant denies that the said statutes deprive intervenor of the equal protection of the law.

11.

Defendant denies that the said statutes are unconstitutional for any of the reasons set forth in paragraphs 1 through 14, inclusive, on pages 7, 8, 9 and 10 of Intervenor's Original Complaint.

12.

Defendant denies that the said statutes are so threatening or uncertain as to constitute a principal deterrent to physicians and patients which delimits the number of therapeutic hospital and clinical abortions.

13.

Defendant denies that the said statutes create a presumption of guilt on the part of any person charged thereunder.

14.

Defendant says that if intervenor is in fact one and the same JAMES H. HALLFORD indicted in cause numbers C-69-2524-H and C-69-5307-IH in the Criminal District Court of Dallas County, Texas, his prayer for relief as to those criminal cases cannot be granted by this Court because of the provisions of 28 USC Sec. 2283.

WHEREFORE, defendant prays that intervenor be required to show by legal and competent evidence the truth of the matters of fact alleged in his Original Complaint, if he can, that all relief prayed for in said Original Complaint be denied, that this cause be dismissed because of intervenor's lack of standing to maintain it, and that defendant recover from intervenor his costs in this behalf expended.

Respectfully submitted,

JOHN B. TOLLE
Assistant District Attorney
Dallas County Courthouse
Dallas, Texas 75202
Attorney for Defendant,
Henry Wade

[Certification of Service omitted in printing.]

Motion of the State of Texas to Dismiss All Complaints, or in the Alternative for Judgment on the Pleadings, Filed April 30, 1970

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action Nos. 3-3690-B and 3-3691-C

JANE ROE, *et al.*,

Plaintiffs,

vs.

HENRY WADE, District Attorney of Dallas County,

Defendant.

To the Honorable Court:

COMES NOW the State of Texas, represented herein by Crawford C. Martin, the Attorney General of Texas, after leave of the Court having been first sought and obtained to respond to the Plaintiffs' and Intervenor's Complaints in the above-entitled actions, and by way of response makes its Motion to Dismiss said Complaint and for Judgment on the Pleadings pursuant to Rule 12, F.R.C.P., and would show unto the Court as follows:

I.

Plaintiffs and Intervenor have failed to state a claim upon which relief may be granted by this Court for the following reasons:

A. They have failed to show that they and members of the class they purport to represent have standing to bring these actions.

B. They have failed to raise a substantial Constitutional question.

C. They have failed to show irreparable injury and the absence of an adequate remedy at law.

D. Intervenor, James Hubert Hallford's, Complaint is barred by 28 U.S.C. 2283.

II.

In the alternative, if the Court should conclude that it can properly consider the constitutionality of the Texas statutes under attack by Plaintiffs and Intervenor, the State of Texas would make this Motion for Judgment on the pleadings pursuant to Rule 12(c), F.R.C.P. In support thereof, the State of Texas would respectfully show that Articles 1191, 1192, 1193, 1194, and 1196 of the Texas Penal Code are constitutional on their face.

III.

The State of Texas requests this Court, under the provisions of Rule 12(c), F.R.C.P., to consider its Motion for Judgment on the pleadings of Plaintiffs and Intervenor

as a motion for summary judgment as provided in Rule 56, F.R.C.P.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant to the
Attorney General

ALFRED WALKER
Executive Assistant to the
Attorney General

ROBERT C. FLOWERS
Assistant Attorney General

By /s/ JAY FLOYD
Jay Floyd
Assistant Attorney General

Attorneys for the
State of Texas
Supreme Court Building
Austin, Texas 78701

[Notice of Motion and
Certificate of Service omitted in printing.]

Motion of Plaintiffs' Jane Roe, John Doe, and Mary Doe for Summary Judgment in *Roe* v. *Wade*, and *Doe* v. *Wade*, Filed May 21, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action Nos. CA-3-3690 and CA-3-3691

[TITLE OMITTED IN PRINTING]

Plaintiffs Jane Roe and John & Mary Doe, upon their first amended complaint heretofore filed, the stipulations if any heretofore or hereafter filed, the briefs of the above-named plaintiff and of plaintiff Hallford heretofore or hereafter filed, and the affidavits filed by any of the plaintiffs, move that summary judgment be granted for the plaintiffs, Jane Roe and John & Mary Doe, in accordance with the relief prayed for in their respective complaints.

Respectfully submitted,

LINDA N. COFFEE
2130 1st Nat'l Bk. Bldg.
Dallas, Texas 75202

SARAH WEDDINGTON
3710 Lawton
Austin, Texas 78731

Attorneys for Plaintiffs
Jane Roe & John and Mary Doe

[Certification of Service omitted in printing.]

Affidavit of Paul Carey Trickett, M.D., in Support of Plaintiffs' Motion for Summary Judgment in *Roe* v. *Wade*, and *Doe* v. *Wade*, Filed May 21, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action Nos. CA-3-3690 and CA-3-3691

[TITLE OMITTED IN PRINTING]

STATE OF TEXAS,
COUNTY OF TRAVIS.

BEFORE ME, the undersigned authority, on this day personally appeared PAUL CAREY TRICKETT, MD., to me well known, who, after being by me first duly sworn, did depose and say as follows:

My name is Paul Carey Trickett. I was born Oct. 13, 1922, in Brunswick, Ohio. I graduated from high school in Waterloo, New York, and attended college at DePauw University in Greencastle, Indiana and at Yale University in New Haven, Connecticut. I graduated from college in the class of 1944. I attended medical school at Long Island College of Medicine (now State University of New York Downstate) in Brooklyn, New York, and graduated in 1948. I served an internship at Stamford General Hospital, Stamford, Connecticut. I have done an Obstetrics and

Gynecology Residency and had Fellowships at St. Agnes Hospital in New York, Stamford General Hospital, Westover Air Force Base Hospital in Massachusetts, and Massachusetts General Hospital in Boston. I was in private obstetrics and gynecology practice in Lewes, Delaware from 1954-1959 and served as Clinical Director of Health Programs at Wayne State University in Detroit from 1959-1961. From 1961-1968 I was Director of the University Health Program at Tulane and taught as a member of the Obstetrics and Gynecology Department at Tulane Medical School, New Orleans. Since September 1, 1968 I have been Director of the Student Health Service, The University of Texas at Austin (Box 7339, University Station, Austin, Texas 78712). In addition to my administrative duties, I am also in charge of our gynecology clinic and see patients regularly.

Based upon my experience as a practicing physician, especially my practice in the field of obstetrics and gynecology, and on my previous medical studies and my continuing studies since graduation from medical school, it is my opinion that an abortion involves only minimal danger to the patient if it is performed early in the pregnancy (preferably during the first 6-10 weeks of pregnancy), if the woman has had an adequate medical examination, and if the procedure is done by a competent physician in a good medical setting. Certainly an abortion is no more dangerous than a diagnostic dilitation and curretage, a common, routine medical procedure, done under the same conditions for other reasons.

Many women who are Texas residents have told me that they wanted an abortion after learning that they were pregnant; those wanting to terminate unwanted pregnancies have included unmarried and married women. Tragi-

cally some of them have gone to great extremes to get the abortion done.

In my opinion, it would be conservative to estimate that we diagnose at least one pregnancy a day at the University of Texas Student Health Center; a majority of those women diagnosed to be pregnant desire an abortion.

I have seen numerous young ladies who have come in following an illegal abortion. From the things they have told me and from my findings upon medical examination, it is my opinion that a large number are getting very poor procedures, which cannot only threaten immediate life but can also lead to psychological and medical problems in later life. It is my opinion that obtaining an abortion under the present non-legal situation is extremely dangerous, and that doing so becomes increasingly dangerous when an unskilled individual performs the abortion. The possible results of a "bad abortion" include death, infection (which may lead to sterility or future ectopic pregnancies), and other medical conditions. It has been my experience that many psychological problems result from the brutality that the girl may experience, and that many girls go through psychological difficulties resulting from their knowledge that they are participating in illegal conduct when their general attitude is one of respect for the law.

Numerous reasons have been stated to me as the basis on which a particular patient desires an abortion. These include lack of marriage (certainly being pregnant is much more pressing to an unmarried girl with no desire to marry or no reasonable chance of marriage than it may be to a married woman), desire to avoid interruption of schooling, and frequency of pregnancy (especially as to married women). Many pregnant women who are students feel that they might be able to finish a current semester but would

have to drop out to have the baby and during the post-partum period and that they would be severely hindered by such in their academic pursuits. It has also been my experience that the rate of academic attrition is very high among those who do carry the pregnancy to term. Another reason women seek abortions is economic; many single women and many couples (especially where they are both in school or where the wife is working to put the husband through school) feel that they cannot afford to have a child.

It is my opinion that inability to find good methods of contraception is another cause of unwanted pregnancies. It has been my recent experience, especially since the last hearings in Washington, that both married and unmarried women who have been on the pill desire to use other methods of contraception, and that more women now hesitate to start taking the pill. This increases the problems in regard to contraception since other methods of contraception are 60-80 per cent effective for the most part and this leaves a 20-40 per cent risk of pregnancy, which is unsatisfactory for most women. The diaphragm is often used by women who wish to avoid or discontinue use of the pill, but a substantial human error factor is involved in use of the diaphragm; a diaphragm must be placed properly to be effective, and that requires a certain level of intelligence and care. The IUD (inter-uterine device) is generally unsatisfactory in women who have not had a prior pregnancy carried to term and there is a high rejection rate; also, some doctors are fearful of the IUD since we don't know what the chronic irritation of the uterus might lead to.

I refuse to do abortions, and the physicians I know refuse to do them, because I wouldn't willfully, knowingly break the law or jeopardize my standing in the medical society or in the community.

However, I do know many physicians who have told me that there are circumstances other than where necessary to preserve the life of the mother when they consider an abortion to be indicated. I know several physicians who would perform abortions if the procedure were legal and if it could be done under good medical circumstances for such reasons as valid medical reasons as to why the pregnancy shouldn't be allowed to continue (as conditions where pregnancy is detrimental to the health of the mother and conditions where the fetus is suspect as to being defective or deformed), valid psychological reasons as to why the pregnancy shouldn't be allowed to continue, economic reasons, rape and incest. I personally would perform abortions under limited circumstances if the procedure were legal and if I had access to the proper medical facilities.

PAUL C. TRICKETT, M.D.

[Jurat omitted in printing.]

Affidavit of Jane Roe in Support of Plaintiffs' Motion for Summary Judgment in *Roe* v. *Wade*, and *Doe* v. *Wade*, Filed May 21, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action Nos. CA-3-3690 and CA-3-3691

[TITLE OMITTED IN PRINTING]

STATE OF TEXAS,
COUNTY OF DALLAS, *ss.*:

BEFORE ME, the undersigned authority, on this day personally appeared , to me well known, who after being by me first duly sworn, did depose and say as follows:

(1) My name is , I am over the age of twenty-one and am fully competent to testify. I presently reside at in Dallas, Texas.

(2) On March 3, 1970 I filed a lawsuit in the United States District Court for the Northern District of Texas, Dallas Division, which cause is presently pending under cause No. CA-3-3690. I filed this suit under the fictitious name of Jane Roe for the following reasons:

(a) I am not married at the present time and have not been at any time in the past six years.

(b) Because of my pregnancy I have experienced extreme difficulty in securing employment of any kind. I feared the notoriety occasioned by the lawsuit would make it impossible for me to secure any employment in the near future and would severely limit my advancement in any employment which I might secure at some later date.

(c) I consider the decision of whether to bear a child a highly personal one and feel that the notoriety occasioned by the lawsuit would result in a gross invasion of my personal privacy.

(3) I was pregnant on March 3, 1970 and am still pregnant at this time. I am and have been otherwise in good health.

(4) At the time I filed the lawsuit I wanted to terminate my pregnancy by means of an abortion performed by a competent, licensed, physician under safe, clinical conditions. I wanted to terminate my pregnancy because of the economic hardship which pregnancy entailed and because of the social stigma attached to the bearing of illegitimate children in our society.

(5) I consider myself to be a law-abiding citizen and have never wanted to participate in an act deemed by the State of Texas to be a felony offense.

(6) It is my understanding that I cannot secure a legal abortion in Dallas County, Texas or any place else in Texas because there has never been any medical indications that my life was endangered by the continuation of my pregnancy.

(7) I have a tenth grade education and have never received any formal training which would prepare me for a well-paying job. Since my pregnancy I have experienced difficulty in securing any kind of employment. Each month I am barely able to make ends meet. Consequently I cannot afford to travel to another jurisdiction in order to secure a legal abortion.

(8) I understand that there are competent licensed physicians in Dallas County who do perform, apparently illegal abortions, but I have never been able to afford their services.

(9) I fear that my very life would be endangered if I submitted to an abortion which I could afford.

(10) I believe that the enforcement of the Texas Abortion Laws against licensed physicians has forced me into the dilemma of electing whether to bear an unwanted child or to risk my life by submitting to an abortion at the hands of unqualified personnel outside of clinical settings.

.....

alias Jane Roe

[Jurat omitted in printing.]

Motion of Plaintiff James Hubert Hallford, M.D., for Summary Judgment in *Roe* v. *Wade*, and *Doe* v. *Wade*, Filed April 20, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action Nos. 3-3690-B and 3-3691-C

[TITLE OMITTED IN PRINTING]

The Plaintiff, James Hubert Hallford, M.D., upon the intervenor and plaintiff Hallford's original complaint heretofore filed, the depositions if any heretofore or hereafter filed, the stipulations if any heretofore or hereafter filed, the briefs of all the plaintiffs heretofore and hereafter filed, and upon his affidavit in support for motion for summary judgment attached hereto, as well as all other affidavits if any filed by the other plaintiffs, moves that summary judgment be granted for the plaintiff, James Hubert Hallford, M.D., in accordance with the relief prayed for in his complaint.

Respectfully submitted,

By FRED BRUNER
Fred Bruner

By ROY L. MERRILL, JR.
Roy L. Merrill, Jr.

DAUGHERTY, BRUNER, LASTELICK
& ANDERSON
1130 Mercantile Bank Building
Dallas, Texas 75201—742-3941
Attorneys for Plaintiff
James Hubert Hallford, M.D.

[Certification of Service omitted in printing.]

Affidavit of Plaintiff-Intervenor James Hubert Hallford, M.D., in Support of Motion for Summary Judgment in *Roe* v. *Wade*, and *Doe* v. *Wade*, Filed April 20, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action No. CA-3-3690-B

JANE ROE,

Plaintiff,

vs.

HENRY WADE, District Attorney of Dallas County,

Defendant.

STATE OF TEXAS)
COUNTY OF DALLAS)

BEFORE ME, the undersigned authority, on this day personally appeared JAMES HUBERT HALLFORD, M.D., to me well known, who, after being by me first duly sworn, did depose and say as follows:

My name is James Hubert Hallford. I was born in 1927 in Wichita Falls, Texas. I graduated from high school in Enid, Oklahoma, and went to Oklahoma Baptist University where I graduated in 1949. I later attended Southern Methodist University in Dallas, Texas, and I attended

medical school at University of Texas Southwestern Medical School in Dallas, Texas. I graduated from medical school in 1958 and served an internship at University of Oklahoma Hospital in Oklahoma City, Oklahoma. I am now and I have been licensed to practice medicine in Texas since 1958 and have been engaged in the practice of medicine in Dallas County since 1960.

I have been arrested several times for the felony offense of abortion and I now stand charged by indictment for the offense of abortion under the laws of the State of Texas in what I am informed by my attorneys are Cause Numbers C-69-5307-IH, styled State of Texas v. James Hubert Hallford, and Number C-69-2524-H, styled State of Texas v. James Hubert Hallford. I have appeared in Judge Chamberlain's Court in the Dallas County Courthouse in regard to these charges and I have been informed that my case is now currently set for trial for Monday, April 20, 1970.

Before I was arrested or indicted in regard to any of the different arrests for abortion, I was never contacted by any police officer, Assistant District Attorney, or any other representative of the State of Texas and questioned or told that I might be arrested for the offense of abortion. Furthermore, no one ever asked me if I ever performed an abortion to "save the life of the mother or woman involved," before I was arrested. In fact, so far as I know, at no time has any representative of the State of Texas or any police officer ever inquired concerning whether or not any alleged abortion was performed legally or whether or not I wish to submit any written report or report of any other physician that any alleged abortion was lawfully performed to "save the life of the mother".

Based upon my experience as a practicing physician in the general practice of medicine and on my previous medi-

cal studies and continuing studies since graduation from medical school, it is my opinion and there is little if any disagreement among other physicians that a therapeutic abortion performed under hospital or clinical conditions by a licensed physician is a safe and simple procedure which presents less danger to the life of the pregnant woman, particularly in the first trimester of pregnancy, than ordinary childbirth. Furthermore, in my opinion, a substantial percentage of physicians would agree that even in the second trimester of pregnancy, if there are no unusual complications, a therapeutic abortion performed under hospital or clinical conditions is as safe or safer than ordinary childbirth.

An abortion performed outside of clinical settings by an unqualified person is extremely dangerous to a woman, and may result in death, maiming, sterility, serious infection and emotional disorders.

In my opinion (and all or nearly all licensed physicians would agree) pregnant women seeking abortion outside the hospital and clinical setting risk their lives and health and hospitals in Dallas County treat numerous cases each year of women who have had septic, incomplete, and badly bungled abortions at the hands of themselves or of unqualified or non-medical abortionists. I would estimate that Parkland Hospital in Dallas County, Texas receives on the average at least three or four women a night with incomplete abortion medical problems usually secondary to treatment by non-medical personnel. When I was in medical school at Parkland Hospital in 1958, I know of my own personal knowledge that there was an average of approximately four or five such emergency patients a night and it is my understanding based on conversations

with other physicians that the number has increased significantly since that time or date.

In my practice as a physician I receive on a frequent and recurring basis appeals from pregnant women who desire a therapeutic abortion in safe hospital or clinical surroundings. Consequently, I must in each case decide whether or not and how I can advise and treat these patients in light of their overall physiological, psychological and other personal needs. My patients and/or prospective patients come within a wide variety of conditions which have included in the past and in all probability will include in the future the following:

A. Those who are in serious danger of immediate death unless an abortion is performed within a short period of time.

B. Serious danger of suicide.

C. Possible danger of suicide.

D. Uncertain or slight danger of suicide.

E. Pregnancy reportedly caused either by rape or incest.

F. Patients ill with cancer.

G. Patients who have been infected with German measles in early pregnancy and/or other infections which cause fatal deformity and consequential damage to the emotional health of the mother and who would not like to risk the danger that continued pregnancy would lead to a serious malformed and sick infant and/or the dangers involved in an emotional disorder.

H. Patients who would prefer to postpone pregnancy to a later date for a wide variety of reasons, includ-

ing contraceptive failure, extreme youth, emotional problems and problems connected with pending divorces, other family problems and those with other financial and marital stress type problems.

I. Patients with a possible danger of death to the woman unless an abortion is performed and/or will have serious complications at the time of delivery unless an abortion is performed.

J. Uncertain or slight danger of death to the woman unless an abortion is performed.

I am not able to ascertain (as a doctor or from other sources) in a vast majority of my cases whether or not the Texas Abortion laws prohibit advice and/or medical treatment and/or an abortion because the Texas Laws and the language of the Texas Laws do not in any way correlate with the regular and recurring medical indications present in my patients.

There is no medical committee, group of physicians, administrative agency or any other medical or legal group that I can apply to for approval to perform a therapeutic abortion so that I can decide whether or not my patient comes within the medical exception to the Texas Abortion Law. Furthermore, it has been my experience as a practicing physician that even in hospital settings where there is an obvious significant danger of loss of life to the mother if an abortion is not performed, it is impossible or extremely difficult to get a hospital committee to commit themselves as to the legality of an abortion and furthermore it is extremely difficult to get another physician to render an opinion whether or not an abortion is necessary to save the mother's life. It has been my experience that while other

physicians are willing to informally talk about the abortion laws and under what circumstances an abortion is legal and/or medically should be performed, it is extremely difficult to get another practicing physician to commit himself in writing as to whether or not an abortion is necessary to "save the mother's life". In my opinion, under such circumstances, physicians are generally concerned about criminal prosecution and more important they are concerned about censure by their colleagues and/or disciplined by the State Board of Medical Examiners.

The different hospitals in Dallas County, Texas that allow abortions within the hospital setting at all, generally have an "abortion committee" composed of physicians which must grant approval before an abortion can be performed within the hospital. At some of the hospitals, abortions are not allowed to be performed at all. Unless the pregnant woman is removed to a different setting where an abortion can be performed, regardless of her condition and whether or not she is obviously going to die if an abortion is not performed, the mother is simply allowed to die.

From my own personal experience I recall having a patient in one hospital within Dallas County that does allow abortions upon approval of the Abortion Committee and my patient was suffering from pernicious vomiting as a result of pregnancy and after the patient who originally weighed 110 pounds lost 30 pounds, I informed the patient as well as the family that she was going to die if an abortion was not performed. I applied for approval from the Abortion Committee and requested a specialist, being a gynecologist, to perform the abortion. After I requested the approval several times and a number of days had gone by and the patient's condition was steadily deteriorating, I informed the committee that we could wait no longer than 48 hours

on an opinion. The Abortion Committee still refused to render an opinion one way or the other and the family removed the patient from the hospital setting to secure an abortion elsewhere.

In my opinion as a practicing physician, it is extremely difficult in Dallas County to obtain a therapeutic abortion in a hospital setting because the physicians involved are in fear of criminal prosecution under the Texas Abortion Laws and consequential reprimands or disciplinary action by the Texas and County Medical Associations. If it were not for the Texas Abortion Laws I and other physicians would better be able to serve the serious health needs of large numbers of women who are directly affected by the Texas laws.

Although I am not an attorney and do not have any special knowledge of the criminal law, I, as well as other physicians, are generally aware that there are laws concerning accomplices and accessories and I have heard such legal terms as have other doctors, like "accessories before the fact" and "accessories after the fact" and such phrases as "aiding and abetting" and have heard of laws concerning acting together to perform a criminal act. Because of the Texas Abortion Laws and other such laws concerning criminal conduct, myself and other physicians are deterred, hindered, chilled, hampered and otherwise thwarted in advising and treating patients as a direct consequence of the Texas Abortion Laws. In this regard I have received numerous patients who have told me that they had tried to discuss abortion with other physicians but without success and I know that many of the doctors here in Dallas County absolutely refuse to even discuss the question of abortion with their patients. It is my opinion, as a physician, that a significant number of physicians in Dallas

County are quite frankly simply afraid to even discuss the subject matter with their patients because of the Texas Abortion Laws.

It is my opinion, as a practicing physician, that I and other doctors are not able to treat patients according to the highest standards of medical practice because of the uncertainty and broad potential sweep and application of the Texas Abortion Laws. Furthermore, a substantial number of physicians or experts in the field of gynecology and obstetrics also agree that the abortion laws in Texas (or similar abortion laws) should either be liberalized or abolished. A study or a poll conducted by the Texas Medical Association reported that approximately 90 percent of the physicians polled were in favor of abolishing or liberalizing the Texas Abortion Laws in different degrees.

It is my understanding, as a physician, and in my opinion other physicians understand that the Texas Abortion Laws prohibit an abortion unless the same is "performed on the basis of medical advice for the purpose of saving the life of the mother". I do not know of any publications by the Texas or Dallas County Medical Associations defining such language, if it is possible to medically define such language. To my knowledge (and I have been so informed by attorneys) there is no legal definition of such terminology within the case laws of the State of Texas. To my knowledge there are not any medical publications nor any legal publications that have defined "medical advice" as used in the abortion laws. I do not know whether or not this includes the medical advice of chiropractors, registered nurses, medical technicians, osteopaths, other M.D.'s or the opinions of any group that holds themselves out to practice medicine. I do not know whether or not the term medical advice includes the body of knowledge or medical opinion

of those licensed to practice medicine outside of the State of Texas or licensed to practice medicine in some other country other than the United States of America. I do not know whether or not under the Texas law I can rely on the opinion or advice of another practicing M.D. or even the advice of a specialist. Furthermore, I do not know of any publications medical or legal which state whether or not an abortion in Texas is legal if it is performed in good faith by a physician to "save the mother's life" or whether or not to defend myself in an abortion offense case, I would have to present objective medical evidence so that some, most, or all doctors of medicine would agree that the abortion in question was "for the purpose of saving the life of the mother".

I do not know of any medical or legal publications which have defined the term "life" particularly as used in abortion statutes. I do not know whether or not it simply means a continuation of neurological, respiratory and cardiac functions. Also, I do not know whether or not the term includes psychological or emotional stability. Furthermore, the term "life" is also susceptible to widely differing interpretation among doctors in that it is not clear whether or not it means immediate survival, probable survival for a period of days, weeks, months, years or whether or not "life" is equivalent to longevity. It is not clear whether or not a patient's "life" encompasses physical and mental "health" or her overall well being.

I do not know of any medical or legal publications which have defined the term "saving" as used in the Texas Abortion Laws. Physicians do not know whether or not the term simply means to keep alive and if so, for how long it means to keep alive. I and other physicians do not know whether or not the term means to keep free from harm or injury

or whether or not the term means to keep free from serious harm or serious injury and if it does mean serious injury, I do not know how serious the injury must be before the abortion would be legal for the purpose of "saving" the mother's life. Furthermore, in my opinion as a physician, it is difficult to define the term "saving" in the sense that it is not unusual for licensed, competent physicians to disagree as to the diagnosis and prognosis in particular patients including pregnant women.

Also, it is my opinion as a practicing physician that if the Texas Abortion Laws mean that an abortion must be performed in good faith and also be based upon a reasonable medical basis concerning the danger of death for the mother, it would be extremely difficult to define "reasonable" or "reasonable belief" since I do not know whether or not it means a belief shared by all, most, or more than half of the practicing physicians in Dallas County.

Based upon my past experience and training, it is also my opinion as a practicing physician that the other physicians and/or M.D.'s in Dallas County do not and could not agree upon the legal and/or medical meaning of the phrase "for the purpose of saving the life of the mother". From my personal experience I know that there are good honest differences of opinions among physicians as to the meaning of the Texas Abortion Laws. Furthermore, I know of my own personal knowledge that hospital abortion committees vary in their interpretations, decisions and opinions concerning the meaning of the phrase.

It is my opinion as a practicing physician that the Texas Abortion Laws as a matter of fact create a conflict of interest between physicians and their patients. Based on my own personal experience it is my belief that a significant number of physicians are extremely concerned about their

liability under criminal abortion laws and resulting professional standing to the detriment of their patients, in making decisions concerning whether or not an abortion should be performed and/or even advising the patient concerning abortion.

It has been my experience, as a practicing physician, that the pregnant women who come to me and raise the subject of an abortion have already made up their minds that they desire and are in fact going to obtain an abortion and they are primarily only concerned whether or not they can legally obtain an abortion and/or whether or not they can obtain full and adequate medical care.

From my experience and observations as a practicing physician, I know that patients who are wealthy or can afford to travel outside the State of Texas, can obtain an abortion under safe clinical conditions. However, the less fortunate or lower economic class of patients, as a general rule cannot obtain a legal abortion and consequently either must bear the child or seek an abortion outside of safe clinical settings. It was my experience while I was at Parkland Hospital that most of the emergency incomplete abortion patients were from a lower social economic class. To my knowledge there is no social agency or any group of physicians or hospitals in Dallas County which make any special effort to serve the needs of indigent pregnant women concerning abortions and/or to help counsel with or otherwise advise such class of people. Other than the possible exception of a private agency in Houston, I do not know of any such organization within the State of Texas or any other group that an indigent pregnant woman can turn to for advice, help and medical treatment concerning an abortion.

Attached to this affidavit are true and correct copies of the indictments pending against me at the present time in the Criminal District Court of Dallas County, Texas. Because I have been arrested several different times on different occasions for the felony offense of abortion and have been indicted and at the present time stand charged by indictment with the offense of abortion, I presently fear prosecution under the Texas Abortion Law and am in fear of future arrest for violating the Texas Abortion Laws for the reason that it is my understanding that in all of the cases previously filed against me and now pending against me, the State is alleging that I performed an abortion upon a woman who was at the time of the abortion a patient of mine.

It is my medical opinion, as a physician, that the Texas Abortion Laws prohibit me from practicing medicine according to the highest of medical standards and it is my medical opinion that the decision as to whether or not a woman should have an abortion, particularly in the first trimester of pregnancy, should strictly be a matter to be decided by the patient and her physician.

/s/ JAMES HUBERT HALLFORD, M.D.
James Hubert Hallford, M.D.

[Jurat omitted in printing.]

INDICTMENT ANNEXED TO AFFIDAVIT OF JAMES HUBERT HALLFORD, M.D.

2023 A

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS, the Grand Jurors, good and lawful men of the County of Dallas and State of Texas, duly elected, tried, impaneled, sworn and charged to inquire of offenses committed within the body of the said County of Dallas, upon their oaths do present in and to the Criminal District Court No. 2, of Dallas County, at the July Term, A.D. 1969, of said Court that one James Hubert Hallford on or about the 12 day of September in the year of our Lord One Thousand Nine Hundred and 69 in the County and State aforesaid, did unlawfully, with the consent of Francis C. King, a pregnant woman, insert into the vagina and womb of the said Francis C. King, an instrument the exact nature and description of which is to the Grand Jurors unknown and which instrument was then and there calculated to produce an abortion and for the purpose and intent of producing an abortion, and did then and there by the use of such means unlawfully, knowingly, wilfully and designedly produce an abortion of the said woman and did then and there and thereby destroy the life of the fetus in the womb of said woman, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State.

/s/ WM. H. ESTES
Foreman of the Grand Jury.

HENRY WADE
Criminal District Attorney of
Dallas County, Texas.

INDICTMENT ANNEXED TO AFFIDAVIT OF JAMES HUBERT HALLFORD, M.D.

556 J

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS, the Grand Jurors, good and lawful men of the County of Dallas and State of Texas, duly elected, tried, impaneled, sworn and charged to inquire of offenses committed within the body of the said County of Dallas, upon their oaths do present in and to the Criminal District Court No. of Dallas County, at the April Term, A.D. 1969, of said Court that one James Hubert Hallford on or about the 4 day of January in the year of our Lord One Thousand Nine Hundred and 69 in the County and State aforesaid, did then and there unlawfully, with the consent of Jane Wilhelm, a pregnant woman, insert into the vagina and womb of the said Jane Wilhelm, an instrument the exact nature and description of which is to the Grand Jurors unknown and which instrument was then and there calculated to produce an abortion and for the purpose and intent to producing an abortion, and did then and there by the use of such means unlawfully, knowingly, wilfully and designedly produce an abortion of the said woman and did then and there and thereby destroy the life of the fetus in the womb of said woman, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State.

/s/ HERBERT R. HOWARD
Foreman of the Grand Jury.

HENRY WADE
Criminal District Attorney of
Dallas County, Texas.

Transcript of Oral Argument Before Statutory Three-Judge United States District Court for the Northern District of Texas, Filed July 30, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

CA NO. 3-3690-B

JANE ROE,

Plaintiff,

—v.—

HENRY WADE,

Defendant,

—v.—

JAMES HUBERT HALLFORD, M.D.,

Intervenor.

CA NO. 3-3691-C

JOHN DOE and MARY DOE,

Plaintiffs,

—v.—

HENRY WADE,

Defendant.

BE IT REMEMBERED that on the 22nd day of May 1970 at Dallas, Texas before the Honorable Irving Goldberg, Judge of Fifth Circuit Court of Appeals; the Honorable Sarah T. Hughes and the Honorable W. M. Taylor, Jr., U. S. District Court Judges, and without a Jury, the above styled and numbered cause came on for hearing as hereinafter shown:

Appearances:

MISS LINDA COFFEE, Dallas, Texas
and
MRS. SARAH WEDDINGTON, Austin, Texas
for the Plaintiffs

DAUGHERTY, BRUNER, LASTELICK & ANDERSON, Dallas, Texas

By: Mr. Fred Bruner
and
Mr. Roy L. Merrill, Jr.
for the Intervenor
Dr. James H. Hallford

OFFICE OF DISTRICT ATTORNEY HENRY WADE, Dallas, Texas

By: Mr. John Tolle
for the Defendant Wade

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS, Austin, Tex.

By: Mr. Jay Floyd
Mr. Ed Mason
For the Defendant Attorney General of Texas

PROCEEDINGS

Dallas, Texas
July 22, 1970

Judge Goldberg: Good afternoon. We have for hearing this afternoon the consolidated cases of ROE, et al versus WADE, 3690 and DOE, et al versus WADE, 3691. Have all the appearances been given to the court reporter?

Mr. Tolle: Yes, Your Honor.

Judge Goldberg: Is everyone ready?

Mr. Tolle: Defendant Wade is ready, Your Honor.

Mr. Bruner: We are ready, Your Honor, the Intervenor is ready.

Miss Coffee: Plaintiffs Doe and Roe are ready, Your Honor.

Judge Goldberg: Will there be any testimony in this case?

Mr. Tolle: No, Your Honor, for purposes of the record, we had previously filed a Motion for a Jury trial, and all facts that were to be in controversy, I think have been resolved by affidavits, and we at this time withdraw that Motion. We will have no evidence to present.

Miss Coffee: We have no evidence to present.

Judge Goldberg: The Intervenor?

Mr. Bruner: The Intervenor has no evidence, Your Honor.

Judge Goldberg: The Court will allocate half an hour to the side for the presentation of your arguments with respect to the Motion for Summary Judgment and the Motion to Dismiss. With that time allocation, we will now hear you. The Intervenor and the Plaintiffs should divide

their half hour. Your positions are the same, are they not, except with respect to standing?

Mr. Fred Bruner: Yes, Your Honor.

May it please the Court, we have agreed upon presentation of the matter before the Court, and ladies first, of course. There are several points to be taken up and we have agreed upon the points to be presented by the respective parties, and we will abide by the Courts' time.

Mr. Floyd: Your Honor, if the Court please, the State of Texas has responded to the Plaintiffs' and the Intervenor's Petitions. We don't know how the Court feels about the allocation of time between the State of Texas and the District Attorney.

Judge Goldberg: Can you divide your half hour?

Mr. Floyd: I think we can.

Judge Goldberg: Let's proceed then.

Miss Coffee: May it please the Court, I am Linda Coffee and I am the attorney representing the Plaintiffs Doe and Roe. We had agreed, my co-counsel and I, to divide up the argument in the following way: I will present the preliminary procedural points, and then my co-counsel, Sarah Weddington, will consider the merits for the Plaintiffs Doe and Roe. In view of the allotted time, I will not attempt to cover all the procedural issues raised for they are many and somewhat complex. I think I must concentrate on the question of whether this Court should abstain from rendering a Declaratory Judgment concerning the validity of the Texas Abortion Laws, and then the question of the propriety of injunctive relief, should they decide that the laws are unconstitutional.

I will first consider the question of declaratory relief. It is our position that the case of *Zwickler* versus *Koota* compels this Court to consider the constitutional question,

compels this Court to give a declaratory judgment concerning the validity of the Texas Abortion statute.

Judge Hughes: Why do you say that?

Miss Coffee: Because in this case the Plaintiffs are contending that there is no possible construction which the State Courts could put on the Texas Abortion Laws which would modify or remove the constitutional question. It could not at least modify all of the questions.

Perhaps the State Court could possibly render a decision explicating and making the statute somewhat less vague, but we are complaining of the statutes not only because they are vague but because they are overbroad. Our contention is that there is no conceivable construction which you can put on the Texas Abortion Laws which would remove the problem of their overbreadth. There is no construction whereby the Court could say Texas Abortion Laws permit abortion or do not punish abortion in the case of a woman who seeks an abortion because of contraceptive failure or because of simply economic reasons, and I would point out that *Zwickler* versus *Koota* is not limited to First Amendment rights, however, if the Court thinks it is important, we do feel that First Amendment rights are involved in our Plaintiffs' constitutional claims.

Judge Hughes: What First Amendment rights?

Miss Coffee: Well, the right of privacy. I think the case of *Stanley* versus *Georgia* clearly extended First Amendment protection to the right of privacy. I think this is clear from the language of the case. However, I don't think—as I said—*Zwickler* versus *Koota* no where indicates it is limited to First Amendment rights.

Judge Goldberg: *Zwickler* was a First Amendment case, wasn't it?

Miss Coffee: It did involve expression—First Amendment rights, however the statement in the case says, "This is especially so when First Amendment rights are involved", implying that the case has as much validity as when First Amendment rights are not involved.

Judge Goldberg: Do you make a distinction between the First Amendment and the Ninth Amendment with respect to perhaps enforcement even if there is no difference with respect to the declaration of unconstitutionality?

Miss Coffee: I think in some cases this may be justified. I don't think it makes any difference in our case because whether you say that the rights involved First Amendment rights or Ninth Amendment rights, I feel that they are so important that they deserve the special protection that has been accorded First Amendment rights. In other words they involve fundamental human freedom, which I think the recent cases have indicated are beginning to be given the same priority treatment that First Amendment rights have already been afforded.

Judge Goldberg: We have been cautioned, however, that we are only to do it in extra ordinary cases where it is liable to have a chilling effect upon First Amendment rights.

Miss Coffee: Well, as I understand, we're talking about injunctive relief now. As I understand it, the traditional rule is that the Courts will not enjoin State criminal proceedings or perhaps proceedings of any kind except in extra ordinary circumstances.

Judge Hughes: What extra ordinary circumstances are involved here? The State has not tried to prosecute unfairly, has it?

Miss Coffee: The State is prosecuting against physicians. I think when the State undertakes to prosecute

against physicians, naturally this will deter physicians from performing abortions even if they feel that in certain cases it's justified.

Judge Goldberg: Well, your position is then that any constitutional invasion of any constitutional right should be protected by an injunction?

Miss Coffee: Not any constitutional right.

Judge Goldberg: Well, where would and where wouldn't you?

Miss Coffee: All right, here's an illustration—where one individual is subjected to an unreasonable search and seizure. As in the present case, this does not really involve what we call public rights, this could be said to be an injury to this one particular individual, and this is not done pursuant to a State statute as in this case, where a State statute clearly authorizes the State to make these prosecutions.

And I think another point is that the members in Jane Roe's class do not have any adequate State remedy. There is no State forum available to the Plaintiff in Jane Roe's class.

Judge Goldberg: Yes, but the State of Texas might hold its statute unconstitutional or the Supreme Court of the United States could hold it unconstitutional when the State has held it constitutional. It's not defenseless.

Miss Coffee: Well, Jane Roe is not personally facing prosecution.

Judge Hughes: Could the Intervenor submit himself to the State Court?

Miss Coffee: He is already before the State Court, the Intervenor is already before the State Court.

Judge Hughes: But can he raise the question?

Miss Coffee: I suppose in his defense he can raise the interest of our Plaintiffs there, but I don't think it's fair to make our Plaintiffs' rights—to make their vindication of their rights be determined on what another class of persons raises.

Judge Goldberg: Do you think the entire statute should be stricken?

Miss Coffee: Yes.

Judge Goldberg: Completely?

Miss Coffee: Yes. I think the Court has no other choice because the scope is so entirely too broad. All the provisions just about are so vague, that I just don't think it's—

Judge Hughes: Suppose we struck out the provision saving the life of the mother in the last section of the law, wouldn't that make the statute constitutional? You would then have that section read, "Nothing in this Chapter applies to an abortion procured or attempted by medical advice."

Miss Coffee: The thing is—this was not the intent—if the Court should do this, then the Court would be rewriting the statute for the State. There is no indication that the State of Texas intended the statute to read that way.

Judge Goldberg: Do you know whether this statute was separable? Did it have a separability provision? When was it passed? When was the Abortion statute passed—1905?

Miss Coffee: I believe this statute was passed around 1919—it might be 1905, but the predecessor was passed in 1886, I am told.

Judge Goldberg: Do you know whether it has a separability provision?

Mr. Tolle: If the Court please, it's 1907, I think.

Judge Goldberg: Does it have a separability provision?

Miss Coffee: I don't know, Your Honor.

Judge Goldberg: Does anyone at the counsel table know?

Mr. Tolle: Not specifically. I believe there is a general provision in the Penal Code providing for separability. I think there is, Judge.

Miss Coffee: Is the Court worried about—

Judge Goldberg: We worry about a lot of things. Don't let that worry you.

Miss Coffee: I was going to suggest if the Court was concerned about there being any criminal sanction against a non-medical personnel performing abortions—

Judge Goldberg: Perhaps—may I suggest—we may be worried, I don't know—that if we struck it down completely, extricated the whole thing, anybody could perform an abortion any place—in a garage or in an attic or any other place? I know you're going to answer about the medical practice, and we'll get to that a little bit later.

Miss Coffee: All right, Your Honor.

In the case of *University Committee to End the War in Vietnam* versus *Dunn*, a court in Austin, a Three-Judge Federal Court in Austin struck down the Texas Breach of the Peace statute.

Judge Goldberg: Yes.

Miss Coffee: They struck down the whole statute, as I understand it, but they stayed the execution of an injunction until the next session of the Legislature out of a Special Order—

Judge Goldberg: You are suggesting we might do that here?

Miss Coffee: That's a possibility. I think the statute is so bad the Court is just really going to have to strike it all down. I don't think it's really worth salvaging. If the

Court made the relief which it mentioned, that would still read "pursuant to medical advice" and that would still be somewhat unclear. The Court would almost have to extricate "by medical advice", whether that's just limited to licensed practitioners of medicine or nurses or what it means. There's nothing in the statute.

Judge Goldberg: You think 63 years of unconstitutionality should have worn everyone's constitutional patience, is that what you're saying?

Miss Coffee: Yes, I think so. I think the State of Texas has had plenty of time to construe this statute, if it can be construed in a constitutional manner.

Judge Goldberg: You've used 13 minutes. Judge Hughes is our timekeeper. Thank you.

Mrs. Weddington: May it please the Court, my name is Sarah Weddington. Since I have very little time left, I would like to speak to two issues, the first being the justification which the State alleges for the State Abortion statute, i.e., the protection of the life of the child; and secondly, whether or not there are substantial constitutional issues involved as protected by the right to privacy.

Since the four recent cases which deal with the Abortion statute have unanimously recognized the right to privacy and have expanded on it to some extent, I would like first to turn to the problem of whether or not—

Judge Goldberg: What four cases are you talking about?

Mrs. Weddington: The four cases I'm talking about are *California* v. *Belous, U. S.* v. *Vuitch*—

Judge Goldberg: In the District of Columbia—you say that they held that the Ninth Amendment was involved—

Mrs. Weddington: I said that they have all recognized the right to privacy.

Judge Goldberg: I don't read *Vuitch* that way. I think it's stricken down on the basis that it was vague.

Mrs. Weddington: Excuse me—quoting from that Opinion—"There has been moreover an increasing indication in decisions of the Supreme Court of the United States that as a secular matter the woman's liberty and right of privacy extends to family, marriage, and sex matters, and may well include the right to remove an unwanted child at least in the early stages of pregnancy."

Judge Goldberg: You are reading from what, now?

Mrs. Weddington: *U. S.* v. *Vuitch*. Memorandum Opinion.

I'll be glad to show this to the Court.

Judge Goldberg: I have it.

Judge Hughes: We have it.

Judge Goldberg: We have it.

Mrs. Weddington: Would you like for me to quote further from this?

Judge Hughes: No, you go ahead.

Mrs. Weddington: I will refer to this question again later, if the Court would like.

The only justification which the State has advanced at this point for the justification for the statute is that of protecting what they term the life of the unborne child.

First, I would like to draw to the Courts' attention the fact that life is an ongoing process. It is almost impossible to define a point at which life begins or perhaps even at which life ends. Certainly life in its very general matter is present in the sperm, it's present in the ova. This potential of life depends on a set of circumstances which must then occur. This is a fact recognized by former Justice Clark in an article he wrote. "To say that life is present at conception is to give recognition to the potential rather

than the actual." The unfertilized egg has life and if fertilized it takes on human proportions.

Judge Goldberg: Assuming that there is a Ninth Amendment right here, I want to ask you to address yourself to the question—does the State have any compelling interest that could regulate or modify in any manner that right? Can they for example say that all abortions must be in a hospital or must be certified by one physician, four physicians or 22 physicians? Whether there should be different standards for abortion for married and unmarried people? Can there be a State compelling interest still recognizing the Ninth Amendment right?

Mrs. Weddington: So far as I can see any interest which the State would allege which could be compelling must be based on some sufficient justification. I can see, for example, sufficient justification for keeping a non-licensed medical person from doing the operation.

Judge Goldberg: You can see this?

Mrs. Weddington: There is a public health problem involved.

I cannot see any justification for regulating the abortion when it is done by a doctor.

Judge Goldberg: Whether it be married or unmarried?

Mrs. Weddington: That is true.

Judge Goldberg: Or the state of the pregnancy or anything?

Mrs. Weddington: The state of the pregnancy gives me some pause. I can see, for example, that you could, as I believe *Babbitz* did, say that this right exists only to the fourth month of pregnancy. To me a more persuasive argument is that you could recognize life when the fetus is able to live outside the body of the mother, which is approximately the 22nd or the 26th week of pregnancy.

I think a solution I would like to suggest to the Court is one which has come up in consideration of transplants, as to when death occurs. Instead of whether or not the heart is beating or there are bodily processes going on, the standard is more and more being adopted as to whether or not there are brain functions present as evidenced by EEG. I think this is an excellent way to determine whether or not the fetus has sufficient human characteristics that it should be given the recognition of a human life and protected as such.

So far the earliest that they have been able to get EEG readings on the fetus is about the seventh month of pregnancy.

Judge Hughes: Would you put that in the statute?

Mrs. Weddington: I think it could be used as a determination point. Certainly EEG is a very standard procedure. Doctors are all familiar with it and it could be something that could be easily done or proven that the brain function is evident.

Judge Goldberg: Do you think that the present statute, bad as you say it is, should show some compelling State interest on the part of the State to regulate some phase of this matter?

Mrs. Weddington: Not as it's written. It is so broad at the present time that it denies, or it covers so many women whom I believe under the Ninth Amendment, that those women have a right to abortion, which is denied them by this statute. I think you cannot make any valid distinction on whether or not she's married or unmarried, whether or not the child is conceived out of marriage—

Judge Goldberg: Not whether we can, but the Legislature could.

Mrs. Weddington: I don't believe the Legislature could make such a valid distinction under the distinctions.

Judge Hughes: Do you think that the State has a more compelling interest with reference to unmarried women than married women?

Mrs. Weddington: I do not. For example, at the present time a great many women who are pregnant and desire abortion are unmarried women. I don't believe it can be successfully argued that to enact a statute which would deny them abortion would in fact serve any State interest.

Judge Goldberg: Well, is there any relationship between promiscuity?

Mrs. Weddington: I don't believe there is.

Judge Goldberg: Is there any body of knowledge on the subject?

Mrs. Weddington: Not to my knowledge, other than the fact that they are already promiscuous when the statute is in effect, and in fact these are some of the girls who need this right and who have the most socially compelling arguments why they should be allowed abortions—the young, those still in school, those unable to shoulder the responsibility of a child—these girls should not be put through the pregnancy and should be entitled to an abortion.

Judge Goldberg: Are there any conditions under which the State has a compelling interest to prevent this—any, any situation that you can think of?

Mrs. Weddington: If the abortion is to be performed on a fetus which has been determined to have human life, which I would suggest would either be when brain waves are present or in the cases I suggested earlier, then I believe the State would have a valid right to regulate. Even then I do not believe the State has a valid right to regulate how it is done other than that it be done by a competent, licensed physician.

Judge Goldberg: Do you think if we struck the law down and there could be no indictments and no prosecutions for abortion and some of the abortions were taking place under conditions which you might even agree were unsanitary or unscientific conditions, what would be the situation then?

Mrs. Weddington: First of all, if it is an unlicensed medical personnel, there are remedies under the Penal Code for the practice of medicine.

Judge Goldberg: Do you know what they are? Do you know that it's just a fine and punishable by 30 days?

Mrs. Weddington: Yes.

Judge Goldberg: That's the limit of the punishment?

Mrs. Weddington: That's right, but if you had licensed personnel available and doing the operation, the girls would have the alternative of going to those people, and any woman would tell you that she would much rather place herself in the hands of a doctor under sterile conditions than to be placed in a motel room—

Judge Hughes: It might be dependent upon whether she had the money or not.

Mrs. Weddington: It might be, but for example, in John Hopkins, they are now doing abortions on an out patient basis for from $75 and $100. In most of the cases now the girls are raising usually $150, more generally $350 for the abortions that they are getting now, which is evidenced by the fact that the girls are coming in, having gone through that abortion and having to be treated.

Judge Goldberg: If the State had to pay for a good many of these abortions, would the State have any compelling interest in keeping the number down from an economic point of view?

Mrs. Weddington: The State would have more of an interest in not having to make the welfare payments to many of those children and their parents when they are later produced, than it would in denying the basic constitutional rights to those women.

I can also point out that Blue Cross has now come out and said that it will definitely consider and feels that it will probably pay medical benefits for abortions in Wisconsin.

Judge Goldberg: One more question—you think this statute is more vulnerable on Ninth Amendment grounds or on vagueness.

Mrs. Weddington: I believe it is more vulnerable on the Ninth Amendment basis.

Judge Goldberg: All right, thank you.

Mr. Bruner: Your Honor, I am Fred Bruner, and I am representing the Intervenor, Dr. Hubert Hallford.

I regret that Mrs. Weddington says on the Ninth Amendment because I was about to argue on the vagueness of the statute.

Judge Hughes: I think you should under the circumstances.

Mr. Bruner: Going back to Judge Hughes' remarks about Article 1196 of the State statute, the question of the exception to an abortion if it's procured or done by or attempted to be done by one on medical advice for the purpose of saving the life of the mother—that's what I'd like to limit my remarks to, and I think it goes without saying that any State law should precisely set out in plain language and intelligible language so that a man of common intelligence could understand the meaning of the law.

It's the position of Dr. Hallford, and I'd like to refer the Courts' attention to his uncontroverted affidavit attached

to my pleadings, that not only is this language vague and hard to understand for the man of common intelligence, but even doctors themselves cannot interpret the language of this statute, and in Dr. Hallford's affidavit he states that even hospitals and doctors cannot determine what they should or shouldn't do, what is permissible and what is not permissible under the language of this particular statute. He points out in his affidavit that a person who comes to a hospital in Dallas, Texas or in the State of Texas pregnant and is going to consult the hospital about the impending pregnancy, that they can't get a decision from the hospital. They sometimes move from one hospital to the other, they sometimes move from doctors' offices to other doctors' offices—it's more or less a passing of the buck, so that doctors themselves can't determine what their liability may or may not be under this particular section of the Texas Abortion Law.

Judge Hughes: Well, if the Court struck out the words "for the purpose of saving the life of the mother", would that make the whole statute constitutional?

Mr. Bruner: You mean, Your Honor, Section 1196 in its entirety?

Judge Hughes: No, just struck out the words "for the purpose of saving the life of the mother"?

Judge Goldberg: There's nothing in this Chapter that applies to an abortion procured or attempted by medical advice—period.

Mr. Bruner: All right—I don't think it would be, Your Honor, because of the fact that "medical advice" as written in this law can be interpreted by many different ways. What is medical advice? Who does it come from?

Judge Goldberg: Can you look it up in a book?

Mr. Bruner: You can't look it up in a book—a dictionary.

Judge Goldberg: Maybe you could look it up in a book by a layman—that might be medical advice, mightn't it?

Mr. Bruner: A layman could look up "medical advice" in a book and he could say, "Come here, young lady, I am a medical advisor and I want to abort you under this law in Texas."

Judge Hughes: But you don't certainly think it would be interpreted that way, do you?

Mr. Bruner: I wouldn't go that far, Your Honor, but it has been interpreted by some to mean people who are pharmacists, who are nurses, who are taxi cab drivers and things of that nature—have interpreted themselves to be one who has medical advice, so I don't want to speculate on what some individual might interpret, but it has been so interpreted in the past that way. So therefore we take the position that this language used in this statute of the State of Texas is vague, and a man of common intelligence can't interpret it. Therefore, under rights to due process under the Constitution of the United States, Article 1196 of the Abortion Law of the State of Texas is unconstitutional.

Going to the life of the mother part of the statute, I might add also before I get away from the medical advice, referring to Dr. Hallford's affidavit, he states in there that when a woman comes into his office and discusses with him an impending pregnancy, that he is afraid to talk to her about it because of this statute; that immediately there becomes a conflict of interest between the physician and the patient in that he's afraid he's going to be prosecuted for abortion, and she's there not worried about the prosecution part of it, she's there for her personal medical

reasons of having an abortion performed; and so then you get into the question of accessory before or after the fact of an abortion. Other doctors will not discuss it with other doctors about the matter of terminating a pregnancy.

Now, on the life of the mother, this part of it we contend—saving the life of the mother. "Saving"—some of the statutes, the *Belous* California statute uses the word "preserve". I assume that's synonymous with "save", and the Court held in the Belous case that that language of preserved and saved was vague and could not be interpreted by a man of common intelligence, and I believe that the Court in the District of Columbia dwelt upon that issue. There is a distinction, however, between those cases decided and the *Babbitz* case in Wisconsin in that the exceptions to the Wisconsin statute did use language of this nature. However, it did say that two physicians advised, the point being that the physicians would make the interpretation of whether it was medically permissible to abort the woman, and it would be upon the shoulders of the physicians and not upon the shoulders of the prosecutor.

Judge Goldberg: The constitutionality of 1196 has never been presented to the Court of Criminal Appeals, has it?

Mr. Bruner: There are no cases that we can find where in the Texas Court, the Texas Court of Criminal Appeals has decided upon the constitutionality. They have talked about it.

Judge Hughes: Has it ever been really raised—the constitutional point?

Mr. Bruner: Not on that particular point, Your Honor, not on 1196.

Mr. Merrill: Could I speak on that?

Mr. Bruner: Yes.

Mr. Merrill: Your Honor, in one case it was raised in the sense that there was a Motion to Quash The Indictment, and the Court just summarily said that the exception was constitutional and there was no evidence in the case about why an abortion was performed, and I think it was on medical grounds, and I have that and can give it to the Court.

Judge Hughes: Give it to us later.

Mr. Bruner: In closing, Your Honor, I want to answer, if I may, a question that Judge Goldberg asked Mrs. Weddington about if the fact that this Court knocked this law out and held it was unconstitutional, that it would open up the door for a woman to go out here in a garage or restroom or anywhere else—in a motel—and have an abortion performed. I think that the very fact that they have this Abortion law on the books of Texas has driven women to that sort of thing in the State today, and that if the Abortion Law of the State of Texas were declared unconstitutional, it would give these women the right, the constitutional right, to go to a doctor or go to a qualified person who has the right surgical instruments and have this matter done at their wishes, and I just wanted to say that in closing. Thank you.

Mr. Floyd: Your Honor, I am Jay Floyd, Assistant Attorney General for the State of Texas—

Mr. Merrill: If it please the Court, my name is Roy Merrill and I am one of the attorneys representing the Intervenor, Dr. Hallford. I'd like to cite the three cases that we could find that did deal with the Texas statute 1196. Of course there are numerous cases on the other Articles. One of them is *Link* versus *State* which is in the original Brief filed on behalf of the Doctor, 164 SW 987; another one is *Ex Parte Vick,* 292 SW 889; and the other

one is *Veevers* versus *State,* 354 SW2d 161. Now, in that case there was a Motion to Quash the indictment on the ground that the Indictment did not allege, that the abortion didn't come under the exception of 1196 and the Court held that that's a proper matter when it's raised as an affirmative defense and no need to quash the Indictment, which is directly related to the point I'd like to argue concerning 1196, that it is unconstitutional on the ground that it places the burden technically of introducing evidence on a Defendant licensed, practicing physician.

I think the Court and everyone here will agree that the State certainly could not pass a law making it a crime for a licensed, practicing physician to perform an abortion to save the life of a mother or where she would die within a few hours if the abortion wasn't performed and it is certainly not the law as it exists now. However, the State does not have any burden when it prosecutes a physician of introducing any evidence that the abortion—why it was performed, and I think when a doctor performs an operation or a procedure such as an abortion, there are two essential elements of the crime as to a doctor. One is that he did perform the abortion, and the other is that his purpose was unlawful. Surely you could not class it a crime just for a doctor to perform an abortion.

Concerning this matter, I think if this exception were viewed as if it were a presumption it would clearly be unconstitutional. If you had a statute saying it shall be unlawful for a physician to perform an abortion, it shall be presumed that the State shows an abortion was performed, that it was performed for an unlawful purpose then clearly those facts are more likely than not, and it would clearly fall, I submit, under the *Leary* decision that it must be substantially certain and it is more likely than not that the

EED THROUGH

presumption is valid or that the interference is valid. I'm sure the State will distinguish and say, "This is just an affirmative defense, it's not a presumption", and I would like to call one case not mentioned in the original Brief to the Courts' attention, being *Morrison* versus *California,* 291 U.S., and on page 83 the Court deals with strictly the burden of introducing evidence, and it concerned in a case in California being a crime for an alien to be in possession or own real property, and the statute merely provided that the State need only prove that he was in possession, and the burden was on him as a defense to show that he actually had citizenship, and the Court held that placing the burden upon that Defendant was a violation of due process, and in various other cases it implied it can be under the Fifth, Ninth, and the Fourteenth Amendments.

I think the *Leary* cases and the cases preceding them—*Trop* and *Gainey,* if read closely, deal with the problem of presumptions in the same manner in which the Court in *Morrison* dealt with the burden of proof.

Judge Hughes: I think we've had enough of this argument.

Mr. Floyd: Your Honor, I got out of line and I apologize to Counsel.

Judge Goldberg: That's all right.

Mr. Floyd: Your Honor, the validity of State statutes are in question, the State has an interest of course when those statutes are attacked; we have requested leave of the Court to respond to the pleadings and we have been granted that relief and leave, and we are here to present an argument on behalf of the State of Texas.

Your Honors, our first contention is that the parties in this lawsuit have no standing before this Court and that if this Court so decides that there is no controversy to be

decided. Now the fundamental aspect of standing, I think, is that the Court focuses its attention on the parties instead of the issues before the Court. This was brought out in the *Flast* versus *Cohen* case. Though the issue may be justiciable, if the parties have no standing, the Court will not go forward to decide that issue.

I am under the impression that Jane Roe no longer is seeking an abortion; that she has either had her baby or is having it—

Judge Goldberg: She may in the future want to have an abortion?

Mr. Floyd: Yes, but at the present time, Your Honor, I am speaking of.

Judge Goldberg: At the time she filed this suit—are we going to let the delay in the hearing of the case abort the case?

Mr. Floyd: Your Honor, I think the law is whether or not the party has standing at the time the issues are decided in the case.

Judge Goldberg: Well, a lot of these civil rights cases and school desegregation cases, I understand that some of the children are through college by the time they remand and remand and so forth, but go ahead with your argument.

Mr. Floyd: Then my point, Your Honor, is the fact that it is problematical if she will become pregnant in the future, and if so, whether or not she will want to abort the child that she is bearing at that particular time.

The Plaintiff Mary Doe is not pregnant at this time, by the Admissions in her Complaint.

Judge Hughes: If it's to be determined as of today, we don't know, do we?

Mr. Floyd: I have no Amended Complaint or anything of this nature, Your Honor, to indicate that she is pregnant at this time, or that—

Judge Goldberg: But she may want to engage in activities by which she'll become pregnant and maybe she will then want to have an abortion. Does she have any right to present the issue under those circumstances?

Mr. Floyd: But, Your Honor, aren't we becoming involved in contingencies—contingent events that may or may not occur in the future?

Judge Hughes: There's nothing contingent about the Doctor's difficulty, he's been charged and indicted and the case is pending.

Mr. Floyd: That is correct.

Judge Goldberg: And if he has standing, do we need more?

Mr. Floyd: You do not need more, Your Honor.

Of course each of these Plaintiffs has brought a class action and all others similarly situated must fall within or stand in the shoes of the Plaintiff, you might say.

Dr. Hallford's complaint, his Intervenor's complaint, alleges that he has been deprived of certain relationships with his patients, that is, discussing abortions and performing abortions; that his rights or his patient's [*sic*] rights are violated; that he desires to perform abortions in the future. Now, I will make note, Your Honors, for what it's worth to the Court that there may be an injection of monetary benefit in performing an abortion; that he's presently under indictment; that he did not bring this suit or intervene in this action until after the indictments had been handed down by the Dallas County Grand Jury.

Judge Goldberg: He might have presumed the State wouldn't go forward on an unconstitutional statute.

Mr. Floyd: I don't believe that the State can presume that they must go forward with it, it's their duty, I think, Your Honor.

Judge Goldberg: Well, if they came to the conclusion that it's unconstitutional, the statute was passed a long time ago, and they may not prosecute it.

Mr. Floyd: That is correct, they could—the State very easily could.

Judge Goldberg: Go ahead.

Mr. Floyd: Your Honor, we do not believe the parties have standing in this court, that they have not shown an actual controversy before this Court at this time; that this Court is being asked to render an advisory Opinion; that just because maybe there are common interests among the public does not mean that these parties have standing to bring this suit.

As to the matter of a substantial constitutional question—

Judge Goldberg: What would you do with a situation where there was no question about standing, but by the time it got to the Appellate Court it had been mooted because the Plaintiff had the baby? What are you going to do with that kind of situation?

Mr. Floyd: Your Honor, I can't say that they have standing because their standing depends upon a future, contingent event.

Judge Hughes: What would give them standing in a case like this to test the constitutionality of this statute? Apparently you don't think that anybody has standing?

Mr. Floyd: I think that if the matter is adjudicated as in the Vuitch case or else the statute is declared unconstitutional in a State Court, then this is where the standing would come in, not in the Federal Court, but this is where this matter could be resolved. Now, the Vuitch case is before the Supreme Court of the United States and Dr.

Hallford of course can attack the constitutionality of this statute in this present State proceedings.

The constitutional rights—I cannot perceive, Your Honors, how it would fall under religion, speech, or press of the First Amendment.

Judge Hughes: We agree with you on that.

Judge Goldberg: No—go to the Ninth Amendment and what about vagueness?

Mr. Floyd: It appears it is directed to the right of privacy under the Ninth Amendment, and I will not discuss the other constitutional amendments alleged, I think it's unnecessary. However, the Intervenor has contended that his right to practice medicine has been impaired or abridged, and we do not see that it has been. Maybe he cannot do all of the things he wants to do and what he considers to be the practice of medicine, but there has been no denial by him of his right to practice medicine. No one has attempted to deny him that right.

That the physician-client relationship has been impaired or abridged—such a relationship does exist, however, I think you can't stop there and say "the physician-client relationship", I think you have to go further and show some right under that relationship that has been impaired.

Now, Your Honors, they have raised a question of the equal protection of the laws, and I do not see that this is relevant.

Judge Goldberg: Skip it.

Mr. Floyd: They have raised the question of privacy, the fundamental right to choose, or the woman to choose whether or not she will bear a child, which goes to her privacy. Now of course Your Honors will discuss this more in detail, but I will point out here under that particular topic that in the Belous case, where this principle, I think,

was established or else followed, and then the Vuitch case, but going back to the Belous case, the Court went further there than to consider the fundamental right of a woman to choose whether or not to bear a child and a right to privacy, and stated further that the critical issue is not whether such rights, and they were enumerated and listed, many rights involving privacy, exist, but whether the State has a compelling interest in the regulation, or whether the regulation is necessary.

Now, Your Honors, there have been many, many arguments advanced as to when an embryo becomes a human being. There have been religious groups that have joined into this controversy, and it's my understanding, and I'm not setting forth the Catholic faith—

Judge Goldberg: This statute is applicable no matter when the embryo comes in to effect—at the first week?

Mr. Floyd: That is correct.

Judge Goldberg: I don't see how that's getting you anywhere.

Mr. Floyd: But the point is that the State's interest is that it may be a consideration of whether or not murder occurs, that is, if this embryo is considered a human being?

Judge Goldberg: You mean if the embryo is considered a human being the moment of pregnancy?

Mr. Floyd: Yes, Your Honor. Now, I'm not advocating this, I'm saying there's some controversy in regard to this, that at no matter what stage of the pregnancy, the embryo is a human being. There is controversy to that effect. Medical practitioners disagree and speaking of medical advances, we have now reached a point, I think, where a medical practitioner can operate on an unborn child, perform surgery.

The State must give considerations to these various interests and opinions in deciding whether or not it has an interest in the subject matter or a compelling interest in the subject matter.

Judge Goldberg: Well, the State here has asserted its compelling interest to the extent that it make any abortion under any condition practically illegal.

Mr. Floyd: Except to save the life of the mother.

Judge Goldberg: Well, yes, except that.

Mr. Floyd: That is correct.

Judge Hughes: But you don't know what that means—the case which you quoted held that that was too vague and indefinite—the Belous case, and knocked the statute out on that ground.

Mr. Floyd: That is correct—on the right of privacy—there's no question about that.

Judge Hughes: Well then your case isn't authority for your argument.

Mr. Floyd: No, the Belous case—I'm not saying it's authority, I'm getting to the right of privacy.

Judge Goldberg: The Vuitch case says this: "The asserted constitutional right of privacy. Here the unqualified right to refuse to bear children has limitations. Congress can—" it's Congress in this case because it's the District of Columbia and the State would be in the same situation. "Congress can undoubtedly regulate abortion practice in many ways, perhaps even establishing different standards at various phases of pregnancy, if its own legislative findings were made after a modern review of medical, social and constitutional problems presented."

That's the best statement that I can find in any of the cases for your position, but what I say to you, Sir, is that I don't see anything in the Texas statute that would form the basis for this sort of compelling interest.

Mr. Floyd: Well, Your Honor, that particular case—now, the Vuitch case, as I understand it, a Motion for a Hearing has been granted by the Supreme Court, and it is my understanding that that case went further than to preserve the life of the mother. It said to preserve the life and health of the mother. This is not an argument along that point, but of course this case has not been decided finally as yet, as the Court well understands.

The State of Texas is—there are many opinions on privacy, Your Honor, and I don't know whether privacy in my opinion—I'm speaking personally now, and I'm not speaking—

Judge Goldberg: Well, I think it's a bad word in this area, but apparently everybody wants to use it. I think it's something different from privacy, but I haven't come up with a phrase myself yet, but I just know "privacy" won't do, but I know what you're talking about.

Mr. Floyd: Well, it seems to me that privacy would mean that a person is entitled to be secluded, left alone.

Judge Goldberg: This is a right to make a decision about a completely subjective matter which only involves the individual, but we won't get into that.

Mr. Floyd: As to vagueness and uncertainty, Your Honor, I think looking at the Texas Abortion statute, I think the criteria would be what a man of ordinary intelligence would have to guess at the meaning, and I do not believe that anyone would have to guess at the meaning of this particular statute.

Judge Goldberg: What time factor are we going to talk about in saving the life of a mother? Would that be imminent or can the doctor say her life may be shortened by a decade?

Mr. Floyd: Your Honor, in my understanding, it's whether or not that it might result from the birth of this particular child, death might result from the birth of this particular child.

Judge Goldberg: Even though she might die a year later?

Mr. Floyd: Well, I can't say a projection into the future.

Judge Goldberg: It's a medical judgment, it could be a scientific judgment?

Mr. Floyd: Your Honor, I think all things could be possible, but I think they have to make a decision, and I think it's left up to a medical examiner to make this decision as to whether or not the mother's life is in danger as a result of the birth of this child.

Judge Goldberg: I think you have gone over your time, if you want your associate to have his time to make his presentation.

Mr. Tolle: If the Court please, my name is John Tolle, and I represent the Defendant Henry Wade.

Mr. Floyd got into areas I wish to discuss and I'm going to have to overlap a little bit on his argument. It seems they have a disagreement, we have one too. We are not arguing with Dr. Hallford's standing, this Defendant Wade is not, he is being prosecuted under the statute and if he hasn't got standing, nobody does, so I think we're clear on that.

I think as to the Plaintiff Roe bringing a class action, she probably has standing as a class, not herself any more than as a class.

We say that Mary Doe and Joe Doe—these are two prospective applications, however, I think as we set out in that very short Brief we filed, the State only has one interest and that is the protection of the life of the unborn

child. There's a lot of medical opinion on both sides of this issue, and I think that Mrs. Weddington in her argument in a sense upheld our position. We say that at some time in the life of that child before it's born, it becomes a living child. I don't know when and I don't think medical science knows exactly when. The article we cited is a recognized work, I believe, and is Grey's Anatomy for Attorneys.

Judge Goldberg: You do not think that a legitimate Judgment could be made, that even though on some technical definition there was life at this particular time, a medical Judgment could be made that there should be an abortion because the mother's health was in being and was in being for a number of years should be continued on a more equitable basis?

Mr. Tolle: It's possible that could be.

You're talking now about the State's right to regulate this field of human life, which is the termination of pregnancy. I believe that in itself gives the State the interest. The only remaining question is whether it is vague or indefinite. However, to answer your first question further, I don't believe there is any—I have not been able to find any firm body of medical opinion that says at what point in the life of an embryo fetus or unborn child or whatever you want to call it, that life occurs. This particular work I referred to says that in their opinion life occurs at conception. The old common-law rule was the term "quickening" which was at the time the mother could feel the child move. As the author of Grey's textbook on medicine pointed out, modern science is able now and at a much earlier age to determine things like fetal heartbeat and muscular movement—things which indicate a living organism of some kind. They refer to the human organism.

Our position is this basically, that the life of every person starts somewhere. Every person in this room at one time was the most primitive form of embryo. We say the State has got a right to protect life that is in being at whatever stage it may be in being, and if there is no absolute fact as to when life occurs, then it becomes, I think, for the purpose of public order, a legislative problem as to when they're going to set up an arbitrary time.

Judge Goldberg: But the statute didn't address itself to that.

Mr. Tolle: That's correct, Your Honor, it doesn't. It says "to save the life of the mother".

Judge Hughes: Suppose we struck out the phrase which we've discussed before—severed it—would that make the statute constitutional, assuming that that phrase does make it unconstitutional on account of its vagueness, would striking it out be a possibility and would it then be constitutional?

Mr. Tolle: I think if you struck it out, it wouldn't make it unconstitutional, it would make the statute virtually meaningless, if it could be done on medical advice—Hallford of course would have no complaint and I don't believe we would have any more controversy on it. I don't think it would be unconstitutional, no. I don't think it's necessary. I believe the statute is constitutional. I believe that when we're talking about rights, I think that the most persuasive right that the Plaintiffs urge as was held in the Babbitz case, and all the cases refer to it quite heavily, is the right of privacy, the Ninth Amendment right of privacy, for want of a better term, and there you get to the point where the State has to regulate conflicting rights—whether the State has got an interest in the life of the unborn child sufficient to regulate the woman's right to pri-

vacy. This is a very difficult question, and I think that is properly a legislative question.

Judge Hughes: Would you discuss the abstention doctrine as applied to this case?

Mr. Tolle: I haven't, Your Honor. Quite frankly, I believe that the Vuitch case and the Babbitz case—the ones that are presently in the process of going before the Supreme Court—I believe in each case, abstention, and as to this case, would not be proper for this reason. Those statutes are different in material aspects from ours. The Vuitch case is very material and one of the things that was struck down was this vague word of "to preserve the life or health" and I believe you could distinguish our case on that ground. The Wisconsin statute goes further than ours in establishing, I believe, a medical review system provided for an abortion, and I believe it says in the case that two doctors agreed that conclusive evidence was needed and prosecution can't occur.

I don't believe that those cases, except for the Ninth Amendment right, will be determining in this case. Now, of course, I think as far as the Ninth Amendment right goes, it will, because if the Supreme Court holds that the right of the female or the mother to privacy under the Ninth Amendment is superior to the right of a young fetus to survive, then of course that will foreclose this issue.

I think that our position is that that is a matter for legislative determination. I don't think a State has to have a law at all regulating abortion. I believe the field is such that it can regulate it constitutionally. I personally, and I think the State's position will be and it is, that the right

of that child to life is superior to that woman's right to privacy. That's basically our position on that.

If I may answer just briefly—of course I think vagueness has been gone over quite heavily in here. We say to preserve the life of the mother means to prevent her death. That's self-explanatory to me. If we're talking about what Dr. Hallford can understand, I can't speak for him. His affidavit refers to his opinion about what he understands and about what other people understand. It doesn't set out as a medical fact or as an absolute fact that other doctors don't understand. It talks about their opinion.

Judge Goldberg: Do you think medical advice can come from a book?

Mr. Tolle: I don't think so. I don't think it will ever be interpreted that way. I don't think there's a statute in the world you couldn't put some unconstitutional interpretation on it, if you look for a way to do it. I believe that this will be—if it ever is attacked and if the statute does stand—will not refer to advice from a book. No—I believe it's going to refer to advice from a doctor or a medical person qualified to give it.

As far as the last thing that was raised of touching very briefly this business about putting the burden on the Defendant to prove his innocence. Mr. Merrill cited two cases—one was Dr. Leary's case and the other one was the case from California preventing aliens from owning land. I think the distinction there is that in each of those cases the thing that was presumed was an element of the offense which the Government had to prove, whereas in this case—this case—our statute is in no way different from the Federal statute regulating tax evasion, 26 U.S.C. 7201.

Judge Goldberg: Or the Dyer Act cases—we have that every day.

Mr. Tolle: Yes—affirmative offenses are present in every case—every criminal prosecution. If the Government makes out a prima facie case, the Defendant has the burden of putting himself under the exception. I believe that answers that. Thank you.

Judge Goldberg: I'd like to ask Miss Coffee or Mrs. Weddington one question—suppose that the only Defendant in this case is enjoined? Where does that leave us with respect to the rest of the State of Texas?

Mrs. Weddington: Excuse me, would you repeat the question?

Judge Goldberg: Suppose the injunction is granted in this case against Henry Wade, District Attorney of Dallas County, every other District Attorney would be free to go ahead, would he?

Mrs. Weddington: It was my understanding that since the Attorney General's Office had chosen to come in and since they are now a party-defendant to the suit—

Judge Goldberg: How are they a party defendant?

Mrs. Weddington: Well, I thought by—

Judge Hughes: I don't believe they have intervened. Has the State intervened?

Mr. Floyd: No.

Judge Goldberg: I don't think so.

Mr. Tolle: If the Court please, I believe we can cite another example—in the Buchanan case, the Courts' injunction ran against Henry Wade only and I don't think it binds anybody else.

Judge Goldberg: Do you have any response to the question?

Mrs. Weddington: We goofed.

Judge Hughes: Miss Coffee, these two cases have not yet been consolidated by Order. Would you prepare one?

Miss Coffee: Yes, Your Honor.

Judge Goldberg: We appreciate very much your argument. We will take the matter under advisement. Thank you very much.

The Marshal: All rise, please.

Court is adjourned.

(These Proceedings Concluded)

[Certification by Court Reporter omitted in printing.]

Opinion of the District Court, Filed June 17, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action 3-3690-B

Civil Action 3-3691-C

[TITLE OMITTED IN PRINTING]

Before GOLDBERG, Circuit Judge, and HUGHES and TAYLOR, District Judges.

PER CURIAM:

Two similar cases are presently before the Court on motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The defendant in both cases is Henry Wade, District Attorney of Dallas County, Texas. In one action plaintiffs are John and Mary Doe, and in the other Jane Roe and James Hubert Hallford, M.D., intervenor.[1]

From their respective positions of married couple, single woman, and practicing physician, plaintiffs attack Articles 1191, 1192, 1193, 1194, and 1196 of the Texas Penal

[1] On March 3, 1970, plaintiff Jane Roe filed her original complaint in CA-3-3690-B under the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution. She alleged jurisdiction to be conferred upon the Court by Title 28, United States Code, Sections 131, 1343, 2201, 2202, 2281, and 2284 and by Title 42, United States Code, Section 1983. On

Code,[2] hereinafter referred to as the Texas Abortion Laws. Plaintiffs allege that the Texas Abortion Laws deprive

---

April 22, plaintiff Roe amended her complaint to sue "on behalf of herself and all others similarly situated."

On March 23, James Hubert Hallford, M.D., was given leave to intervene. Hallford's complaint recited the same constitutional and jurisdictional grounds as the complaint of plaintiff Roe. According to his petition for intervention, Hallford seeks to represent "himself and the class of people who are physicians, licensed to practice medicine under the laws of the State of Texas and who fear future prosecution."

On March 3, 1970, plaintiffs John and Mary Doe filed their original complaint in CA-3-3691-C. The complaint of plaintiffs Doe recited the same constitutional and jurisdictional grounds as had the complaint of plaintiff Roe in CA-3-3690 and, like Roe, plaintiffs Doe subsequently amended their complaint so as to assert a class action.

Plaintiffs Roe and Doe have adopted pseudonyms for purposes of anonymity.

[2] *Article 1191 Abortion*

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

Article 1192 Furnishing the Means

Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

Article 1193 Attempt at Abortion

If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

Article 1194 Murder in Producing Abortion

If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

Article 1196 By Medical Advice

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

married couples and single women of the right to choose whether to have children, a right secured by the Ninth Amendment.

Defendant challenges the standing of each of the plaintiffs to bring this action. However, it appears to the Court that Plaintiff Roe and plaintiff-intervenor Hallford occupy positions *vis-a-vis* the Texas Abortion Laws sufficient to differentiate them from the general public. *Compare Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), and *Griswold* v. *Connecticut,* 381 U.S. 479 (1965),[3] *with Frothingham* v. *Mellon,* 262 U.S. 447 (1923). Plaintiff Roe filed her portion of the suit as a pregnant woman wishing to exercise the asserted constitutional right to choose whether to bear the child she was carrying. Intervenor Hallford alleged in his portion of the suit that, in the course of daily exercise of his duty as a physician and in order to give his patients access to what he asserts to be their constitutional right to choose whether to have children, he must act so as to render criminal liability for himself under the Texas Abortion Laws a likelihood. Dr. Hallford further alleges that Article 1196 of the Texas Abortion Laws is so vague as to deprive him of warning of what produces criminal liability in that portion of his medical practice and consultations involving abortions.

On the basis of plaintiffs' substantive contentions,[4] it appears that there then exists a "nexus between the status asserted by the litigant[s] and the claim[s] [they present]." *Flast* v. *Cohen,* 392 U.S. 83, 102 (1968).

---

[3] By the authority of *Griswold,* Dr. Hallford has standing to raise the rights of his patients, single women and married couples, as well as rights of his own.

[4] "[I]n ruling on standing, it is both appropriate and necessary to look to the substantive issues * * * to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast* v. *Cohen,* 392 U.S. 83, 102 (1968).

Further, we are satisfied that there presently exists a degree of contentiousness between Roe and Hallford and the defendant to establish a "case of actual controversy" as required by Title 28, United States Code, Section 2201. *Golden* v. *Zwickler*, 394 U.S. 103 (1969).

Each plaintiff seeks as relief, *first*, a judgment declaring the Texas Abortion Laws unconstitutional on their face and, *second*, an injunction against their enforcement. The nature of the relief requested suggests the order in which the issues presented should be passed upon.[5] Accordingly, we see the issues presented as follows:

I. Are plaintiffs entitled to a declaratory judgment that the Texas Abortion Laws are unconstitutional on their face?

II. Are plaintiffs entitled to an injunction against the enforcement of these laws?

I.

Defendants have suggested that this Court should abstain from rendering a decision on plaintiffs' request for a declaratory judgment. However, we are guided to an opposite conclusion by the authority of *Zwickler* v. *Koota*, 389 U.S. 241, 248-249 (1967):

> "The judge-made doctrine of abstention • • • sanctions • • • escape only in narrowly limited 'special circumstances.' • • • One of the 'special circumstances • • • is the susceptibility of a state statute of a construction by the state courts that would avoid or modify the constitutional question."

---

[5] *Zwickler* v. *Koota*, 389 U.S. 241, 254 (1967); *Cameron* v. *Johnson*, 390 U.S. 611, 615 (1968).

The Court in *Zwickler* v. *Koota* subsequently quoted from *United States* v. *Livingston,* 179 F.Supp. 9, 12-13 (E.D.S.C. 1959):

> "Regard for the interest and sovereignty of the state and reluctance needlessly to adjudicate constitutional issues may require a federal District Court to abstain from adjudication if the parties may avail themselves of an appropriate procedure to obtain state interpretation of state laws requiring construction. • • • The decision in [Harrison v. N.A.A.C.P., 369 U.S. 167], however, is not a broad encyclical commanding automatic remission to the state courts of all federal constitutional questions arising in the application of state statutes. • • • Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it. Any other course would impose expense and long delay upon the litigants without hope of its bearing fruit." [6]

Inasmuch as there is no possibility that state question adjudication in the courts of Texas would eliminate the necessity for this Court to pass upon plaintiffs' Ninth Amendment claim or Dr. Hallford's attack on Article 1196 for vagueness, abstention as to their request for declaratory judgment is unwarranted. *Compare Chicago* v. *Atchison T. & S.F.R. Co.,* 357 U.S. 77, 84 (1958), *with Reetz* v. *Bozanich,* 38 U.S.L.W. 4170, —— U.S. —— (1970).

---

[6] 389 U.S. at 250-251. (Citations omitted.)

On the merits, plaintiffs argue as their principal contention[7] that the Texas Abortion Laws must be declared unconstitutional because they deprive single women and married couples of their right, secured by the Ninth Amendment,[8] to choose whether to have children. We agree.

The essence of the interest sought to be protected here is the right of choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of individuals. The manner by which such interests are secured by the Ninth Amendment is illustrated by the concurring opinion of Mr. Justice Goldberg in *Griswold* v. *Connecticut,* 381 U.S. 479, 492 (1965):

> "[T]he Ninth Amendment shows a belief of the Constitution's authors that *fundamental* rights exist that are not expressly enumerated in the first eight amendments and intent that the list of rights included there not be deemed exhaustive." • • •
>
> "The Ninth Amendment simply shows the intent of the Constitution's authors that other *fundamental* personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments." (Emphasis added.)[9]

---

[7] Aside from their Ninth Amendment and vagueness arguments, plaintiffs have presented an array of constitutional arguments. However, as plaintiffs conceded in oral argument, these additional arguments are peripheral to the main issues. Consequently, they will not be passed upon.

[8] "The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people."

[9] At 492 the opinion states: "In determining which rights are fundamental, judges are not left at large to decide cases in light

Relative sanctuaries for such "fundamental" interests have been established for the family,[10] the marital couple,[11] and the individual.[12]

Freedom to choose in the matter of abortions has been accorded the status of a "fundamental" right in every case coming to the attention of this Court where the question has been raised. *Babbitz* v. *McCann,* —— F.Supp. —— (E.D.Wis. 1970); *People* v. *Belous,* 80 Cal. Rptr. 354, 458 P.2d 194, (Cal. 1969); *State* v. *Munson,* —— (South Dakota Circuit Court, Pennington County, April 6, 1970). *Accord United States* v. *Vuitch,* 305 F.Supp. 1032 (D. D.C. 1969). The California Supreme Court in *Belous* stated:

> "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this Court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." 458 P.2d at 199.

---

of their personal and private notions. Rather, they must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental.' *Snyder* v. *Massachusetts,* 291 U.S. 97, 105. The inquiry is whether a right involved 'is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . .' *Powell* v. *Alabama,* 287 U.S. 45, 67."

[10] *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923); and *Prince* v. *Massachusetts,* 321 U.S. 158 (1944).

[11] *Loving* v. *Commonwealth,* 388 U.S. 1 (1967); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); and *Buchanan* v. *Batchelor,* —— F.Supp. —— (N.D. Tex. 1970).

[12] *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942); and *Stanley* v. *George,* 394 U.S. 557 (1969).

The District Court in *Vuitch* wrote:

> "There has been • • • an increasing indication in the decisions of the Supreme Court of the United States that as a secular matter a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy." 305 F. Supp. at 1035.

Writing in *Griswold* v. *Connecticut, supra,* and the decisions leading up to it, former Associate Justice Tom C. Clark observed:

> "The result of these decisions is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution." [13]

Since the Texas Abortion Laws infringe upon plaintiffs' fundamental right to choose whether to have children, the

---

[13] Religion, Morality, and Abortion: A Constitutional Appraisal, 2 *Loyola Univ. L. Rev.* 1, 8 (1969). Mr. Justice Clark goes on to write, ". . . abortion falls within that sensitive area of privacy—the marital relation. One of the basic values of this privacy is birth control, as evidenced by the *Griswold* decision. Griswold's act was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent contraception, why can he not nullify that conception when prevention has failed?" *Id.* at 9.

burden is on the defendant to demonstrate to the satisfaction of the Court that such infringement is necessary to support a compelling state interest.[14] The defendant has failed to meet this burden.

To be sure, the defendant has presented the Court with several compelling justifications for state presence in the area of abortions. These include the legitimate interests of the state in seeing to it that abortions are performed by competent persons and in adequate surroundings. Concern over abortion of the "quickened" fetus may well rank as another such interest. The difficulty with the Texas Abortion Laws is that, even if they promote these interests,[15] they far outstrip these justifications in their impact by prohibiting *all* abortions except those performed "for the purpose of saving the life of the mother."[16]

It is axiomatic that the fact that a statutory scheme serves permissible or even compelling state interests will not save it from the consequences of unconstitutional overbreadth. *E.g., Thornhill* v. *Alabama,* 310 U.S. 88 (1940);

---

[14] "In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling,' *Bates* v. *Little Rock,* 361 U.S. 516, 524." *Griswold* v. *Connecticut,* 381 U.S. 479, 497 (1965) (Concurring opinion of Mr. Justice Goldberg). *See also Kramer* v. *Union Free School District,* 395 U.S. 621 (1969).

[15] It is not clear whether the Texas laws presently serve the interests asserted by the defendant. For instance, the Court gathers from a reading of the challenged statutes that they presently would permit an abortion "for the purpose of saving the life of the mother" to be performed *anywhere* and quite possibly by *one other than a physician.*

[16] Article 1196.

Buchanan v. *Batchelor,* —— F.Supp. —— (N.D. Tex. 1970). While the Ninth Amendment right to choose to have an abortion is not unqualified or unfettered, a statute designed to regulate the circumstances of abortions must restrict its scope to compelling state interests. There is unconstitutional overbreadth in the Texas Abortion Laws because the Texas Legislature did not limit the scope of the statutes to such interests. On the contrary, the Texas statutes, in their monolithic interdiction, sweep far beyond any areas of compelling state interest.

Not only are the Texas Abortion Laws unconstitutionally overbroad, they are also unconstitutionally vague. The Supreme Court has declared that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally* v. *General Construction Co.,* 269 U.S. 385, 391 (1926). "No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453 (1929). *See also Giaccio* v. *Pennsylvania,* 382 U.S. 399, 402-403 (1966). Under this standard the Texas statutes fail the vagueness test.

The Texas Abortion Laws fail to provide Dr. Hallford and physicians of his class with proper notice of what acts in their daily practice and consultation will subject them to criminal liability. Article 1196 provides:

> "Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

It is apparent that there are grave and manifold uncertainties in the application of Article 1196. How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How *imminent* must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years? These questions simply cannot be answered.

The grave uncertainties in the application of Article 1196 and the consequent uncertainty concerning criminal liability under the related abortion statutes are more than sufficient to render the Texas Abortion Laws unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment.

II.

We come finally to a consideration of the appropriateness of plaintiffs' request for injunctive relief. Plaintiffs have suggested in oral argument that, should the Court declare the Texas Abortion Laws unconstitutional, that decision would of itself warrant the issuance of an injunction against state enforcement of the statutes. However, the Court is of the opinion that it must abstain from granting the injunction.

Clearly, the question whether to abstain concerning an injunction against the enforcement of state criminal laws is divorced from concerns of abstention in rendering a declaratory judgment. Quoting from *Zwickler* v. *Koota*,

> "[A] request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against enforcement of that statute. We hold that a federal district court has the duty to decide the appropriateness and merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction." 389 U.S. at 254.

The strong reluctance of federal courts to interfere with the process of state criminal procedure was reflected in *Dombrowski* v. *Pfister,* 380 U.S. 479, 484-485 (1965):

> "[T]he Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."

This federal policy of non-interference with state criminal prosecutions must be followed except in cases where "statutes are justifiably attacked on their face as abridging free expression," or where statutes are justifiably attacked "as applied for the purpose of discouraging protected activities." *Dombrowski* v. *Pfister,* 380 U.S. at 489-490.

Neither of the above prerequisites can be found here. While plaintiffs' first substantive argument rests on notions of privacy which are to a degree common to the First

and Ninth Amendments, we do not believe that plaintiffs can seriously argue that the Texas Abortion Laws are vulnerable "on their face as abridging free expression." [17] Further, deliberate application of the statutes "for the purpose of discouraging protected activities" has not been alleged. We therefore conclude that we must abstain from issuing an injunction against enforcement of the Texas Abortion Laws.

Conclusion

In the absence of any contested issues of fact, we hold that the motions for summary judgment of the plaintiff Roe and plaintiff-intervenor Hallford should be granted as to their request for declaratory judgment. In granting declaratory relief, we find the Texas Abortion Laws unconstitutional for vagueness and overbreadth, though for the reasons herein stated we decline to issue an injunction. We need not here delineate the factors which could qualify the right of a mother to have an abortion. It is sufficient to state that legislation concerning abortion must address itself to more than a bare negation of that right.

---

[17] "[T]he door is not open to all who would test the validity of state statutes or conduct a federally supervised pre-trial of a state prosecution by the simple expedient of alleging that the prosecution somehow affects First Amendment rights." *Porter* v. *Kimzey*, 309 F.Supp. 993, 995 (N.D. Ga. 1970).

Judgment of the District Court, Filed June 17, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action 3-3690-B

Civil Action 3-3691-C

[TITLE OMITTED IN PRINTING]

This action came on for hearing on motions for summary judgment before a three-judge court composed of Irving L. Goldberg, Circuit Judge, Sarah T. Hughes and W. M. Taylor, Jr., District Judges. The defendant in both cases is Henry Wade, District Attorney of Dallas County, Texas. In one action plaintiffs are John and Mary Doe, husband and wife, and in the other Jane Roe and James Hubert Hallford, M.D., intervenor.

The case having been heard on the merits, the Court, upon consideration of affidavits, briefs and arguments of counsel, finds as follows:

Findings of Fact

(1) Plaintiff Jane Roe, plaintiff-intervenor James Hubert Hallford, M.D. and the members of their respective classes have standing to bring this lawsuit.

(2) Plaintiffs John and Mary Doe failed to allege facts sufficient to create a present controversy and therefore do not have standing.

(3) Articles 1191, 1192, 1193, 1194 and 1196 of the Texas Penal Code, hereinafter referred to as the Texas Abortion Laws, are so written as to deprive single women and married persons of the opportunity to choose whether to have children.

(4) The Texas Abortion Laws are so vaguely worded as to produce grave and manifold uncertainties concerning the circumstances which would produce criminal liability.

Conclusions of Law

(1) This case is a proper one for a three-judge court.

(2) Abstention, concerning plaintiffs' request for a declaratory judgment, is unwarranted.

(3) The fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment.

(4) The Texas Abortion Laws infringe upon this right.

(5) The defendant has not demonstrated that the infringement of plaintiffs' Ninth Amendment rights by the Texas Abortion Laws is necessary to support a compelling state interest.

(6) The Texas Abortion Laws are consequently void on their face because they are unconstitutionally overbroad.

(7) The Texas Abortion Laws are void on their face because they are vague in violation of the Due Process Clause of the Fourteenth Amendment.

(8) Abstention, concerning plaintiffs' request for an injunction against the enforcement of the Texas Abortion Laws is warranted.

It is therefore ORDERED, ADJUDGED and DECREED that: (1) the complaint of John and Mary Doe be dismissed; (2) the Texas Abortion Laws are declared void on their face for unconstitutional overbreadth and for vagueness; (3) plaintiffs' application for injunction be dismissed.

Dated this the 17 day of June, 1970.

IRVING L. GOLDBERG
United States Circuit Judge

SARAH T. HUGHES
United States District Judge

W. M. TAYLOR, JR.
United States District Judge

Notice of Appeal by Plaintiffs Jane Roe, John Doe, Mary Doe, and James Hubert Hallford, M.D., From the Judgment of the District Court to the Supreme Court of the United States, Filed With the District Court August 17, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Actions Nos. 3-3690-B and 3-3691-C

[TITLE OMITTED IN PRINTING]

Notice is hereby given that Jane Roe, Plaintiff, John Doe, Plaintiff, and Mary Doe, Plaintiff, as well as James Hubert Hallford, M.D., Intervenor, Appellants, hereby appeal to the Supreme Court of the United States from that part of the final judgment entered in the above causes on the 17th day of June, 1970, in favor of Defendant Henry Wade, and Responding Party Defendant, State of Texas, wherein the Court denied all injunctive relief prayed for by said Plaintiffs and Intervenor.

Notice is also given that John Doe and Mary Doe, Plaintiffs, Appellants, hereby appeal to the Supreme Court of the United States from that part of the final judgment entered in the above cause on the 17th day of June, 1970 in favor of Defendant, Henry Wade, and Responding Party Defendant, State of Texas, wherein the Court denied the standing of John Doe and Mary Doe to attack the con-

stitutionality of the Texas Abortion Laws, Articles 1191, 1192, 1193, 1194 and 1196, Texas Penal Code.

This appeal is taken pursuant to Title 28, U.S.C., Section 1253.

I.

The Clerk will please prepare a transcript of the record in these causes, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

A. All pleadings of the parties in these causes including all briefs in support of the Plaintiffs' and Intervenor's pleadings.

B. The court reporter's transcription of the proceedings before the Court.

C. All evidentiary items on file in this cause including depositions, stipulations and request for admissions and replies thereto, if any.

D. All orders of the Court.

II.

The following questions are presented by this appeal:

A. Whether the Plaintiffs John Doe and Mary Doe had standing to challenge the constitutionality of Articles 1191, 1192, 1193, 1194, and 1196, Texas Penal Code?

B. Whether the Plaintiffs and Intervenor were entitled to a permanent injunction restraining Defendant Henry Wade from enforcing Articles 1191, 1192, 1193, 1194, and 1196, Texas Penal Code?

By Linda N. Coffee
Attorney for Plaintiffs John Doe, Mary Doe and Jane Roe
2130 First National Bank Bldg.
Dallas, Texas 75202 748-1211

By Fred Bruner
Attorney for Intervenor James Hubert Hallford, M.D.
1130 Mercantile Bank Bldg.
Dallas, Texas 75201

[Certificate of Service omitted in printing.]

Notice of Appeal by Defendant State of Texas From the Judgment of the District Court to the Supreme Court of the United States, Filed With the District Court August 17, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Actions Nos. 3-3690-B and 3-3691-C

[TITLE OMITTED IN PRINTING]

Notice is hereby given that the State of Texas, Responding Party Defendant, Appellant, hereby appeals to the Supreme Court of the United States from that part of the final judgment entered in the above causes on the 17th day of June, 1970, in favor of Plaintiffs, Jane Roe, John Doe and Mary Doe, and Intervenor, James Hubert Hallford, M.D., and against the named Defendant, Henry Wade, and Responding Party Defendant, State of Texas, wherein the Court granted summary declaratory relief finding the Texas Abortion Laws, Articles 1191, 1192, 1193, 1194 and 1196, Texas Penal Code, unconstitutional.

This appeal is taken pursuant to Title 28, U.S.C., Section 1253.

I.

The Clerk will please prepare a transcript of the record in these causes, for transmission to the Clerk of the Su-

preme Court of the United States, and include in said transcript the following:

A. All pleadings of the parties in these causes including all briefs in support of the State of Texas' pleadings.

B. The court reporter's transcription of the proceedings before the Court.

C. All evidentiary items on file in this cause including depositions, stipulations and request for admissions and replies thereto, if any.

D. All orders of the Court.

II.

The following questions are presented by this appeal:

A. Whether the Plaintiffs and Intervenor had standing to challenge the constitutionality of Articles 1191, 1192, 1193, 1194 and 1196, Texas Penal Code?

B. Whether the Plaintiffs and Intervenor failed to state a claim upon which relief could be granted for the reason that they failed to plead facts which raised any substantial constitutional question?

C. Whether the Plaintiffs and Intervenor failed to state a claim upon which relief could be granted for the reason that they failed to show that they suffered or will suffer any irreparable injury and that they had no adequate remedy at law?

D. Whether Intervenor, James Hubert Hallford, M.D.'s, Complaint is barred by 28 U.S.C. 2283?

E. Whether, as held by the Court, Article 1191, Texas Penal Code, is unconstitutional?

F. Whether, as held by the Court, Article 1192, Texas Penal Code, is unconstitutional?

G. Whether, as held by the Court, Article 1193, Texas Penal Code, is unconstitutional?

H. Whether, as held by the Court, Article 1194, Texas Penal Code, is unconstitutional?

I. Whether, as held by the Court, Article 1196, Texas Penal Code, is unconstitutional?

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant to the
Attorney General

ALFRED WALKER
Executive Assistant to the
Attorney General

ROBERT C. FLOWERS
Assistant Attorney General

By ROBERT C. FLOWERS

Attorneys for the State of Texas
Box R, Capitol Station
Austin, Texas 78711

[Certificate of Service omitted in printing.]

Notice of Appeal by Plaintiff Jane Roe From the Judgment of the District Court to the United States Court of Appeals for the Fifth Circuit, Filed With the District Court July 24, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action No. 3-3690-B

Civil Action No. 3-3691-C

[TITLE OMITTED IN PRINTING]

Notice is hereby given that JANE ROE, Plaintiff above named, appeals to the United States Court of Appeals for the Fifth Circuit from that portion of the final judgment entered in this action on the 17th day of June, 1970, denying the injunctive relief prayed for in Plaintiff's Complaint.

July 24, 1970.

By LINDA N. COFFEE
2130 First National Bank Bldg.
Dallas, Texas 75202 RI 8-1211
Attorney for Plaintiff Jane Roe

Notice of Appeal by Plaintiff-Intervenor James Hubert Hallford, M.D., From the Judgment of the District Court to the United States Court of Appeals for the Fifth Circuit, Filed With the District Court July 23, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action No. 3-3690-B

Civil Action No. 3-3691-C

[TITLE OMITTED IN PRINTING]

Notice is hereby given that JAMES HUBERT HALLFORD, M.D., Intervenor and Plaintiff above named, appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 17th day of June, 1970.

July 23, 1970

By FRED BRUNER
DAUGHERTY, BRUNER, LASTELICK and ANDERSON
1130 Mercantile Bank Building
Dallas, Texas 75201 742-3941
Attorneys for Intervenor and Plaintiff James Hubert Hallford, M.D.

Notice of Appeal by Defendant Wade From the Judgment of the District Court to the United States Court of Appeals for the Fifth Circuit, Filed With the District Court July 10, 1970

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action No. 3-3690-B

[TITLE OMITTED IN PRINTING]

Notice is hereby given that HENRY WADE, Criminal District Attorney of Dallas County, Texas, defendant above named, and THE STATE OF TEXAS, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 17th day of June, 1970.

July 9, 1970.

CRAWFORD C. MARTIN
Attorney General of the
State of Texas
Austin, Texas

HENRY WADE
Criminal District Attorney
Dallas County, Texas

JOHN B. TOLLE
Assistant District Attorney
Dallas County Courthouse
Dallas, Texas 75202
Attorney for Defendant,
Henry Wade

Motion of Plaintiffs Roe, Doe, and Hallford to Hold Appeal to Fifth Circuit by Defendant Wade in Abeyance Pending Decision by the Supreme Court of the United States, Filed October 13, 1970

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 30329

[TITLE OMITTED IN PRINTING]

I. INTRODUCTION

The present appeal to this Court was taken by Appellant Wade from a declaratory judgment rendered below by a statutory three-judge federal district court that the Texas Abortion Laws violate the federal constitution by reason of unconstitutional vagueness and overbreadth. The judgment below, while granting declaratory relief, denied an injunction against future enforcement of the aforesaid statutes. From that portion of the judgment, Appellees here have taken an appeal directly to the Supreme Court of the United States pursuant to 28 U.S.C. §1253 (1964 ed.). Appellees make the present motion to hold the appeal in abeyance pending disposition by the Supreme Court. In the event that the Supreme Court's action allows the appeal here to go forward, Appellee respectfully requests an additional 20 days time within which to file a brief, and leave to file a brief of 50 pages.

II. Reasons for Holding Appeal in Abeyance

Title 28, U.S. Code §1253, authorizes an appeal from a three-judge district court order "granting or denying . . . an interlocutory or permanent injunction . . . ." The decision below denied such an injunction. While it is unusual that declaratory relief is granted, and an injunction denied, there have been such cases from time to time in the past, and the Supreme Court has heard such appeals. *See, e.g., Carter* v. *Jury Comm'n of Greene County,* 396 U.S. 320, 328 (1970); *Williams* v. *Rhodes,* 393 U.S. 23, 26-28 (1968). It is the action on the injunction which governs appealability.

When the appeal goes up properly, the entire case is opened for review. As *Dandridge* v. *Williams,* 397 U.S. 471 (1970) teaches:

> "The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment . . . ." 397 U.S. at 475 n. 6.

Hence Appellant Wade may contest the declaratory judgment in the Supreme Court by way of defense to the propriety of not granting an injunction. Wade is in no way prejudiced by the holding of the present appeal in abeyance. He need do little more than change the heading on the brief already submitted to this Court.

III. Relief Requested

Accordingly, Appellee respectfully requests the following:

(1) That the present appeal be held in abeyance pending disposition of this case by the Supreme Court of the United States, in an appeal filed by Appellee (See Jurisdictional Statement attached hereto);

(2) That the record on this appeal be certified to the District Court for transmission to the Supreme Court of the United States for use in the appeal of this case docketed there as No. 808, October 1970 Term;

(3) That in the event this appeal is ultimately allowed to go forward, Appellee be granted an additional 20 days within which to file a brief, and that leave be granted to file a printed brief of 50 pages length, exclusive of indices and appendices.

Respectfully submitted,

ROY LUCAS
Four Patchin Place
New York, N.Y. 10011
Attorney for Appellees

[Affidavit of Service by mail and Jurat omitted in printing.]

Order of United States Court of Appeals for the Fifth Circuit Granting Motion of Plaintiffs Roe, Doe, and Hallford to Hold Appeal by Defendant Wade in Abeyance Pending Decision by the Supreme Court of the United States, Filed October 29, 1970

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 30329

JANE ROE,

Plaintiff-Appellee-Cross Appellant,

versus

HENRY WADE, *et al.,*

Defendant-Appellant-Cross Appellee,

versus

JAMES HUBERT HALLFORD, M.D.,

Intervenor-Appellee-Cross Appellant.

JOHN DOE and MARY DOE,

Plaintiffs,

versus

HENRY WADE,

Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

IT IS ORDERED that appellees' motion to hold appeal in abeyance pending the decision of the United States Supreme Court, in this cause, is hereby GRANTED.

JOHN C. GODBOLD
United States Circuit Judge

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By BRENDA H. BONIS
Deputy
New Orleans, Louisiana
Oct 28 1970

(SEAL)

FILED
JUL 31 1971
E. ROBERT SEAVER, CL

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. ~~971~~ 70-40

MARY DOE, et al, etc.,

Appellants,

-v.-

ARTHUR K. BOLTON, Attorney General of the State of Georgia, *et al*, etc.,

Appellees.

On Appeal from the United States District Court For the Northern District of Georgia

Filed November 14, 1970
Jurisdiction Postponed May 3, 1971

Attorneys for Appellants:

MARGIE PITTS HAMES
Suite 822, 15 Peachtree St., N.E.
Atlanta, Georgia 30303

REBER F. BOULT, JR.
CHARLES MORGAN, JR.
American Civil Liberties Union Foundation, Inc.
5 Forsyth Street, N.W.
Atlanta, Georgia 30303

Of Counsel:

ELIZABETH ROEDIGER RINDSKOPF
GALE M. SIEGEL
185 Central Avenue, S.W.
Atlanta, Georgia 30303

TOBIANE SCHWARTZ
153 Pryor Street, S.W.
Atlanta, Georgia 30303

Attorneys for Appellees:

ARTHUR K. BOLTON
HAROLD N. HILL, JR.
MARION O. GORDON
DOROTHY T. BEASLEY
Attorneys for Arthur K. Bolton
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

JOEL FELDMAN
Attorney for Lewis R. Slaton
Fulton County Courthouse
Atlanta, Georgia 30303

HENRY L. BOWDEN
RALPH H. WITT
Attorneys for Herbert T. Jenkins
2614 First National Bank Building
Atlanta, Georgia 30303

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 971

MARY DOE, et al, etc.,

Appellants,

-v-

ARTHUR K. BOLTON, Attorney General
of the State of Georgia, *et al,* etc.,

Appellees.

On Appeal from the United States District Court
For the Northern District of Georgia

APPENDIX

LIST OF CONTENTS

Page

PART I—RELEVANT DOCKET ENTRIES iii

PART II—PLEADINGS

Complaint 1

Motion for Temporary Restraining Order 18

Order Appointing guardian ad litem 21

Answer of guardian ad litem 22

Answer of Lewis R. Slaton, District Attorney 30

Answer of Herbert T. Jenkins, Chief of Police 35

Order revoking appointment of guardian ad litem and allowing amicus curiae 39

Defendant Arthur K. Bolton's motion to dismiss 43

Motion for reconsideration of order revoking guardian ad litem 48

Motion of Ferdinand Buckley to intervene 50

Motion of Lewis R. Slaton to dismiss as to Mary Doe 53

Lewis R. Slaton's interrogatories to Mary Doe 55

Lewis R. Slaton's motion to dismiss Bourne, *et al* 58

LIST OF CONTENTS—continued

Page

Mary Doe's answers to Lewis R. Slaton's interrogatories 63

Lewis R. Slaton's motion requiring disclosure 66

Lewis R. Slaton's motion for a physical and mental examination of Mary Doe 67

Lewis R. Slaton's motion for continuance 69

Decision of Three Judge Court 71

Judgment 87

Motion of Ferdinand Buckley to alter or amend judgment 90

Petition of Jane Roe to intervene 92

Arthur K. Bolton's memorandum in opposition to motion of Jane Roe 101

Memorandum in support of Petition of Jane Roe 108

Supplemental decision of Three Judge Court 161

PART III—ORAL ARGUMENT 125

RELEVANT DOCKET ENTRIES

Date 1970		Proceedings
Apr.	16	Complaint (class action) for declaratory & injunctive relief, with request for three-judge court, & Sealed Affidavit, filed.
	17	Pltf's motion for temporary restraining order, with affidavit of Margie Pitts Hames, br. in support & proposed order, filed.
	27	Order appointing Ferdinand Buckley guardian ad litem for purpose of representing interests of said unborn child, & that he file an answer & any other pleadings necessary to the protection of the interests of the unborn child within 15 days from this date; that guardian ad litem shall have right to participate in all discovery proceedings authorized by law, shall be served with copies of all pleadings & discovery proceedings & shall appear in behalf of said unborn child in all hearings in the case, filed.
May	1	Order of Judge Brown, designating Dist. Judges Sidney O. Smith, Jr. & Albert J. Henderson, Jr. and Cir. Judge Lewis R. Morgan, to constitute a 3-Judge Court, filed.
		ANSWER of Guardian ad Litem of unborn child of MARY DOE, including COUNTER-CLAIM - filed.
	5	ANSWER of LEWIS R. SLATON, DIST. ATTY. OF FULTON CO., filed.

RELEVANT DOCKET ENTRIES—continued

Date 1970	Proceedings
6	ANSWER of deft. HERBERT T. JENKINS, filed.
	Order revoking and setting aside appointment of guardian ad litem & that guardian is free to proceed as amicus curiae in case now referred to a three-judge panel filed.
11	Deft's. MOTION to dismiss, with brief in support, filed.
13	Motion for reconsideration of order revoking appointment of guardian ad litem of unborn foetus with brief in support, filed.
June 2	Motion of Ferdinand Buckley to intervene, with brief in support and Appendix "A", filed.
8	Motion to dismiss as to Mary Doe, filed by deft., LEWIS R. SLATON with brief in support filed.
	Deft., LEWIS R. SLATON'S, interrogatories to pltf., Mary Doe - filed.
	Motion fo deft., LEWIS R. SLATON, to dismiss as to Peter G. Bourne, et al, with brief in support, filed.
15	Pltf's (MARY DOE) answers to interrogatories propounded by deft. LEWIS R. SLATON, filed.
	Deft. LEWIS R. SLATON'S motion for an order requiring the disclosure of the iden-

Date 1970	Proceedings
	tity of Mary Doe so that the names defts. may properly prepare their defense, filed. Deft. LEWIS R. SLATON'S motion for a physical & mental examination of the pltf. Mary Doe, filed.
	Deft. LEWIS R. SLATON'S motion for continuance, filed.
	TRIAL — NON-JURY — 3-JUDGE. Ct. (Morgan) stated arguments would be limited to two issues, *i.e.,* jurisdiction & merits.
31	Order filed denying Arthur Bolton's motion to dismiss him as a party; that no ruling is necessary on Atty. Gen.'s objection to interrogatories; granting motion of Nat'l Legal Program of Health Problem of the Poor to submit a brief amicus curiae; denying Lewis R. Slaton's motions to require disclosure of pltf's identity & further discovery; denying motion of Ferdinand Buckley for reconsideration, and finding that:
	"Portions of Ga. Code Section 26-1202 to be in violation of the constitutional rights of petitioner: A. Section (a) beginning with the word "because" on line 5 and thru subsection (a)(3) in its entirety. B. Section (b) subsection (3) beginning with the word "because" on line 6 and thru the end of

Date 1970	Proceedings
	said subsection. C. Section (b) subsection (6) in its entirety. D. Section (c) in its entirety. . . . the court further finds remainder of Code 26-1202 (Ga.) to constitute a proper exercise of state power within the context of this opinion. * * * Accordingly, pltf's request for a declaratory judgment is hereby granted."
	An appropriate formal declaratory judgment may be presented upon request of any party.
Aug. 25	JUDGMENT filed & entered, that the complaint of all pltfs. except Mary Doe be dismissed; that certain sections of the Ga. Abortion Statute are declared void on their face for unconstitutional overbreadth; that pltfs' application for injunction be dismissed; costs of action are taxed against defts. DENIED request for stay pending appeal.
Sept. 3	Motion of Ferdinand Buckley as next frined of unborn child of Mary Doe to alter or amend judgment, filed.
15	Petition of Jane Roe to intervene as pltf & to clarify & enforce the courts' opinion of July 31, 1970, filed.
18	Defts' notice of precautionary appeal, filed. Defts' notice of appeal to the SUPREME COURT OF U.S., filed.

RELEVANT DOCKET ENTRIES—continued

Date 1970		Proceedings
		Pltfs' notice of appeal to the Supreme Court of the U.S., filed.
	23	Pltfs'. notice of precautionary appeal, filed.
	25	Deft.'s (Arthur K. Bolton) memorandum in opposition of motion to intervene, filed.
Oct.	6	Pltf's. memorandum in support of the petition of Jane Roe to intervene as pltf. and to clarify & enforce the Ct's. opinion of July 31, 1970, filed.
	14	ORDER by 3-Judge panel - filed. (1) Amending Judgment of 8-25-70 to deny mot. of Ferdinand Buckley to intervene, etc., Court declined to rule on his appointment as guardian *ad litem;* (2) denying motion of Jane Roe to intervene, for a temporary restraining order and for clarif. of opinion of 7-31-70; (3) in sum, statutory processes of approval are left standing.

[7]

(Filed in Clerk's Office Apr. 16, 1970, Claude L. Goza, Clerk; By: MJW, Deputy Clerk)

(Received Apr. 20, 1970, United States Marshal, Atlanta, Georgia)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE; PETER G. BOURNE; ROBERT HATCHER; LILLAS L. JAMES; JAMES WATERS; CORBETT TURNER; NEWTON LONG; EDWARD LEADER; WILLIAM H. BIGGERS; GEORGE VIOLIN; PATRICIA S. SMITH; JENNIE WILLIAMS; JUDITH BOURNE; SUZANNE DUNAWAY; JOYCE PARKS; LOU ANN IRION; MARY LONG; J. EMMETT HERNDON; SAMUEL L. WILLIAMS; EUGENE PICKETT; RICHARD DEVOR; DONALD DAUGHTRY; JUDITH ZORACH and KAREN WEAVER, residents of the State of Georgia; PLANNED PARENTHOOD ASSOCIATION OF ATLANTA, INC., a Georgia corporation; and GEORGIA CITIZENS FOR HOSPITAL ABORTION, INC., a Georgia corporation, for and on behalf of all persons and organizations similarly situated,

Plaintiffs,

vs.

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; LEWIS R. SLATON, as District Attorney of Fulton County, Georgia and HERBERT T. JENKINS, as Chief of Police of the City of Atlanta,

Defendants.

CIVIL CASE
NO. 13676

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action for a temporary restraining order,

preliminary and permanent injunction against the enforcement of the Ga. Code Ann. § 26-1201, et seq. (sometimes referred to as the Georgia Abortion Act), which provides as follows:

"26-1201. *Criminal Abortion*

Except as otherwise provided in Section 26-1202, a person commits criminal abortion when he administers any medicine, drug or other substance whatever to any woman or when he uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion.

26-1202. *Exception*

(a) Section 26-1201 shall not apply to an abortion performed by a physician duly licensed to practice medicine [8] and surgery pursuant to Chapter 84-9 or 84-12 of the Code of Georgia of 1933, as amended, based upon his best clinical judgment that an abortion is necessary because:

(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or

(2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or

(3) The pregnancy resulted from forcible or statutory rape.

(b) No abortion is authorized or shall be performed under this section unless each of the following conditions is met:

(1) The pregnant woman requesting the abortion certifies in writing under oath and subject to the penalties of false swearing to the

physician who proposes to perform the abortion that she is a bona fide legal resident of the State of Georgia.

(2) The physician certifies that he believes the woman is a bona fide resident of this State and that he has no information which should lead him to believe otherwise.

(3) Such physician's judgment is reduced to writing and concurred in by at least two other physicians duly licensed to practice medicine and surgery pursuant to Chapter 84-9 of the Code of Georgia of 1933, as amended, who certify in writing that based upon their separate personal medical examinations of the pregnant woman, the abortion is, in their judgment necessary because of one or more of the reasons enumerated above.

(4) Such abortion is performed in a hospital licensed by the State Board of Health and accredited [9] by the Joint Commission on Accreditation of Hospitals.

(5) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose.

(6) If the proposed abortion is considered necessary because the woman has been raped,

the woman makes a written statement under oath, and subject to the penalties of false swearing, of the date, time and place of the rape and the name of the rapist, if known. There must be attached to this statement a certified copy of any report of the rape made to any law enforcement officer or agency and a statement by the solicitor general of the judicial circuit where the rape occurred or allegedly occurred that, according to his best information, there is probable cause to believe that the rape did occur.

(7) Such written opinions, statements, certificates, and concurrences are maintained in the permanent files of such hospital and are available at all reasonable times to the solicitor general of the judicial circuit in which the hospital is located.

(8) A copy of such written opinions, statements, certificates, and concurrences is filed with the Director [10] of the State Department of Public Health within ten (10) days after such operation is performed.

(9) All written opinions, statements, certificates, and concurrences filed and maintained pursuant to Paragraphs (7) and (8) of this subsection shall be confidential records and shall not be made available for public inspection at any time.

(c) Any solicitor general of the judicial circuit in which an abortion is to be performed under this section, or any person who would be a relative of the child within the second degree of consanguinity, may petition the superior court of the county in which the abortion is to be performed for a declaratory judgment whether the performance of such

abortion would violate any constitutional or other legal rights of the fetus. Such solicitor general may also petition such court for the purpose of taking issue with compliance with the requirements of this section. The physician who proposes to perform the abortion and the pregnant woman shall be respondents. The petition shall be heard expeditiously and if the court adjudges that such abortion would violate the constitutional or other legal rights of the fetus, the court shall so declare and shall restrain the physician from performing the abortion.

(d) If an abortion is performed in compliance with this section, the death of the fetus shall not give rise to any claim for wrongful death.

(e) Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b)(5). A physician, or any other person who is a member of or associated with the staff of a [11] hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person.

26-1203. *Punishment*

A person convicted of criminal abortion shall be punished by imprisonment for not less than one nor more than 10 years."

The plaintiffs seek a declaratory judgment that the above

statute is unconstitutional in that it deprives physicians, their patients, and women desiring abortions of rights protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.

2. The plaintiffs invoke this Court's jurisdiction under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution; Title 28, U.S.C.A. §§ 2281 and 2284; and Title 42, U.S.C.A. § 1983.

3. The plaintiffs seek a declaration that the Georgia Abortion Statute is unconstitutional on its face, and as applied, under the Declaratory Judgment Act, Title 28 U.S.C.A. §§ 2201 and 2202.

4. This is a proper case to be heard by a three-judge court, in that plaintiffs are challenging the validity of a State Statute under the United States Constitution and under Title 28, U.S.C.A. §§ 2281 and 2284, and seek an injunction against the enforcement and other implementation and effects of the Statute.

5. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure because the questions of law and fact are common to plaintiffs and to the classes they represent; [12] the members of the classes are so numerous as to make joinder impracticable; the claims of plaintiffs are typical of the claims of all members of the class; plaintiffs fairly and adequately represent the claims of all the members of the classes; defendants are acting on grounds generally applicable to the entire class; the questions of law and fact common to the class predominate over any question affecting individual members; and because a class action

will best provide a fair and efficient adjudication of the important issue herein.

6. Plaintiff referred to herein as *Mary Doe* is a natural person employing a fictitious name in order to protect her true identity. It is her belief that the use of her true name would subject plaintiff to unfavorable publicity resulting in public embarrassment, ridicule and intimidation. A sealed affidavit containing plaintiff's true identity will be filed with the court.

7. Plaintiff Mary Doe is a 22 year old citizen of the United States and of the State of Georgia residing in the Northern District of Georgia. Plaintiff Doe states that she is presently nine weeks pregnant; she has been advised that an abortion can be performed on her with less danger to health than if she should give birth to such child. Plaintiff has given birth to three children; as to the third child born to her (July 19, 1969), she was placed with adoptive parents. The other two children have recently been placed in a foster home because of plaintiff's poverty and inability to care for said children. Plaintiff's husband recently abandoned her, forcing plaintiff to live with her indigent parents and their eight small children. Out of five years marriage, she and her husband have lived together only about two years. She and her husband have become reconciled, however, they are financially unable to support and care for a child. Mr. Doe is a construction worker and is sporadically employed. Plaintiff has been a mental patient at the Georgia State Hospital in Milledgeville, Georgia. If forced to continue with this pregnancy, plaintiff will suffer irreparable mental anguish and harm, and she will be unable to care for or support such resulting child.

8. On or about March 25, 1970 plaintiff Doe made application to the Abortion Committee of Grady Memorial Hospital to be considered an appli[13]cant for a legal therapeutic abortion as allowed by Ga. Code Ann. § 26-1202. Plaintiff's application was denied on April 10, 1970, by the said Committee on grounds that her present situation did not come within the terms of Ga. Code Ann. § 26-1202(a)(1).

9. Because the Committee has denied plaintiff's application for a therapeutic abortion, plaintiff Doe has been forced to either relinquish her right to decide when and how many children she will bear or to seek an abortion which must be termed illegal under Ga. Code Ann. § 26-1201 in violation of her constitutional rights guaranteed by the First, Ninth, and Fourteenth Amendments. Plaintiff sues on her own behalf and on behalf of all others similarly situated.

10. Plaintiff physicians, listed below, are residents of the State of Georgia, and are licensed to practice medicine in the State of Georgia, namely: *Peter G. Bourne,* Psychiatrist, Mental Health Director, Atlanta Southside Comprehensive Health Center, Faculty member Emory University Medical School; *Robert Hatcher,* Director, Family Planning Services, Grady Memorial Hospital; *Lillas L. James,* private practitioner of medicine specializing in health problems of children and women; *James Waters,* Director of the Adolescent Pregnancy Program, Grady Memorial Hospital; *Corbett Turner,* Child Psychiatrist at Atlanta Southside Comprehensive Health Center and Faculty member Emory University Medical School; *Newton Long,* Director of Maternal-Infant Project at Grady Memorial and professor Obstetrics and Gynecology, Emory University Medical School; *Edward*

Leader, William H. Biggers, Psychiatrists engaged in private practice; *George Violin,* physician.

Patricia S. Smith, Jennie Williams, Judith Bourne, Suzanne Dunaway, Joyce Parks, Lou Ann Irion and *Mary Long* are registered nurses licensed to practice in the State of Georgia and are residents of said State.

The above listed physicians (obstetricians, gynecologists) and nurses are, on numerous occasions, consulted by pregnant women about unwanted pregnancies. In instances where an abortion is needed, under the medical judgment of such physician, they are placed in the position of [14] being unable to provide for their patients optimum medical care. Because an abortion must be performed in a hospital, Ga. Code § 26-1202(b)(4); because of the burdensome procedure of obtaining two other physicians' concurring opinions and presentation to the hospital abortion committee; and further because of the vagueness of the grounds for abortion, plaintiffs have been chilled and deterred from practicing their professions as medical practitioners to give their patients the benefit of their best medical knowledge and treatment as guaranteed by the First, Fourth and Fourteenth Amendments of the Constitution. Plaintiffs sue on their own behalf and on behalf of all others similarly situated.

11. *Reverend J. Emmett Herndon,* Presbyterian Campus Minister, Emory University, *Reverend Samuel L. Williams,* Minister, Friendship Baptist Church; *Reverend Eugene Pickett,* Minister, Unitarian Universalist Congregation; *Reverend Richard Devor,* Methodist Campus Minister, Emory University, and *Reverend Donald Daughtry,* First Congregation Church, and *Judith Zorach* and *Karen Weaver,* social workers, are residents of

the State of Georgia. As ministers and social workers they are consulted by pregnant women concerning where to obtain safe, speedy and adequate medical care to terminate pregnancies. Plaintiffs wish to provide confidential counselling services to such individuals and offer information concerning such medical care, however, they are chilled and deterred in the practice of their professions and the exercise of their constitutionally guaranteed right of free speech because of the unconstitutional Georgia law referred to above. Plaintiffs sue on their own behalf and on behalf of all others similarly situated.

12. The Honorable Arthur K. Bolton, defendant, is sued in his official capacity as the Attorney General of the State of Georgia; he is charged with the state-wide enforcement and administration of the challenged statutes.

13. The Honorable Lewis R. Slaton, defendant, is sued in his official capacity as District Attorney of Fulton County, Georgia. He is charged with the enforcement and administration of the challenged statutes [15] in Fulton County.

14. Defendant Herbert T. Jenkins is sued in his official capacity as the Chief of Police and is charged with the initial enforcement of the challenged statutes in the City of Atlanta, Georgia.

15. Planned Parenthood Association of Atlanta, Inc., and Georgia Citizens for Abortion, Inc., are non-profit corporations engaged in birth control counselling and are consulted by pregnant women regarding safe, speedy and adequate medical care to terminate unwanted pregnancies.

First Cause of Action

16. As a result of the above statute, plaintiff Mary Doe, and the class she represents, can only obtain a legal abortion if she has been raped, the child would likely be born with a severe mental or physical defect, or the "continuation of her pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health . . ." The quoted basis for abortion is vague and indefinite in that the term health is not defined and it is not clear that it includes varying degrees of mental health as well as physical health. Nor is the degree of possible danger to life from natural causes specified, therefore, the provision as to danger to life is subject to many and varied interpretations. Further, there are no guide lines as to what constitutes serious and permanent injury to health and this is subject to diverse interpretations and plaintiff believes that the law is being interpreted restrictively by some hospital committees and more liberally by others.

17. As a result of the above statute, plaintiff Mary Doe, and the class she represents, can only obtain a legal abortion if she obtains the assistance of psychiatrists and physicians and has them present her request to a hospital abortion committee. The committee must then be convinced that an abortion is necessary to preserve her life or prevent serious and permanent injury to her health. This is a burdensome and costly procedure and denies plaintiffs and other poor persons equal access to medical care and facilities thereby denying equal protection of the laws in contravention of rights guaranteed under the Fourteenth Amendment of [16] the United States Constitution. Additionally, because of the time limitations inherent in pregnancy and the desire of pregnant women

for privacy, it is rarely possible to test the denial of an abortion by a hospital committee by request for review or redress in the courts.

18. Further, the challenged statute is unconstitutional on its face and as applied in that it:

(a) invades plaintiff's right of privacy or liberty in matters related to marriage, family and sex, the sacred right of every individual to the possession and control of her own person; and the right to be left alone as guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution;

(b) chills and deters plaintiff in the exercise of her rights of association, privacy and sexual and family relations as guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments;

(c) deprives plaintiff of the fundamental right of a woman to choose whether to bear children as guaranteed by the Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments;

(d) deprives plaintiff of the right to safe, speedy and adequate medical care on the basis of wealth in violation of the constitutional guarantee of equal protection of the laws;

(e) denies plaintiff life and liberty without due process of law despite a lack of compelling state interest, in that it forces her to expose herself to the hazards and risks of illegal non-medical abortion in order to terminate an unwanted pregnancy;

(f) deprives plaintiff of safe and adequate medical care on the basis of the religious beliefs of others in viola-

tion of the First Amendment guarantee against the establishment of religion;

(g) denies plaintiff access to information concerning her health, safety and welfare and the availability of safe, speedy and adequate medical care in violation of the guarantees of the First Amendment;

(h) deprives plaintiff of guarantees of due process of law in that the criteria for a legal abortion are unconstitutionally vague and [17] without standards;

(i) deprives plaintiff of what little access she might have to a legal abortion without due process in violation of the Fourteenth Amendment in that it chills and deters doctors and hospitals from performing such medical procedures because of fear of prosecution under the unconstitutionally vague statutes;

(j) constitutes cruel and unusual punishment in violation of the Eighth Amendment in that it forces plaintiffs to bear and raise unwanted children;

(k) deprives plaintiff of equal access to both public and private medical facilities which on information and belief receive substantial federal, state, county, and city funding, such equal access being guaranteed by the Fifth and Fourteenth Amendments to the Constitution.

Second Cause of Action

Plaintiff physicians, psychiatrists, nurses, ministers and social workers named above reallege each allegation specified in paragraphs 16-18 and in addition allege that:

19. The challenged statute is unconstitutional on its face and as applied in that:

(a) the threat of grand jury subpoena and/or prose-

cution under a statute which is void for vagueness under the First and Fourteenth Amendments chills and deters plaintiffs from exercising their rights of free speech guaranteed by the First Amendment to the Constitution in that they are unable to inform women or others seeking information on their behalf, where they can obtain safe, speedy and adequate medical care for the termination of an unwanted pregnancy.

Third Cause of Action

Plaintiff physicians named above in paragraph 10 reallege each and every allegation specified in paragraphs 16-19 and in addition allege that:

20. The challenged statute is unconstitutional on its face and [18] as applied in that:

(a) it is unconstitutionally vague in violation of the Fourteenth Amendment in that the statute does not establish a formal administrative procedure or body for establishing rules, regulations or official interpretation of the provisions of said statute. Thus, the law is subject to many interpretations by hospital abortion committees and is not uniformly applied throughout the state.

(b) it requires plaintiffs as persons charged with the health of their patients, to determine whether an abortion is necessary to preserve the life of the mother, an incorrect judgment subjecting them to possible criminal prosecution and loss of license to practice medicine;

(c) it chills and deters plaintiffs from practicing their profession as medical practitioners to give their patients the benefit of their best medical knowledge and from fulfilling their duties and responsibilities in the highest traditions of their professions as guaranteed by the First, Fifth and Fourteenth Amendments to the Constitution.

21. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs respectfully pray that:

1. Pursuant to Title 28 U.S.C. §§ 2282 and 2284 a three-judge district court be convened to hear and determine this proceeding;

2. A declaratory judgment be issued holding the Georgia Abortion Statute, Ga. Code Ann. § 26-1201, *et seq.* to be in violation of the rights of plaintiffs as protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution;

3. Pending the hearing and determination of the prayers for permanent relief the Court enter an interlocutory injunction restraining the defendants, their agents, and successors from in any way enforcing or threatening to enforce the aforementioned statutes;

4. A permanent injunction be entered restraining and enjoining defendants, their agents, and successors from enforcing, threatening to [19] enforce, or otherwise applying the challenged statute in derogation of the rights of plaintiffs;

5. They be granted such other relief as may seem to this Court appropriate.

Respectfully submitted,

/s/ MARGIE PITTS HAMES

MARGIE PITTS HAMES
210 Brighton Road, N. E.
Atlanta, Georgia 30309

/s/ TOBIANE SCHWARTZ

TOBIANE SCHWARTZ
153 Pryor Street, S. W.
Atlanta, Georgia 30303

ELIZABETH RINDSKOPF
551 Forrest Road, N. E.
Atlanta, Georgia 30312

BETTY KEHRER
41 Exchange Place
Atlanta, Georgia 30303

Attorneys for Plaintiffs

[20]

UNITED STATES DISTRICT COURT

MARY DOE, et al,
Plaintiff
VS.
ARTHUR K. BOLTON, et al,
Defendants

CIVIL CASE
NO. ----------

AFFIDAVIT

This is to certify that this envelope contains the affidavit disclosing the identity of Mary Doe Plaintiff in the above case. This envelope is not to be opened except on order of the Court and notice to the undersigned attorney for Plaintiff.

This 16th day of April, 1970.

/s/ MARGIE PITTS HAMES

MARGIE PITTS HAMES
Attorney for Plaintiffs
210 Brighton Rd., N.E.
Atlanta, Georgia 30309
355-8998

[22]

(Filed in Clerk's Office Apr. 17, 1970, Claude L. Goza, Clerk. By: MJW Deputy Clerk)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al.
-vs-
ARTHUR K. BOLTON, et al.
} CIVIL ACTION NO. 13676

MOTION FOR TEMPORARY RESTRAINING ORDER

Comes now the plaintiff in the above-styled action and moves this Court for a Temporary Restraining Order enjoining and restraining the defendants, and each of them, from enforcing, threatening to enforce, or otherwise applying the Georgia Abortion Statute, 26 Ga. Code Ann. § 1201, *et seq.*, in derogation of the rights of plaintiff. As grounds, plaintiff shows that:

(a) She has challenged the constitutionality of the Georgia Abortion Statute, 26 Ga. Code Ann. § 1201, *et seq.*

(b) Plaintiff, Mary Doe, is a pregnant woman (9 weeks) who desires an abortion.

(c) Plaintiff has attempted to obtain an abortion by applying to the Therapeutic Committee of Grady Memorial Hospital as allowed by 26 Ga. Code Ann. § 1202.

(d) Plaintiff's application was denied by the committee on the grounds that her situation did not come within the terms of 26 Ga. Code Ann. § 1202(a)(1).

(e) If forced to comply with the Georgia Abortion Statute, plaintiff will suffer irreparable mental anguish, be forced to bear an unwanted child whom plaintiff will be unable to care for or support, and will thus be caused irreparable harm and injury.

(f) In order to receive good medical care, plaintiff must obtain an abortion before she is 16 weeks pregnant.

(g) Plaintiff believes that she has a right to receive an abortion, and any infringement upon this right is a denial of basic constitutional guarantees.

(h) Plaintiff has no administrative remedy by which she can seek review or question the decision of the Abortion Committee.

(i) Plaintiff has been advised that a licensed physicial has [23] agreed to perform an abortion on her if this Court enjoins defendants from enforcing of said Statute as to him.

(j) The named defendants will not be injured by the issuance of such a Temporary Restraining Order.

Respectfully submitted,

Attorneys for Plaintiff

/s/ MARGIE PITTS HAMES

---

[24]

STATE OF GEORGIA }
COUNTY OF FULTON } SS

AFFIDAVIT

Comes now, Margie Pitts Hames, who first being put upon oath, deposes as follows:

That I am a member of the Bar of the State of Georgia and of the United States District Court for the Northern District of Georgia;

That I am one of the attorneys representing the plaintiffs herein;

That based on information and belief, I believe the facts in the complaint and in the motion for temporary restraining order to be true;

That I have given notice by telephone April 15, 1970, 3:10 p.m. to defendants that I intend to present this motion for temporary restraining order on April 17, 1970, at 9:30 a.m.

The foregoing is true and correct, based on personal knowledge, information and belief, and is given for use in legal proceedings.

This 17 day of Apr., 1970.

/s/ MARGIE PITTS HAMES

MARGIE PITTS HAMES

Subscribed and sworn to before me
this 17 day of April, 1970.

/s/ EUGENE S. TAYLOR

Notary Public, State of Georgia
My Commission Expires: Dec. 22, 1972.

BLEED THROUGH

[41]

(Filed in Clerk's Office Apr. 27, 1970, Claude L. Goza, Clerk; By: JAR, Deputy Clerk)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al.,
Plaintiffs

v.

ARTHUR K. BOLTON, et al.,
Defendants

CIVIL ACTION
NO. 13676

ORDER APPOINTING GUARDIAN AD LITEM

It appearing to the Court from the allegations of the complaint that the interests of the unborn child of the plaintiff Mary Doe could be adversely affected by the granting of the relief prayed for in plaintiffs' complaint, and that the interests of the unborn child may not be adequately represented by any of the parties named in the complaint, it is hereby ordered that Ferdinand Buckley, be, and he hereby is, appointed guardian ad litem for the purpose of representing the interests of said unborn child, and that said guardian ad litem file an answer and any other pleadings necessary to the protection of the interests of the unborn child within 15 days from this date. Said guardian ad litem shall have the right to participate in all discovery proceedings authorized by law, shall be served with copies of all pleadings and discovery proceedings, and shall appear in behalf of said unborn child in all hearings in the case.

This 25th day of April, 1970.

/s/ SIDNEY O. SMITH

United States Judge

[44]

(Filed in Clerk's Office May 1, 1970, Claude L. Goza, Clerk; By: JWE, Deputy Clerk)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al.,
Plaintiffs
v.
ARTHUR K. BOLTON, et al.,
Defendants

CIVIL ACTION NO. 13676

ANSWER OF GUARDIAN AD LITEM OF UNBORN CHILD OF MARY DOE

Comes now the guardian ad litem of the unborn child of Mary Doe, and files this answer to plaintiffs' complaint in behalf of said unborn child.

FIRST DEFENSE

Said complaint fails to state a claim upon which relief can be granted to Mary Doe or to any of the other plaintiffs named in said complaint.

SECOND DEFENSE

Said complaint fails to state a claim for equitable relief in behalf of Mary Doe or any of the other plaintiffs named in said complaint.

THIRD DEFENSE

As to plaintiff Mary Doe, said action is not being prosecuted in the name of a real party in interest as required by Rule 17(a) of the Federal Rules of Civil Procedure.

FOURTH DEFENSE

Said complaint fails to join the father of the [45] unborn child of Mary Doe and therefore said complaint fails to join an indispensable party as required by Rule 19(a) of the Federal Rules of Civil Procedure.

FIFTH DEFENSE

1.

The unborn child of Mary Doe denies that plaintiffs are entitled to any relief sought in paragraphs 1 and 2 of said complaint, and specifically denies that any right of plaintiffs protected by the First, Fourth, Fifth, Ninth or Fourteenth Amendment to the United States Constitution is at issue in this action.

2.

The unborn child of Mary Does denies that plaintiffs are entitled to the relief sought in paragraph 3 of said complaint.

3.

The unborn child of Mary Doe denies that plaintiffs are entitled to the relief sought in paragraph 4 of said complaint.

4.

The unborn child of Mary Doe denies that plaintiffs are entitled to the relief sought in paragraph 5 of said complaint.

5.

Answering paragraph 6 of said complaint, the unborn child of Mary Doe avers that for want of information sufficient to form a belief, said unborn child is unable to admit or deny the allegations of paragraph 6 of said

complaint but demands strict proof thereof. Further answering said allegations, said unborn child denies that it is necessary or proper for said plaintiff to conceal her [46] identity from the Court or from the unborn child.

6.

Answering paragraph 7 of said complaint, the unborn child of Mary Doe avers on information and belief that Mary Doe is at least fifteen weeks pregnant, but for want of information sufficient to form a belief, the unborn child is unable to admit or deny the remaining allegations of said paragraph of said complaint, except that the allegations of the last sentence of paragraph 7 of said complaint are specifically denied.

7.

For want of information sufficient to form a belief, the unborn child of Mary Doe can neither admit nor deny the allegations of paragraph 8 of said complaint.

8.

The unborn child of Mary Doe denies the allegations of paragraph 9 of said complaint.

9.

Answering paragraph 10 of said complaint, for want of information sufficient to form a belief, the unborn child of Mary Doe is unable to admit or deny the allegations of the first two paragraphs of paragraph 10 of said complaint and the first sentence of the third paragraph of paragraph 10 of said complaint. However, the remaining allegations of paragraph 10 of said complaint are specifically denied.

10.

Answering paragraph 11 of said complaint, for want of information sufficient to form a belief, the unborn child of Mary Doe is unable to admit or deny the allegations [47] of the first two sentences of paragraph 11 of said complaint. The unborn child of Mary Doe denies the allegations of the last two sentences of paragraph 11 of said complaint.

11.

The unborn child of Mary Doe admits the allegations of paragraphs 12, 13 and 14 of said complaint.

12.

For want of information sufficient to form a belief, the unborn child of Mary Doe can neither admit nor deny the allegations of paragraph 15 of said complaint.

13.

The unborn child child of Mary Doe denies the allegations of paragraphs 16, 17, 18, 19, 20 and 21 of said complaint.

14.

Further answering said complaint and specifically paragraph 21 thereof, the unborn child of Mary Doe avers that plaintiffs have an adequate remedy at law insofar as concerns the alleged application of Mary Doe to the Abortion Committee of Grady Memorial Hospital to obtain an abortion in that they can appeal the alleged denial of that Committee to the Fulton Superior Court for the purpose of determining whether or not that Committee has acted illegally.

15.

Further answering said complaint, if Mary Doe does not wish to have children after the birth of this unborn child, she has an adequate remedy at law under the provisions of the Georgia "Voluntary Sterilization Act", Ga. Laws 1966, p. 453, Ga. Code § Ann. 84-931, et seq.

16.

COUNTER-CLAIM

Further answering said complaint, and by way of [48] counter-claim, the unborn child of Mary Doe avers as follows:

1.

The unborn child of Mary Doe is a legal person in contemplation of law and as such is entitled to the full protection of all laws of the United States and of the State of Georgia.

2.

The plaintiffs have conspired to deprive the unborn child of Mary Doe of life in violation of the following legal rights of the unborn child of Mary Doe:

(a) The right of the unborn child of Mary Doe under the Fourth Amendment to the United States Constitution to be secure in his person against unreasonable seizure.

(b) The right of the unborn child of Mary Doe under the Fifth Amendment of the United States Constitution not to be deprived of life without due process of law.

(c) The right of the unborn child of Mary Doe under the Sixth Amendment of the United States Consti-

tution to a trial by jury and an opportunity to confront witnesses against him.

(d) The rights of the unborn child of Mary Doe as guaranteed by the Ninth Amendment to the United States Constitution.

(e) The right of the unborn chlid of Mary Doe to due process and the equal protection of the law under the Fourteenth Amendment to the United States Constitution.

(f) The right of the unborn child of Mary Doe under the Eighth Amendment to the United States Constitution and Article I, Section I, Paragraph IX, of the Georgia Constitution of 1945 (Ga. Code Ann. § 2-109) not to have cruel and unusual punishment inflicted upon him.

[49]

(g) The right of the unborn child of Mary Doe under Article IX, Section I, Paragraph II, of the Georgia Constitution of 1945 (Ga. Code Ann. § 2-102) to the impartial and complete protection of his person by the state and local governments of the State of Georgia.

(h) The right of the unborn child of Mary Doe under Article I, Section I, Paragraph XVI of the Georgia Constitution of 1945 (Ga. Code Ann. § 2-116) to be secure in his person from unreasonable seizure.

(i) The right of the unborn child of Mary Doe under Article I, Section I, Paragraph III, of the Georgia Constitution of 1945 (Ga. Code Ann. § 2-103) not to be deprived of life except by due process of law.

(j) The right of the unborn child of Mary Doe

under Title 42, Section 1981, of the United States Code to the full and equal benefit of all laws and proceedings for the security of his person.

(k) The right of the unborn child of Mary Doe under Title 42, Section 1985, of the United States Code to be free from any conspiracy to deprive him of the equal protection of the laws of the United States and of the State of Georgia and the equal privileges and immunities under said laws.

(l) The right of the unborn child of Mary Doe to the protection of his person and all civil rights secured to him by the laws of the United States and the State of Georgia as provided in Title 42, Section 1988, of the United States Code.

3.

Plaintiffs Peter G. Bourne, Robert Hatcher, James Waters, Corbett Turner and Newton Long are acting in the [50] aforesaid conspiracy and in this action in their capacity as agents of Grady Memorial Hospital, and such action therefore constitutes state action.

4.

The unborn child of Mary Doe brings this action for himself and as representative of the class of unborn children.

5.

The unborn child of Mary Doe brings this action under Title 42, Section 1983, of the United States Code seeking an injunction against plaintiffs depriving him of the aforesaid rights, privileges and immunities.

6.

The unborn child of Mary Doe avers that whether or not the Court upholds the validity of those provisions of Georgia law challenged in the plaintiffs' complaint, under the provisions of the common law of the State of Georgia he is entitled to life.

WHEREFORE, the unborn child of Mary Doe prays as follows:

(a) That the prayers of plaintiffs' complaint be denied;

(b) That plaintiffs be temporarily and permanently enjoined from conspiring to deprive the unborn child of Mary Doe of his civil rights.

/s/ FERDINAND BUCKLEY

Guardian ad Litem for the unborn child of Mary Doe

[53]

(Filed in Clerk's Office May 5, 1970, Claude L. Goza, Clerk; By: RMS, Deputy Clerk)

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

MARY DOE, et al,
Plaintiffs
vs.
ARTHUR K. BOLTON, et al,
Defendants
CIVIL ACTION NO. 13676

ANSWER OF LEWIS R. SLATON, DISTRICT ATTORNEY OF FULTON COUNTY

Comes now, Defendant, LEWIS R. SLATON, District Attorney of Fulton County, and files this answer to plaintiff's complaint and shows the court as follows:

FIRST DEFENSE

Said complaint fails to state a claim upon which relief can be granted to Mary Doe or to any of the other plaintiffs named in said complaint.

SECOND DEFENSE

Said complaint fails to state a claim for equitable relief in behalf of Mary Doe or any of the other plaintiffs named in said complaint.

THIRD DEFENSE

As to plaintiff, Mary Doe, said action is not being prosecuted in the name of a real party in interest as

BLEED THROUGH

required by Rule 17(a) of the Federal Rules of Civil Procedure.

FOURTH DEFENSE

Said complaint fails to join the father of the unborn [54] child of Mary Doe and therefore said complaint fails to join an indispensable party as required by Rule 19(a) of the Federal Rules of Civil Procedure.

FIFTH DEFENSE

Said complaint fails to show said Mary Doe complied with the provisions of Georgia Code Ann. § 26-1201, et seq. (sometimes referred to as the Georgia Abortion Act.).

1.

Respondent, Lewis R. Slaton, denies that plaintiffs are entitled to any relief sought in paragraphs 1 and 2 of said complaint, and specifically denies that any right of plaintiffs protected by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution is at issue in this action.

2.

Respondent denies that plaintiffs are entitled to the relief sought in paragraph 3 of said complaint.

3.

Respondent denies that plaintiffs are entitled to the relief sought in paragraph 4 of said complaint.

4.

Respondent denies the allegations of paragraph 5 of said complaint and specifically denies that plaintiffs are

entitled to the relief sought in paragraph 5 of said complaint.

5.

Respondent avers that for want of information sufficient [55] to form a belief, he is unable to admit nor deny the allegations of paragraph 6 of said complaint and demands strict proof thereof. In further answer, Respondent denies that it is necessary or proper for said plaintiff, Mary Doe, to conceal her identity from the court or Respondent. Respondent further shows that Mary Doe's identity is necessary for Respondent to properly prepare his defense to plaintiff's factual allegations.

6.

Respondent specifically denies the allegations of the last sentence of paragraph 7 of said complaint. For want of sufficient information to form a belief, Respondent is unable to admit nor deny the remaining allegations of said paragraph of said complaint.

7.

For want of information sufficient to form a belief, Respondent can neither admit nor deny the allegations of paragraph 8 of said complaint.

8.

Respondent specifically denies the allegations of paragraph 9 of said complaint.

9.

Respondent is unable to admit or deny the allegations of the first two paragraphs of paragraph 10 and the

first sentence of the third paragraph of paragraph 10 of said complaint for want of information sufficient to form a belief. Respondent specifically denies the remaining allegations of paragraph 10 of said complaint.

[56] 10.

Respondent is unable to admit or deny the allegations of the first two sentences of paragraph 11 of said complaint for want of information sufficient to form a belief. Respondent denies the remaining portions of paragraph 11 of said complaint.

11.

Respondent is unable to admit or deny the allegations of paragraph 12 of said complaint as worded, for want of information sufficient to form a belief.

12.

Paragraph 13 of said complaint is admitted.

13.

Respondent is unable to admit nor deny the allegations of paragraph 14 of said complaint, as worded, for want of sufficient information to form a belief.

14.

Respondent is unable to admit or deny the allegations of paragraph 15 of said complaint for want of sufficient information to form a belief.

15.

Respondent denies the allegations of paragraph 16, 17, 18, 19, 20, 21 and every sub-paragraph thereof of said complaint.

WHEREFORE, Respondent prays:

a) That the prayers of plaintiff's complaint be denied;

b) That the Respondent have such further relief as is just and equitable.

/s/ TONY H. HIGHT

TONY H. HIGHT,
Assistant District Attorney,
Atlanta Judicial Circuit
OF COUNSEL FOR RESPONDENT

BLEED THROUGH

[58]

(Filed in Clerk's Office May 6, 1970, Claude L. Goza, Clerk; By: JAR, Deputy Clerk)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, ET AL
Plaintiff

vs.

HERBERT T. JENKINS, as Chief of Police of the City of Atlanta, Georgia,
Defendant

Civil Case No. 13676

ANSWER OF DEFENDANT HERBERT T. JENKINS, AS CHIEF OF POLICE OF THE CITY OF ATLANTA, GEORGIA

Defendant HERBERT T. JENKINS, as Chief of Police of the City of Atlanta, answers the Complaint in this action as follows:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The Complaint fails to state a claim upon which relief can be granted against this defendant.

THIRD DEFENSE

The Complaint fails to state a claim against this de-

fendant upon which relief can be granted under any provision of the First Amendment to the Constitution of the United States of America.

FOURTH DEFENSE

The Complaint fails to state a claim against this defendant upon which relief can be granted under any provision of the Fourth Amendment to the Constitution of the United States of America.

[59]

FIFTH DEFENSE

The Complaint fails to state a claim against this defendant upon which relief can be granted under any provision of the Fifth Amendment to the Constitution of the United States of America.

SIXTH DEFENSE

The Complaint fails to state a claim against this defendant upon which relief can be granted under any provision of the Ninth Amendment to the Constitution of the United States of America.

SEVENTH DEFENSE

The Complaint fails to state a claim against this defendant upon which relief can be granted under any provision of the Fourteenth Amendment to the Constitution of the United States of America.

EIGHTH DEFENSE

The Complaint fails to state a claim against this defendant upon which relief can be granted under any pro-

vision of the Eighth Amendment to the Constitution of the United States of America.

NINTH DEFENSE

The Complaint fails to state a claim against this defendant upon which relief can be granted under any provision of Title 42 USC Section 1983.

TENTH DEFENSE

The Complaint fails to state a claim against this defendant upon which relief can be granted under any provision of Title 28 USC Sections 2201 and 2202.

ELEVENTH DEFENSE

1.

This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in [60] paragraph 1 of the Complaint except that the law quoted therein is a part of the laws of the State of Georgia so far as defendant is informed and believes.

2.

This defendant denies any averment in paragraphs 2, 3, 4, 5, 7, 8, 9, 10, 11, 16, 17, 18, 19, 20 and 21 as to which a response from this defendant is required by any rule of law.

3.

This defendant denies any averment in paragraph 6 of the Complaint as to which a response from him is required. Defendant further states that the refusal of plaintiff to disclose her true identity in the pleadings

prevents this proceeding from being a case or controversy to which the jurisdiction of this court extends within the meaning of Article 3, Section 2, Clause 1 of the Constitution of the United States of America.

4.

Defendant admits the averments of paragraphs 12, 13 and 14 of the Complaint insofar as the names, titles and general duties of defendant and the other officers are concerned.

WHEREFORE, this defendant demands the court enter judgment against all plaintiffs with all costs taxed against plaintiffs.

/s/ HENRY L. BOWDEN

HENRY L. BOWDEN

/s/ RALPH H. WITT

RALPH H. WITT
Attorneys for Defendant
HERBERT T. JENKINS

2614 First National
Bank Bldg.
Atlanta, Georgia 30303
524-7731

[62]

(Filed in Clerk's Office May 6, 1970, Claude L. Goza, Clerk; By: JAR, Deputy Clerk)

(Received May 6, 1970, Clerk's Office)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al.,
Plaintiffs
v.
ARTHUR K. BOLTON, et al.,
Defendants
} CIVIL ACTION NUMBER 13676

The court having heretofore appointed a guardian ad litem for the unborn foetus in the within matter and said guardian having filed an answer seeking affirmative relief by way of injunction against the plaintiffs

Now, upon consideration, it appears that said appointment was improvidently entered in that said foetus is not entitled to representation by a guardian ad litem; at least not to the extent of being able to ask for affirmative relief. *Cf.* Ga. Code Ann. §26-1103; Ga. Code Ann. §26-1101; Biegun v. The State, 206 Ga. 618 (1950); White v. The State, 114 Ga. App. 437 (1966); Hunter v. The State, 29 Ga. App. 366 (1923); *contra,* Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504 (1956), *and* Note, *In Defense of the Right to Live: The Constitutionality of the Therapeutic Abortion,* 1 Ga. L. Rev. 693 at 705-706 (1967); *see* Babbitz v. McCann, 38 U.S.L.W. 2498 (E.D. Wis., Filed March 5, 1970).

Accordingly, said appointment is hereby revoked and set aside. However, the guardian is free to proceed as amicus curiae in the case now referred to a three-judge panel.

For the panel

IT IS SO ORDERED.

This the 5th day of May, 1970.

/s/ SIDNEY O. SMITH, JR.

SIDNEY O. SMITH, JR.
United States District Judge

[63]

(Filed in Clerk's Office May 11, 1970, Claude L. Goza, Clerk; By: JAR, Deputy Clerk)

(Received May 11, 1970, Clerk's Office)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al.,
Plaintiffs
v.
ARTHUR K. BOLTON, as Attorney General of the State of Georgia, et al.,
Defendants

CIVIL ACTION
NO. 13676

MOTION TO DISMISS

Comes now Arthur K. Bolton, in his official capacity as Attorney General of the State of Georgia, and moves: (1) to be dismissed from the above-captioned suit as a party defendant in that it fails to state a claim upon which relief can be granted against him; (2) To be granted permission to file an amicus curiae brief in support of the constitutionality of the statutes of the State of Georgia attacked in said suit, *i.e.*, Criminal Code of Georgia, §§ 26-1201, 26-1202, 26-1203.

/s/ ARTHUR K. BOLTON

ARTHUR K. BOLTON
Attorney General

/s/ HAROLD N. HILL, JR.

HAROLD N. HILL, JR.
Executive Assistant
Attorney General

/s/ MARION O. GORDON

MARION O. GORDON
Assistant Attorney General

Please Serve:
DOROTHY T. BEASLEY
P. O. Address:

132 Judicial Building
40 Capitol Square
Atlanta, Georgia 30334

/s/ DOROTHY T. BEASLEY

DOROTHY T. BEASLEY
Assistant Attorney General

[64]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al.,
Plaintiffs

v.

ARTHUR K. BOLTON, as Attorney General of the State of Georgia, et al.,
Defendants

CIVIL ACTION
NO. 13676

BRIEF IN SUPPORT OF MOTION TO DISMISS

FACTS:

"Arthur K. Bolton, as Attorney General of the State of Georgia", is named as a party defendant in the above-styled action. It is alleged in the Complaint that "he is charged with the State-wide enforcement and administration of the challenged statutes." (Complaint, Par. 12). This is the only basis given for joining him.

The suit challenges the constitutionality of that portion of the Criminal Code of Georgia which deals with abortion, *i.e.*, Sections 26-1201 through 26-1203. It prays for a declaration of unconstitutionality and an injunction against enforcement and application of the subject statutes.

ARGUMENT:

It is submitted that none of the various forms of relief prayed for by plaintiffs can be awarded against the Attorney General of Georgia. That being so, as will be further explained below, the suit does not lie against

him and, therefore, it is respectfully urged that he be dismissed as a party defendant.

The Attorney General is not charged generally with the enforcement, application, or administration of the criminal [65] statutes of this State. He is an elected executive officer of the State. Constitution of the State of Georgia of 1945, Art. V, § II, Par. I; Art. VI, § X, Par. I (Ga. Code § 2-3101, § 2-4501). As such, certain of his duties are enumerated in the Constitution;

> "It shall be the duty of the Attorney General to act as the legal adviser of the Executive Department, to represent the State in the Supreme Court in all capital felonies; and in all civil and criminal cases in any court when required by the Governor and to perform such other services as shall be required of him by law." Constitution, *supra,* Art. VI, § X, Par. II (Ga. Code § 2-4502).

In addition to these duties, the authority of the Attorney General is prescribed as follows:

> "The General Assembly shall have power to prescribe the duties, authority, and salaries of the executive officers, ..." Constitution, *supra,* Art. V, § II, Par. I (Ga. Code § 2-3102).

Pursuant to the Constitutional mandate, numerous duties have been prescribed, none of which involve the enforcement or administration of the criminal laws here subject. Georgia Code, Ch. 40-16 contains the bulk of them. Thus, in addition to the statutorily listed duties required by the Governor (Ga. Code § 40-1602), the Department of Law, of which the Attorney General is the head, is vested with complete and exclusive authority in matters of law relating to the Executive Branch of the State government. Ga. Laws 1966, pp. 43-45; Ga. Code Ann.

§ 40-1612, -1614. As chief legal officer of the State, [66] the Attorney General has only limited, clearly proscribed authority and power to prosecute certain criminal cases. Ga. Laws 1943, pp. 284, 286-287 (Ga. Code Ann. § 40-1616, -1619). Nowhere is there a general blanket authority to prosecute all types of criminal cases, which would include those arising under the statutes here subject.

That duty is delegated to the district attorneys, as representatives of the State. Constitution, *supra*, Art. VI, § XI, Par. II (Ga. Code Ann. § 2-4602). It is therefore his duty: ". . . (4) to draw up all indictments or presentments, when requested by the grand jury, and to prosecute all indictable offenses." Ga. Code § 24-2908. It is only in cases of emergency, when a district attorney "is absent or indisposed, or disqualified from interest or relationships to engage in a prosecution," that the Attorney General, among others, may serve in the place of the district attorney. Ga. Code § 24-2913; § 40-1603. That, of course, is not the situation here.

The combination of specific constitutional and statutory provisions defines the boundaries of the Attorney General's authority and duties. ". . . (W)here the Constitution creates an office and prescribes the duties of the holder thereof, and declares that other duties may be imposed on him by statute, he has no authority to perform any act not legitimately within the scope of such statutory and constitutional provisions." *Walker ex rel. Mason v. Georgia Railway and Power Company*, 146 Ga. 655 (1917); *State ex rel. Boykin v. Ball Investment Company*, 191 Ga. 382, 387 (1940); *Boykin v. Martocello*, 194 Ga. 867, 870 (1942); *Board of Commissioners v. Clay*, 214 Ga. 70, 73 (1958). Thus, the Attorney Gen-

eral has no power or authority to determine who is to be prosecuted for an alleged offense under the criminal abortion statutes, nor can he as a part of his official [67] duties enforce, administer, or apply those statutes except in the limited instances referred to above.

It is also pointed out that the district attorneys are not his agents but are elected by the people and are answerable to them. Constitution, *supra,* Art. VI, § XI, Par. I (Ga. Code § 2-4601). The district attorneys are independent of the Attorney General, who therefore has no control over them as to prosecutions under the subject criminal statutes; nor do they act under his supervision or his direction. Neither does he have any authority or power to direct the chief of police as his agent.

Inasmuch as none of the relief prayed for can be directed against the Attorney General, he is an improper party defendant and should hence be dismissed as a party defendant.

Inasmuch, however, as the procedure contained in 28 U.S.C. § 2284 has been called into operation by the plaintiffs' assertion of the necessity of a three-judge court pursuant to 28 U.S.C. § 2281, the Attorney General respectfully requests permission to appear as amicus curiae with respect to the defense of the State statutes' constitutional validity.

Respectfully submitted,

/s/ ARTHUR K. BOLTON

ARTHUR K. BOLTON
Attorney General

/s/ HAROLD N. HILL, JR.

HAROLD N. HILL, JR.
Executive Assistant
Attorney General

/s/ MARION O. GORDON

MARION O. GORDON
Assistant Attorney General

Please Serve:
DOROTHY T. BEASLEY
P. O. Address:

132 Judicial Building
40 Capitol Square
Atlanta, Georgia 30334

/s/ DOROTHY T. BEASLEY

DOROTHY T. BEASLEY
Assistant Attorney General

[69]

(Filed in Clerk's Office May 13, 1970, Claude L. Goza, Clerk; By: RMS, Deputy Clerk)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al.,
Plaintiffs
v.
ARTHUR K. BOLTON, et al.,
Defendants

CIVIL ACTION
NO. 13676

MOTION FOR RECONSIDERATION OF ORDER REVOKING APPOINTMENT OF GUARDIAN AD LITEM OF UNBORN FOETUS

Comes now the undersigned, appearing as amicus curiae, and moves the Court to reconsider and revoke its Order of May 5, 1970, revoking appointment of the undersigned as guardian ad litem for the unborn foetus of Mary Doe upon the following grounds:

1.

It is alleged in the complaint that at the time of filing the complaint Mary Doe was nine weeks pregnant. Mrs. Hames, of counsel for Mary Doe, has stated to the undersigned that the aforesaid allegation was mistaken and that Mary Doe has been pregnant for approximately four to five weeks longer than alleged in the complaint. Thus, the foetus is now between sixteen and one-half weeks and seventeen and one-half weeks old.

2.

It is probable that the foetus is now quick as a matter of law, but if this is not the case, it is at least a question of fact whether or not the foetus is quick and the vast preponderance of the evidence would demand a finding that it is is.

[70] 3.

There is no party present before the Court who is representing the interests of the foetus.

4.

If the guardian ad litem filed a claim for affirmative relief which should not have been filed in behalf of the foetus, the Court can correct any error in that regard without depriving the foetus of representation by a guardian ad litem.

WHEREFORE, the undersigned prays that said Order of May 5, 1970, be revoked and that the undersigned or some other qualified person be appointed guardian ad litem for the foetus.

/s/ FERDINAND BUCKLEY

Amicus Cuaiae

[100]

(Filed in Clerk's Office Jun 2, 1970, Claude L. Goza, Clerk; By: JWE, Deputy Clerk)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al.,
Plaintiffs
v.
ARTHUR K. BOLTON, et al.,
Defendants
} CIVIL ACTION NO. 13676

MOTION OF FERDINAND BUCKLEY TO INTERVENE

Comes now Ferdinand Buckley, who respectfully requests this Court for leave to intervene in the above styled action on behalf of the unborn child of Mary Doe and on behalf of all unborn children in the State of Georgia who are or might be affected by a judgment in the above styled action upon the following grounds:

1.

Plaintiffs have filed an action in behalf of themselves and as representatives of the several classes to which they belong, claiming that the abortion laws of the State of Georgia adversely affect them and their respective classes and are violative of the United States Constitution.

2.

Each of the named defendants is allegedly charged with the duty of enforcing the abortion laws under attack.

3.

Neither the unborn child of Mary Doe nor any of the unborn children who are or might be affected by a judgment in this case have been named defendants in this case, and no one purports to represent the unborn child [101] of Mary Doe or the class of unborn children in general who are or might be affected by a decision in this case.

4.

The granting of the relief prayed for in the plaintiffs' complaint would deprive the unborn child of Mary Doe and other children similarly situated of their lives and liberty without due process of law and without the actual protection of the law in violation of the United States Constitution.

5.

The granting of the relief prayed for in plaintiffs' complaint would subject the unborn child of Mary Doe and other children similarly situated to cruel and unusual punishment in violation of the United States Constitution.

6.

The granting of the relief prayed for in plaintiffs' complaint would deprive the unborn child of Mary Doe and other children similarly situated of their civil rights in violation of Title 42, §§ 1981, 1985 and 1988 of the United States Code.

7.

The number of the members of the class which movant seeks to represent in this litigation is so large that the joinder of all members of the class would be impractical if not impossible. There are questions of law and fact in

this case which will determine the rights of every member of this class to life and liberty.

8.

Your movant will fairly, adequately and aggressively protect the interests of each member of this class, and movant therefore requests appointment as guardian ad [102] litem for and on behalf of the unborn child of Mary Doe and other unborn children in the State of Georgia.

9.

The class of unborn children will be irreparably injured if intervention is not allowed by this Court.

10.

While movant has been granted by the court leave to participate in the action as an amicus curiae, the rights of the class which movant seeks to represent will not be adequately protected unless movant is permitted to participate fully, as representative of a party in every phase of the action.

WHEREFORE, movant respectfully requests leave to intervene in this action in behalf of the unborn child of Mary Doe and other unborn children similarly situated, and for such other relief as this Court may deem appropriate.

/s/ FERDINAND BUCKLEY

FERDINAND BUCKLEY,
Movant

[114]

(Filed in Clerk's Office Jun 8, 1970, Claude L. Goza, Clerk; By: JAR, Deputy Clerk)

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, ET AL,
Plaintiffs
vs.
ARTHUR K. BOLTON, ET AL,
Defendants

CASE
NO. 13676

MOTION TO DISMISS AS TO MARY DOE

Now comes LEWIS R. SLATON, Defendant and moves this court to dismiss the petition of Mary Doe and shows the court as follows:

1.

The Plaintiff's petition shows a complete failure to comply with and exhaust state administrative procedures.

2.

An adequate State remedy exists.

3.

The Georgia State courts should have the initial opportunity to decide the constitutionality of a State law.

Respectfully submitted,

/s/ LEWIS R. SLATON

LEWIS R. SLATON,
District Attorney
Atlanta Judicial Circuit

/s/ TONY H. HIGHT

TONY H. HIGHT,
Assistant District Attorney,
Atlanta Judicial Circuit

Fulton County
Courthouse

Atlanta, Ga. 30303

[120]

(Filed in Clerk's Office Jun 8, 1970, Claude L. Goza, Clerk; By: JAR, Deputy Clerk)

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al.,
Plaintiffs
vs.
ARTHUR K. BOLTON, et al.,
Defendants

CASE
NO. 13676

DEFENDANT, LEWIS R. SLATON'S INTERROGATORIES TO PLAINTIFF, MARY DOE

I herewith serve upon you the following interrogatories pursuant to the provisions of Rule 31 of the Federal Rules of Civil Procedure (28 USCA).

INTERROGATORY 1

List the names of medical doctors that have examined Mary Doe concerning her current alleged pregnancy giving the date and place of each examination performed by said doctor.

INTERROGATORY 2

Is petitioner's (Mary Doe) husband living with petitioner?

INTERROGATORY 3

If the answer to interrogatory 2 is in the affirmative, give her husband's name and place of employment.

INTERROGATORY 4

Has Mary Doe or her husband ever been convicted of a crime?

[121]

INTERROGATORY 5

If the answer to interrogatory 4 is affirmative, list the convictions of either or both.

INTERROGATORY 6

Was the application of Mary Doe for an abortion denied in writing by the alleged Grady Hospital Abortion Committee?

INTERROGATORY 7

If the answer to interrogatory 6 is negative, what representative of Grady Hospital notified said Mary Doe of said denial?

INTERROGATORY 8

Was the consent of the husband of Mary Doe to an abortion presented in writing to the Grady Hospital Abortion Committee?

INTERROGATORY 9

Did three physicians certify in writing that based upon their separate personal examinations of the pregnant woman, the abortion was necessary as required under Ga. Code Ann. § 26-1202?

INTERROGATORY 10

If the answer to interrogatory 9 is affirmatively list the physicians' names and date of such certification.

INTERROGATORY 11

List the hospitals that Mary Doe has made a formal application for an abortion.

INTERROGATORY 12

State whether the medical doctors examinations indicated in interrogatory 1 was charitable or whether compensation was paid therefor.

[122]

INTERROGATORY 13

Was the application of said Mary Doe to Grady Memorial Hospital Abortion Committee for an abortion, a request for a charitable abortion at the taxpayer's expense.

INTERROGATORY 14

If the previous answer of interrogatory 12 was, Examinations were not charitable, indicate the amount paid to each physician.

Third Floor
Fulton County
Courthouse
Atlanta, Ga. 30303

/s/ TONY H. HIGHT

Counsel for Defendant,
Lewis R. Slaton

[123]

(Filed in Clerk's Office Jun 8, 1970, Claude L. Goza, Clerk; By: JAR, Deputy Clerk)

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al,
Plaintiffs
vs
ARTHUR K. BOLTON, et al,
Defendants
CASE NO. 13676

MOTION TO DISMISS AS TO PETER G. BOURNE; ROBERT HATCHER; LILLAS L. JAMES; JAMES WATERS; CORBETT TURNER; NEWTON LONG; EDWARD LEADER; WILLIAM H. BIGGERS; GEORGE VIOLIN; PATRICIA S. SMITH; JENNIE WILLIAMS; JUDITH BOURNE, SUZANNE DUNAWAY; JOYCE PARKS; LOU ANN IRION; MARY LONG; J. EMMETT HERNDON; SAMUEL L. WILLIAMS; EUGENE PICKETT; RICHARD DEVOR; DONALD DAUGHTRY; JUDITH ZORACH and KAREN WEAVER, residents of the State of Georgia; PLANNED PARENTHOOD ASSOCIATION OF ATLANTA, INC., a Georgia Corporation; and GEORGIA CITIZENS FOR HOSPITAL ABORTION, INC., a Georgia Corporation, for and on behalf of all persons and organizations similarly situated.

Now comes LEWIS R. SLATON, Defendant and moves this court to dismiss the above parties as plain-

tiffs in the above styled case and shows the court as follows:

1.

Peter G. Bourne; Robert Hatcher; Lillas L. James; James Waters; Corbett Turner; Newton Long; Edward Leader; William H. Biggers; George Violin; Patricia S. Smith; Jennie Williams; Judith Bourne; Suzanne Dunaway; Joyce Parks; Lou Ann Irion; Mary Long; J. Emmett Herndon; Samuel L. Williams; Eugene Pickett; Richard Devor; Donald Daughtry; Judith Zorach and Karen Weaver, residents of Georgia; Planned Parenthood Association of Atlanta, Inc., a Georgia Corporation; and Georgia Citizens for Hospital Abortion, Inc., a Georgia Corporation, for and on behalf of all persons and organizations similarly situated, do not have an enforceable interest.

[124] 2.

Peter G. Bourne; Robert Hatcher; Lillas L. James; James Water; Corbett Turner; Newton Long; Edward Leader; William H. Biggers; George Violin; Patricia S. Smith; Jennie Williams; Judith Bourne; Suzanne Dunaway; Joyce Parks; Lou Ann Irion; Mary Long; J. Emmett Herndon; Samuel L. Williams; Eugene Pickett; Richard Devor; Donald Daughtry; Judith Zorach and Karen Weaver, residents of Georgia; Planned Parenthood Association of Atlanta, Inc., a Georgia Corporation; and Georgia Citizens for Hospital Abortion, Inc., a Georgia Corporation, for and on behalf of all persons and organizations similarly situated, are not proper parties

which present ill-defined controversies of constitutional issues which are hypothetical or abstract in character.

Respectfully submitted,

/s/ LEWIS R. SLATON

LEWIS R. SLATON,
District Attorney
Atlanta Judicial Circuit

/s/ TONY H. HIGHT

TONY H. HIGHT,
Assistant District Attorney,
Atlanta Judicial Circuit

Third Floor
Fulton County
Courthouse
Atlanta, Ga. 30303

COUNSEL FOR DEFENDANTS

[130]

(Filed in Clerk's Office Jun 8, 1970, Claude L. Goza, Clerk; By: JAR, Deputy Clerk)

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al.,
Plaintiffs
vs
ARTHUR K. BOLTON, et al.,
Defendants

CASE
NO. 13676

DEFENDANT, LEWIS R. SLATON'S INTERROGATORIES TO PLAINTIFFS PETER G. BOURNE; ROBERT HATCHER; LILLAS L. JAMES; JAMES WATERS; CORBETT TURNER; NEWTON LONG; EDWARD LEADER; WILLIAM H. BIGGERS; GEORGE VIOLIN; PATRICIA S. SMITH; JENNIE WILLLIAMS; JUDITH BOURNE; SUZANNE DUNAWAY; JOYCE PARKS; LOU ANN IRION; MARY LONG; J. EMMETT HERNDON; SAMUEL L. WILLIAMS; EUGENE PICKETT; RICHARD DEVOR; DONALD DAUGHTRY; JUDITH ZORACH and KAREN WEAVER, residents of the State of Georgia; PLANNED PARENTHOOD ASSOCIATION OF ATLANTA, INC., a Georgia Corporation; and GEORGIA CITIZENS FOR HOSPITAL ABORTION, INC., a Georgia Corporation, for and on behalf of all persons and organizations similarly situated.

I herewith serve upon you the following interrogatory

pursuant to the provisions of Rule 31 of the Federal Rules of Civil Procedure (28 USCA).

INTERROGATORY 1

State whether or not each of you are represented by Attorneys, Margie Pitts Hames, Tobiane Schwartz, Elizabeth Rindskopf, and Betty Kehrer, as indigent persons qualified for legal aid services.

Third Floor,
Fulton County
Courthouse
Atlanta, Ga. 30303

/s/ TONY H. HIGHT

Counsel for Defendant,
Lewis R. Slaton

[465]

(Filed in Clerk's Office Jun 15, 1970, Claude L. Goza, Clerk; By: JWE, Deputy Clerk)

IN THE UNITED STATES DISTRICT COURT
OF THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al,
Plaintiffs,
Vs.
Arthur K. Bolton, et al,
Defendants.

CIVIL CASE
NO. 13676

ANSWERS TO INTERROGATORIES

Comes now Plaintiff Mary Doe and makes the following responses to Interrogatories propounded by defendant Lewis R. Slaton and served upon my attorney on June 10, 1970.

INTERROGATORY NO. 1: I do not remember the names and specific dates of all doctors that have examined me concerning my pregnancy. I do recall that I went to Grady Memorial Hospital on or about March 15 or 16, 1970. I remember being seen by a Dr. White and a Dr. Butler. In late April, 1970, I was examined by Dr. Donald Block and a Dr. Bourn. I saw another doctor but do not recall his name. I saw Dr. Block at his office and Dr. Bourn at the Southside Comprehensive Medical Center. The other doctor was at Lenox Towers.

INTERROGATORY NO. 2: My husband and I are now separated.

INTERROGATORY NO. 3: No response required.

INTERROGATORY NO. 4: I object to answering this question because any conviction of crime is completely irrelevant to My right to an abortion.

INTERROGATORY NO. 5: I object to answering this interrogatory for the same reason.

INTERROGATORY NO. 6: The denial of my application by Grady Memorial Hospital was not in writing.

[466] INTERROGATORY NO. 7: My recollection is that I was notified by a doctor from Grady, Dr. Butler, as I recall.

INTERROGATORY NO. 8: My husband and I were separated at the time I applied for the abortion at Grady.

INTERROGATORY NO. 9: Yes, to the best of my knowledge.

INTERROGATORY NO. 10: I do not have copies of the certifications made by the physicians.

INTERROGATORY NO. 11: My application for abortion was denied by Grady Memorial Hospital, on or about April 10, 1970. Georgia Baptist Hospital, Atlanta, Georgia, approved my application on May 5, 1970.

INTERROGATORY NO. 12: I am an indigent person qualified for medical services at Grady Memorial Hospital. I do not have the money to pay my doctors. I was not approved as a charity patient at Georgia Baptist Hospital and I did not have the money to pay for the abortion there.

INTERROGATORY NO. 13: I am unemployed, have no income, receive no support from my husband

and do not yet qualify for welfare assistance. I do qualify, so I am advised, for free medical services at Grady Memorial Hospital. I received one emergency check from the Welfare department in an amount under $20.00.

/s/ MARY DOE

MARY DOE

STATE OF GEORGIA

COUNTY OF FULTON

Personally appeared before me, the undersigned Notary Public in and for said County and State, the said Mary Doe who made oath that she was the person so identified in the suit Mary Doe, et al, vs. Arthur K. Bolton, et al, and that her true identity is revealed in an affidavit attached to the complaint filed with the court in a sealed container, and further that the above and foregoing responses to interrogatories are true and correct to the best of her knowledge, information and belief.

This 14th day of June, 1970.

/s/ MARGIE PITTS HAMES

Notary Public

My Commission expires: Aug. 24, 1973

[468]

(Filed in Clerk's Office Jun 15, 1970, Claude L. Goza, Clerk; By: JWE, Deputy Clerk)

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al,
Plaintiffs
VS
ARTHUR K. BOLTON, et al,
Defendants
} CIVIL ACTION NO. 13676

MOTION FOR AN ORDER REQUIRING THE DISCLOSURE OF THE IDENTITY OF MARY DOE SO THAT THE NAMED DEFENDANTS MAY PROPERLY PREPARE THEIR DEFENSE

Now comes, LEWIS R. SLATON, District Attorney of Fulton County and moves this Court to require the identity of plaintiff, Mary Doe be revealed to the named defendants so that a proper defense to the allegations of the petition may be conducted.

Respectfully submitted,

/s/ TONY H. HIGHT

TONY H. HIGHT,
Assistant District Attorney,
Atlanta Judicial Circuit

COUNSEL FOR DEFENDANT
LEWIS R. SLATON

[469]

(Filed in Clerk's Office Jun 15, 1970, Claude L. Goza, Clerk; By: JWE, Deputy Clerk)

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al,
Plaintiffs
VS
ARTHUR K. BOLTON, et al,
Defendants
} CIVIL ACTION NO. 13676

MOTION FOR A PHYSICAL AND MENTAL EXAMINATION OF THE PLAINTIFF MARY DOE

Now comes the Defendant, LEWIS R. SLATON, District Attorney of Fulton County and moves that the Court order a mental and physical examination of Plaintiff, Mary Doe.

Defendant, Lewis R. Slaton, shows the Court as follows:

1.

The allegations of the Petition of Mary Doe shows that she suffers from a serious mental condition and may be unable to give her consent to an abortion.

2.

Due to the allegations of Plaintiff's Petition, a Guardian Ad Litem may be required to protect the interest of the Petitioner, Mary Doe.

3.

The Defendants are placed in the position of having to accept the allegations of the Petition as to whether said Mary Doe is in fact pregnant and the time that has elapsed since conception as estimated by the attorney for said Mary Doe, who is certainly not a medical expert.

[470] 4.

The Defendant is unable to adequately prepare a defense to the allegations of the Petition without such an examination.

WHEREFORE, the Respondent prays that said Mary Doe be required to be examined by medical experts selected either by the court or the defendant.

/s/ TONY H. HIGHT

TONY H. HIGHT,
Assistant District Attorney,
Atlanta Judicial Circuit

Fulton County
Courthouse
Atlanta, Ga. 30303

COUNSEL FOR DEFENDANT,
LEWIS R. SLATON

[471]

(Filed in Clerk's Office Jun 15, 1970, Claude L. Goza, Clerk; By: JWE, Deputy Clerk)

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al,
Plaintiffs
VS
ARTHUR K. BOLTON, et al,
Defendants

CIVIL ACTION
NO. 13676

MOTION FOR A CONTINUANCE

Now comes LEWIS R. SLATON, District Attorney of Fulton County and requests that this Court grant a continuance for a reasonable time after the identity of the Plaintiff, Mary Doe, is disclosed in order that the defendants may properly prepare a defense to the allegations in said Petition.

Defendant, Lewis R. Slaton, shows the court:

1.

That the plaintiffs have refused to disclose the identity of said Mary Doe which has hampered and rendered impossible an adequate investigation by the defendants;

2.

That the Defendants have been unable to obtain a deposition from Mary Doe by the avowed refusal of the plaintiffs to disclose her identity;

3.

That the Defendants have been unable to obtain a mental and physical examination of said Mary Doe by her avowed refusal to disclose her identity;

[472] 4.

That the Defendant, Lewis R. Slaton, has been denied the right to be confronted by a real person whose identity is known to him in order to properly prepare his sundry defense.

WHEREFORE, the Defendant respectfully requests a continuance for a reasonable time after the disclosure of the identity of Mary Doe, in order to properly prepare his defense and defend his person under due process of law.

/s/ TONY H. HIGHT

TONY H. HIGHT,
Assistant District Attorney,
Atlanta Judicial Circuit

Fulton County
Courthouse
Atlanta, Ga. 30303

COUNSEL FOR DEFENDANT,
LEWIS R. SLATON

[604]

(Filed in Clerk's Office Jul 31, 1970, Claude L. Goza, Clerk; By: JAR, Deputy Clerk)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al,
Plaintiffs
vs.
ARTHUR K. BOLTON, as Attorney General of the State of Georgia; LEWIS R. SLATON, as District Attorney of Fulton County, Georgia; and HERBERT T. JENKINS, as Chief of Police of the City of Atlanta,
Defendants

CIVIL ACTION NUMBER 13676

PER CURIAM.

This is an action for declaratory and injunctive relief brought pursuant to 28 U.S.C.A. §2201 and 2202, and 42 U.S.C.A. §1983 and 28 U.S.C.A. §1343. It is a class action attacking Ga. Code Ann. §26-1201, *et seq.* (1969) Georgia's "Abortion Act."

Plaintiffs claim to represent four sub-classes: pregnant women, single or married, wishing legal abortions; licensed physicians who wish to perform or counsel performance of legal abortions; registered nurses who desire to participate in performing or counsel performance of legal abortions; and ministers and social workers who

wish to be free to advise abortion in counselling pregnant women.

Plaintiffs seek an order declaring Georgia's Abortion Statute unconstitutional and enjoining its enforcement on various grounds:

(1) the Statute is unconstitutionally vague and indefinite on its face and as applied, failing to provide sufficient [605] warning of the conduct proscribed, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

(2) Georgia's Abortion Statute unconstitutionally abridges a woman's right to decide to terminate an unwanted pregnancy, in restricting that fundamental liberty without an overriding compelling state interest;

(3) the Statute unconstitutionally restricts the right of the physicians, nurses, ministers and social workers to practice their professions;

(4) Georgia's Abortion Statute produces discrimination against poor and non-white women in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

PENDING MOTIONS

Arthur K. Bolton, sued in his official capacity as Attorney General of Georgia has moved for an order dismissing the claim against him on the ground that no relief could be granted against him since he is not charged generally with the enforcement, application or administration of the Georgia criminal statutes.

As plaintiffs observe, Article VI, § X, Par. II of the Georgia Constitution, Ga. Code Ann. §2-4502 (1933)

requires the Attorney General to represent the State in any civil or criminal case when required by the Governor. Furthermore, he may be required to give the Governor advisory opinions on the abortion statute. Ga. Code Ann. §40-1602 (1933). Finally, the Attorney General is head of the Department of Law, which is vested with [606] authority and jurisdiction in all matters of law relating to governmental departments, boards and agencies. Ga. Code Ann. §40-1614 (1943). The Attorney General has sufficient connection with enforcement of the statutes attacked to justify retaining him as a party.[1] See Arneson v. Denny, 25 F.2d 993 (W.D. Wash. 1928); Jackson v. Colorado, 294 F. Supp. 1065, 1072 (D. Colo. 1968); James v. Almond, 170 F. Supp. 331, 341-342 (E.D. Va. 1959); International Longshoremen's & W. U. v. Ackerman, 82 F.Supp. 65, 124 (D. Haw. 1948), *rev'd* on other grounds 187 F.2d 860 (9th Cir. 1951); Revins v. Prindable, 39 F. Supp. 708, 710 (E.D. Ill. 1941). Accordingly, that motion is denied.

The Attorney General has also objected to interrogatories which plaintiffs served for answer by a witness, Roger Rochat, M.D. In view of the disposition of this case made below, no ruling on this motion is necessary.

The motion of Ferdinand Buckley, Esquire, for reconsideration of the revocation of his appointment as guardian ad litem will be dealt with in connection with the discussion under MERITS below.

The motion of the National Legal Program on Health Problems of the Poor to submit a brief as *amicus curiae* is granted.

---

[1]The Court is also aware that the Attorney General regularly interprets State criminal laws and decisions in published opinions and circulars to State judges and law enforcement officers.

The defendant Lewis R. Slaton, District Attorney of Fulton County, filed motions seeking orders requiring disclosure of plaintiff's identity, granting a continuance for discovery for a reasonable time thereafter, and requiring plaintiff to submit to a [607] physical and mental examination. In view of the reasons for which it is held that the complaint of this plaintiff presented a justiciable controversy, these motions are directed toward obtaining information which is not relevant to the case. Accordingly, they are denied.

JURISDICTION

A. *Substantial Constitutional Question.*

A three-judge court was convened pursuant to 28 U.S.C.A. §2281 and 2284. Such action is proper where plaintiffs attack the constitutionality of a state statute, raising a substantial constitutional question, and seek equitable relief against its enforcement. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715 (1962).

Plaintiffs here attack the constitutionality of Ga. Code Ann. §26-1201 *et seq.* (1969) on the grounds that it infringes rights protected by various Amendments to the United States Constitution. They seek an injunction against enforcement. In light of recent cases on the subject of the Constitutional right to an abortion, this Constitutional question appears substantial. *See* Roe v. Wade, ... F. Supp. ..... (N.D. Tex., No. 3-3690-B, June 17, 1970); Doe v. Randall, ... F. Supp. ..... (D. Minn., No. 3-70-Civ.-97, May 19, 1970); Doe v. Scott, ... F. Supp. ..... (N.D. Ill., No. 70-C-395, March 27, 1970); Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970);

United States v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969), *app. docketed,* No. 1155 (February 5, 1970); California v. Belous, 71 Cal. 2d 991, 458 P.2d 194 (1969), *cert. den.* 397 U. S. 915 (1970).

[608]

B. *Justiciability.*

Standing

By motion to dismiss, Lewis R. Slaton, District Attorney of Fulton County, contends that all plaintiffs other than Mary Doe lack standing to maintain this action. The basis for the claims of these plaintiffs is that because they are not free to perform or counsel the obtaining of abortions, they are unconstitutionally restricted in the practice of their professions.

There are certainly instances in which any of these plaintiffs would have standing to claim a constitutional right to practice his profession, and infringement thereof. For instance, few would dispute that a social worker being prosecuted for conspiracy because he (or she) counselled obtaining an abortion, and referred the client to a physician for the abortion, would have standing to seek a declaratory judgment of his (or her) asserted constitutional right and infringement thereof. *See* Griswold v. Connecticut, 381 U. S. 479 (1965).

But absent prosecution or indictment, that these plaintiffs do have standing is more difficult to see. Whether their claim is otherwise justiciable is irrelevant. Flast v. Cohen, 392 U. S. 83, 100 n. 21 (1968). The sole issue is whether there is a logical link between the status they assert (physician, nurse) and the claim they seek adjudicated, or between their status and both the type of enact-

ment attacked and the nature of the constitutional infringement alleged. 392 U. S. at 102.

Under either test, all the plaintiffs have standing. As physicians, nurses, ministers or social workers they attack a [609] criminal statute potentially applicable to them, on the grounds that it unconstitutionally restricts their right to practice. Accordingly, the motion to dismiss for lack of standing is denied.

Collision of Interests

Article III of the United States Constitution limits the jurisdiction of the federal courts to cases and controversies. And it is well established that in actions for declaratory judgments, a District Court may not render an advisory opinion on the constitutionality of a state statute. Rather there must be "exigent adversity," an actual controversy in which the constitutionality of the statute is drawn into question in a truly adversary context. *See* Golden v. Zwickler, 394 U. S. 103, 108 (1969); Poe v. Ullman, 367 U. S. 497 (1961); United Public Workers of America v. Mitchell, 330 U. S. 75, 89 (1947).

Most akin to the instant case is Poe v. Ullman, 367 U. S. 497 (1961). There, a married couple, a married woman and their physician sought a declaratory judgment that Connecticut's statutes prohibiting the use of contraceptive devices and the giving of medical advice in the use of such devices violated plaintiffs' Fourteenth Amendment rights, depriving them of life and liberty without due process of law. None of the plaintiffs had been indicted or prosecuted under the statutes. There had been only one recorded prosecution for violation of the

statutes in the seventy-five years since their enactment, and that single instance occurred twenty years before the declaratory judgment action was brought. The Supreme Court suggested that the lack of a pending prosecution or immediate threat of such prosecution against the particular plaintiffs made the claims non-justiciable, [610] citing United Public Workers of America v. Mitchell, 330 U. S. 75 (1947). 367 U. S. at 501. But the Justices went on to find that the lack of recorded prosecutions, the unchallenged, open, ubiquitous public sales of contraceptive devices showed a deeply embedded State policy against enforcement, amounting to a tacit agreement not to prosecute violators of the statutes. The majority therefore held:

> "It is clear that the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting." 367 U. S. at 507.

However, these three cases seem precedent for the proposition that in the absence of a pending or threatened indictment or prosecution of the particular plaintiffs bringing a declaratory judgment action, a federal court cannot consider the constitutionality of the challenged criminal statute.

However in 1968, the Supreme Court decided Epperson v. Arkansas, 393 U. S. 97 (1968), in which a public school teacher argued that the Arkansas statute prohibiting the teaching of evolution was unconstitutional. There was no pending or threatened indictment or prosecution against the teacher. There was no record of any prosecutions under the challenged statute. The teacher's

dilemma was solely that (1) the new biology textbooks she was supposed to use in the approaching term contained a chapter on evolution, and (2) her action for a declaratory judgment in state court, granted on the trial level, had been reversed by [611] the Arkansas Supreme Court. The United States Supreme Court majority reached the merits and reversed the decision of the Arkansas Supreme Court in an opinion which summarily brushed aside the question of justiciability. 393 U. S. at 101-102. Apparently, then, the majority felt that the appeal presented a "substantial controversy . . . of sufficient immediacy and reality." Golden v. Zwickler, 394 U. S. 103, 108 (1969).

In the instant case, the plaintiff Mary Doe alleges that having properly applied to the Abortion Committee of Grady Memorial Hospital for a legal therapeutic abortion allowed by Ga. Code Ann. §26-1202 (1969), she was denied an abortion solely on the grounds that her present situation did not come within the terms of Ga. Code Ann. §26-1202(a)(1)(1969).

Georgia's Abortion Act defines a criminal abortion as the act performed by a person who administers a substance or uses an instrument or other means with intent to produce a miscarriage or abortion. Ga. Code Ann. §26-1201 (1969). However, Ga. Code Ann. §26-1202-(a) establishes three circumstances under which an abortion shall not be considered a criminal abortion. And Ga. Code Ann. §26-1202(b) (1969) prescribes procedure which *must* be followed if an abortion is to be authorized by or performed under 1202(a).

Ga. Code Ann. §26-1202(b)(1969) provides in relevant part:

"No abortion is authorized or shall be performed under this section unless each of the following conditions is met:

* * *

[612]

(6) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose.

Thus, the denial of plaintiff's application for an abortion, on the grounds alleged, was not the decision of a private physician declining to render professional services, occasioned by the mere existence of Georgia's Abortion Act. The statute confers upon the hospital committee power to grant or deny abortions. A decision denying an application for abortion on the ground that the woman's situation does not fall within one of the three enumerated exceptions is an exercise of that power, which allegedly violated plaintiff's constitutional rights. To this extent then, this statute has been invoked against the plaintiff Mary Doe, causing an alleged constitutional deprivation. Here, there has been actual interference with a claimed constitutional right by the decision of a body which the State has vested [613] with power to grant or deny legal abortions. These circumstances put plaintiff and the defendants on opposite sides of a very

real and lively controversy, amenable to judicial resolution.

Accordingly, it appears that May Doe's complaint, in this context, presents a justiciable controversy. Since the claims of the other plaintiffs do not stand in such a posture, the Attorney General's motion to dismiss must be granted to that extent.

C. *Exhaustion.*

There is no merit to the defendant Slaton's motion to dismiss for failure to exhaust state remedies. It does not appear that there are any administrative remedies for the denial by a hospital committee of an application for an abortion. And however desireable such a requirement might be for orderly judicial administration, there is no requirement that a litigant in federal court exhaust state judicial remedies, where he is asserting a claim in proceedings other than *habeas corpus* involving a subject over which the federal and state courts have concurrent jurisdiction. As will appear below, the instant case does not involve granting injunctive relief.

THE MERITS

Plaintiff asserts that certain cases leading up to and following Griswold v. Connecticut, 381 U. S. 479 (1965) establish a Constitutional right to privacy broad enough to encompass the right of a woman to terminate an unwanted pregnancy in its early stages, by obtaining an abortion. *See* Stanley v. Georgia, 394 U.S. [614] 557 (1969); Loving v. Virginia, 388 U. S. 1 (1967); Skinner v. Oklahoma, 316 U. S. 535 (1942); Olmstead v. United States, 277 U. S. 438, 478 (1928) (disenting opinion of Mr. Justice Brandeis); Pierce v. Society of Sisters, 268 U. S. 510 (1925); Meyer v. Nebraska, 262

U. S. 390 (1923). While the Court agrees that the breadth of the right to privacy encompasses the decision to terminate an unwanted pregnancy, we are unwilling to declare that such a right reposes unbounded in any one individual. Rather, we are of the view that although the state may not unduly limit the reasons for which a woman seeks an abortion, it may legitimately require that the decision to terminate her pregnancy be one reached only upon consideration of more factors than the desires of the woman and her ability to find a willing physician.

In Griswold v. Connecticut, 381 U. S. 479 (1965), the Supreme Court held that the decision to use contraceptive devices is an aspect of a relationship lying within a penumbral zone of privacy created by several fundamental constitutional guarantees, and that a state law forbidding the use of such devices unduly invades that area of protected freedoms with maximum destructive effect upon that relationship. 381 U. S. at 485. In a concurring opinion, Mr. Justice Goldberg differed with the majority only to the extent of stipulating that the right to marital privacy is encompassed in his concept of personal liberty because of the Ninth Amendment, rather than because of penumbral emanations of specific constitutional guarantees.

For whichever reason, the concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy.[2] Like the decision [615] to use contraceptive

[2]We see no connection between this theory and the claimed unlimited right of a woman "to use her body in any way she wishes" read into Griswold by some. There are obvious limitations to the latter such as self abuse, *e.g.* disease, drugs, suicide, etc. and the rights of others in which the state clearly has an interest. Any such theory in its ultimate is flatly rejected.

devices, the decision to terminate an unwanted pregnancy is sheltered from state regulation which seeks broadly to limit the reasons for which an abortion may be legally obtained. However, unlike the decision to use contraceptive devices, the decision to abort a pregnancy affects other interests than those of the woman alone, or even husband and wife alone.

Once conception takes place and an embryo forms, for better or for worse the woman carries a life form with the *potential* of independent human existence.[3] Without positing the existence of a new being with its own identity and federal constitutional rights, we hold that once the embryo has formed, the decision to abort its development cannot be considered a purely private one affecting only husband and wife, man and woman.

A potential human life, together with the traditional interests in the health, welfare and morals of its citizenry under the police power, grant to the state a legitimate area of control short of an invasion of the personal right of initial decision.

The whole thrust of the present Georgia statute[4] is to [616] treat the problem as a medical one. Such approach

[3]This view of the impact of conception on the decision not to have children implies that the distinction between a quick and unquick fetus, and even that between embryo and fetus is not relevant here.
And since the Court does not postulate the existence of a new being with federal constitutional rights at any time during gestation, the motion of Mr. Ferdinand Buckley for reconsideration of the order revoking his appointment as guardian *ad litem* for the embryo (or fetus) is denied. Mr. Buckley's motion to intervene in such capacity is also denied. However, he has the Court's appreciation for his participation in this litigation as *amicus curiae*.

[4]Apparently patterned after the American Law Institute, Model Penal Code §230.3 (Proposed Official Draft, 1962).

is reasonable and seemingly sound inasmuch as medical practitioners are in the best position by virtue of training to judge concurrently the basis as well as the risk inherent in such a decision. In this respect, the state moreover has a legitimate interest in seeing to it that the decision—personal and medical—is not one undertaken lightly and without careful consideration of all relevant factors, whether they be emotional, economic, psychological, familiar or physical. For example, the legislature might require any number of conditions such as consultation with a licensed minister or secular guidance counselor as well as the concurrence of two licensed physicians or any system of approval related to the quality and soundness of the decision in all its aspects. It certainly has a clear right to circumscribe a decision made by a woman alone or by a woman and a single physician and to guard against the establishment of transient "abortion mills" by the occasional opportunistic or unethical practitioner and the concomitant dangers to his patrons and the public. Such controls and requirements, so long as they do not restrict the reasons for the initial decisions and do not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment, are properly within the sphere of legislative discretion. In that respect, where abortions may be obtained only from licensed physicians and surgeons, and only after psychiatric consultation, the mere fact that physicians and psychiatrists are more accessible to rich people than to poor people, making abortions more available to the wealthy than to the indigent, is not in itself a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Cf.* Dandridge v. Williams, 397 U. S. 471 (1970); MacQuarrie v. McLaughlin, 294 [617]

F. Supp. 176 (D. Mass. 1968), *aff'd* 394. U. S. 456 (1969).

Moreover, there is an overriding interest in the manner of performance as well as the quality of the final decision to abort. Obvious need for control through licensing, sanitation requirements and proper medical standards in the execution of a legal abortion are examples. Again such decisions address themselves to legislative decision based upon informed judgment.

Having decided that the reasons for an abortion may not be proscribed, but that the quality of the decision as well as the manner of its execution are properly within the realm of state control, the present statute must be examined in such light.

Rather than regulating merely the quality of the decision to have an abortion, and the manner of its performance, the Georgia statute also limits the number of reasons for which an abortion may be sought. This the State may not do, because such action unduly restricts a decision sheltered by the Constitutional right to privacy. *See* Griswold v. Connecticut, 381 U. S. 479 (1965); California v. Belous, 71 Cal. 2d 991, 458 P. 2d 194 (1969), cert. den. 397 U. S. 915 (1970). The question becomes a matter of statutory overbreadth.

Based upon the above, the court finds the following portions of Georgia Code §26-1202 to be in violation of the constitutional rights of petitioner:

A. Section (a) beginning with the word "because" on line 5 and through subsection (a)(3) in its entirety.

[618]

B. Section (b) subsection (3) beginning with the

word "because" on line 6 and through the end of said subsection.

C. Section (b) subsection (6) in its entirety.

D. Section (c) in its entirety.

There being no showing to the contrary, the court further finds the remainder of said Code §26-1202 to constitute a proper exercise of state power within the context of this opinion.[5]

An appropriate formal declaratory judgment may be presented upon request of any party.

ABSTENTION

It is recognized that there is no pending state court proceeding against which the injunction prayed by plaintiff would operate. Nevertheless, the request for injunctive relief is denied, on the same basis as such a prayer would be denied were a state proceeding actually in progress:

> ". . . the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted . . . that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court." City of Greenwood v. Peacock, 384 U. S. 808, 828 (1968).

[619] However under the authority of Zwickler v. Koota, 389 U. S. 241 (1967), the Court has proceeded to issue the declaratory relief, in spite of its unwillingness to

[5]It is not thereby implied that those provisions constitute the only or best means of state control. On the whole, the present system appears unnecessarily cumbersome, a potential hazard under due process and equal protection considerations.

broadly enjoin future prosecutions under the Act. Accordingly, plaintiff's request for a declaratory judgment is hereby granted. Judgment shall issue in the form described above.

IT IS SO ORDERED.

This the 31 day of July, 1970.

/s/ LEWIS R. MORGAN

LEWIS R. MORGAN
United States Circuit Judge

/s/ SIDNEY O. SMITH, JR.

SIDNEY O. SMITH, JR.
United States District Judge

/s/ ALBERT J. HENDERSON, JR.

ALBERT J. HENDERSON
United States District Judge

[620]

(Filed and entered in Clerk's Office Aug. 25, 1970, Claude L. Goza, Clerk; By: JWE, Deputy Clerk)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al,
Plaintiff

vs.

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; LEWIS R. SLATON, as District Attorney of Fulton County, Georgia; and HERBERT T. JENKINS, as Chief of Police of the City of Atlanta,
Defendants

CIVIL ACTION NUMBER 13676

JUDGMENT

This action came on for hearing on defendants' motions to dismiss on June 15, 1970, before a three-Judge Court composed of Lewis R. Morgan, United States Circuit Judge, Sidney O. Smith, Jr., and Albert J. Henderson, Jr., United States District Judges.

Plaintiffs' request to introduce evidence in proof of allegations of the complaint was denied; defendants' motions to dismiss were treated as motions for summary judgment; argument was heard on the Court's jurisdiction and the constitutional issues raised. The Court issued its opinion on July 31, 1970.

Having determined that a substantial constitutional question was raised, one which created a justiciable controversy between plaintiff Mary Doe and the defendants, over which question this Court has jurisdiction and which it does not abstain from exercising; and

Having granted plaintiff Mary Doe's request for a declaratory judgment and denied her request for injunctive relief,

[621] Judgment is hereby entered as follows:

1. The following portions of the Criminal Code of Georgia, §26-1202[1], are declared to be in violation of the constitutional rights of Petitioner Mary Doe, within the context of the aforesaid opinon:

A. Section (a) beginning with the word "because" on line 5 and through subsection (a)(3) in its entirety.

B. Section (b) subsection (3) beginning with the word "because" on line 6 and through the end of said subsection.

C. Section (b) subsection (6) in its entirety.

D. Section (c) in its entirety.

2. The remainder of the said section 26-1202 of the Criminal Code of Georgia is declared to constitute a proper exercise of state power, within the context of the court's opinion.

IT IS THEREFORE ORDERED, that the complaint of all plaintiffs except Mary Doe be dismissed; that the

[1]It is the intention of this Court that our decision reach the codification of identical provisions of Ga. Code Ann. § 26-9925a and corresponding provisions enumerated above if such codification has any force as law.

above sections of the Georgia Abortion Statute are declared void on their face for unconstitutional overbreadth; that plaintiffs' application for injunction be dismissed; costs of this cause are taxed against defendants.

The request for stay of this order pending any appeal is denied.

IT IS SO ORDERED.

This the 24th day of August, 1970.

FOR THE PANEL.

/s/ SIDNEY O. SMITH, JR.

SIDNEY O. SMITH, JR.
United States District Judge

[622]

(Filed in Clerk's Office Sep. 3, 1970, Claude L. Goza, Clerk; By: MJW, Deputy Clerk)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, ET AL,
Plaintiff

VS.

ARTHUR K. BOLTON, As Attorney General of the State of Georgia; LEWIS R. SLATON, as District Attorney of Fulton County, Georgia; and HERBERT T. JENKINS, as Chief of Police of the City of Atlanta,
Defendants

CIVIL ACTION NUMBER 13676

MOTION OF FERDINAND BUCKLEY AS NEXT FRIEND OF UNBORN CHILD OF MARY DOE TO ALTER OR AMEND JUDGMENT

Comes now the unborn child of Mary Doe, acting through his next friend, and pursuant to Rule 59 (e) of the Federal Rules of Civil Procedure moves the Court to alter or amend its judgment of August 24, 1970 upon the following grounds:

1.

Said judgment contains no express ruling upon the

motion of the unborn child of Mary Doe to intervene in the above styled action.

2.

Said judgment contains no express ruling upon the motion of the guardian ad litem of the unborn child of Mary Doe for reconsideration of this Court's order revoking the appointment of a guardian ad litem for the unborn child of Mary Doe.

3.

Said judgment contains no express ruling upon the prayers contained in the answer and counterclaim which were filed in behalf of the unborn child of Mary Doe prior to revocation of the appointment of the guardian ad litem for the unborn child [623] of Mary Doe, and said answer and counterclaim were never stricken or acted upon by the Court.

WHEREFORE, the unborn child of Mary Doe, acting through his next friend, prays that this Court alter or amend its judgment of August 24, 1970 so as to expressly rule upon the issues raised in the aforesaid motions, answer and counterclaim and that said rulings be in accordance with the prayers of the aforesaid motions, answer and counterclaim.

Respectfully submitted.

/s/ FERDINAND BUCKLEY

Unborn Child of Mary Doe by
Next Friend, Ferdinand Buckley

1515 Peachtree Center South
225 Peachtree Street, N. E.
Atlanta, Georgia 30303

[624]

(Filed in Clerk's Office Sep. 15, 1970, Claude L. Goza, Clerk); By: MJW, Deputy Clerk)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, ET AL.,
Plaintiffs,
v.
ARTHUR K. BOLTON, ET AL.,
Defendants.

CIVIL ACTION
NO. 13676

PETITION OF JANE ROE TO INTERVENE AS PLAINTIFF AND TO CLARIFY AND ENFORCE THE COURTS' OPINION OF JULY 31, 1970

1. Comes now, Jane Roe, and petitions and moves the Court that she be permitted to intervene in this action as a party plaintiff and that Georgia Baptist Hospital, a Georgia corporation with its principal place of business in Atlanta, Georgia, and R. Mitchell Sealey, M.D., in his capacity as Chief of Obstetrical and Gynecological Services of Georgia Baptist Hospital, be intervened as defendants. Plaintiffs' action and the original have a question of law in common and intervention is authorized under Rule 24.

2. Plaintiff seeks a temporary restraining order, preliminary and permanent injunction against the enforcement of Ga. Code Ann. § 26-1201(b), (d) and (e) (hereafter called the "Georgia Abortion Act or Statute"), and enforcing this Court's Opinion in this case dated July 31, 1970.

3. Plaintiff seeks a declaratory judgment that the above sections of the Georgia Abortion Statute are unconstitutional on their face and as applied in that they deprived her and her physician of rights protected by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

4. This Court's jurisdiction has heretofore been invoked under the above constitutional amendments and Title 28, U.S.C. §§ 2281 and 2284; 42 U.S.C. § 1983; and 28 U.S.C. § 2201-2. This is a petition [625] to enforce and clarify the Court's prior order and to further consider the constitutionality of the above section of the Georgia Abortion Statute on its face and as applied.

5. The three judge panel heretofore convened in this case is requested to grant an oral hearing for the presentation of evidence and argument of questions raised in this petition to intervene.

6. Plaintiff files this motion to intervene as a member of the class of pregnant women heretofore represented by Mary Doe and as representative of the members of a class who have been denied use of hospital facilities by abortion committees without due process of law or in denial of equal protection of the law or other constitutional rights.

7. Plaintiff herein referred to as Jane Roe is a natural person employing a fictitious name in order to protect her true identity. It is her belief that the use of her true name would subject her to unfavorable publicity resulting in great embarrassment, ridicule and intimidation. A sealed affidavit containing intervening plaintiff's true identity will be filed with the Court upon direction.

8. Intervening plaintiff is unmarried, presently un-

employed and approximately eight to ten weeks pregnant. After consulting with and being counseled by her physician and two psychiatrists, she applied through her doctor to Georgia Baptist Hospital for a therapeutic abortion. There were no medical indications that the abortion should not be performed. The two consulting psychiatrists counseled with her physician that in their best clinical judgment an abortion was necessary. She certified that she was a resident of Georgia and her physician, she believes, completed all documents, papers and procedural requirements of the Georgia law and rules of said hospital. On or about September 11, 1970, she was advised by her physician that her application had been denied. Plaintiff was never furnished a written explanation of the reason for the denial of her request for this medical service.

[626] 9. Intervening plaintiff's attorney sought to have said decision reviewed by an appellate review board of said hospital but was advised by defendant Dr. Sealey that there was no established procedure for appealing decisions of the committee. After much urging, Dr. Sealey, on September 14, 1970, at 7:00 p.m. agreed to bring the matter of establishing an appeal procedure and Jane Roe's case before the Executive Committee of the Obstetrical and Gynecological Service of the hospital on September 15, 1970, at 7:00 a.m. provided Jane Roe or her doctor or her attorney would be present with "her file." Plaintiff was unable to comply because the psychiatric consultation letters had been returned to her and they were in the hands of another physician for presentation to another hospital abortion committee. Plaintiff was not able to obtain her file, neither was her Georgia Baptist physician or her attorney. A copy of all

of plaintiff's consultations, certificates, etc., are maintained in her file by Georgia Baptist Hospital and should have been available to the abortion committee or Dr. Sealey and the Executive Committee of his department.

10. Plaintiff was advised by Dr. Sealey that the Georgia Baptist Abortion Committee had adopted the standards of the American College of Obstetricians and Gynecologists as standards which the Committee would apply in deciding whether or not an abortion would be approved. The "ACOG" standards are as follows:

> "Termination of pregnancy by therapeutic abortion is a medical procedure. It must be performed only in a hospital accredited by the Joint Commission on Accreditation of Hospitals and by a licensed physician qualified to perform such operations.
>
> "Therapeutic abortion is permitted only with the informed consent of the patient and her husband, or herself if unmarried, or of her nearest relative if she is under the age of consent. No patient should be compelled to undergo, or a physician to perform, a therapeutic abortion if either has ethical, religious or [627] any other objections to it.
>
> "A consultative opinion must be obtained from at least two licensed physicians other than the one who is to perform the procedure. This opinion should state that the procedure is medically indicated. The consultants may act separately or as a special committee. One consultant should be a qualified obstetrician-gynecologist and one should have special competence in the medical area in which the medical indications for the procedure reside.

"Therapeutic abortion may be performed for the following established medical indications:

"a. When continuation of the pregnancy may threaten the life of the woman or seriously impair her health. In determining whether or not there is such risk to health, account may be taken of the patient's total environment, actual or reasonably foreseeable.

"b. When pregnancy has resulted from rape or incest: in this case the same medical criteria should be employed in the evaluation of the patient.

"c. When continuation of the pregnancy is likely to result in the birth of a child with grave physical deformities or mental retardation."

Plaintiff's attorney was advised that if Jane Roe's abortion was denied it was because she did not fall within any of the reasons for abortion within the "ACOG" standards used by the Georgia Baptist Abortion Committee. Plaintiff alleges that said standards are unconstitutionally vague and improperly adopted and applied by said Committee. Plaintiff alleges that such standards violate her constitutional rights and are in conflict with the decision of this Court (Opinion of July 31, 1970).

[628] 11. Because the Committee has denied plaintiff's application for a therapeutic abortion, she has been forced to seek an abortion at another hospital thereby incurring additional expenses for another physician, or seek an abortion termed illegal under Georgia law, or to borrow money in order to obtain a therapeutic abortion outside the State of Georgia involving great expense and inconvenience to her. Said alternatives and pro-

cedures are unnecessarily expensive and burdensome requiring a great expenditure of money and time and deny her equal access to medical care and facilities thereby depriving her of due process and equal protection of the laws. Further, said action negates and invades her right of privacy in deciding when and the number of children she will bear such action being in violation of the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

12. Plaintiff alleges that under this Court's decision of July 31, 1970, the decision of whether or not one will bear a child is a personal and medical decision to be arrived at by a woman, her physician and two consulting physicians or psychiatrists; that the Abortion Committee of a hospital may not substitute its judgment or values for that of a woman and her physicians and rule that one's reason is not sufficient; that under the Court's decision and the statute as it now remains, the duty of the abortion committee is merely an administrative rather than a judicial function; and that the Court should clarify its prior opinion.

13. The delegation of authority to decide if an abortion may be performed and for what reasons, to hospital abortion committees is an unlawful delegation of state authority thereby depriving plaintiffs and members of her class, of due process and to equal protection of the laws.

14. The statute is unconstitutional on its face and as applied in that it deprives plaintiff of equal access to both public and private medical facilities which on information and belief receive [629] substantial federal and state funding, such equal access being guaranteed

by the Fifth and Fourteenth Amendments to the Constitution. Further, said statute is unconstitutional on its face in that it permits an abortion to be performed only in a hospital accredited by the Joint Commission on Accreditation of Hospitals. Plaintiff is advised and alleges that only 82 out of 214 licensed Georgia hospitals have been accredited by said Joint Commission and the statute which limits abortions to accredited hospitals is unconstitutional because it deprives many members of Mary Doe and Jane Roe's class who live in an area served only by a licensed but not accredited hospitals of access to abortion service.

15. The Georgia Abortion Statute provides that Abortion Committees will be established and maintained in accordance with "standards" of the "Joint Commission on Hospital Accreditation" without specifying whether said commission is an existing state or national agency or otherwise fully identifying said Commission. That plaintiffs and other Georgia citizens have no rule making safeguards over a national organization known as the Joint Commission on Hospital Accreditation, of Chicago, Illinois, and the delegation of authority to such an organization to set standards for Georgia abortion committees is a denial of procedural due process. The present commission standards (which will be exhibited by Appendix to the Court) are vague and indefinite and do not delineate rights of patients or physicians with adequate definiteness resulting in many interpretations by various hospital abortion committees and lack of uniformity throughout the state.

16. That plaintiff has incurred medical expenses, hospital bills, attorney's fees, court costs, court reporter fees,

etc., as a result of the wrongful action of defendant Georgia Baptist Hospital through its Abortion Committee's unlawful infringement of plaintiff's constitutional rights.

WHEREFORE, plaintiff Jane Roe prays:

1. That she be permitted to intervene as a party plaintiff [630] and member of the class originally represented by Mary Joe and that the named defendants be intervened as such.

2. That the three-judge court previously convened pursuant to 28 U.S.C. §§ 2282 and 2284 hear and determine this proceeding.

3. That a declaratory judgment be issued holding the Georgia Abortion Statute, section 26-1202(b), (d) and (e) to be in violation of the rights of plaintiff as protected by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

4. Pending the hearing and determination of the prayers for permanent relief, the Court enter an interlocutory injunction restraining the original and intervened defendants from denying the use of its operating facilities to plaintiff's physician for the purpose of terminating plaintiff's pregnancy.

5. That a permanent injunction be entered restraining and enjoining the original and intervened defendants from enforcing or in any way effectuating the provisions of Ga. Code Ann. § 26-1202(b), (d) and (e), or otherwise applying said sections in derogation of plaintiff's rights or the rights of members of her class.

6. That plaintiff be awarded damages in an amount deemed appropriate by this Court together with an

amount of punitive damages and tax the costs of this cause against the intervened defendants.

7. For such other relief as may be deemed proper by this Court.

Respectfully submitted,

/s/ MARGIE PITTS HAMES

MARGIE PITTS HAMES
210 Brighton Road, N. E.
Atlanta, Georgia 30309
Attorney for Plaintiff

[647]

(Filed in Clerk's Office Sep. 25, 1970, Claude L. Goza, Clerk; By: HDS, Deputy Clerk)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al., *Plaintiffs,*
v.
ARTHUR K. BOLTON, et al., *Defendants.*
CIVIL ACTION NO. 13676

MEMORANDUM IN OPPOSITION OF MOTION TO INTERVENE

Arthur K. Bolton, Attorney General of the State of Georgia, a Defendant in the above-styled cause, opposes the Petition of Jane Roe to intervene filed September 15, 1970, on the following grounds:

(1) The alleged complaint, particularly insofar as it involves the original defendants, is entirely moot. The basis for Petitioner's attempt to intervene was that she allegedly had been denied approval for an abortion by a hospital not party to this cause. This Defendant has been advised by Petitioner's attorney that Jane Roe has subsequently been granted approval for abortion by the hospital attempted to be intervened as an additional party defendant. Consequently, she has no standing as a plaintiff in the instant suit to challenge the Georgia Criminal Abortion Law. The only prayer which might remain is Petitioner's claim for monetary damages, which

in no way involves, or is sought to involve, any of the original defendants.

[648] (2) The attempted intervention fails to show a claim of Petitioner which contains a question of law or fact in common with the main action, particularly in light of the described mootness.

Even assuming there is no question of mootness, Petitioner's attempt to intervene is for the purpose of compelling a private hospital, not an original party, to permit the use of its facilities for an abortion to be performed on her. This raises no question of law or fact common to the original action, except as to the constitutional challenge to certain sections of the Law. This, of course, merely attempts to raise again an issue raised, argued, considered, and rejected by the Court in the main cause. Recourse is by appeal, which has already been commenced. No purpose will be served by adding another unknown plaintiff, represented by the same counsel as the original plaintiff, to pursue the same position. There is no allegation or showing that Jane Roe's interests in seeking appellate review of this Court's decision with respect to subsections (b) (d) and (e) of the Law, will not be adequately represented by existing parties. Thus, the "common" question has already been finally litigated in this Court.

With that exception thus disposed of, an analysis of Petitioner's complaint shows that it is against a nondefendant hospital, and, in her view, its chief of obstetrical and gynecological services. Entirely new issues of fact are raised, since her pre-mootness circumstances and Mary Doe's bear nothing in common other than that they both seek an abortion. Entirely [649] new issues

of law are raised since the allegations challenged the legality of a private hospital's internal administrative policy based on medically proposed standards, not on the State's criminal statute which was challenged in the principal cause.

Whether or not mootness is considered, other issues, not even collateral to the principal cause but rather totally unrelated to it, are raised by Petitioner's claim for money damages. Both issues of fact and law are obviously injected by this claim, which has no bearing on the original parties and is of no consequence or substantial interest to them. The relationship between non-plaintiff Roe and non-defendants Sealey and Georgia Baptist Hospital contains no nexus with the principal parties. Damages she may have suffered by the Hospital's and Doctor Sealey's actions bear no common interest to the main cause. If collection is her goal, a separate suit should be instituted. It is submitted that she has an adequate remedy at loss for any damages, and the complex questions involved therein are not germane to the instant cause.

(3) The attempted intervention will unduly delay and prejudice the final adjudication of the rights of Defendant and the State of Georgia.

Petitioner has not alleged that she has an absolute right to intervene, and in fact, she does not have such a right. Rule 24(a), Federal Rules of Civil Procedure. Rather, she seeks to intervene pursuant to the permissive provision of Rule 24(b). Defendant recognizes that such interventions are purely discretionary on the part of the Court, and that the Court's principal [650] consideration is whether or not a permissive intervention will

unduly delay or prejudice the adjudication of the rights of the principal parties. An intervention at this late point would unduly delay and prejudice the ultimate conclusion of the cause, which has already been finalized by this Court. Appeal to the United States Supreme Court has been commenced by all parties to the principal action. The necessity for further proceedings, pleadings by new parties, hearings, and determinations should intervention be permitted would inevitably delay the final outcome of the cause. As notably recognized in *Crosby Steam Gauge and Valve Co. v. Manning, Maxwell & Moore, Inc.*, 51 F.Supp. 972 (D. Mass. 1943):

> "Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions, and the like which tend to make the proceeding a Donnybrook Fair. Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention."

The interests of this Defendant and the State of Georgia in obtaining an ultimate judicial determination of the validity of a State criminal statute of state-wide application at the earliest possible time, are obvious and legitimate. No possible purpose could be served in further delaying that goal. Particularly when it may be construed that the Court has suggested, as here, [651] that further legislative action be taken with respect to the statute in question, it is imperative that that opportunity not be jeopardized by an intervention, such as Jane Roe's, that is not absolutely compelled. It is submitted that the purpose of Rule 24 is to avoid undue

delay and expense to all parties. The attempted intervention in this case would not only fail to serve this purpose, but, to the contrary, would aggravate and increase delay and expense to parties totally unaffected by Jane Roe's non-mooted claims.

The Court, in considering permissive intervention, may also consider other factors besides the possible delay cause. The court in *Durkin v. Pet Milk Co.*, 14 F.R.D. 374 (1953), quoting the United States Supreme Court in *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137, at 141, noted:

> " 'It is common knowledge that, where a suit is of large public interest, the members of the public often desire to present their views to the court in support of the claim or defense. To permit a multitude of such interventions may result in accumulating proofs and arguments without assisting the court.' " *Durkin v. Pet Milk Co., supra,* p. 380.

The court in *Durkin* felt that the attempt to intervene was merely a reassertion of precisely the same claims made in the principal suit, and that when considered with the slight delay that the intervention might occasion, the motion to intervene [652] should be denied. Since in this case, the Court's final decision has already been rendered, the attempt to relitigate the issues which plaintiffs may be dissatisfied with, should be denied.

(4) The attempted intervention is not timely, having been filed about six weeks after the Court's opinion had been rendered on the merits of the principal action, and almost a month after the final judgment had been entered. Intervention after judgment is unusual and not often granted. *Turner v. Willard,* 157 F.Supp. 451

(S.D.N.Y. 1957). It has been held that intervention may be allowed after a final decree where it is necessary to preserve some right which cannot otherwise be protected. *Wolpe v. Poretsky,* 144 F.2d 505 (D.C. Cir. 1944), *cert. den.* 323 U.S. 777. Petitioner here shows no such necessity.

At this state of the proceedings, and in consideration of her present status as known, Jane Roe has merely a general interest in the subject matter of the litigation. This is insufficient. *Jewel Ridge Coal Corporation v. Local No. 6167, United Mine Workers of America* (W.D. Va. 1943), 3 F.R.D. 251. She must have an enforceable right. *Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij,* 76 F.Supp. 335 (S.D.N.Y. 1948). She has no enforceable right, that under the circumstances, would involve the principal defendants. As to her petition for a declaratory judgment, her rights have already been declared, in the Court's opinion and judgment entered in this cause; and by virtue of the hospital's subsequent approval, her rights have been granted and afforded. Her petition to intervene must present a judiciable controversy. *Rose v. Brotherhood of R.R.&S.S. Clerks,* 181 F.2d 944 (4th Cir. 1950), *cert. den.* 340 U.S. 851; *Wilson v. Illinois Cent. R. R.,* 21 F.R.D. 588 (N.D. Ill. 1957), 21 F.R.D. 588.

[653]

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition of Jane Roe be denied and dismissed.

/s/ ARTHUR K. BOLTON

ARTHUR K. BOLTON
Attorney General

/s/ HAROLD N. HILL, JR.

HAROLD N. HILL, JR.
Executive Assistant
Attorney General

/s/ MARION O. GORDON

MARION O. GORDON
Assistant Attorney General

/s/ DOROTHY T. BEASLEY

DOROTHY T. BEASLEY
Assistant Attorney General

Please serve:

DOROTHY T. BEASLEY
132 State Judicial Bldg.
40 Capitol Square, S. W.
Atlanta, Georgia 30334

[662]

(Filed in Clerk's Office Oct. 6, 1970, Claude L. Goza, Clerk; By: JWE, Deputy Clerk)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, ET AL,
VS.
ARTHUR K. BOLTON, ET AL,
} CIVIL ACTION NO. 13676

MEMORANDUM IN SUPPORT OF THE PETITION OF JANE ROE TO INTERVENE AS PLAINTIFF AND TO CLARIFY AND ENFORCE THE COURT'S OPINION OF JULY 31, 1970

Jane Roe, by and through her attorneys, files this Memorandum in support of her Petition to Intervene and Motion to Clarify and Enforce the Court's Opinion of July 31, 1970, and shows to the Court the following:

I

SUMMARY OF CASE

On September 11, 1970, Jane Roe's application to the Georgia Baptist Hospital Abortion Committee for an abortion was denied. She was advised of this denial by her physician who presented her request to the committee. The abortion was considered "necessary" in his best clinical judgment and that of two psychiatrists consulting with him on this matter. The abortion committee ruled that the abortion was not necessary in accordance with their best medical or clinical judgment and

in arriving at that judgment apparently applied the American College of Obstetricians and Gynacologists standards which specifies that abortions may be performed for only three reasons (basically those which this Court declared unconstitutional on July 31, 1970). On the date September 15, 1970, this action was filed seeking a temporary restraining order and declaratory relief that the standards applied by Georgia Baptist Hospital were unconstitutional and further that the portion of the statute requiring approval by abortion committees (and other requirements) was unconstitutional. [663] The decision of the abortion committee was reversed; notice of said reversal was dated September 16, 1970, but not received by plaintiff's attorney until September 23, 1970.[1] Plaintiff's attorney was advised by Jane Roe that her request for an abortion was also turned down by Crawford Long Hospital but she was approved at Piedmont Hospital. Said abortion was scheduled several days ago, however, plaintiff's attorney has been unable to reach Jane Roe to confirm that the abortion has in fact been performed.

---

[1]The Objections of said Hospital and Dr. Sealy filed by their attorney Mr. Pearce do not accurately reflect what happened at the time of filing. Most of the events are now irrelevant, however, it is implied that counsel acted unreasonably or improperly. Notice of plaintiff's intent to file this proceeding was given Dr. Sealey September 14th and Mr. Pearce on the 15th prior to 10:00 a.m., said petition and request for TRO to be presented to Judge Smith at noon on the 15th. Mrs. Hames did receive a call from Mr. Pearce that the decision had been reversed and advised he would be available to come talk with Judge Smith about same. After Judge Smith set an in-chambers conference at 1:45 p.m., Mr. Pearce was called; he had "left the office for the day." Unsigned papers were mailed Mr. Pearce on an informal basis since copies of all papers had been furnished the clerk for service by the Marshall. The members of the Abortion Committee were not named as parties because Georgia Baptist has a rotating com-

The status of this matter, in all probability, is that Jane Roe has received an abortion; however, that does not moot other requests and allegations of the petition to clarify the Opinion of the Court. Plaintiff seeks a declaratory judgment that Ga. Code Ann. Sec. 26-1201 (b), (d) and (e) are unconstitutional. She alleges that she is a member of the class of pregnant women heretofore represented by Mary Doe and she is representative of a class of persons who have been denied use of hospital facilities by abortion committees without due process of law and in denial of equal protection of the laws. She further requests that the Court clarify its opinion of July 31, 1970, as to the role of abortion committees under the statute if the Court refuses to declare the remaining sections of said law unconstitutional.

The Attorney General asserts that this is an attempt to relitigate issues argued, raised, considered and rejected by the Court in the main cause. Plaintiff's attorney would merely state that in the original case an effort was made to have the court consider evidence on the matters of [664] due process and equal protection problems in the statute; however, the Court saw fit to refuse to hear any evidence on these arguments. For that reason, plaintiff Mary Doe did not have her "full day in Court" and intervenor Jane Roe, having suffered at the hands of the remaining portion of the statute, now seeks her day in Court to litigate the unlitigated issues and to seek enforcement and clarification of the Court's Opinion. First, the two procedural questions raised will be discussed, namely, intervention and clarification of the opinion.

---

mittee and Mr. Pearce has refused to advise the names of physicians who sat on the committee.

II

A PETITION TO INTERVENE UNDER RULE 24 OF THE FEDERAL RULES OF CIVIL PROCEDURE IS PROPER FOR INTERVENTION AFTER JUDGMENT.

Intervention is authorized as a matter of right by Rule 24(a)(2), F.R.C.P, or as a matter of permission by Rule 24(b)(2). Intervention of right, Rule 24(a) provides:

> Upon timely application any one shall be permitted to intervene in an action: . . . or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action;

The rule permitting intervention as a matter of right is to be liberally construed. See *United States v. C. M. Lane Life-Boat Co., Inc.*, 25 F. Supp. 411 (1938) and *Twentieth Century Fox Film Corp. v. Jenkins*, 7 F.R.D. 197 (1947). The present applicant for intervention, Jane Roe, is bound by the Judgment in this Court dated July 31, 1970, which held:

> There being no showing to the contrary, the court further finds the remainder of said Code Sec. 26-1202 to constitute a proper exercise of state power within the context of this opinion.[5]

Foot note "5" reads as follows:

> [5]It is not thereby implied that those provisions constitute the only or best means of state control. On the whole, the present system appears unnecessarily cumbersome, a potential hazard under due process and equal protection considerations.

The "remainder" of said Code are those which have op-

erated to deprive Jane Roe of the benefits of the court's opinion that portions of the Georgia Abortion Statute were unconstitutional. That is, the requirements [665] of Sections (b), (d) and (e) deny her due process, equal protection of the laws and infringe upon her right of privacy. Unless Intervenor, as a member of the class represented by Mary Doe, is permitted to intervene, her interests may not be represented by existing parties or said representation will not be adequate. Since the filing of the petition by Mary Doe, the "law" in Georgia relating to abortions has substantially changed. Before the Court's decision of July 31, 1970, a physician and two consultants applied to an abortion committee for approval of an abortion; before the abortion could be approved, the committee had to perform an administrative-judicial function and decide if the statutory criteria had been met, that is one of three permitted reasons was present. The Court's opinion sets forth that the designation of reasons is unconstitutional but left the requirements for residency, approval of three physicians, performance in a licensed-accredited hospital, and approval by an abortion committee of said hospital. The statute as it remains provides that the criminal abortion proscription does not apply

> to an abortion performed by a physician duly licensed to practice medicine and surgery pursuant to Chapter 84-9 or 84-12 of the Code of Georgia of 1933, as amended, based upon his best clinical judgment that an abortion is necessary. (b) No abortion is authorized or shall be performed under this section unless each of the following conditions is met: . . . (5) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the opera-

tion is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose.

[666] Jane Doe asserts that Mary Doe does not adequately represent the interests of pregnant women members of their class in view of the change in the law and in view of the change in the role of the abortion committees provided for under the statute. The role of the abortion committee is unclear and the procedural requirements of the remainder of the statute place an undue hardship on pregnant women seeking an abortion and subject them to the confused role of the committees which was not present in the main action. The role of the committee is discussed later, however, the foregoing is set forth to demonstrate that the interests of pregnant woment of Georgia today may not be fully and adequately represented in the main action in view of the present state of the law and certainly they are affected substantially by said Judgment and may be bound thereby. For these reasons, Jane Doe should be permitted to intervene as a matter of right. If intervention is not deemed a matter of right, then Jane Roe should be permitted to intervene under Rule 24(b)(2) because her claim and the main action have questions of law or fact in common. This intervention is discretionary and may be permitted if it will not unduly delay or prejucide the rights of the original parties. Jane Roe is in no way attempting to delay the appeal in this case. This portion of the

proceeding may be considered ancillary or severed from the main cause and may be consolidated with the main action during appeal. Intervention after judgment has often been held timely when used to enforce rights conferred in the original action's judgment. Jane Roe originally sought to enforce rights under the Court's Opinion of July 31, 1970, and now seeks a declaration that procedures of the abortion committee denied her due process, equal protection, etc., and that the remainder of said statute infringe her constitutional rights.

In deciding timeliness, the Court should consider not only the period of time that has elapsed and the fact that Judgment has been entered, but should take into consideration the circumstances leading to the necessity for intervention, including the fact that Jane Roe had been denied the benefits of the Judgment of this Court. In *Pellegrino v.* [667] *Nesbit,* 203 F.2d 463 (9th Cir. 1953), intervention after judgment was allowed because the court found that it had become necessary only after judgment. Only then did it become clear that the original parties action would not protect intervenor's rights adequately by filing notice of an appeal.

Similarly, in *Wilson v. City of Paducah,* 100 F.Supp. 116, 118 (W.D. Ky. 1951), judgment was entered in favor of two Negro plaintiffs seeking entrance into college. Later two other Negroes who were subsequently denied entrance were permitted to intervene as members of the original class. The Court held that "intervention after entry of judgment was permissible to members of the class in whose behalf the action was originally filed, even though such intervenors were not specifically named as parties in the original action." Citing *System*

Federation No. 91, Rwy. Employees v. Reed, 180 F.2d 991 (6th Cir. 1950). More recently, this Court has twice permitted intervention after judgment by non-named members of the original class of plaintiffs. In *Hunter v. Allen,* Civil Action No. 11328 (N.D. Ga), intervenor George Dean, by order dated February 19, 1969, was allowed to intervene after judgment and to receive damages for civil contempt against the original defendants. Dean complained that the original defendants, the mayor and the police chief of the City of Atlanta, had continued to enforce provisions of the City Code against him after such had been held unconstitutional in the original action. See also *Wilson v. Kelley,* Civil Action No. 11647 (N.D. Ga.) conferring upon intervenors the benefits of an earlier prison desegregation decree and granting them civil contempt damages against two non-named members of the class of defendants (June, 1970).

Intervenor Jane Roe asserts that the petition for intervention and clarification is a proper procedural vehicle to obtain the benefits of the Court's prior opinion and to seek clarification thereof.

As to the timeliness of the application to clarify the Court's opinion, it should be noted that at the time of filing the request to [668] clarify the 30 day time for appeal provided by the Federal Rules had not expired. (Final Judgment entered August 24, 1970, petition filed September 15, 1970). Hence the judgment had not yet acquired the degree of immutability normally associated with a final judgment. It appears from the following that there is considerable latitude within said period to proceed with respect to the judgment:

> The Fifth Circuit has announced what may be a somewhat broader doctrine that, at least in non-jury cases, the judge on his own motion may grant rehearing at any time prior to expiration of the time for appeal. (Citing *McDowell v. Celebrezze*, 310 F. 2d 358 (2d Cir. 1955); *Gila River Ranch, Inc. v. United States*, 368 F. 2d 354 (9th Cir. 1966) *Schildhaus v. Moe*, 335 F. 2d 529, 531 (2d Cir. 1964)). If the judge can do this on his own motion, he surely can do it on the motion of counsel. 3A *W. Barron & A. Holtzoff, Federal Practice and Procedure*, Sec. 1553 at 28 (Supp. 1968).

In this respect, it should also be noted that the Court has inherent power to effectuate its judgments. If confusion has resulted from a judgment, and intervenor asserts that it has, then a motion to enforce or clarify judgment is a proper procedure and is aimed at securing a just, speedy and inexpensive determination of the problems. Federal Rules of Civil Procedure, Rule 1. It is presumed that the defendants herein are urging that Jane Roe must file a separate action to obtain benefit of the judgment in this case. This was an argument asserted in the United States Court of Appeals for the District of Columbia Circuit in *Mary Doe, et al, v. General Hospital*, ... F.2d ..... (May 15, 1970, No. 24,011). There hospital officials failed to abide by a lower court's decision in abortion cases:

> Our primary concern is not the good faith of the city and hospital officials, but the deprivation of medical care suffered by indigent patients. This class action asserts the rights of people who have been overwhelmed by poverty, wretched medical care, unemployment, inadequate education, substandard housing, and a [669] cluster of poverty-related problems. If every poor person must bring a law-

> suit each time her rights are infringed either by insensitivity or by the ignorance of city and hospital officials, all will be effectively deprived of those rights. There are limits to the ability of the most able volunteer counsel to maintain the state of alert watchfulness — and the caseload — that would be necessary to protect against wrongs on such a scale.

It is not the intention of Jane Roe or her attorneys to burden this Court's already crowded calendar, however, it is earnestly urged (by Mary Doe and Jane Roe's volunteer counsel), that the Court clarify its opinion as to the procedural aspects of the statute as it remains. A separate action involving Polly Poe vs. The Fulton-DeKalb Hospital Authority d/b/a Grady Memorial Hospital is being filed in this Court. That action seeks relief for Polly Poe and additionally seeks to adjudicate the role of the abortion committee and the constitutionality of the procedural requirements left in the statute. If this Court is inclined to dismiss this action, it is requested that the petition to intervene be severed and treated as a separate suit.

III

THE ABORTION STATUTE AS IT REMAINS PROVIDES NO PROCEDURAL DUE PROCESS FOR WOMEN SEEKING ABORTIONS; THE ROLE OF THE ABORTION COMMITTEE IS VAGUE AND AMBIGUIOUS AND IS AN UNLAWFUL DELEGATION OF STATE AUTHORITY.

As set forth above, the Court left the procedural requirements of the Georgia Abortion Statute in the law. In order to obtain an abortion, one must be a resident of

Georgia, one must convince her physician that an abortion is necessary, they must convince an abortion committee of a hospital that it is necessary and the abortion may be performed only in an accredited-licensed hospital. This, the court observed, appears "unnecessarily cumbersome, a potential hazard under due process and equal protection considerations." This is exactly the problem and is operating to deny many women abortions and denying many physicians the right to render medical services to their patients that they deem necessary in their best clinical judgment.

The procedure requires that a woman be able to juggle physicians and hospitals into a winning combination—the odds are probably no better [670] than those for a line of lemons on a Las Vegas slot machine. Assume, however, that Jane Roe sees a physician and in his best clinical judgment he deems an abortion necessary and after two consulting opinions which concur, her case is presented to the abortion committee. What are the problems then? Here, Jane Roe's case demonstrates what can actually happen. A physician submits a written request to the abortion committee—there is no time for presentation of cases on an oral basis because of the time it would require not only from the proposer's stand point but from the stand point of the committee members. The committee then must approve. Query, what type of approval is necessary. Under the statute as originally written by the legislature, the abortion committee had to decide whether one of the three reasons for abortions was present. Now there are no reasons—what is the role of the committee. The committees are acting in many different ways over the state. For example, Georgia Baptist Hospital abortion committees

had been using the ACOG standards according to Dr. Sealey. It should also be noted that the General Counsel for the Medical Association of Georgia and the Georgia Hospital Association issued an opinon (which was circulated over the State) which defined the role of the committee to be the same as the woman's physicians and consultants, i.e., the committee must find that an abortion is necessary in their best clinical judgment. THUS—Jane Roe and the other women of Georgia must convince an administrative arm of the State without an opportunity to appear before the committee, or an opportunity to be heard. Her fate is guided by the written requests and opinions of her physicians. Can it be really said that the members of the committee, without seeing the patient or examining her or discussing the matter with her, is in a position to substitute their judgment for that of the three physicians who have seen her. There is no appeal from the decision of the committee; the woman and her physician have no recourse. It might be said that she could go into court and seek to enforce her right, but this is no practical answer to the problems of the Mary Doe's of Georgia. Those people who are turned down generally do not have the resources to seek legal assistance to pursue their rights. It has been advanced that one may go to another hospital—that is precisely what Jane Roe did—she went to three. It is frequently stated that one may go out of state—explain that to an indigent woman who has no money to go from Grady to Georgia Baptist much less Atlanta to New York!

[671]

It is submitted that the abortion committee is not needed in the statutory structure. There is no other

medical procedure which requires the concurrence of at least five physicians. If all the practice of medicine had to be submitted to this procedure our residents would die before treatment was available—just as today, the time in which one may obtain the needed medical service (an abortion), passes before the approval can be obtained. If the abortion committee has any role to play, it should be a purely administrative role. They should not be permitted to substitute their judgment for the judgment of the woman's physician. They should check to see that all paper work has been completed, that there are no contra-medical indications, that hospital facilities may be allocated within the time in which they are needed, that a physician proposing an abortion is qualified to render the service and other matters of an administrative nature. They should not have a veto power over the physician's judgment. If the abortion committee is left in the law, its role should be limited to an administrative function. If its role is not limited, then there should be an appeal procedure whereby a woman and her physician may obtain review. Absent such a procedure, there is certainly an absence of fair play and due process.

It should be noted here that the committee procedures and practices vary from hospital to hospital. At Georgia Baptist the committee is a rotating one among staff members of the OB-GYN department. Thus, if the committee is made up of persons who have moral or ethical objections to abortions, the woman is subject to this subjective criteria without a remedy. Such is the case with the physician. Who is to insure that the committee does not act arbitrarily? This Court, nor these attorneys, certainly may not be the watch dog of the committees. If

the role of the committee is an administrative one, women will not be subjected to the caprice of anti-abortion members and their right of privacy will not thereby be invaded.

[672]

Again, the alternatives of poor women who are members of Mary Doe's class. If she is turned down by Grady Memorial Hospital, she has but two alternatives. First, she may carry the baby to term and suffer the burdens of pregnancy and an unwanted child or place the child for adoption. These alternatives place extreme psychological and social burdens on the individuals involved, mothers and children, and are a major source of psychiatric problems of our population today. The other alternative is to seek out an illegal abortionist. This forces the woman to take her life to the hands of a non-medical person for possible slaughter. This is what is still happening in our state and in our City. Women are turning to illegal abortions; they are getting infections and must be treated then to save their lives. Would it not be a better allocation of hospital dollars and facilities to perform the abortion rather than treat the botched up job? A woman determined to get an abortion will certainly resort to illegal means if she has no money and is denied a safe, medical one.

Abortion committees frequently refuse to give reasons why an abortion is turned down. If there are contrary medical indications, a woman should certainly be told. If the facilities are not available, she should be told. The reason women are being turned down is they are healthy women who do not fall within any of the three reasons previously authorized under the statute. This

certainly smacks of a denial of equal protection of the laws—if one is healthy, she cannot obtain an abortion. If one is unhealthy, her chances are better. If an opportunity to prove this assertion were given, Plaintiffs assert that the evidence would show that abortions are being performed only where the prior standards are met. Once an institution seeks to perform abortions, that service must be granted equally. See *United States v. Vuitch*, 305 F. Supp. 1032 (D.D.C. 1969); and *Mary Doe v. General Hospital, supra.*

If given an opportunity to present evidence, it would show that women over the state are being denied equal protection because the statute permits abortions only in accredited hospitals. There are only 82 of 214 Georgia licensed hospitals accredited in Georgia, thereby depriving the poor resident of a rural county access to such service particularly [673] in the situation where the county hospital, even though licensed by the state, is not accredited by the Joint Commission on Hospital Accreditation. Thus, if indigent hospital care is available only at a non accredited hospital, the statute serves to deny those women residents of that county of abortion services. Travel, even assuming alternate facilities would be available in some other city, to another city can effectively make such a service unavailable. The requirement that an abortion be performed in an accredited hospital denies many women needed medical services and deprives physicians of the right to practice their profession.

The accreditation process is currently carried out by the Joint Commission on Hospital Accreditation, Inc., a private group situated at 645 North Michigan Avenue, Chicago, Illinois 60611. The Commission is self-ap-

pointed and subject to no government check and balances or governmental regulation. The Commission promulgates Standards for hospitals to meet to attain accreditation. There have been six differing versions and a 111 page massive revision is now pending. Apparently the Georgia abortion law refers to whatever version is currently in force even though this is not clear. These Standards are changed from time to time and such standards are subject to no rule making procedures which would safe guard residents of Georgia subject to its requirements. Not only is it an unlawful delegation of State authority to abortion committees to decide when abortions will be granted, it is an unlawful delegation of authority to the Commission to give them power to set standards for abortions in Georgia. This gives the Commission power to legislate reasons for abortions in Georgia. Secondly, numerous provisions in the current Standards are arbitrary and have no relationship to health needs of a patient seeking an abortion. For example, a hospital must be in operation for twelve months before it can be accepted for accreditation. This excludes many new facilities, for example Northside Hospital in Atlanta, Georgia. A hospital must have radiology facilities and emergency care for mass casualties. These are unreasonable requirements especially in view of the fact that licensed hospitals perform other surgery and are not required to be accredited for those procedures.

[674]

Thus, it appears that the court's refusal to hear evidence on the due process and equal protection objections to the statute has left many difficult practical and legal questions. If this court is not inclined to grant a hearing on the remaining constitutional problems under

the statute, it is Intervenor's request that this petition be consolidated with the Polly Poe vs. The Fulton-DeKalb County Hospital Authority (Grady Memorial Hospital), Civil Action No. ....., for determination of the issues presented herein.

Respectfully submitted,

/s/ MARGIE PITTS HAMES

MARGIE PITTS HAMES
210 Brighton Road N.E.
Atlanta, Georgia 30309

[677]

JUNE 15, 1970

oOo

JUDGE MORGAN: Gentlemen, I call the case of Mary Doe, et al, versus Arthur K. Bolton, et al. Who represents Mary Doe?

MRS. HAMES: Your Honor, I am Margie Hames. I am one of a team of attorneys. This is Tobiane Schwartz on my right and Mrs. Elizabeth Rindskopf on my left, and we represent all the plaintiffs.

JUDGE MORGAN: All right. Who represents the defendants?

* * * * *

[678]

MRS. HAMES: We have asserted several different rights on behalf of different groups of plaintiffs. The first right on behalf of Mary Doe being the First and Ninth Amendment right of privacy and right to control her own body, that is to determine for herself whether or not she will have an abortion, seek an abortion. The right on behalf of the doctors is their right to practice medicine in accordance with their [679] best medical judgment. It is their claim that they are being deprived of this right without due process by virtue of the Georgia abortion statute since it is vague and indefinite and imposes a cumbersome procedural requirement on the process of getting abortions for their patients; and further, that there is an unlawful delegation of authority to the abortion committees, state authorities, to the abortion committees since they are the arm that interprets the law. Ministers, social workers and nurses claim that their

rights, First Amendment rights of association and free speech have been infringed.

* * * * *

[685]

JUDGE SMITH: Mr. Buckley, how important is it that you have the legal status of guardian ad litem? To me that question is really wound up with the final question, and that is the balancing of rights between the mother and the unborn child. If the law is that the unborn child has rights, then undoubtedly that unborn child should be represented. If the law is that the unborn child does not have rights, then there is no need for representation. So, I think the ultimate answer to the legal question of whether there should be officially a guardian ad litem is all tied up in the problems on the merits.

MR. BUCKLEY: I agree with the Court in this sense, as Your Honor suggests, if the Court decided there [686] isn't any legal entity, obviously you wouldn't need a guardian ad litem. On the other hand, the need of someone to advocate and certainly uphold procedure for litigation is an adversary type of proceeding, but the need is for someone to try to help the Court to be certain that it has considered all issues that have any conceivable bearing on the matter.

* * * * *

[688]

JUDGE SMITH: Let me stop there. All this business about witnesses and discovery, as I read the attack of the plaintiff, it is on the statute as written. It is a facial attack on the statute and an all-out broad attack on the facial, alleged facial unconstitutionality of the

BLEED THROUGH

statute. I don't see what we need any evidence for to reach that question.

MR. BUCKLEY: It is a facial attack in part, but is also, as I understand the pleadings and the evidence, it is also an attack based on particular facts. Now, one of the facts that would seem to me to be of vital importance in this case is the stage of pregnancy, if the alleged plaintiff is, in fact, pregnant. Every case that is cited in the plaintiff's briefs, certainly the three principal ones, *Babbitz, Vuitch* and *Belous,* all involved early pregnancy cases. I can't tell from a reading of the Municipal Court calendar for Georgia cases—maybe I have forgotten, but I don't remember whether those were early pregnancy or not.

JUDGE SMITH: Well, the Georgia law makes no distinction. I think all of these would be covered in the facial attack, and if this is some effort to mute it or something like that, I don't see any point in [689] that.

MR. BUCKLEY: It goes to your jurisdictional point, too, and in other words, this court, as I understand the law, and it is true, you have already asked we submit briefs on this, and I don't want to burden you, but it looks to me like the facts would be relevant to determine whether you have controversy.

JUDGE MORGAN: I was under the impression there wouldn't be any evidence.

JUDGE SMITH: Let's assume there was no controversy. Couldn't there be a controversy shown?

MR. BUCKLEY: Certainly, as Your Honor says, assuming that this Mary Doe or whoever she may be does not have a controversy, then someone else could

come along tomorrow. Of course, I would rather the issue be decided now.

JUDGE SMITH: This is my feeling. All these little technicalities about whether the Attorney General enforces a law or not. We just spend a lot of wasted effort on that. Why don't we go on and grope with it either jurisdictionally or on the merits?

* * * * *

[691]

JUDGE SMITH: That was my feeling. I see no need for any evidence. I think we have two basic features. One, is there Federal jurisdiction; and if there is Federal jurisdiction, what are the merits. What is the answer on the merits, the question of constitutionality of this statute. I don't see why we ought to spend a lot of time going down these trials that will carry us away from those two central issues, and I think this Court ought to meet those two issues. If we don't have jurisdiction, that ends it. If we have,

* * * * *

[693]

JUDGE SMITH: Aren't they all doctors?

MRS. HAMES: Yes, they are.

JUDGE SMITH: As I conceive it, part of this statute is to make a medical decision the test. Now, usually the doctors complain because the Courts are interfering with their right to make a medical decision. Apparently they are saying the opposite.

MRS. HAMES: They are saying that their right to make a medical decision as to advisable medical pro-

BLEED THROUGH

cedure—in order to do that they must get the consent of two other physicians and then, they must convince a panel of three other physicians who interpret the law.

JUDGE SMITH: There is not a lot of difference in that and the hospital regulations, and they have recommended this hospital regulation as requiring a witness to the operation or approval of it by a committee before certain medical procedure is carried out is lawful and constitutional. This has been true since 1920 in a Texas case.

JUDGE MORGAN: What would you propose to prove by evidence, Mrs. Hames?

MRS. HAMES: We would propose to prove by Dr. Donald Block that in his practice of obstetrics that he has patients who come to him seeking an abortion and [694] that he sends them to psychiatrists and other physicians for consultations and that upon the recommendation of these physicians that is presented to the committee at Georgia Baptist Hospital, I believe is where he is staffed there, and that there is no way to predict what they will do. In some instances they are approved and in some instances they are not approved, and the law is applied in some way unknown to him so that all people who are recommended by three physicians for abortion cannot get it; they must then convince the abortion committee that this is a burdensome procedure, it takes up to five or six weeks and by that time a safe period in which an abortion can be performed is passed, that this is not only replacing his medical judgment with the medical judgments of three other people who never see the patient, by the way.

JUDGE MORGAN: That is set by the statute.

JUDGE SMITH: What does he propose as an alternative?

MRS. HAMES: He proposes that the abortion committee not have control of them.

JUDGE SMITH: Does he propose that he himself alone be able to make that decision?

MRS. HAMES: I would have to ask Dr. Block his [695] personal opinion. We say we propose as a legal matter that the abortion committee is unconstitutional in that it deprives the physicians of their right to practice.

JUDGE SMITH: Is there any question about the statute providing for the committee?

JUDGE MORGAN: Isn't it just facially on the statute as it provides for these 3 physicians? Would evidence help?

MR. BUCKLEY: You might get in some of the argument about how burdensome it is, and how facially burdensome it is might provide some question. They have a psychiatrist who is in the department and the procedures require that he be the one to examine these people, so I think it is suggested in some of the briefs that they have to go looking around for weeks to get an appointment.

JUDGE MORGAN: I mean the statute itself is what we are talking about. I can't see why we can't approach the constitutional question without evidence.

MRS. HAMES: Well, if our allegations are taken as true that it does infringe on the physician's right to practice medicine in accordance —.

JUDGE SMITH: You wouldn't want them to stipu-

BLEED THROUGH

late themselves out of court. If it is taken as true, it infringes on their constitutional right to practice medicine and the case would be over.

MR. BUCKLEY: Your Honor, if I can't stipulate as [696] Amicus —

JUDGE SMITH: I think you meant to say can your allegations about what is necessary to go through be stipulated as true. Is there any objection to that?

MR. BUCKLEY: Not as stated up to now. It might be that after some evaluation, it might be possible to stipulate.

MR. HIGHT: Your Honor, I think we would have an objection because as stated in the statute itself the doctors can be from a hospital abortion committee instead of, say, five or six doctors, you may have a maximum of four.

JUDGE MORGAN: What does the statute provide for, three doesn't it?

MR. HIGHT: Yes, sir, but it also provides that they can be part of the abortion committee, that you have to have a certain number in the case, some of them are on the abortion committee.

JUDGE MORGAN: What evidence do you plan to present and how many witnesses? What evidence do you plan to present?

MRS. HAMES: I had planned to present Dr. Newton Long who is a member of the abortion committee at Grady Memorial Hospital to testify as to the operations of the abortion committee and how differing opinions [697] in the areas are and how they apply the law.

I had planned to introduce Dr. Hillis James from Macon, Georgia to testify regarding the rules and regulations of the Macon City Hospital which requires a unanimous decision of the abortion committee, which is contrary to law, which says the majority of the committee must approve.

JUDGE MORGAN: I don't follow you on Macon. We are not trying that; the attack is on this.

MRS. HAMES: This would be evidence which shows that Dr. James is deprived of her right to practice medicine by rules and regulations purportedly promulgated to comply with the statute. It is a misinterpretation of the statute.

JUDGE SMITH: Really, I think we are all shadow boxing. If these doctors propose to get up and say that any procedure like this interferes with their right to practice medicine, then I am sure that everybody can agree they would so testify. Isn't this basically what they are saying?

MRS. HAMES: That is correct.

JUDGE SMITH: I think you have two different questions. If a particular hospital has a local regulation that it will not permit an abortion in its institution except under certain rules, that is a [698] different question from what the state statute provides, because hospitals are free to set their own regulations. They can have their abortions elsewhere as far as that institution is concerned.

JUDGE MORGAN: If this court is properly concerned, it is on the question of the constitutionality of this statute and that is what we —

JUDGE SMITH: Is there any problem of assuming that the plaintiff doctors say that the procedure provided for in the state statute interferes with their right to practice medicine as they see fit? Is there any problem?

MRS. BEASLEY: There would be other doctors who would say this is what we do in cases of surgery or others exactly like that, you would have situations where it would become a fact question. So if they are saying that—there is the requirement which we hold is a health requirement to have this procedure of protection to the woman just as well as it is for the child, as far as the health part of it is concerned—if that in and of itself is unconstitutional, no evidence is necessary. However, if they are trying to show that the way it is applied it is burdensome, then evidence would be required. We wouldn't admit that.

JUDGE SMITH: You wouldn't admit it burdensome; I [699] understand your position. Well, is your attack that it is all right like it is, that it is burdensome, or is your attack that it is not all right like it is?

MRS. HAMES: No, we are asserting that the language of the statute is vague and ambiguous and particularly the word "health." I think this requires interpretation of the word —

JUDGE MORGAN: I don't think we are required to show evidence on whether the word is vague. I think this court — I think that is a legal question, as I see it.

JUDGE SMITH: I may be missing something, but I would suggest that if the court finds it necessary to reconvene on the question of whether a particular hospital is not doing it right, which I don't think we have

any jurisdiction over as a three judge court, then we can reconvene.

MRS. HAMES: Well, we are not trying — we are not saying that any particular hospital is not doing it right. We are merely pointing out defects in the statute. In addition to the term "health", I think that the doctor's interpretation of the word health is certainly relevant to determine whether or not it is a vague term. For example, is this mental health or physical health?

[700]

Also, the term "residence" is one that gives the doctors considerable trouble. There must be a certification by the doctor that the female is a resident of the state. These are areas in which the doctors are placed in position of having to make legal decisions, and their interpretation and the varying interpretations goes to the vagueness or ambiguity of the statute.

JUDGE SMITH: That is what I was driving at a moment ago. They say they are having to make legal decisions when the whole function is to make a medical decision out of it. Do they want somebody else to make the medical decisions for them, is that their position?

MRS. HAMES: No, sir.

JUDGE SMITH: They want to make themselves, this is the whole thing, alone.

MRS. HAMES: No, they do not want a law which delineates only three circumstances under which an abortion may be performed. They want to make the decision whether or not they can perform an abortion on a female based on factors they consider relevant.

BLEED THROUGH

JUDGE SMITH: All right. And that position, I don't think anybody will question, this is what they contend, so they are attacking the statute on its face. [701] I may be missing a part of the problem here, but to me that is it, they say this is an interference with their right to practice medicine, just as they might make an attack on a regulation of a hospital that says they have to have the concurrence of a doctor before they have a Cesarean operation is an interference of their right to practice medicine. You don't need a lot of proof about that, do you?

MRS. HAMES: I believe such a regulation would not have the same standing as the abortion statute in Georgia.

JUDGE SMITH: It may not, but it is the same position.

MR. BUCKLEY: You would have the same standing if it was in a state hospital.

JUDGE SMITH: That is right.

MRS. HAMES: The other question which requires proof is the equal protection argument. Mary Doe has made an argument on behalf of the people in her class that she is denied equal protection of the laws. We plan to introduce statistics to show that poor people are not the ones who get the therapeutic abortions. They are the ones who go to the illegal abortionist and have a resulting health problems from it. The law as applied results in a denial of equal protection of the [702] laws.

JUDGE MORGAN: In other words, you are complaining of procedure violations?

MRS. HAMES: The law as applied or as it exists results in hospitals denying abortions to charity patients.

JUDGE SMITH: Is this the fault of the law?

MRS. HAMES: I think it is, yes; if the law were not on the books I think we would —

JUDGE SMITH: But there is nothing in the law that makes it unequal, is there?

MRS. HAMES: The procedure itself whereby one has to get consultation by other doctors imposes a financial burden, so I guess this is as applied.

JUDGE SMITH: Well, wouldn't that suit be against the person who is not applying it right?

MRS. HAMES: I don't understand who would not be applying it right.

JUDGE SMITH: Well, the normal equal protection case is against some state official or some person acting under color of the state law who is not applying the law to the plaintiff as he or it or whatever the authority is, is applying it to everybody else. That is not in this case as it is framed, as I see it.

MRS. HAMES: Well, it is an issue we have raised. [703] Maybe we have not —

JUDGE SMITH: I know you have pleaded it, but there is nothing on that statute that says a different procedure applies to poor people from rich people; there is nothing in that statute that says that.

MRS. HAMES: But in the operation of the statute which we would show by evidence —

JUDGE SMITH: Sue whoever is not operating properly, this is the point there.

MRS. HAMES: I think to require Mary Doe and

poor persons to file suit to get an abortion is placing on her and members of her class an undue burden, and to require every female who is indigent to do this is to deny them of equal protection in and of itself.

JUDGE SMITH: The point I am making is that procedurally I don't think you can raise that question in this kind of suit. I think you have to sue somebody that is not applying the law equally. If the law on its face applies equally, then you have to sue somebody that has not applied it equally, and you haven't done that here. We can wrestle with that, but I am getting worried about the evidence.

JUDGE MORGAN: I think the question comes down to a facial attack on the statute on the Georgia abortion law —

* * * * *

[704] AFTER RECESS

JUDGE MORGAN: As a three judge court, we are going to limit our inquiry initially to two questions. First, the jurisdiction which we have already covered; and second, to the merits of the case. If afterwards this court determines that more evidence is required, then we will reconvene. Otherwise, we feel that the attack can be made, possibly made without any evidence. Are you ready to proceed on the question of the merits of the statute?

MR. HIGHT: If Your Honors please, speaking for defendant Lewis R. Slaton, we haven't had an opportunity to reply to the merits. I believe we got off from counsel to Mr. Buckley's argument. We haven't had a chance to reply to the merits as we feel them to be in the case — I mean, not the merits, but the question as to jurisdiction.

JUDGE MORGAN: You can be permitted to file a [705] brief.

* * * * *

MRS. HAMES: Hames. Do I understand the Court that there will be no evidence on the equal protection question at all?

JUDGE MORGAN: At this time, yes, ma'am, and if it is later determined that it is necessary to have some evidence to pass on this statute, then we will reconvene this court.

MRS. HAMES: Of course, time is of considerable importance in the case, and we have witnesses here today and we would like to dispose of any evidentiary problem. If I could make one more comment about the equal protection matter, and that is that the application of the statute on its face does impose burden on poor people since it requires going to three physicians. This is like the law which permitted all people to appeal their cases to the Court of Appeals but they [706] had to pay for the transcript, and this was held by the Supreme Court in the *Edwards v. California case* to be a denial of equal protection of poor people. I wanted to make this one further point, that the statute on its face does deny equal protection.

JUDGE SMITH: If you want to go in business, it requires you to call on people to get a license and all that kind of thing, or if you want to avoid the zoning ordinance you have to call on different people.

MRS. HAMES: I don't know that that is a basic constitutional right such as we are asserting here.

JUDGE SMITH: The right to profit.

BLEED THROUGH

MRS. HAMES: One's right to control one's own person, the right to one's life and liberty, those are substantial issues in this case. That was the situation, liberty was a question in the *Edwards case*. I wanted to make this one point.

JUDGE MORGAN: *Edwards* was a criminal case in California, as I recall.

JUDGE SMITH: As they use "liberty," they are talking about being locked up. As you are using "liberty," you are saying it is your freedom to do what you want to.

MRS. HAMES: I am talking about life in this case, the right to life, because medical statistics show us [707] that it is safer to have a therapeutic abortion than it is to have natural childbirth. To force a woman to bear a child by natural childbirth increases her risk of death, where if she could have an abortion her risk would be less. That is the basic constitutional right to life that we bring under this case.

* * * * *

[716]

MRS. HAMES: I think that I have already stated the arguments on behalf of the doctors, and they contend the vagueness of the statute and the cumbersomeness of the procedure and the interference of their rights to practice medicine. I would like the right to summarize the argument.

* * * * *

[717]

MR. HIGHT: . . . The state, as to Mary Doe, is setting forth rules and regulations for Mary Doe, for the

unborn child as such, and a means and method to protect doctors that do perform an abortion; and they are regulating the doctors until you come to a medical question. They are saying, this is the procedure that you use, but when we reach a medical question, then that is for the doctors to determine under the statute itself. We feel like this, of course, is proper under *Griswold*.

JUDGE MORGAN: What about Mary Doe's right to have or not have?

MR. HIGHT: Your Honor, the state at this time is in a position that we don't know why Mary Doe was rejected. Was it because she was not mentally capable of [718] agreeing to an abortion, was it because she was in such a physical condition that she could not medically have an abortion with safety? The state does not know at this time as to Mary Doe.

JUDGE MORGAN: Didn't she allege in the petition why —

MR. HIGHT: No, sir, she alleged she was denied by Grady Hospital abortion committee, and we have no means or knowledge, and we have a motion we filed this morning with the Court we would like for the Court to consider later that we be revealed the identify of Mary Doe if we get into a factual question, and the Court hear evidence so we can properly investigate our case for the defendant Lewis R. Slaton as well as the other defendants.

JUDGE MORGAN: I was under the impression that maybe it was alleged that she had two children, for economic reasons. I thought —

JUDGE SMITH: That is why she wants it, but he is saying he doesn't know why she was denied it.

MR. HIGHT: We don't even know who Mary Doe is and we ask the Court to inform us so we could properly investigate the case.

JUDGE HENDERSON: She also alleges on grounds of her health. Would you like to discuss that on the [719] question?

MR. HIGHT: Yes, we also have filed a motion for a mental and a physical examination of Mary Doe because the state does not know whether Mary Doe is physically or mentally capable of agreeing to an abortion; if she is not, we feel it is incumbent on the court to appoint —

JUDGE HENDERSON: A constitutional question.

MR. HIGHT: — a guardian ad litem.

JUDGE MORGAN: Going to the constitutional question, suppose she is mentally and physically able but she says from an economic standpoint, I can't have it? What would be your contention then? She says, I have a right to, without this statute.

MR. HIGHT: Well, I think —

JUDGE MORGAN: That is a basic attack on the statute as I understand it.

MR. HIGHT: As I think, as *Griswold* points out, her right to privacy is in the marital state, but she is not in the marital state at this time. She is coming out and asking the court to say, I have a constitutional right at any time to go to a hospital, to go to a doctor and say that I am entitled to an abortion. Now, this is not the private marital state that is referred to in *Griswold*.

[720]

Secondly, Your Honor, the right of the father is involved along here. In *Griswold* the court did consider the rights of the father. That was the use of contraceptives in the marital relation between husband and wife. The rights of the father was considered in that particular case, and under their theory it would be lost.

Now, secondly, Your Honor, is that if a woman is declared to have a constitutional right to have an abortion as they allege, without any restrictions, this is, in fact, dictating to a doctor as to how he has to practice medicine, because it does not impose a restriction that this may not be medically feasible in your mind, it may be something you feel that as a doctor you cannot give an abortion for, and he may be subject to a suit for infringing on her constitutional rights to an abortion.

JUDGE HENDERSON: You mean if he is asked for it, he has to do it?

MR. HIGHT: Your Honor, I think under what they are alleging is that the hospital as such has to give her an abortion regardless of whether she is able to pay for it, the state and the people are required to pay for an abortion, and this is not like —

JUDGE MORGAN: I didn't interpret it that way.

[721]

JUDGE HENDERSON: I don't think they are making that contention.

MR. HIGHT: That's what they say, Your Honor; she is poor; she is unable to pay for an abortion; and she is subject to this type of infirmity; they bring the

idea that she is poor; she is unable to pay for an abortion; unable to pay for the doctors. I think the matter was raised in *U.S. v. Vuitch,* wherein it is stated that the poor person should have the constitutional right to have an abortion as any other person in the state hospital, or in such a situation that we recommend they start to become more liberal in that regard. But, what I am saying is that it is a very serious question involved here as to whether she can go so far as to have the right to an abortion. The father is not considered, the other parties are not considered in society. Society is told it is not a private matter anymore; it is not in the confines of the marital state, but it is coming out to medical authorities, doctors, hospitals, and saying, I'm entitled to an abortion under the Constitution.

* * * * *

[722]

We feel that in this particular case that there are other rights other than Mary Doe, the rights of the unborn child —

JUDGE MORGAN: What is the difference of the rights of an unborn child here and where there is a forcible rape?

MR. HIGHT: In that particular situation —

JUDGE MORGAN: You have an exception in the statute. What is the difference if you can look at it from the child's standpoint?

MR. HIGHT: The statute in this case, Your Honor, as I interpret it — and I believe the hospitals interpret it — make the necessity of an abortion a question for the medical authorities as to whether this woman needs an abortion.

JUDGE MORGAN: In a forcible rape case?

MR. HIGHT: No, sir. I'm talking about in a [723] normal situation, therapeutic abortion. In the case of rape it also requires in the statute —

JUDGE MORGAN: I'm looking at it from the unborn child's standpoint. What is the difference?

MR. HIGHT: There is none, Your Honor, as far as the statute because in each case under the statute the same procedure is followed, and with the rape victim an additional procedure is used. In each case the doctor certifies the need under the statute that an abortion is necessary because of one of these three.

JUDGE MORGAN: I was questioning from the standpoint you were looking at it —from the unborn child. I don't see any difference with the unborn child's rights in the case of rape.

MR. HIGHT: This evolves into a medical question for the doctor to determine as to whether or not in this situation, as in any therapeutic abortion, it is such a medical question that an abortion should be performed. This is the way the statute leaves it, that if this rape victim, statutory rape, young girl, is at such a degree of hypertension, physical or mental, that the doctor and the statute would consent to an abortion.

JUDGE SMITH: As I read it, she doesn't have to be under hypertension; if she is a rapee, that's it.

[724]

MR. HIGHT: But the doctor is still under the statute.

JUDGE MORGAN: I was looking at it from the

unborn child. You put it on the basis and I don't see the difference. That is what I'm saying.

MR. HIGHT: I think in that situation what you have, of course, is an overriding, perhaps policy or state policy to protect victims of a forcible rape that you do not have in a normal —

JUDGE MORGAN: But looking at it from the unborn baby's standpoint, I don't see any difference.

MR. HIGHT: No, sir, you don't, as far as the child is concerned, but you have such an overwhelming right in favor of the prospective mother that you don't have in a situation where the mother has all types and means to prevent conception. Then, after conception you have a father's right involved and a number of other rights you don't have in a rape victim. If the Court is determined to hear facts in the case, we would respectfully request that you consider our motion to disclose the identify of Mary Doe.

JUDGE MORGAN: All right. Mrs. Beasley, were you going to argue for the defendant?

MRS. BEASLEY: Your Honor, with respect to this rape question, I think it perhaps grew up a long time [725] ago because it actually did have to do with the health of the mother.

JUDGE MORGAN: Maybe the abortion statute grew up a long time ago, too.

MRS. BEASLEY: Indeed it did. It certainly was part of the common law which we have mentioned, of course, in our briefs; and Blackstone mentioned it. I think that was one of the very reasons why the child's life is protected under our Constitution too, as well as

the mother's rights of privacy, if, indeed, there are such in this case. I don't think that when our Constitution was written, it did not take into account the protection of life and pursuit of life that an unborn child had because the common law in our states, the first abortion statute was in 1831; however, the Fourteenth Amendment came after that even, so that under the Constitution there was imbued upon it the fact that the unborn child was recognized by the community as having some rights of protection. That is exactly what we have now, plus the fact that perhaps it even has more right of protection now because modern medicine being what it is, it becomes viable at a much earlier stage of its development, so that a child that is being carried by a woman is much closer to life now even than it was during common law.

[726]

Plaintiffs keep referring to the woman's right to choose whether or not she should bear children. I don't think that the statute really has anything to do with that. Certainly it does not infringe upon her right to not bear children. She has many methods by which she may exert that right. Georgia has a new sterilization law passed during this General Assembly whereby all it takes is the consent of the husband and wife for sterilization to occur. That assists her in having this right not to bear children, and the various types of contraceptives certainly give her an opportunity not to bear children. Thirdly, and most traditionally, abstention. She has voluntarily put herself in the position to have this child and once that life is kindled in her, the state takes the position that it has the right to be born because it is regarded as a life.

The plaintiffs take a position whereby they completely

ignore the balancing. They say it is not a balancing. They look at it with one eye closed; they look only at the woman's rights, but what about the child's rights? It is myopic, I think, to look at it as though only the mother had any rights. The law is replete with examples of where an unborn child has certain legal rights and those, of course, have been [727] well laid out, I think, in some of the briefs.

JUDGE MORGAN: How do you answer the question I propounded to Mr. Hight in regard to the forced rape? That child has a right, too, doesn't it?

MRS. BEASLEY: Yes, it does, but there you come to a balancing of who has the right to life. I think in that respect —

JUDGE MORGAN: Who has the right to life?

MRS. BEASLEY: Who has the right to life and pursuit of happiness, and there the state has taken the position that examples and experience has been that people who have been raped, women who have been raped, it is going to so effect their lives that perhaps it becomes almost a health or mental question, and it is going to leave open this exception. It doesn't mandate that you have to have an abortion if you are raped, but it leaves this open to you. The state takes the position that what repayment can be done to a person who has been the victim of such a crime, and this is the only way in which her life and the continuation of it in a normal fashion in the way she chooses can go on if she is given the opportunity to stop the life which is growing in her without any voluntariness on her part. But in these cases, the plaintiffs put themselves in the position where they believe that [728] for whatever reason—and we talked about economic rights—

very often, I think, if we went into the evidence, we would see that mental health can include an economic situation where the woman will become so mentally disturbed if she had to bear another child she couldn't afford, that it would have an effect and perhaps that situation could very well come under this statute, and if we went into evidence, we would be happy to show —

JUDGE SMITH: Do you think it is possible for different states to have different public policies on this matter, legally?

MRS. BEASLEY: Yes, I do. I think that if the state takes the position where it wants to protect its unborn children as prospective citizens of its state, it should have the right to do so.

JUDGE SMITH: I would assume legally if there is a basic constitutional prohibition against it that the state could not.

MRS. BEASLEY: If that were determined. We don't have a case saying that the Federal Government, or under the Federal Constitution you take that view. The view has been espoused that the state has the right to control this area of abortion.

JUDGE SMITH: Well, I'm making the comparison like [729] gambling. Some people may consider the pursuit of happiness to be able to gamble, and this law varies from state to state. Each state has the right to make its own public policy in some area. Now, I would assume, though, that legally a state would be free to do that unless there is some basic Federal constitutional guide that says everybody has to be alike in this area and namely that is have nothing, have no restrictions against abortion.

MRS. BEASLEY: I think a good argument could be made for it to be a Federal constitutional right for the unborn child to have a right to live. The basis of it is, as I pointed out in the beginning —

JUDGE SMITH: Well, the point I am making is that in the tort area the laws do vary from state to state for unborn children.

MRS. BEASLEY: That is right.

JUDGE SMITH: Do you think this is right in this field also?

MRS. BEASLEY: No, sir, not necessarily. I think that as far as Georgia is concerned we have always looked at the unborn child as having rights and having protection of his life to be born; but I think also that under the Federal Constitution, which guarantees protection of life, it can be said and it can be argued [730] that this includes the right of life of the unborn child. He would have a right under the Federal Constitution which means that it would have to apply to all the states, as far as his life is concerned — not tort law or laws of inheritance, which are specifically delegated to the states — but if you have a basic right to life which we believe this unborn child has, if the woman is going to be allowed to terminate this life because of her desire, what is to prevent the law from stopping her from killing this child after it is born? What is the difference? If she says she has a right not to bear that child and not to raise that child for twenty years as plaintiffs argue, then why does she have to after it has been born?

JUDGE MORGAN: Are you making a distinction between before and after the child becomes a person?

MRS. BEASLEY: I am not, I think the plaintiffs are, and I don't think that they can do so logically. I think the child has a right to life from the moment of its conception, but the plaintiffs would like to have what they call abortion on demand.

Now, in cases of marriage and right to privacy and sexual relations and so on, there are two parties and that is why the state may not invade, but the situation is far different when a third party gets [731] involved, and that is the unborn who is the weakest one of the three, who is absolutely helpless. That is where we say the state has a right to protect.

* * * * *

JUDGE HENDERSON: In the argument saying that the state has the right to except victims of forcible rape, is the state saying that they are presuming there is a health problem that will occur by reason of forcible rape? In other words, the woman and her mental health. Isn't that what they are saying there?

* * * * *

[732]

MR. WITT: May it please the Court, representing Chief Jenkins, I wanted to in cameo support Mr. Buckley's argument on intervention by showing to the Court the position of Chief Jenkins in this matter. Chief Jenkins has no policy making functions in state laws. He is a police officer and he has the administration of the City of Atlanta police. He has an interest in this case, and that is that he be able to discern what laws he is going to be required to enforce. That is the reason that on behalf of the Chief a brief with respect only to the abstention doctrine was filed. With all [733] due respect, it is

very difficult as a lawyer not to engage in these other matters that are very crucial and very critical in our society today, but because the Chief has no policy making function it would not be within his domain to inject his notions into this case personally.

JUDGE MORGAN: Actually, Mr. Slaton would be the one to enforce this law, the Attorney General.

MR. WITT: Basically that is correct, Your Honor. I was prepared to submit an affidavit as part of the evidence in this case which the Court could well consider to the effect that no arrests for abortions committed by a doctor in a hospital have been made by the Atlanta Police Department. These, aside from the question of abortions committed by unlicensed practitioners of some sort, this leaves aside the question of abortion which may or may not be outside of a hospital. This is strictly the kind of procedure that is involved in this statute.

In that respect, I believe Mr. Buckley's urging on the Court the need for child representation is kind of highlighted in cameo by the Chief's position where he can't urge these things properly. He has no interest in it, and, of course, our legal system believes that a problem is best presented to a court by [734] adverse interest arguing very earnestly for their position, which is not the position I find myself in this morning, with the one exception of the abstention doctrine. I think that is very critical in this case,

* * * * *

[735]

MR. HIGHT: Under the Georgia Code section in question the state has the right to protect any interest of the unborn child by appropriate action in this court;

we do not. And if the Court does reach the merits of the case, in order to protect the rights of the unborn child, we would respectfully ask that Mr. Buckley be permitted to intervene as guardian ad litem.

* * * * *

MR. BUCKLEY: . . . [737] In any event, the law specifically says that an action for declaratory judgment may be brought in the Superior Court of the county in question wherein the court may determine whether or not the constitutional or other legal rights of the unborn child are being violated, and if so, may grant an injunction, so that says that even in the event of a rape, even in the event of an alleged probable deformity, in the event of a critical illness, there is a forum provided, as there should be, under our system of constitutional law, for the testing of the rights of the unborn child.

Now, I would submit that arguing solely from the point of view of the unborn child — and that is the only point of view that I represent — that even in the event of rape that is a very extreme consequence for the unborn child. That brings me to the focus, I think, of the entire argument in this case, and that is this. I think a lot of people are inclined to view the constitutional law as some sophisticated area of the law where only people who call themselves constitutional lawyers are permitted to practice. Constitutional law is not unlike any other area of the law. [738] This is an equity case, and in equity we have been dealing for centuries with the balancing of convenience, the balancing of interest. Common law is really the same thing. We have — and *Griswold* did not enounce any brand new concept of law. The Supreme Court has recognized for years and years and years the basic right of family privacy, the right of

the family to control the conduct of children, for example. However, all of those cases over the years, you keep seeing recurring the qualifications that those rights must be balanced against others' interests.

* * * * *

[740]

But here you don't have any right known to man that exists in a vacuum. We are all members of society and you don't have a right over your body that permits you, for example, to go through the traffic light when it is red, because my body may be coming the other way and we might collide. That is the trouble with rights — they collide. And that is what the courts are for, to determine, and that is what the Legislatures are for, is to determine when laws should be and rules should be laid down to try to avoid collisions or try to determine systems and procedures for balancing these conveniences and these interests and these rights, to try to weigh these rights and then determine in this instance, using again the illustration of rape, for example.

* * * * *

[743]

Well, common law has found since then, not just by looking at a crystal ball, but by looking at medical practice and the progress of medical practice, the common law has found that the fetus is in no sense of the word a part of the mother. He has all of the characteristics of a human being, and as one person I was speaking with the other day said, it must be a human being because he isn't any other kind of being. He is in being. In any dictionary sense of the word, it is a human being. He has his own circulatory system, his own digestive system, he reacts to light, pain, to various forms of stimuli;

and to say that, as asked by counsel for plaintiff, that we are going to say that there is some magic at the threshold of the moment of delivery and that we are going to say that no one can regulate this child except the mother up until the moment of delivery, that would be absurd I think.

* * * * *

[746] And here this law was not adopted just on the spur of the moment. There was legislative hearings that went into this consideration and there were many arguments—economic, medical, statistical, and philosophical. These arguments were thrashed out at considerable length and not one but two different legislative [747] sessions. Then, again, in the course of an amendment being offered at the 1970 session, there were further hearings on this matter, and as Mr. Witt pointed out, there is a rather peculiar situation in that we are not exactly sure which of these two statutes the Georgia Supreme Court may say is the one that is enforced in Georgia. The Court will recall that they were both adopted. One is a part of the overall criminal code that was revised in 1968 session of the General Assembly, and the other was a carry-over special act dealing only with abortion that carried over from '67 and was finally enacted in '68. So we have two similar but slightly different laws.

* * * * *

[748]

Medical science says he is a separate and distinct entity.

* * * * *

[752]

I submit that this is the whole thread of my argument, from the time of conception a life comes into being

and there is no medical differentiation based on a difference in the life of that child at eleven weeks as compared with thirteen weeks or eleven weeks as compared with twenty weeks. The only difference is the ease of performing an abortion, and I submit that that is not a criteria to apply in deciding the rights of the unborn. This is a legal person who has a legally protected right and I respectfully say that the Court must consider that right and should uphold the statute.

* * * * *

[755]

We have been asked today for the first time to identify Mary Doe. Mary Doe is present in court, and I think our proffer of testimony was an offer to have her testify as to her particular situation. To request that she be given a medical or physical examination at this late date is too late, in my opinion, because this could have been done several weeks ago. There is no need for us to allege the negative of all these particulars that have been asserted, that she is mentally competent to file a petition.

* * * * *

[756]

Now, in our evidence which we had planned to present today, we were going to get into the question of statistics to show that the major group of women who receive abortions are white and of the upper economic classification. I think there is sufficient medical and sociological studies in the area that the Court can take judicial notice of these studies.

JUDGE SMITH: Is that true under this law? Do those statistics relate only to abortions in Georgia under this law?

MRS. HAMES: Yes.

JUDGE SMITH: Does this count the rich gal that [757] flies off to Sweden?

MRS. HAMES: No. When we talk about the statistics in Georgia, we are talking about abortions performed in Georgia, so that the rich gal that flies to Sweden or to New York or to Johns-Hopkins is not counted as an abortion.

JUDGE SMITH: In other words, the statistics you attach in your appendix relate only to legal abortions occurring in Georgia under this law?

MRS. HAMES: That is correct.

JUDGE SMITH: And how do those relate to the population percentage?

MRS. HAMES: To the population percentage?

JUDGE SMITH: Yes. Of rich to poor. Who decides who is poor and who is rich?

MRS. HAMES: That was in a statistical study that we had planned to introduce by Dr. John Asher who has made such a statement. It is not attached to our brief. There he made an analysis of the people at Grady Memorial Hospital who had received the abortion, and in this connection, I believe, it was eighty percent of them that were white that received the abortion and sixty percent in the upper socioeconomic classification. I'd have to ask him questions about how he arrived —

[758]

JUDGE SMITH: How does that relate to who asked to have one?

MRS. HAMES: That was other evidence to show

that people who asked for abortions can be turned down at various levels and never get them. Those are the women who are uninitiated in the medical care, in seeking medical care. They merely make the request and are turned away by a clerk. We don't know how many of those there are.

I did want to point out in the report of the U. S. Public Health Service that is attached to the brief, you compare abortions, therapeutic abortions to live births in the hospital, Grady Memorial Hospital in 1969 had five per one thousand live births and that is compared to five hundred sixteen at Johns-Hopkins. This, we submit, is evidence that the law in Georgia is not meeting the needs. Obviously there is no greater need for abortions in Johns-Hopkins and in Maryland than there is in any other state.

In another report, which we attach to the brief, there is information that seventy-seven women died in Georgia from 1960 to 1968 as a result of illegal abortions. Now, the authorities tell us that for every one that dies there is ten thousand illegal abortions, so that leads you to see the extent of the [759] health problem that we have in Georgia alone. In the last two years there were fourteen blacks that died in Georgia from illegal abortions. This we contend is a health problem which is caused as a result of the abortion statute. Since the procedures are burdensome and costly it drives the women, in particular the poor women, to an inexpensive, illegal abortionist.

JUDGE MORGAN: What about the contention that there are probably two statutes in Georgia, one under the adopted criminal code and one under the —

MRS. HAMES: It is my understanding that the statute 26-9925, the one that is printed at the end of the new Georgia criminal code was adopted April 11th, or it became effective April 11 or 12th when the governor did not sign the bill — this was April 11, 1968 — that was the original abortion law in Georgia.

Now, at the same time they adopted the new criminal code for Georgia which embodied the same provisions. They are the same.

JUDGE MORGAN: The same statute?

MRS HAMES: Yes, they are the same provisions, but they were not to become effective until July 1st, 1969. So the 26-99 provisions were to give Georgia citizens the benefit of the abortion statute prior to the new criminal law coming into effect.

* * * * *

[761]

JUDGE HENDERSON: You want to have all abortions, you don't have any distinction, do you? You want to declare all the laws about abortions unconstitutional [762] and let the doctor perform them whether it is for the health of the mother or not.

MRS. HAMES: That is correct.

JUDGE SMITH: What if it happened that all doctors in Georgia were real conservative and they had decided in their medical meeting that it was bad to have abortions. Where would you be then?

MRS. HAMES: I think there would be a duty on behalf of the public hospitals to hire doctors who would provide this service for indigent persons. Now, as far as private patients are concerned, I don't think there

would be any way to compel.

* * * * *

MRS. HAMES: I think there is a duty when the County of Fulton and DeKalb undertakes to provide medical services to the indigent that they must provide all medical services.

* * * * *

[763]

JUDGE SMITH: Anybody.

MRS. HAMES: I don't think there is any remedy to compel the performance of an abortion now.

JUDGE SMITH: If they could get them at Hopkins and couldn't get them in Georgia, where would we be legally? This would mean you would have to move into a jurisdiction where the public policy and attitude were different, wouldn't you?

MRS. HAMES: That is correct, and I think that runs to the equal protection argument which we have made. I think that is the situation we find ourselves in now, that people who have money can go to Hopkins. They can go to California, they soon are going to be able to go to New York.

* * * * *

[770]

MR. BUCKLEY: On factual question, Your Honor, and not involving evidence, but since the allegations of the complainant, as I recall, projected the fetus as being approximately nine weeks or so, and since I believe Mrs. Hames told me in private conversation that the fetus in this situation is actually four or five weeks older than that; it never has been changed in the plead-

ing and never has been referred to in plaintiff's briefs; and I think it would be appropriate to inquire as to whether that allegation is correct or should be amended.

JUDGE SMITH: I don't know the relevancy, but will you stipulate at the time of filing suit that the fetus was four or five weeks older than alleged? That is all he is asking.

[771]

MRS. HAMES: I think we could stipulate that Mary Doe is about twenty weeks pregnant at the present time, and that is because women sometimes miscalculate and with three of us doing it, all three of us miscalculated.

JUDGE MORGAN: Thank you.

The Court will permit you to file along with your brief on the jurisdiction — if you desire additional briefs on the merits, and any cases which you feel like have been omitted or haven't been cited. That is left up to you.

I will say this again; that if the Court determines to decide this case, if evidence should be considered, we will reconvene it; otherwise, we will pass on the argument.

[774]
(Filed in Clerk's Office Oct. 14, 1970, Claude L. Goza, Clerk; By: PWM, Deputy Clerk)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al vs. ARTHUR K. BOLTON, as Attorney General of the State of Georgia; et al	CIVIL ACTION NUMBER 13676

Since the Court's opinion of July 31, 1970, several motions have been filed necessitating this opinion and order.

MOTION OF AMICUS CURIAE

Ferdinand Buckley filed a motion on September 3, 1970, to alter or amend the Court's judgment of August 25, 1970, to rule on several of his earlier motions and prayers. Accordingly, that judgment is hereby amended in the following (See FN) respect:

Mr. Buckley's motion for reconsideration of the order revoking his appointment as guardian *ad litem* for the embryo (or fetus), and his motion to intervene in any representative capacity on behalf of the embryo or fetus is denied. This ruling makes it unnecessary, and the Court declines, to rule on the prayers in the answer and counterclaim Mr. Buckley filed before revocation of his appointment as guardian *ad litem*.

MOTIONS OF JANE ROE

Jane Roe petitions for leave to intervene as a plaintiff, moves for a temporary restraining order, and asks that the Court clarify and enforce its opinion of July 31, 1970. Said petition, and accordingly also the motion and the request are denied for two reasons.

[775]

First, the Court is informed by counsel for all concerned that Georgia Baptist Hospital has reconsidered its earlier decision and subsequently granted Jane Roe's application for an abortion. Said action renders the petition of Jane Roe moot, there now being no sufficient collision of interests between Jane Roe and the defendants.

Second, Jane Roe's petition to intervene makes it clear that her controversy was with Georgia Baptist Hospital, and only tangentially with the defendants in this case. Under such circumstances there is no showing that Mary Doe—representing the class of pregnant women denied abortions because of the Georgia statute attacked—could not adequately represent the tangential interest of Jane Roe in this action. *See Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137, 141 (1944); *Durkin v. Pet Milk Co.*, 14 F.R.D. 374 (W.D. Ark. 1953).

In spite of the above, the motion presents an aspect of the case which justifies some amplification of the previous declaratory judgment. The court concludes that this should be done by way of amendment sua sponte. Rule 60(b)(6); *Klapcott v. United States*, 335 U. S. 601 (1948); *Bros. Incorporated v. W. E. Grace Mfg. Co.*, 320 F.2d 594 (5th Cir. 1963).

The problem relates to the role and function of the "abortion committees" in the several hospitals. Ga. Code §26-1202(5). The thrust of the original opinion was to carry out the apparent intent of the Georgia legislature by making the ultimate decision on individual abortions a medical one. However, in line with constitutional principles, the ultimate decision cannot be [776] restricted to the three reasons stated in the statute. This left the abortion committee free to decide whether an abortion was "necessary" on the broader medical basis, namely, the totality of circumstances surrounding each patient.

From the motion it is apparent that those committees who have voluntarily adopted the standards promulgated by the American College of Obstetricians and Gynecologists as controlling have placed themselves in the position of being restricted by the same reasons stated in the statute.[1] What is denied directly cannot be accomplished indirectly. It follows that the abortion committees cannot be limited to the stated reasons as the sole

---

[1]The Georgia statute requires the hospital to apply standards promulgated by the Joint Commission on the Accreditation of Hospitals. No such restrictive reasons for approval of an abortion are contained therein. However, the voluntary standards promulgated by the American College of Obstetricians and Gynecologists in part limit he grounds for abortion to the three stated statutory reasons: injury to health of the mother; danger of grave physical or mental defect to the child; and pregnancy due to rape. Any such limiting restrictions, as seen, must fail. Likewise, lack of consent by the husband, while it may freely be considered by the committee, may not be automatically established as an absolute bar.

By way of additional comment, good faith administration of the statute as now constituted would prohibit a committee from secretly restricting abortions to those statutory reasons, which the court has already deleted. To the contrary, all relevant factors should be considered and an informed medical judgment made.

basis for approval of an individual abortion, nor can they so limit themselves by the adoption of such standards. Any such action by a hospital committee is declared to be an unconstitutional exercise of delegated power.

[777]

In sum, the statutory processes of approval are left standing. The patient is required to obtain the approval of (1) the certifying physician, (2) the two consulting physicians, and (3) the abortion committee of the admitting hospital. Failure to obtain approval at any level necessarily precludes abortion on that application. A majority of the abortion committee shall control its action, whether for approval or for disapproval.

To the extent stated herein, the original opinion is modified.

IT IS SO ORDERED.

This the 13 day of October, 1970.

/s/ LEWIS R. MORGAN

LEWIS R. MORGAN
United States Circuit Judge

/s/ SIDNEY O. SMITH, JR.

SIDNEY O. SMITH, JR.
United States District Judge

/s/ ALBERT J. HENDERSON, JR.

ALBERT J. HENDERSON, JR.
United States District Judge

FILE COPY

Supreme Court, U.S.
FILED
OCT 6 1970
ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~808~~ 70-18

JANE ROE, JOHN DOE, and MARY DOE,
Appellants,

JAMES HUBERT HALLFORD, M.D.,
Appellant-Intervenor,

—v.—

HENRY WADE,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

ROY LUCAS
The James Madison Constitutional Law Institute
Four Patchin Place
New York, N.Y. 10011

NORMAN DORSEN
School of Law
New York University
Washington Square South
New York, N.Y. 10003

LINDA N. COFFEE
2130 First National Bank Building
Dallas, Texas 75202

SARAH WEDDINGTON
3710 Lawton
Austin, Texas 78731

ROY L. MERRILL, JR.
DAUGHERTY, BRUNER, LASTELICK & ANDERSON
1130 Mercantile Bank Building
Dallas, Texas 75201

Attorneys for Appellants

INDEX

PAGE

Citation to Opinions Below 2

Jurisdiction 2

Statutes Involved 4

Questions Presented 5

Statement of the Case 6

The Questions Are Substantial 12

Introduction 14

I. The Three-Judge Court Should Have Enjoined Future Enforcement of the Texas Anti-Abortion Laws, Which the Court Had Declared Unconstitutional, Because an Injunction Was Necessary in Aid of the Court's Jurisdiction, Proper to Effectuate the Declaratory Judgment, and Needed to Prevent Irreparable Injury to Important Federal Rights of the Class of Pregnant Women Who Are or Will Be Seeking Abortions, and the Class of Physicians Who Are Forced to Reject Such Women as Patients Out of a Reasonable Fear of Prosecution 14

II. A Married Couple, and Others Similarly Situated, Have Standing to Challenge the Texas Anti-Abortion Laws, Because Said Laws Have

PAGE

a Present and Destructive Effect on Their Marital Relations, They Are Unable to Utilize Fully Effective Contraceptive Methods, Pregnancy Would Seriously Harm the Woman's Health, and Such a Couple Could Not Obtain Judicial Relief in Sufficient Time After Pregnancy to Prevent Irreparable Injury 30

CONCLUSION 33

APPENDIX:

Notice of Appeal to the Supreme Court of the United States From the United States District Court, Filed August 17, 1970 ..... 1a

Judgment of the United States District Court, Granting Declaratory Judgment, and Denying Injunction, Entered June 17, 1970 ..... 4a

Decision of United States District Court, Filed June 17, 1970 ..... 7a

Notice of Protective Appeal to the United States Court of Appeals for the Fifth Circuit, Filed July 24, 1970, by Appellant Jane Roe 21a

Notice of Protective Appeal to the United States Court of Appeals for the Fifth Circuit, Filed July 23, 1970, by Appellant James H. Hallford, M.D. 23a

PAGE

TABLE OF AUTHORITIES

Constitutional Provisions:

United States Constitution—

Amendment I 9, 12, 14, 27
Amendment IV 9, 14
Amendment VIII 9, 19
Amendment IX 9, 10, 14, 20
Amendment XIV 9, 14, 15, 19

Article III 32

STATUTES:

N.Y. Penal Law §125.05(3), at 79 (McKinney Supp. 1970-71) 17
12B Texas Civ. Stat. art. 4437f, at 212 (1966) 7
12B Texas Civ. Stat. arts. 4505-06, at 541 (1966), at 132 (Supp. 1969-70) 7
2A Texas Penal Code arts. 1191-94, at 429-35 (1961) ..3, 4, 5, *passim*
2A Texas Penal Code art. 1196, at 436 (1961) ....3, 4, *passim*
28 U.S.C. §1253 (1964 ed.) 3, 13
28 U.S.C. §1343(3) (1964 ed.) 2
28 U.S.C. §2101 (1964 ed.) 3
28 U.S.C. §2201 (1964 ed.) 2
28 U.S.C. §2281 (1964 ed.) 3
28 U.S.C. §2283 (1964 ed.) 25, 26, 27, 29
28 U.S.C. §2284 (1964 ed.) 3
42 U.S.C. §1983 (1964 ed.) 2

PAGE

Cases:

Baggett v. Bullitt, 377 U.S. 360 (1964) 24
Baird v. Eisenstadt, —— F.2d ——, No. 7578 (1st Cir. July 6, 1970) 16
Barrows v. Jackson, 346 U.S. 249 (1953) 20

California v. Belous, 71 Cal. 2d ——, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970) 6, 11, 18, 19
Carter v. Jury Comm'n of Greene County, 396 U.S. 320 (1970) 3
Catching v. State, 364 S.W.2d 691 (Tex. Ct. Crim. App. 1962) 8

Dinis v. Volpe, 389 U.S. 570 (1968) (per curiam) 3
Doe v. Bolton, —— F. Supp. ——, Civ. No. 13676 (N.D. Ga. July 31, 1970) (per curiam) 20, 21
Doe v. Lefkowitz, 69 Civ. 4423 (S.D.N.Y. Dec. 12, 1969) (per curiam) (unreported) 6
Doe v. Randall, 314 F. Supp. 32 (D. Minn. May 19, 1970), *rehearing denied*, 314 F. Supp. 36 (D. Minn. July 1, 1970) (per curiam), *appeal docketed sub nom.* Hodgson v. Randall, 39 U.S.L.W. 3115 (U.S. Sept. 21, 1970) (No. 728, Oct. 1970 Term) 6, 13, 25
Doe v. Scott, No. 18382 (7th Cir. Mar. 30, 1970) (per curiam), *rev'g* 310 F. Supp. 688 (N.D. Ill. Mar. 27, 1970) 6
Dombrowski v. Pfister, 380 U.S. 479 (1965) 12, 23, 24, 25, 26, 28

Evans v. Cornman, 398 U.S. 419 (1970) 3

PAGE

Fletcher v. State, 362 S.W.2d 845 (Tex. Ct. Crim. App. 1962) 8

Goldberg v. Kelly, 397 U.S. 254 (1970) 3
Griswold v. Connecticut, 381 U.S. 479 (1965) .....*passim*

Hale v. Bimco Trading Co., 306 U.S. 375 (1939) 3, 25, 26
Hodgson v. Minnesota, 39 U.S.L.W. 3115 (U.S. Sept. 21, 1970) (No. 729, Oct. 1970 Term), *on appeal from* No. 42652 (Minn. Sup. Ct. July 20, 1970), *denying prohibition to* No. 23789 (Minn. Dist. Ct., Ramsey County June 29, 1970) 13

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 24

Loving v. Virginia, 388 U.S. 1 (1967) 19

McCann v. Babbitz, 310 F. Supp. 293 (E.D. Wis. 1970) (per curiam), *appeal docketed,* 38 U.S.L.W. 3524 (U.S. June 20, 1970) (No. 297, Oct. 1970 Term) 11, 13, 19, 20
Meyer v. Nebraska, 262 U.S. 390 (1923) 11
Mindel v. U. S. Civil Service Comm'n, 312 F. Supp. 485 (N.D. Calif. 1970) 16
Mitchell v. Donovan, 398 U.S. 427 (1970) (per curiam) 13
Moore v. Ogilvie, 394 U.S. 814 (1969) 3, 31

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 11
Planned Parenthood Ass'n of Phoenix v. Nelson, Civ. No. 70-334 PHX (D. Ariz. Aug. 24, 1970) (per curiam) (unreported) 20
Prince v. Massachusetts, 321 U.S. 158 (1944) 11

PAGE

Rockefeller v. Catholic Medical Center, 397 U.S. 820 (1970) (per curiam) 13
Roe v. Wade, —— F. Supp. ——, Civ. No. 3-3690-B (N.D. Tex. June 17, 1970) (per curiam) .....7a, *passim*

Shively v. Board of Medical Examiners, No. 590333 (Calif. Super. Ct., San Fran. County Sept. 24, 1968), *on remand from* 65 Cal. 2d 475, 421 P.2d 65, 55 Cal. Rptr. 217 (1968) 19
Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) 11, 19
Stanley v. Georgia, 394 U.S. 557 (1969) 11
State v. Hallford, Nos. C-69-2524-H & C-69-5307-IH (Tex. Crim. Ct., Dallas County 1969) 9
Sturgis v. Attorney General, 260 N.E.2d 687 (Mass. 1970) 16

Toilet Goods Ass'n v. Gardner, 360 F.2d 677 (2d Cir. 1966) 31

United States *ex rel.* Williams v. Follette, 313 F. Supp. 269 (S.D.N.Y. 1970) 20, 21
United States v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969), *ques. of juris. postponed to merits,* 397 U.S. 1061, *further juris. questions propounded,* 399 U.S. 923 (1970) 11, 13, 21
United States v. W. T. Grant Co., 345 U.S. 629 (1953) .. 31

Veevers v. State, 354 S.W.2d 161 (Tex. Ct. Crim. App. 1962) 9

PAGE

Williams v. Rhodes, 393 U.S. 23 (1968) 3
Willingham v. State, 33 Tex. Crim. 98, 25 S.W. 424 (1894) 15

Zwickler v. Koota, 389 U.S. 241 (1967) 10

Books:

Calderone, M. (ed.), Abortion in the United States (1958) 16
Eastman, N. & L. Hellman, Williams Obstetrics (13th ed. 1966) 16
Ehrlich, P. & A. Ehrlich, Population Resources Environment (1970) 16
Gebhard, P., *et al.*, Pregnancy, Birth and Abortion (1958) 16
Taussig, F., Abortion: Spontaneous and Induced (1936) 16

Articles and Commentary:

Brewer, Dombrowski v. Pfister: Federal Injunctions Against State Prosecutions in Civil Rights Cases—A New Trend in Federal-State Judicial Relations, 34 Fordham L. Rev. 71 (1965) 27, 28
Clark, Tom C., Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola Univ. (L.A.) L. Rev. 1 (1969) 11, 22
Federal Anti-Injunction Statute and Declaratory Judgements in Constitutional Litigation, The, Note, 83 Harv. L. Rev. 1870 (1970) 27
Federal Injunctions Against State Actions, Comment, 35 Geo. Wash. L. Rev. 744 (1967) 27, 28

PAGE

Fisher, Criminal Abortion, in Abortion in America 3 (H. Rosen ed. 1967) 16
George, Current Abortion Laws: Proposals and Movements for Reform, 17 W. Res. L. Rev. 371 (1966) 17
Hardin, History and Future of Birth Control, 10 Perspectives in Biology & Med. 1 (1966) 16
Lucas, Laws of the U. S., in I Abortion in a Changing World 127 (R. Hall ed. 1970) 17
Stickgold, Variations on the Theme of Dombrowski v. Pfister: Federal Intervention in State Criminal Proceedings Affecting First Amendment Rights, 1968 Wis. L. Rev. 369 27
Tietze, Clinical Effectiveness of Contraceptive Methods, 78 Am. J. Obst. & Gynec. 650 (1959) 16
Tietze, Therapeutic Abortions in the United States, 101 Am. J. Obst. & Gynec. 784 (1968) 15

Other Authorities:

J.A.M.A., 213:1242 (Aug. 24, 1970) 17
Model Penal Code §230.3(2) (Proposed Official Draft, 1962) 17, 18
Sup. Ct. Rules (July 1, 1970 ed.) 3
Uniform Abortion Act (2d Tent. Draft, 1970) 18
U. S. Bureau of the Census: Statistical Abstract of the United States: 1969, Table 59, at 50 (90th ed. 1969) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

JANE ROE, JOHN DOE, and MARY DOE,

Appellants,

JAMES HUBERT HALLFORD, M.D.,

Appellant-Intervenor,

—v.—

HENRY WADE,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

Appellants bring this direct appeal from a judgment entered June 17, 1970, by a statutory three-judge United States District Court for the Northern District of Texas. The judgment appealed from granted these Appellants (Plaintiffs below) a declaration that the Texas anti-abortion statutes were unconstitutional on their face, by reason of overbreadth affecting fundamental individual rights, and that provisions in the statute suffered from unconstitutional uncertainty. However, the judgment denied a permanent injunction which had been sought as necessary in aid of the District Court's jurisdiction to enjoin future enforcement of the statute declared invalid. Appellants submit this

Statement to show that this is a direct appeal over which this Court has jurisdiction, and that the appeal presents important and substantial federal questions which merit plenary review.

Citation to Opinions Below

The June 17, 1970, opinion of the statutory three-judge United States District Court for the Northern District of Texas is not yet reported. The text of the decision is set out in the Appendix, *infra*, at 7a.

Jurisdiction

(i) On March 3, 1970, Appellant Jane Roe filed her original complaint,[1] basing jurisdiction on 28 U.S.C. §1343(3) (1964 ed.), and complementary remedial statutes, 28 U.S.C. §2201 (1964 ed.); 42 U.S.C. §1983 (1964 ed.). On the same day Appellants John and Mary Doe filed a complaint predicating federal jurisdiction on the same statutes. On March 23, 1970, the District Court granted leave for Appellant James H. Hallford, M.D., to intervene as a party-plaintiff, on the basis of a complaint alleging a class action and the same jurisdictional grounds set out above. Subsequently, on April 22, 1970, Appellant Jane Roe amended her complaint to sue "on behalf of herself and all others similarly situated" (App. at 8a n. 1). Appellants John and Mary Doe also amended their complaints to assert a class action (*Id.*). All Appellants, from their respective positions as married couples, pregnant single women, and practicing physicians asked that the Texas anti-abortion stat-

[1] The Complaint and all other documents referred to in this Jurisdictional Statement are part of the record on appeal.

utes[1] be declared unconstitutional on their face, and for an injunction against future enforcement of the statutes. A statutory three-judge United States District Court was requested and convened pursuant to 28 U.S.C. §§2281, 2284 (1964 ed.).

(ii) The final judgment of the statutory three-judge District Court, granting Appellants' request for a declaratory judgment, but denying any injunctive relief, was entered on June 17, 1970 (App. at 4a). On Monday, August 17, 1970, all Appellants filed with the United States District Court for the Northern District of Texas notices of appeal to this Court (App. at 1a), pursuant to 28 U.S.C. §2101(b) (1964 ed.), and SUP. CT. RULES 11, 34 (July 1, 1970 ed.), 398 U.S. 1015, 1021, 1045 (1970). A protective appeal to the United States Court of Appeals for the Fifth Circuit was noticed on July 23, 1970, by Appellant Hallford (App. at 23a), and on July 24, 1970, by Appellant Jane Roe (App. at 21a).

(iii) Jurisdiction of this Court to review by direct appeal the three-judge District Court's final judgment denying a permanent injunction is conferred by 28 U.S.C. §1253 (1964 ed.).

(iv) Cases which sustain the jurisdiction of this Court are: *Evans* v. *Cornman*, 398 U.S. 419, 420 (1970); *Goldberg* v. *Kelly*, 397 U.S. 254, 261 (1970); *Carter* v. *Jury Comm'n of Greene County*, 396 U.S. 320, 328 (1970); *Moore* v. *Ogilvie*, 394 U.S. 814, 815-16 (1969); *Williams* v. *Rhodes*, 393 U.S. 23, 26-28 (1968); *Dinis* v. *Volpe*, 389 U.S. 570 (1968) (per curiam); *Hale* v. *Bimco Trading Co.*, 306 U.S. 375, 376-78 (1939).

---

[1] The statutes, set out verbatim, *infra*, at 4-5, are 2A TEXAS PENAL CODE arts. 1191-1194, 1196, at 429-36 (1961).

Statutes Involved

2A Texas Penal Code art. 1196, at 436 (1961):

"Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

2A Texas Penal Code art. 1191, at 429 (1961):

"If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused."

2A Texas Penal Code art. 1192, at 433 (1961):

"Whoever furnishes the means for procuring an abortion knowing the purpose intended is an accomplice."

2A Texas Penal Code art. 1193, at 434 (1961):

"If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars."

2A TEXAS PENAL CODE art. 1194, at 435 (1961):

"If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder."

Questions Presented

I. Whether the Three-Judge Court Should Have Enjoined Future Enforcement of the Texas Anti-Abortion Laws, Which the Court Had Declared Unconstitutional, Where an Injunction was Necessary in Aid of the Court's Jurisdiction, Proper to Effectuate the Declaratory Judgment, and Needed to Prevent Irreparable Injury to Important Federal Rights of the Class of Pregnant Women Who Are or Will be Seeking Abortions, and the Class of Physicians Who are Forced to Reject such Women as Patients Because of a Reasonable Fear of Prosecution.

II. Whether a Married Couple, and Others Similarly Situated, Have Standing to Challenge the Texas Anti-Abortion Laws, Where Said Laws Have a Present and Destructive Effect on their Marital Relations, They are Unable to Utilize Fully Effective Contraceptive Methods, Pregnancy Would Seriously Harm the Woman's Health, and Such a Couple Could Not Obtain Judicial Relief in Sufficient Time After Pregnancy to Prevent Irreparable Injury.

Statement of the Case

Appellants brought three actions on behalf of three variously situated classes of Plaintiffs.

John and Mary Doe, a childless married couple, sued on behalf of themselves and all others similarly situated. Mary Doe has a neural-chemical disorder which renders pregnancy a threat to her physical and mental health, although not to her survival. Her physician has so advised her, and has also advised against using oral contraceptives. The alternate means of contraception used by John and Mary Doe is subject to a significant risk of failure. In such event, Mary Doe would like to, but legally could not, obtain a therapeutic abortion in a suitable medical facility in Texas. The probability of contraceptive falure in the class represented by Mary Doe is unquestionably high, when the size of the class is considered. Also, the limitations of judicial relief for a pregnant woman seeking an abortion are well known.[3] For Mary Doe and others in her position, a pre-

---

[3] The period between pregnancy detection, which normally occurs after the fourth week, and the safest time for a therapeutic abortion, before the twelfth week, leaves little time for judicial deliberation. With the notable exception of the Seventh Circuit, courts have declined to render a decision on behalf of a pregnant woman in the limited time available. In the present case, the first complaint was filed March 3, 1970, and followed after fifteen full weeks by a decision on the merits, June 17, 1970. *Compare Doe* v. *Randall*, 314 F. Supp. 32 (D. Minn. 1970) (nearly five weeks between decision and complaint); *Doe* v. *Lefkowitz*, 69 Civ. 4423 (S.D.N.Y. Dec. 12, 1969) (per curiam) (preliminary injunction denied until all factual materials developed by deposition); and *California* v. *Belous*, 71 Cal. 2d ——, 458 P.2d 194, 80 Cal. Rptr. 354 (1969) (argument March 3, 1969; decision September 5, 1969); with *Doe* v. *Scott*, No. 18382 (7th Cir. Mar. 30, 1970) (per curiam), *rev'g* 310 F. Supp. 688 (N.D. Ill. Mar. 27, 1970) (order entered in three days where pregnancy caused by rape).

pregnancy ruling on the validity of the Texas anti-abortion laws was the only ruling that could grant her the relief she would be seeking. Any other decision would simply be too late to prevent irreparable injury. Accordingly, John and Mary Doe brought an action for declaratory and injunctive relief against the present effect of the Texas statutes on their marital relations, and the inevitable future effect the statutes would have, in the certain event that a member of the class would become pregnant and not qualify for a legal abortion in Texas.

Jane Roe, an unmarried pregnant woman, also brought an action of the same nature, on her own behalf and for all others similiarly situated. Jane Roe had been unable to obtain a legal abortion in a medical facility in Texas, because her survival was not threatened by continued pregnancy, and no hospital would perform the abortion, in light of the Texas anti-abortion statutes.[4] Jane Roe was financially unable to journey to another jurisdiction with less restrictive laws on abortion, and accordingly had no recourse other than continuing an unwanted pregnancy, or risking her life and health at the hands of a non-medical criminal abortionist.

James H. Hallford, M.D., intervened as a Plaintiff, representing himself and other licensed Texas physicians similarly situated. Dr. Hallford's interest was twofold. As a

[4] While Texas does not punish the woman who persuades a physician to abort her, the anti-abortion statutes impose a felony sanction of up to five years for the physician. 2A Texas Penal Code art. 1191, at 429 (1961). Moreover, the physician risks cancellation of his license to practice. 12B Texas Civ. Stat. art. 4505, at 541 (1966); *id.* art. 4506, at 132 (Supp. 1969-70). Also, the hospital can lose its operating license for permitting an illegal abortion within its facilities. 12B Texas Civ. Stat. art. 4437f, §9, at 216 (1966).

physician, he is requested by patients, on a regular and recurring basis, to arrange for medically induced abortions in hospitals or other appropriate clinical facilities. This he cannot do, for several reasons. The Texas anti-abortion statutes are unclear in their potential application to the situations in which patients request abortions. Consequently, both physician and hospital must exercise special caution to avoid prosecution. Also, the potential sweep of the statutes is so drastic that the only clear case of legal abortion is one in which the patient is near to certain death. These cases are rare; hence the typical patient's case will be legally uncertain, or of certain illegality. To avoid the realistic possibility of severe penal and administrative sanctions, the physician must turn away the typical patient. Since the conscientious physician knows full well that such a patient may seek out an incompetent non-medical abortionist, thereby endangering her life or health, he will continually be forced by the statute to breach his professional duty of care to the patient.[8] To rectify this invasion of the physician-patient relationship, Dr. Hallford brought this action to enjoin future enforcement of the Texas anti-abortion statutes, against himself, or against any other physician similarly situated.

Dr. Hallford's second interest in bringing the action was to seek relief against two indictments outstanding against

---

[8] If prior cases on abortion prosecutions in Texas are a reliable index, patients who are turned away by physicians have recourse only to an assortment of quacks. *See, e.g., Fletcher* v. *State*, 362 S.W.2d 845 (Tex. Ct. Crim. App. 1962) (non-physician using crude techniques in "cottage on the river"; hysterectomy necessary to prevent girl's death); *Catching* v. *State*, 364 S.W.2d 691 (Tex. Ct. Crim. App. 1962) (non-physician; police found "tool box containing several catheters, a knitting needle, and other items").

him on abortion charges.[6] Under Texas law, a physician charged with abortion is presumed guilty, if the State is able to establish the fact of the abortion. The physician, in such a case, must admit complicity in the act, waive his privilege against self-incrimination, and defend on the basis that the abortion was "procured or attempted by medical advice for the purpose of saving the life of the [woman]." 2A TEXAS PENAL CODE art. 1196, at 436 (1961). Decisions such as *Veevers* v. *State*, 354 S.W.2d 161 (Tex. Ct. Crim. App. 1962), hold that the Article 1196 exception is an affirmative defense, which the physician must raise and prove. In numerous respects, this settled state-law practice deprives a physician of essential constitutional rights. Moreover, state practice invades the privacy of physician and patient by exposing intimate and confidential associations to the public glare of a criminal trial. In addition, the possibility of conviction carries with it the revocation of the physician's license before appeal. These elements of state practice render defense to criminal abortion charges a wholly inadequate means of vindicating the physician's constitutional rights. Accordingly, Dr. Hallford brought the present action as a Plaintiff-Intervenor in the main actions filed by Jane Roe, John Doe, and Mary Doe. The cases were consolidated, and argued together.

Essentially, the federal questions raised by each individual Plaintiff were raised by all. The complaints charged that the Texas anti-abortion statutes deprived physicians and patients of rights protected by the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments, as construed by this Court in decisions such as *Griswold* v. *Connecticut*,

---

[6] *State* v. *Hallford*, Nos. C-69-2524-H & C-69-5307-IH (Tex. Crim. Ct., Dallas County).

381 U.S. 479 (1965).[7] Defendants interposed objections to the standing of each Plaintiff, the propriety of adjudication versus abstention, the ripeness of the dispute for present decision, and the propriety of injunctive relief.

A statutory three-judge court, convened in response to Plaintiffs' request for injunctive relief from the Texas anti-abortion statutes, granted a declaratory judgment that the statutes were unconstitutionally vague and overbroad.

After dealing with the jurisdictional questions of standing,[8] ripeness,[9] and abstention,[10] raised by the Defendants, the three-judge court stated:

> "[T]he Texas Abortion Laws must be declared unconstitutional because they deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children" (App. at 12a).

---

[7] In the brief on the merits, Appellants will more fully elaborate this complex substantive constitutional point. For purposes of this Statement, however, it is sufficient to note that *Griswold* has been applied in the abortion context by numerous state and federal courts. *See* cases cited in notes 31-37, *infra*, and accompanying text.

[8] Jane Roe, the pregnant Plaintiff, and Dr. Hallford, had standing because they "occupy positions *vis-à-vis* the Texas Abortion Laws sufficient to differentiate them from the general public." App. at 9a. Also, on the authority of *Griswold*, Dr. Hallford had standing to raise the "rights of his patients, single women and married couples, as well as rights of his own." App. at 9a n. 3. John and Mary Doe, however, were held to lack standing. App. at 5a.

[9] The district court was "satisfied that there presently exists a degree of contentiousness between Roe and Hallford and the defendant to establish a 'case of actual controversy' . . . ." App. at 10a.

[10] *Zwickler* v. *Koota*, 389 U.S. 241, 248-49 (1967), was sufficient authority to preclude abstention. App. at 11a.

Reliance was placed on decisions by this Court establishing "[r]elative sanctuaries for such 'fundamental' interests [as] the family,[11] the marital couple,[12] and the individual." [13] Further precedent was found in similar decisions by other federal and state courts,[14] as well as a major treatment of *Griswold* in the abortion setting by Retired Justice Tom C. Clark, *see* Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOYOLA UNIV. (L.A.) L. REV. 1 (1969).

Not only were the statutes overbroad, and not justified by a narrowly drawn compelling State interest, but the language of the statutes was unconstitutionally vague. Although a physician might lawfully perform an abortion "for the purpose of saving the life of the [pregnant woman]," [15] the circumstances giving rise to such necessity were far from clear. The district court detailed a few of the more apparent ambiguities:

> "How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertain-

---

[11] *See Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), all cited by the district court. App. at 13a.

[12] *See Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

[13] *See Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

[14] *See, e.g., McCann* v. *Babbitz*, 310 F. Supp. 293 (E.D. Wis.) (per curiam), *appeal docketed*, 38 U.S.L.W. 3524 (U.S. June 20, 1970) (No. 297, Oct. 1970 Term); *United States* v. *Vuitch*, 305 F. Supp. 1032 (D.D.C. 1969), *ques. of juris. postponed to merits*, 397 U.S. 1061, *further juris. questions propounded*, 399 U.S. 923 (1970); *California* v. *Belous*, 71 Cal. 2d ——, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970).

[15] 2A TEXAS PENAL CODE art. 1196, at 436 (1961).

> ably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How *imminent* must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years? These questions simply cannot be answered." App. at 17a.

After finding the Texas anti-abortion statutes unconstitutional on two grounds, the district court considered the propriety of injunctive relief. Acting on the assumption that *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965) controlled, the court refused to enjoin any present or future enforcement of the statutes. Appellants have brought this appeal to review the denial of injunctive relief.

The Questions Are Substantial

The present appeal presents important and unresolved federal questions which have not been but should be determined by this Court. A district court's refusal to enjoin present and future enforcement of a statute declared facially unconstitutional raises important issues for the vindication by federal courts of rights guaranteed by the Constitution. Decisions by this Court have not in recent years clarified the propriety of federal injunctive relief against state criminal statutes outside the pristine speech area of the First Amendment. A decision by this Court is needed, particularly where, as here, the injunction was sought by some Appellants who were total strangers to any pending prosecutions, and by one Appellant for whom defense of state court prosecution would be a wholly inadequate means of vindicating his federally protected rights.

In addition, the substantive issues in the case, which will surely be raised for further review by Appellee, are novel issues of profound national import, affecting the lives of many thousands of American citizens each year. Further, the same issues are presented in four appeals already docketed,[16] a variety of conflicting decisions in the lower courts,[17] and a host of pending actions in federal and state lower courts.[18]

---

[16] (1) *United States* v. *Vuitch*, No. 84, arises under a differently worded felony abortion statute, however, and poses numerous alternate grounds for affirmance other than the central questions presented here, of overbreadth and vagueness.

(2) *McCann* v. *Babbitz*, No. 297, was decided at the federal district court level on grounds virtually the same as those below in the present case. It appears in *McCann*, however, that the appeal was taken by the State solely from the granting of a declaratory judgment for Dr. Babbitz. No appeal was taken from the denial of an injunction, as 28 U.S.C. §1253 (1964 ed.), would seem to require, and as this Court twice held last Term, *Mitchell* v. *Donovan*, 398 U.S. 427 (1970) (per curiam), *vacating* 300 F. Supp. 1145 (D. Minn. 1969), with directions to enter a fresh judgment of dismissal, to enable appellants to appeal to the Eighth Circuit; *Rockefeller* v. *Catholic Medical Center*, 397 U.S. 820 (1970) (per curiam).

(3) *Hodgson* v. *Randall*, No. 728, is an appeal from a three-judge federal court decision refusing to enjoin state court prosecution of a physician who sought federal relief before performing a hospital therapeutic abortion for German measles indications, and long before the state indictment.

(4) *Hodgson* v. *Minnesota*, No. 729, involves the same subject matter as No. 728, and is an appeal from the Supreme Court of Minnesota's denial of a writ of prohibition to a state trial court which had upheld the constitutionality of an abortion statute, where unconstitutionality was the only defense to the charges.

[17] *See* cases cited in notes 31-37, *infra*, and accompanying text.

[18] *See* cases cited in note 38, *infra*.

Introduction

In the remainder of this Jurisdictional Statement, Appellants will show that the questions presented are substantial, and merit plenary review by the full Court. Because of the novelty and complexity of the issues, and the limited function of a Jurisdictional Statement, this showing will not undertake to develop all arguments in depth.

I.

The Three-Judge Court Should Have Enjoined Future Enforcement of the Texas Anti-Abortion Laws, Which the Court Had Declared Unconstitutional, Because an Injunction Was Necessary in Aid of the Court's Jurisdiction, Proper to Effectuate the Declaratory Judgment, and Needed to Prevent Irreparable Injury to Important Federal Rights of the Class of Pregnant Women Who Are or Will Be Seeking Abortions, and the Class of Physicians Who Are Forced to Reject Such Women as Patients Out of a Reasonable Fear of Prosecution.

A. The Subject Matter of the Merits Involves Important and Substantial Federal Constitutional Questions:

On the merits, Appellants argued successfully that decisions by this Court, construing the First, Fourth, Ninth, and Fourteenth Amendments supported a claim that the Texas anti-abortion statutes swept too broadly and thereby invaded rights protected by the Constitution (App. at 5a, 6a, 12a-16a).[19] Moreover, the statutes in question were held

[19] In particular, Appellants relied upon the reasoning of *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), where this Court invalidated a state law prohibiting use of contraceptive devices, because

to be so vague and indefinite as to violate the Fourteenth Amendment due process guarantee of reasonably specific legislation (App. at 5a, 6a, 16a-18a). That guarantee is particularly significant where, as here, important personal rights are at stake, and an impermissibly vague statute operates to inhibit a wide range of constitutionally protected conduct.[20]

Ultimately, the substantive question presented is whether a State may enact a felony statute to punish a physician, a woman, and her husband, with five years in state prison, where the couple requests, and the physician performs, a therapeutic surgical procedure to abort a pregnancy which the couple did not want, but were unable to prevent.[21] Under *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), it is clear that a husband and wife[22] are constitutionally priv-

---

the law swept too broadly and invaded "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." 381 U.S. at 485.

[20] The most reliable estimates hold that fewer than 10,000 hospital therapeutic abortions are performed yearly, in states where there has been no abortion law reform. *See* Tietze, *Therapeutic Abortions in the United States*, 101 AM. J. OBST. & GYNEC. 784, 787 (1968). These constitute a minute proportion of all unwanted pregnancies which face American couples each year. Those excluded from hospitals have two alternatives: continuation of unwanted pregnancy, or extra-hospital, probably illegal, induced abortion.

[21] The woman is not an accomplice under Texas law, but other participants, including her husband, are fully liable. *See Willingham* v. *State*, 33 Tex. Crim. 98, 25 S.W. 424 (1894) (woman neither principal nor accomplice).

[22] *Griswold* was silent on the more significant problem of access by unmarried persons to contraceptives. A result of non-access, and failure, is the birth of over 100,000 illegitimate children yearly to girls age nineteen or younger. *See* U.S. BUREAU OF THE CENSUS: *Statistical Abstract of the United States: 1969*, Table 59, at 50 (90th ed. 1969).

Outside of the state judiciary in Massachusetts, authorities have uniformly held the *Griswold* rationale applicable to litigants who

ileged to control the size and spacing of their family by contraception. The failure of contraception, however, is commonplace.[23] Authoritative estimates are that between 750,000 and 1,000,000 births each year are unwanted.[24] These are in addition to the 200,000 to 1,000,000 unwanted pregnancies which are estimated to end in abortions induced outside of the clinical setting.[25] Taken together, some

---

had not entered into the marriage contract. *Compare Baird* v. *Eisenstadt*, —— F.2d ——, No. 7578 (1st Cir. July 6, 1970) (invalidating Massachusetts statute which outlawed distribution of contraceptives to the unmarried), *Mindel* v. *United States Civil Service Comm'n*, 312 F. Supp. 485 (N.D. Calif. 1970) (reinstating postal clerk who had been dismissed for cohabitation without benefit of marriage), *and* the present case, *Roe* v. *Wade*, —— F. Supp. ——, Civ. No. 3-3690-B (N.D. Tex. June 17, 1970) (per curiam) (Texas anti-abortion statutes "deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children."), *with Sturgis* v. *Attorney General*, 260 N.E.2d 687, 690 (Mass. 1970) (directly contrary to federal decision in *Baird*).

[23] If a married couple is to have private control over numbers and spacing of children, induced abortion is absolutely necessary as a backstop to contraceptive failure. For compilation of contraceptive failure rates according to method used, see P. EHRLICH & A. EHRLICH, POPULATION RESOURCES ENVIRONMENT 218-19 & Table 9-1 (1970); N. EASTMAN & L. HELLMAN, WILLIAMS OBSTETRICS 1068-75 (13th ed. 1966); Hardin, *History and Future of Birth Control*, 10 PERSPECTIVES IN BIOLOGY & MED. 1, 7-13 (1966); Tietze, *Clinical Effectiveness of Contraceptive Methods*, 78 AM. J. OBST. & GYNEC. 650 (1959).

[24] The most recent scholarly examination of unwanted birth magnitudes will appear in a forthcoming issue of SCIENCE. A summary of these findings by Dr. Charles F. Westoff of Princeton University's Office of Population Research, analyzing the 1965 National Fertility Study, appeared in the N.Y. Times, Oct. 29, 1969, at 25, col. 3.

[25] Secret induced abortions are inherently incapable of quantification. Nonetheless, one can be certain that the number is very high. For estimates, see Fisher, *Criminal Abortion*, in ABORTION IN AMERICA 3-6 (H. Rosen ed. 1967); M. CALDERONE (ed.), ABORTION IN THE UNITED STATES 180 (1958); P. GEBHARD *et al.*, PREGNANCY, BIRTH AND ABORTION 136-37 (1958); F. TAUSSIG, ABORTION:

950,000 to 2,000,000 unwanted births plus non-clinical abortions occur yearly. Accordingly, one must conclude that restrictive anti-abortion statutes, such as the Texas law in question here, drastically affect the conduct of literally millions of American citizens.

The national significance of the issues in this case can also be inferred from increased activity within the medical profession, and in the legislatures. On June 25, 1970, the House of Delegates of the American Medical Association voted to permit licensed physicians to perform abortions in hospitals, with the sole additional qualification that two other physicians be consulted.[26] Physicians were cautioned, however, not to violate existing state statutes, forty-seven of which are far more restrictive.[27] Three states in 1970—New York, Alaska, and Hawaii—removed, for the most part, any criminal penalties which might previously have been imposed upon physicians for performing abortions in appropriate medical facilities.[28] From 1967 to 1970, twelve states had adopted therapeutic abortion statutes similar to that of the MODEL PENAL CODE's 1962 Proposed Official

---

SPONTANEOUS AND INDUCED 25 (1936); Regine, *A Study of Pregnancy Wastage*, 13 MILBANK MEM. FUND QUART. No. 4, at 347-65 (1935).

[26] *See* N.Y. Times, June 26, 1970, at 1, col. 1. The statement has not yet been published in an official A.M.A. document. A recent issue of the J.A.M.A. noted that only 26 physicians had resigned from the body because of new policy. 213 J.A.M.A. 1242 (Aug. 24, 1970).

[27] For analysis of abortion laws in the United States prior to the most recent changes, see Lucas, *Laws of the United States*, in I ABORTION IN A CHANGING WORLD 127 (R. Hall ed. 1970); George, *Current Abortion Laws: Proposals and Movements for Reform*, 17 W. RES. L. REV. 371 (1966).

[28] *See, e.g.*, N.Y. PENAL LAW §125.05(3), at 79 (McKinney Supp. 1970-71).

Draft.[29] More recently, on August 4, the Commissioners on Uniform State Laws issued a Second Tentative Draft of a UNIFORM ABORTION ACT. The Act sanctioned abortions by licensed physicians "within 24 weeks after the commencement of the pregnancy; or if after 24 weeks . . . " under the circumstances set out in the MODEL PENAL CODE proposal.

These developments bear witness to the importance of the issues presented here.

While policy-making and legislative bodies have debated the issue of abortion, courts, confined to the constitutional framework, have been asked to resolve the questions of individual privacy and legislative power which are presented here. Although the questions framed in this case have not been decided[30] by this Court, numerous federal

---

[29] *See* MODEL PENAL CODE §230.3(2) (Proposed Official Draft, 1962). The states are Arkansas, California, Colorado, Delaware, Georgia, Kansas, New Mexico, North Carolina, Oregon, South Carolina, and Virginia.

[30] On at least eight occasions this Court has declined to review state court decisions which involved restrictive anti-abortion laws. The eight denials are: *Mucie* v. *Missouri*, 398 U.S. 938 (June 1, 1970), *denying cert. to* 448 S.W.2d 879 (Mo. 1970) (manslaughter abortion conviction where patient died); *California* v. *Belous*, 397 U.S. 915 (Feb. 24, 1970), *denying cert. to* 71 Cal. 2d —, 458 P.2d 194, 80 Cal. Rptr. 354 (1969) (statute repealed after prosecution commenced); *Molinaro* v. *New Jersey*, 396 U.S. 365 (Jan. 19, 1970) (per curiam), *dismissing appeal from* 54 N.J. 245, 254 A.2d 792 (1969) (defendant jumped bail after appeal filed); *Knight* v. *Louisiana Bd. of Medical Examiners*, 395 U.S. 933 (June 2, 1969), *denying cert. to* 252 La. 889, 214 So.2d 716 (1968) (per curiam) (federal questions not properly raised and preserved); *Morin* v. *Garra*, 395 U.S. 935 (June 2, 1969), *denying cert. to* 53 N.J. 82 (1968) (per curiam) (same); *Moretti* v. *New Jersey*, 393 U.S. 952 (Nov. 18, 1968), *denying cert. to* 52 N.J. 182, 244 A.2d 499 (1968) (conspiracy conviction; abortion to have been performed by barber); *Fulton* v. *Illinois*, 390 U.S. 953 (Mar. 4, 1968), *denying*

and state decisions attest to the substantiality of the federal questions. Moreover, the sometimes sharp divisions in the courts below illustrate further the need for a decision at this level. In showing that the Court has jurisdiction, and that the questions are substantial, Appellants will outline the divisions among lower courts.

In September, 1969, the Supreme Court of California became the first appellate court to recognize the constitutional stature of a "fundamental right of the woman to choose whether to bear children . . . ."[31] The *Belous* court found this right implicit in this Court's "repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex."[32]

---

cert. to 84 Ill. App.2d 280, 228 N.E.2d 203 (1967); *Carter* v. *Florida*, 376 U.S. 648 (Mar. 30, 1964), *dismissing appeal from* 150 So.2d 787 (Fla. 1963).

[31] *California* v. *Belous*, 71 Cal. 2d ——, ——, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969), *cert. denied*, 397 U.S. 915 (1970). *Belous*, a state court appeal of a conspiracy conviction of a physician, involved a statute worded almost identically to that in the present case.

One year earlier, a California trial court had ruled that the Eighth and Fourteenth Amendments prohibited license revocation proceedings against physicians who had performed hospital approved abortions on patients exposed in early pregnancy to German measles. The opinion of the trial court, however, simply enumerated those Amendments among various conclusions of law, without supporting the conclusions with any attempt at reasoned analysis. Nonetheless, the result, and the factual similarities between that and the present case, are of interest. *See Shively* v. *Board of Medical Examiners*, No. 590333 (Calif. Super. Ct., San Fran. County Sept. 24, 1968) (not reported), *on remand from* 65 Cal. 2d 475, 421 P.2d 65, 55 Cal. Rptr. 217 (1968) (granting physicians' motions for discovery, without reference to merits).

[32] 71 Cal. 2d at ——, 458 P.2d at 199, 80 Cal. Rptr. at 359, *citing, e.g., Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967); *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 536 (1942).

More recently, three different decisions by statutory three-judge federal courts have invalidated restrictions on access to medical abortion in Wisconsin and Georgia, as well as in the present case from Texas. The first, *McCann* v. *Babbitz*,[33] recognized in that jurisdiction a woman's

> "basic right reserved to her under the ninth amendment to decide whether she should carry or reject an embryo which has not yet quickened." 310 F. Supp. at 302.

McCann grew out of the prosecution of a physician, but the three-judge court had no difficulty holding that a physician has standing to assert the rights of pregnant patients.[34]

The second recent federal decision is the present case, *Roe* v. *Wade*,[35] declaring the Texas anti-abortion statutes unconstitutional on the similar ground that

> "they deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children."

---

[33] 310 F. Supp. 293 (E.D. Wis. 1970) (per curiam), *appeal docketed*, 38 U.S.L.W. 3524 (U.S. June 20, 1970) (No. 297, Oct. 1970 Term).

[34] The standing of a physician to assert a patient's rights along with his own follows from *Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965), and *Barrows* v. *Jackson*, 346 U.S. 249, 257 (1953). On this standing point, lower court decisions involving abortion laws all agree. *See also Planned Parenthood Ass'n of Phoenix* v. *Nelson*, Civ. No. 70-334 PHX (D. Ariz. Aug. 24, 1970) (per curiam); *Doe* v. *Bolton*, —— F. Supp. ——, Civ. No. 13676 (N.D. Ga. July 31, 1970) (per curiam); *Roe* v. *Wade*, —— F. Supp. ——, Civ. No. 3-3690-B (N.D. Tex. June 17, 1970) (per curiam); *United States ex rel. Williams* v. *Follette*, 313 F. Supp. 269, 273 (S.D.N.Y. May 12, 1970).

[35] —— F. Supp. ——, Civ. No. 3-3690-B (N.D. Tex. June 17, 1970) (per curiam).

A third federal decision, *Doe* v. *Bolton*,[36] followed *Belous*, *McCann*, and *Roe*, holding:

> "[T]he concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy.
>
> ". . . [T]he reasons for an abortion may not be proscribed. . . ."

Numerous lower courts have followed this lead, in both federal and state disputes.[37] In addition, three-judge courts have been requested and/or convened in a number of states

---

[36] —— F. Supp. ——, Civ. No. 13676 (N.D. Ga. July 31, 1970) (per curiam).

[37] *See, e.g., State* v. *Munson* (S.D. 7th Jud. Cir., Pennington County Apr. 6, 1970) (Clarence P. Cooper, *J.*) (recognizing the woman's " 'private decision whether to bear her unquickened child' "); *State* v. *Ketchum* (Mich. Dist. Ct. Mar. 30, 1970) (Reid, *J.*) ("the statute as written infringes on the right of privacy in the physician-patient relationship, and may violate the patient's right to safe and adequate medical advice and treatment."); *Commonwealth* v. *Page*, Centre County Leg. J. at 285 (Pa. Ct. Comm. Pl., Centre County July 23, 1970) (Campbell, *P.J.*) ("the abortion statute interferes with the individual's private right to have or not to have children."); *People* v. *Gwynne*, No. 176601 (Calif. Mun. Ct., Orange County Aug. 13, 1970) (Schwab, *J.*); *People* v. *Gwynne*, No. 173309 (Calif. Mun. Ct., Orange County June 16, 1970) (Thomson, *J.*); *People* v. *Barksdale*, No. 33237C (Calif. Mun. Ct., Alameda County Mar. 24, 1970) (Foley, *J.*); *People* v. *Robb*, Nos. 149005 & 159061 (Calif. Mun. Ct., Orange County Jan. 9, 1970) (Mast, *J.*); *People* v. *Anast*, No. 69-3429 (Ill. Cir. Ct., Cook County, 1970) (Dolezal, *J.*) (holding the Illinois abortion statute "unconstitutional (1) for vagueness; and (2) for infringing upon a woman's right to control her body."); *cf. United States* v. *Vuitch*, 305 F. Supp. 1032 (D.D.C. 1969), *ques. of juris. postponed to merits*, 397 U.S. 1061, *further juris. questions propounded*, 399 U.S. 923 (1970); *United States ex rel. Williams* v. *Follette*, 313 F. Supp. 269, 272-73 (S.D.N.Y. 1970) (questions substantial, but habeas petitioner-physician remitted to state courts).

to consider questions quite similar to those raised here.[38] The convening of a statutory court, of course, requires that the questions presented be "substantial."[39]

Scholarly commentary also recognizes that these issues are of tremendous national importance, and "substantial" in the sense of warranting determination by this Court. Retired Justice Clark addressed himself to the applicability of *Griswold* in the abortion context more than a year ago.[40] According to Justice Clark's analysis,

> "Griswold's act[41] was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent conception, why can he not nullify that conception when prevention fails?"[42]

---

[38] *See, e.g., Gwynne* v. *Hicks,* Civ. No. 70-1088-CC (C.D. Calif., filed May 18, 1970); *Arnold* v. *Sendak,* IP 70-C-217 (S.D. Ind., filed Mar. 29, 1970); *Corkey* v. *Edwards,* Civ. No. 2665 (W.D.N.C., filed May 12, 1970); *YWCA of Princeton* v. *Kugler,* Civ. No. 264-70 (D.N.J., filed Mar. 5, 1970); *Hall* v. *Lefkowitz,* 305 F. Supp. 1030 (S.D.N.Y. 1969), *dismissed as moot* Op. No. 36936 (S.D.N.Y. July 1, 1970) (per curiam) (statute repealed); *Benson* v. *Johnson,* Civ. No. 70-226 (D. Ore., filed Aug. 4, 1970); *Doe* v. *Dunbar,* Civ. No. C-2402 (D. Colo., filed July 2, 1970); *Henrie* v. *Blankenship,* Civ. No. 70-C-211 (N.D. Okla., filed July 6, 1970); *Planned Parenthood Ass'n of Phoenix* v. *Nelson,* Civ. No. 70-334 PHX (D. Ariz. Aug. 24, 1970) (per curiam); *Ryan* v. *Specter,* Civ. No. 70-2527 (E.D. Pa., filed Sept. 14, 1970); *Doe* v. *Rampton,* Civ. No. 234-70 (D. Utah, filed Sept. 16, 1970).

[39] *Idlewild Bon Voyage Corp.* v. *Epstein,* 370 U.S. 713, 715 (1962) (per curiam).

[40] Tom C. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal,* 2 LOYOLA UNIV. (L.A.) L. REV. 1-11 (1969).

[41] Although it is a minor point, Griswold was the Executive Director of Planned Parenthood in the *Griswold* case. It was the physician, the late Dr. Buxton of the Yale Medical School who had examined the patients and prescribed contraceptive devices.

[42] Clark, *supra* note 40, at 9.

To examine Justice Clark's hypothetical question in the full constitutional context, and to decide the propriety of injunctive relief in this case, the Court should note probable jurisdiction, and set the matter down for full briefing and argument.

B. Having Determined the Merits in Appellants' Favor, the Three-Judge Court Should Have Enjoined Future Enforcement of the Invalid Statutes:

Not only do the substantive issues in this case involve important federal questions, but the remedy following judgment also presents a novel point on which this Court has not clearly ruled.

Although no state proceedings were pending or imminently threatened against Appellants Jane Roe, John Doe, and Mary Doe, or members of their respective classes, the District Court declined to grant any injunctive relief whatever. This denial of necessary relief is contrary to decisions by this Court, and has the probable effect of inviting federal-state friction, rather than lessening such untoward interaction. Moreover, the denial of injunctive relief to Dr. Hallford was equally improper, as he had requested an injunction against the commencement of any future prosecutions. As to charges then pending against Dr. Hallford, an injunction would have been proper in addition, for reasons which shall appear more fully hereinafter.

Relying entirely on *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), the three-judge court recognized a "federal policy of non-interference with state criminal prosecutions [which] must be followed except in cases where 'statutes are justifiably attacked on their face as abridging free ex-

pression,' or where statutes are justifiably attacked 'as applied for the purpose of discouraging protected activities.'" 380 U.S. at 489-90. The quote from *Dombrowski,* however, was not pertinent, for Appellants' principal thrust was not against pending prosecutions, but against any *future* enforcement and effects of the challenged statutes. The pregnant Plaintiff, Jane Roe, for example, could never be prosecuted under Texas law regardless of the number of abortions she underwent, but the statute, unless enjoined, would have the effect of keeping her from obtaining an abortion.

For the most part, Appellants were strangers to any existing or contemplated prosecutions. Their chief controversy was over the drastic impact of the statutes on their lives, not any possibility of imminent enforcement. In *Dombrowski,* the appellants were actively threatened with prosecution, and an injunction would necessarily have abated that threat by operating directly on law officers who stood ready to go forward with existing indictments. Accordingly, "special circumstances" were necessary to justify the conclusion ultimately reached.

If, however, *Dombrowski* had been purely a challenge to quantifiable and recurring effects of a state criminal statute, without the pendency of criminal charges, the case would have been different. This is shown by the ease with which this Court has reversed lower courts that refused declaratory and injunctive relief against loyalty oath statutes backed by criminal sanctions. *See Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967); *Baggett* v. *Bullitt,* 377 U.S. 360, 365-66 (1964). Injunctive relief against the statute in *Dombrowski* would have presented no special problem, if the statute had been a loyalty oath backed by the very same criminal penalties, and no indictments had been waiting in the wings.

Dombrowski falls in the middle ground between (1) injunctive actions which are filed and completed prior to the commencement of any state criminal proceedings, and (2) actions which are filed after "proceedings in a State court," [43] are underway. The *Dombrowski* case itself was filed but not completed before State proceedings began.[44] Hence, while *Dombrowski* acknowledged that "[28 U.S.C. §2283 (1964 ed.)], and its predecessors do not preclude injunctions against the institution of state court proceedings, but only bar stays of suits already instituted," [45] this Court nonetheless required "special circumstances" to justify interference with a criminal proceeding begun shortly after the federal complaint was filed.

The present case lies chronologically in the earliest of the categories, (1), because, as to the bulk of relief sought against future enforcement of the anti-abortion statute, state proceedings have never been contemplated. Appellants were thus in the same position as petitioners contesting a loyalty oath that was backed by criminal sanctions. Their entitlement to an injunction against future enforcement should have followed as a matter of course. Put another way, Appellants were "strangers to [any pending] state court proceedings." *Hale* v. *Bimco Trading Co.*,

---

[43] 28 U.S.C. §2283 (1964 ed.).

[44] While *Dombrowski* did not clarify the thorny definitional problems surrounding the concept of a "proceeding" in a state court, the Court did hold that at least an indictment must be returned. The federal complaint came before the indictments in *Dombrowski*, and was held to relate back where a district court erroneously dismissed the complaint. An almost identical situation in the abortion context is before this Court in *Hodgson* v. *Randall*, No. 728, docketed Sept. 21, 1970, where law enforcement authorities secured the dismissal of a federal action for want of a case or controversy, and proceeded within two days to obtain an indictment against a physician who had been a federal plaintiff.

[45] 380 U.S. at 484 n. 2.

306 U.S. 375, 378 (1939) (Frankfurter, *J.*).[46] The fact of pending prosecutions against other physicians, or against Dr. Hallford based upon alleged past conduct, had no bearing on Appellants' request for prospective injunctive relief.

Accordingly, the three-judge court should have undertaken an inquiry as to the propriety of injunctive relief without reference to *Dombrowski* v. *Pfister,* and without any greater concern for hypothetical federal-state friction than exists in the ordinary case where state judicial machinery has not entered the controversy. Indeed, denial of injunctive relief was an open invitation for Texas authorities to maintain existing enforcement policies. Should this have occurred against Dr. Hallford, or any other physician member of the class he represented, a federal injunction would have been sought from the district court as "necessary in aid of its jurisdiction, or to protect or effectuate its"[47] declaratory judgment invalidating the statute. A confrontation between federal and state judiciary might then have ensued. To avoid such a possibility, the three-judge court should have enjoined future enforcement of the statute on June 17, 1970, when it ruled the statute invalid. In other words, an injunction *ab initio* would have prevented federal-state conflict, and enhanced the very policy the three-judge court thought it was following by denying the injunction.

---

[46] *Hale* teaches that strangers to state proceedings may secure federal injunctive relief against a state statute, even though the effect of the federal decision may be to confuse cases pending at the same time before the highest court of the state. *Hale* affirmed a three-judge court decision enjoining enforcement of a Florida statute although "the injunction in effect stayed proceedings in the Supreme Court of Florida." 306 U.S. at 376.

[47] 28 U.S.C. §2283 (1964 ed.).

A further reason for having granted the injunction was to avoid irreparable injury to individuals in the class of Jane Roe, and to physicians deterred by the ongoing possibility that the State might continue to enforce the statute until the controversy was determined by *this* Court. Without a coercive order on record, Texas law enforcement authorities are free to ignore the declaratory judgment rendered below, because the judgment is subject to possible reversal here. It requires no argument to show that a declaratory judgment by this Court ends the controversy,[48] but such judgments at the district court level carry much less practical import.

---

[48] A decision by this Court on the propriety of injunctive relief, however, is necessary for guidance of lower courts in similar future controversies. Otherwise, the law of the district courts would be final law in all cases where the merits were correctly resolved, but an injunction improperly denied. In addition, as commentators have frequently observed, this Court has not resolved a sufficient variety of cases concerning the parameters of 28 U.S.C. §2283 (1964 ed.), to provide answers to questions such as those presented here. The criteria for commencement of "proceedings in a State court," for example, are uncertain, as is the relevance of a State proceeding brought after a federal complaint. Also, the extent to which the anti-injunction statute affects declaratory judgments is in dispute, as well as the availability of injunctions against future prosecutions where one or more indictments is outstanding, or prosecutions threatened. Similarly, the availability of injunctive relief against prosecutions which threaten to inhibit wide areas of constitutionally protected conduct outside the First Amendment context is uncertain. For a more comprehensive review of the need for further guidelines from this Court in these areas, see Stickgold, *Variations on the Theme of Dombrowski v. Pfister: Federal Intervention in State Criminal Proceedings Affecting First Amendment Rights*, 1968 WIS. L. REV. 369; Brewer, *Dombrowski v. Pfister: Federal Injunctions Against State Prosecutions in Civil Rights Cases—A New Trend in Federal-State Judicial Relations*, 34 FORDHAM L. REV. 71 (1965); Note, *The Federal Anti-Injunction Statute and Declaratory Judgments in Constitutional Litigation*, 83 HARV. L. REV. 1870 (1970); Comment, *Federal Injunctions Against State Actions*, 35 GEO. WASH. L. REV. 744 (1967).

Appellant Dr. Hallford sought not only an injunction against future enforcement of the Texas anti-abortion statutes, but also an injunction to bar the commencement of State proceedings against him based upon two outstanding indictments. This request for injunctive relief presents several substantial questions which merit review by this Court.

Assuming that the district court improperly denied an injunction directed generally against future enforcement of the anti-abortion laws, one question is whether that injunction, if entered, should cover the commencement of prosecution under the aforesaid indictments. Whether a bare indictment, returned from the secrecy of a grand jury, alone constitutes a "proceeding in a State court" is an open question.[49] If there is no "proceeding," as this Court found in *Dombrowski*, the degree of irreparable injury needed to justify an injunction must apparently be considered nonetheless. Here, unlike *Dombrowski*, law enforcement authorities have not to date gone forward with prosecutions; hence the degree of friction between state and federal judicial systems is considerably lessened.

Also here, as in *Griswold* v. *Connecticut*,[50] and unlike *Dombrowski*, the permissible range of leeway for State regulation of marital and personal privacy is small. While

---

[49] Taken together, *Dombrowski*, 380 U.S. at 484 n. 2, and *Hill* v. *Martin*, 296 U.S. 393, 403 (1935), suggest that a "proceeding" begins at some time after indictment. Respectable authorities argue that the indictment or information is an administrative act, done *ex parte* and in secrecy; hence, no "proceeding" exists until trial or arraignment, when both parties are first before a "State court." *See* Brewer, *supra* note 48, at 92; Comment, 35 GEO. WASH. L. REV. at 766-67.

[50] 381 U.S. 479 (1965).

government may regulate many facets of speech coupled with conduct, there is much doubt whether government can so intrude into the domain of privacy. Thus, to allow any prosecution at all of Dr. Hallford is to permit the State to invade the privacy of physician and patient in an area where the district court concluded that the State had little business at all.

If one assumes that 28 U.S.C. §2283 (1964 ed.), is *prima facie* a bar to an injunction on Dr. Hallford's behalf, the further question remains whether, notwithstanding §2283, an injunction would be "necessary in aid of [the three-judge court's] jurisdiction," or "to protect or effectuate" the outstanding declaratory judgment. On this theory, since the court had jurisdiction to grant an injunction on behalf of all parties, it would be incongruous to exclude Dr. Hallford. Indeed, the alleged patients who were aborted, according to the two indictments, might be able to enjoin the compulsion of process against them in order to protect their privacy.

In light of the above, the questions presented in this case, both on the merits, and with respect to relief, are substantial, novel, and hitherto unresolved by this Court. Accordingly, the Court should note probable jurisdiction, and set the case down for plenary review.

II.

A Married Couple, and Others Similarly Situated, Have Standing to Challenge the Texas Anti-Abortion Laws, Because Said Laws Have a Present and Destructive Effect on Their Marital Relations, They Are Unable to Utilize Fully Effective Contraceptive Methods, Pregnancy Would Seriously Harm the Woman's Health, and Such a Couple Could Not Obtain Judicial Relief in Sufficient Time After Pregnancy to Prevent Irreparable Injury.

A further aspect of the judgment below is presented on this appeal. In one part of the lower court's opinion is the holding that "Dr. Hallford has standing to raise the rights of his patients, single women and married couples, as well as rights of his own" (App. at 9a n. 3). Yet, the judgment states that "[p]laintiffs John and Mary Doe failed to allege facts sufficient to create a present controversy and therefore do not have standing" (App. at 5a). Accordingly, both declaratory and injunctive relief were denied as to John and Mary Doe.

John and Mary Doe alleged a present impact of the Texas anti-abortion laws on their marital relations which, when considered in light of their assertion of the interests of a class, created a present controversy over a future right to relief in the event Mary Doe or another class member became pregnant.

This Statement has already pointed out, *supra* at 6-7, that the judicial machinery is not equipped to grant relief

to a party such as Mary Doe after she becomes pregnant. The only meaningful relief must be forthcoming prior to the twelfth week of pregnancy. While twelve weeks is a lengthy period of time, pregnancy is rarely detected before the fourth week, and often not until considerably later, depending upon the degree of medical sophistication of the patient.

Based upon an assumed size of the class represented by Mary Doe, and the known failure rate of the contraceptive she used, it would not be speculative to assume that one or more members of the class would be or become pregnant during the litigation. To assume to the contrary, as the district court did, was not only medically unsound, but served to elevate "ripeness" requirements to an unnecessarily high point, namely a point which deprived the entire class of the relief sought simply because no class member stepped forward as pregnant. Indeed, Jane Roe, the pregnant plaintiff, won a judgment which proved meaningless to her, because it was too late.

Ample precedent, moreover, could have been found to conclude that a present controversy existed between the Does and Appellees. Not only should the lower court have considered "'the hardship of denying judicial relief,'"[51] but the dilemma faced by the class of Mary Does when they become pregnant is "'capable of repetition, yet evading review' . . ." *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969). The situation, admittedly difficult if one ignores its uniqueness, is nonetheless one in which the "mere possibility of [recurrence] . . . serves to keep the case alive." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953). To the

[51] Friendly, *J.*, in *Toilet Goods Ass'n* v. *Gardner*, 360 F.2d 677, 684 (2d Cir. 1966), *aff'd*, 387 U.S. 167, 170 (1967).

extent that the lower court, almost without discussion, rejected the standing of John and Mary Doe for want of an Article III case or controversy, the court erred. To the Does the case was and is a very real one. There was never an absence of adversity. The relief requested had significant meaning for the Does throughout, and the denial of that relief could provide harmful precedent for similar situations. Accordingly, this Court should reverse the determination below, after noting jurisdiction to consider the claim by John and Mary Doe that they too were entitled to declaratory and injunctive relief.

CONCLUSION

For the reasons set out in this Jurisdictional Statement, the Court should note probable jurisdiction, and set the case down for plenary consideration with briefs on the merits and oral argument.

Respectfully submitted,

ROY LUCAS
The James Madison Constitutional Law Institute
Four Patchin Place
New York, N. Y. 10011

NORMAN DORSEN
School of Law
New York University
Washington Square
New York, N. Y. 10003

LINDA N. COFFEE
2130 First National Bank Building
Dallas, Texas 75202

SARAH WEDDINGTON
3710 Lawton
Austin, Texas 78731

ROY L. MERRILL, JR.
DAUGHERTY, BRUNER, LASTELICK & ANDERSON
1130 Mercantile Bank Building
Dallas, Texas 75201

Attorneys for Appellants

APPENDIX

Notice of Appeal to the Supreme Court of the United States From the United States District Court, Filed August 17, 1970

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION
Civil Actions Nos.
3-3690-B and 3-3691-C

JANE ROE,
Plaintiff,

—v.—

HENRY WADE,
Defendant,

—v.—

JAMES HUBERT HALLFORD, M.D.,
Intervenor.

JOHN DOE and MARY DOE,
Plaintiffs,

—v.—

HENRY WADE,
Defendant.

Before GOLDBERG, *Circuit Judge,* HUGHES and TAYLOR, *District Judges.*

Notice is hereby given that Jane Roe, Plaintiff, John Doe, Plaintiff, and Mary Doe, Plaintiff, as well as James Hubert Hallford, M.D., Intervenor, Appellants, hereby appeal to the Supreme Court of the United States from that part of the final judgment entered in the above causes on the 17th day of June, 1970, in favor of Defendant Henry Wade, and Responding Party Defendant, State of Texas, wherein the Court denied all injunctive relief prayed for by said Plaintiffs and Intervenor.

Notice is also given that John Doe and Mary Doe, Plaintiffs, Appellants, hereby appeal to the Supreme Court of the United States from that part of the final judgment entered in the above cause on the 17th day of June, 1970 in favor of Defendant, Henry Wade, and Responding Party Defendant, State of Texas, wherein the Court denied the standing of John Doe and Mary Doe to attack the constitutionality of the Texas Abortion Laws, Articles 1191, 1192, 1193, 1194 and 1196, Texas Penal Code.

This appeal is taken pursuant to Title 28, U.S.C., Section 1253.

I.

The Clerk will please prepare a transcript of the record in these causes, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

A. All pleadings of the parties in these causes including all briefs in support of the Plaintiffs' and Intervenor's pleadings.

B. The court reporter's transcription of the proceedings before the Court.

C. All evidentiary items on file in this cause including depositions, stipulations and request for admissions and replies thereto, if any.

D. All orders of the Court.

II.

The following questions are presented by this appeal:

A. Whether the Plaintiffs John Doe and Mary Doe had standing to challenge the constitutionality of Articles 1191, 1192, 1193, 1194, and 1196, Texas Penal Code?

B. Whether the Plaintiffs and Intervenor were entitled to a permanent injunction restraining Defendant Henry Wade from enforcing Articles 1191, 1192, 1193, 1194, and 1196, Texas Penal Code?

By Linda N. Coffee
Attorney for Plaintiffs John Doe, Mary Doe and Jane Roe
2130 First National Bank Bldg.
Dallas, Texas 75202
748-1211

By Fred Bruner
Attorney for Intervenor James Hubert Hallford, M.D.
1130 Mercantile Bank Bldg.
Dallas, Texas 75201

Judgment of the United States District Court, Granting Declaratory Judgment, and Denying Injunction, Entered June 17, 1970

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION
Civil Action 3-3690-B

JANE ROE,
Plaintiff,
—v.—
HENRY WADE,
Defendant,
—v.—
JAMES HUBERT HALLFORD, M.D.,
Intervenor.

Civil Action 3-3691-C
JOHN DOE and MARY DOE,
Plaintiffs,
—v.—
HENRY WADE,
Defendant.

JUDGMENT

This action came on for hearing on motions for summary judgment before a three-judge court composed of Irving

L. Goldberg, Circuit Judge, Sarah T. Hughes and W. M. Taylor, Jr., District Judges. The defendant in both cases is Henry Wade, District Attorney of Dallas County, Texas. In one action plaintiffs are John and Mary Doe, husband and wife, and in the other Jane Roe and James Hubert [Hallford] M.D., intervenor.

The case having been heard on the merits, the Court, upon consideration of affidavits, briefs and arguments of counsel, finds as follows:

Findings of Fact

(1) Plaintiff Jane Roe, plaintiff-intervenor James Hubert Hallford, M.D. and the members of their respective classes have standing to bring this lawsuit.

(2) Plaintiffs John and Mary Doe failed to allege facts sufficient to create a present controversy and therefore do not have standing.

(3) Articles 1191, 1192, 1193, 1194 and 1196 of the Texas Penal Code, hereinafter referred to as the Texas Abortion Laws, are so written as to deprive single women and married persons of the opportunity to choose whether to have children.

(4) The Texas Abortion Laws are so vaguely worded as to produce grave and manifold uncertainties concerning the circumstances which would produce criminal liability.

Conclusions of Law

(1) This case is a proper one for a three-judge court.

(2) Abstention, concerning plaintiffs' request for a declaratory judgment, is unwarranted.

(3) The fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment.

(4) The Texas Abortion Laws infringe upon this right.

(5) The defendant has not demonstrated that the infringement of plaintiffs' Ninth Amendment rights by the Texas Abortion Laws is necessary to support a compelling state interest.

(6) The Texas Abortion Laws are consequently void on their face because they are unconstitutionally overbroad.

(7) The Texas Abortion Laws are void on their face because they are vague in violation of the Due Process Clause of the Fourteenth Amendment.

(8) Abstention, concerning plaintiffs' request for an injunction against the enforcement of the Texas Abortion Laws is warranted.

It is therefore ORDERED, ADJUDGED and DECREED that: (1) the complaint of John and Mary Doe be dismissed; (2) the Texas Abortion Laws are declared void on their face for unconstitutional overbreadth and for vagueness; (3) plaintiffs' application for injunction be dismissed.

Dated this the 17 day of June, 1970.

/s/ IRVING L. GOLDBERG
United States Circuit Judge

/s/ SARAH T. HUGHES
United States District Judge

/s/ WILLIAM M. TAYLOR, JR.
United States District Judge

Decision of United States District Court,
Filed June 17, 1970

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION
Civil Action 3-3690-B

JANE ROE,
Plaintiff,

—v.—

HENRY WADE,
Defendant,

—v.—

JAMES HUBERT HALLFORD, M.D.,
Intervenor.

Civil Action 3-3691-C

JOHN DOE and MARY DOE,
Plaintiffs,

—v.—

HENRY WADE,
Defendant.

Before GOLDBERG, *Circuit Judge,* and HUGHES and TAYLOR, *District Judges.*

PER CURIAM:

Two similar cases are presently before the Court on motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The defendant in both cases is Henry Wade, District Attorney of Dallas County, Texas. In one action plaintiffs are John and Mary Doe, and in the other Jane Roe and James Hubert Hallford, M.D., intervenor.[1]

From their respective positions of married couple, single woman, and practicing physician, plaintiffs attack Articles 1191, 1192, 1193, 1194, and 1196 of the Texas Penal Code,[2]

---

[1] On March 3, 1970, plaintiff Jane Roe filed her original complaint in CA-3-3690-B under the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution. She alleged jurisdiction to be conferred upon the Court by Title 28, United States Code, Sections 131 [*sic*], 1343, 2201, 2202, 2281, and 2284 and by Title 42, United States Code Section 1983. On April 22, plaintiff Roe amended her complaint to sue "on behalf of herself and all others similarly situated."

On March 23, James Hubert Hallford, M.D., was given leave to intervene. Hallford's complaint recited the same constitutional and jurisdictional grounds as the complaint of plaintiff Roe. According to his petition for intervention, Hallford seeks to represent "himself and the class of people who are physicians, licensed to practice medicine under the laws of the State of Texas and who fear future prosecution."

On March 3, 1970, plaintiffs John and Mary Doe filed their original complaint in CA-3-3691-C. The complaint of plaintiffs Doe recited the same constitutional and jurisdictional grounds as had the complaint of plaintiff Roe in CA-3-3690[B] and, like Roe, plaintiffs Doe subsequently amended their complaint so as to assert a class action.

Plaintiffs Roe and Doe have adopted pseudonyms for purposes of anonymity.

[2] *Article 1191 Abortion*

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor

hereinafter referred to as the Texas Abortion Laws. Plaintiffs allege that the Texas Abortion Laws deprive married couples and single women of the right to choose whether to have children, a right secured by the Ninth Amendment.

Defendant challenges the standing of each of the plaintiffs to bring this action. However, it appears to the Court that Plaintiff Roe and plaintiff-intervenor Hallford occupy positions *vis-a-vis* the Texas Abortion Laws sufficient to differentiate them from the general public. *Compare Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), and *Griswold* v. *Connecticut*, 381 U.S. 479 (1965),[3] *with Frothingham* v. *Mellon*, 262 U.S. 447 (1923). Plaintiff Roe filed her portion of the suit as a pregnant woman wishing to exercise the as-

---

more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

Article 1192 Furnishing the Means

Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

Article 1193 Attempt at Abortion

If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

Article 1194 Murder in Producing Abortion

If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

Article 1196 By Medical Advice

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

[3] By the authority of *Griswold*, Dr. Hallford has standing to raise the rights of his patients, single women and married couples, as well as rights of his own.

serted constitutional right to choose whether to bear the child she was carrying. Intervenor Hallford alleged in his portion of the suit that, in the course of daily exercise of his duty as a physician and in order to give his patients access to what he asserts to be their constitutional right to choose whether to have children, he must act so as to render criminal liability for himself under the Texas Abortion Laws a likelihood. Dr. Hallford further alleges that Article 1196 of the Texas Abortion Laws is so vague as to deprive him of warning of what produces criminal liability in that portion of his medical practice and consultations involving abortions.

On the basis of plaintiffs' substantive contentions,[4] it appears that there then exists a "nexus between the status asserted by the litigant[s] and the claim[s] [they present]." *Flast* v. *Cohen*, 392 U.S. 83, 102 (1968).

Further, we are satisfied that there presently exists a degree of contentiousness between Roe and Hallford and the defendant to establish a "case of actual controversy" as required by Title 28, United States Code, Section 2201. *Golden* v. *Zwickler*, 394 U.S. 103 (1969).

Each plaintiff seeks as relief, *first*, a judgment declaring the Texas Abortion Laws unconstitutional on their face and, *second*, an injunction against their enforcement. The nature of the relief requested suggests the order in which the issues presented should be passed upon.[5] Accordingly, we see the issues presented as follows:

---

[4] "[I]n ruling on standing, it is both appropriate and necessary to look to the substantive issues * * * to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast* v. *Cohen*, 392 U.S. 83, 102 (1968).

[5] *Zwickler* v. *Koota*, 389 U.S. 241, 254 (1967); *Cameron* v. *Johnson*, 390 U.S. 611, 615 (1968).

I. Are plaintiffs entitled to a declaratory judgment that the Texas Abortion Laws are unconstitutional on their face?

II. Are plaintiffs entitled to an injunction against the enforcement of these laws?

I.

Defendants have suggested that this Court should abstain from rendering a decision on plaintiffs' request for a declaratory judgment. However, we are guided to an opposite conclusion by the authority of *Zwickler* v. *Koota*, 389 U.S. 241, 248-249 (1967):

> "The judge-made doctrine of abstention • • • sanctions • • • escape only in narrowly limited 'special circumstances.' • • • One of the 'special circumstances' • • • is the susceptibility of a state statute of [*sic*] a construction by the state courts that would avoid or modify the constitutional question."

The Court in *Zwickler* v. *Koota* subsequently quoted from *United States* v. *Livingston*, 179 F. Supp. 9, 12-13 (E.D. S.C. 1959):

> "Regard for the interest and sovereignty of the state and reluctance needlessly to adjudicate constitutional issues may require a federal District Court to abstain from adjudication if the parties may avail themselves of an appropriate procedure to obtain state interpretation of state laws requiring construction. • • • The decision in [Harrison v. N.A.A.C.P., 369 U.S. 167], however, is not a broad encyclical commanding automatic remission to the state courts of all federal constitutional questions arising in the application of

> state statutes. • • • Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it. Any other course would impose expense and long delay upon the litigants without hope of its bearing fruit."[6]

Inasmuch as there is no possibility that state question adjudication in the courts of Texas would eliminate the necessity for this Court to pass upon plaintiffs' Ninth Amendment claim or Dr. Hallford's attack on Article 1196 for vagueness, abstention as to their request for declaratory judgment is unwarranted. *Compare Chicago* v. *Atchison T. & S.F.R. Co.*, 357 U.S. 77, 84 (1958), *with Reetz* v. *Bozanich*, 38 U.S.L.W. 4170, —— U.S. —— (1970).

On the merits, plaintiffs argue as their principal contention[7] that the Texas Abortion Laws must be declared unconstitutional because they deprive single women and married couples of their right, secured by the Ninth Amendment,[8] to choose whether to have children. We agree.

The essence of the interest sought to be protected here is the right of choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of individuals. The manner by which such interests

---

[6] 389 U.S. at 250-251. (Citations omitted.)

[7] Aside from their Ninth Amendment and vagueness arguments, plaintiffs have presented an array of constitutional arguments. However, as plaintiffs conceded in oral argument, these additional arguments are peripheral to the main issues. Consequently, they will not be passed upon.

[8] "The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people."

are secured by the Ninth Amendment is illustrated by the concurring opinion of Mr. Justice Goldberg in *Griswold* v. *Connecticut*, 381 U.S. 479, 492 (1965):

> "[T]he Ninth Amendment shows a belief of the Constitution's authors that *fundamental* rights exist that are not expressly enumerated in the first eight amendments and intent that the list of rights included there not be deemed exhaustive." • • •
>
> "The Ninth Amendment simply shows the intent of the Constitution's authors that other *fundamental* personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments." (Emphasis added.)[9]

Relative sanctuaries for such "fundamental" interests have been established for the family,[10] the marital couple,[11] and the individual.[12]

---

[9] At 492 the opinion states: "In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental.' *Snyder* v. *Massachusetts*, 291 U.S. 97, 105. The inquiry is whether a right involved 'is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . ."' *Powell* v. *Alabama*, 287 U.S. 45, 67."

[10] *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); and *Prince* v. *Massachusetts*, 321 U.S. 158 (1944).

[11] *Loving* v. *Commonwealth*, 388 U.S. 1 (1967); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); and *Buchanan* v. *Batchelor*, —— F. Supp. —— (N.D. Tex. 1970).

[12] *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); and *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

Freedom to choose in the matter of abortions has been accorded the status of a "fundamental" right in every case coming to the attention of this Court where the question has been raised. *Babbitz* v. *McCann,* —— F. Supp. —— (E.D. Wis. 1970); *People* v. *Belous,* 80 Cal. Rptr. 354, 458 P.2d 194 (Cal. 1969); *State* v. *Munson,* —— (South Dakota Circuit Court, Pennington County, April 6, 1970). *Accord, United States* v. *Vuitch,* 305 F. Supp. 1032 (D. D.C. 1969). The California Supreme Court in *Belous* stated:

> "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this Court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." 458 P.2d at 199.

The District Court in *Vuitch* wrote:

> "There has been * * * an increasing indication in the decisions of the Supreme Court of the United States that as a secular matter a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy." 305 F. Supp. at 1035.

Writing in [on] *Griswold* v. *Connecticut, supra,* and the decisions leading up to it, former Associate Justice Tom C. Clark observed:

> "The result of these decisions is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that

outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution." [13]

Since the Texas Abortion Laws infringe upon plaintiffs' fundamental right to choose whether to have children, the burden is on the defendant to demonstrate to the satisfaction of the Court that such infringement is necessary to support a compelling state interest.[14] The defendant has failed to meet this burden.

To be sure, the defendant has presented the Court with several compelling justifications for state presence in the area of abortions. These include the legitimate interests of the state in seeing to it that abortions are performed by competent persons and in adequate surroundings. Con-

---

[13] Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola Univ. L. Rev. 1, 8 (1969). Mr. Justice Clark goes on to write, ". . . abortion falls within that sensitive area of privacy—the marital relation. One of the basic values of this privacy is birth control, as evidenced by the *Griswold* decision. Griswold's act was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent contraception [*sic*], why can he not nullify that conception when prevention has failed?" *Id.* at 9.

[14] "In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling,' *Bates* v. *Little Rock*, 361 U.S. 516, 524." *Griswold* v. *Connecticut*, 381 U.S. 479, 497 (1965) (Concurring opinion of Mr. Justice Goldberg). *See also Kramer* v. *Union Free School District*, 395 U.S. 621 (1969).

cern over abortion of the "quickened" fetus may well rank as another such interest. The difficulty with the Texas Abortion Laws is that, even if they promote these interests,[15] they far outstrip these justifications in their impact by prohibiting *all* abortions except those performed "for the purpose of saving the life of the mother."[16]

It is axiomatic that the fact that a statutory scheme serves permissible or even compelling state interests will not save it from the consequences of unconstitutional overbreadth. *E.g., Thornhill* v. *Alabama,* 319 U.S. 88 (1940); *Buchanan* v. *Batchelor,* —— F. Supp. —— (N.D. Tex. 1970). While the Ninth Amendment right to choose to have an abortion is not unqualified or unfettered, a statute designed to regulate the circumstances of abortions must restrict its scope to compelling state interests. There is unconstitutional overbreadth in the Texas Abortion Laws because the Texas Legislature did not limit the scope of the statutes to such interests. On the contrary, the Texas statutes, in their monolithic interdiction, sweep far beyond any areas of compelling state interest.

Not only are the Texas Abortion Laws unconstitutionally overbroad, they are also unconstitutionally vague. The Supreme Court has declared that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the

---

[15] It is not clear whether the Texas laws presently serve the interests asserted by the defendant. For instance, the Court gathers from a reading of the challenged statutes that they presently would permit an abortion "for the purpose of saving the life of the mother" to be performed *anywhere* and quite possibly by *one other than a physician.*

[16] Article 1196.

first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). "No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1929). *See also Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402-403 (1966). Under this standard the Texas statutes fail the vagueness test.

The Texas Abortion Laws fail to provide Dr. Hallford and physicians of his class with proper notice of what acts in their daily practice and consultation will subject them to criminal liability. Article 1196 provides:

> "Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

It is apparent that there are grave and manifold uncertainties in the application of Article 1196. How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How *imminent* must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years? These questions simply cannot be answered.

The grave uncertainties in the application of Article 1196 and the consequent uncertainty concerning criminal liability under the related abortion statutes are more than sufficient to render the Texas Abortion Laws unconstitu-

tionally vague in violation of the Due Process Clause of the Fourteenth Amendment.

II.

We come finally to a consideration of the appropriateness of plaintiffs' request for injunctive relief. Plaintiffs have suggested in oral argument that, should the Court declare the Texas Abortion Laws unconstitutional, that decision would of itself warrant the issuance of an injunction against state enforcement of the statutes. However, the Court is of the opinion that it must abstain from granting the injunction.

Clearly, the question whether to abstain concerning an injunction against the enforcement of state criminal laws is divorced from concerns of abstention in rendering a declaratory judgment. Quoting from *Zwickler* v. *Koota*,

> "[A] request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against enforcement of that statute. We hold that a federal district court has the duty to decide the appropriateness and merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction." 389 U.S. at 254.

The strong reluctance of federal courts to interfere with the process of state criminal procedure was reflected in *Dombrowski* v. *Pfister*, 380 U.S. 479, 484-485 (1965):

> "[T]he Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal frame-

> work. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."

This federal policy of non-interference with state criminal prosecutions must be followed except in cases where "statutes are justifiably attacked on their face as abridging free expression," or where statutes are justifiably attacked "as applied for the purpose of discouraging protected activities." *Dombrowski* v. *Pfister*, 380 U.S. at 489-490.

Neither of the above prerequisites can be found here. While plaintiffs' first substantive argument rests on notions of privacy which are to a degree common to the First and Ninth Amendments, we do not believe that plaintiffs can seriously argue that the Texas Abortion Laws are vulnerable "on their face as abridging free expression." [17] Further, deliberate application of the statutes "for the purpose of discouraging protected activities" has not been alleged. We therefore conclude that we must abstain from issuing an injunction against enforcement of the Texas Abortion Laws.

---

[17] "[T]he door is not open to all who would test the validity of state statutes or conduct a federally supervised pre-trial of a state prosecution by the simple expedient of alleging that the prosecution somehow affects First Amendment rights." *Porter* v. *Kimzey*, 309 F. Supp. 993, 995 (N.D. Ga. 1970).

Conclusion

In the absence of any contested issues of fact, we hold that the motions for summary judgment of the plaintiff Roe and plaintiff-intervenor Hallford should be granted as to their request for declaratory judgment. In granting declaratory relief, we find the Texas Abortion Laws unconstitutional for vagueness and overbreadth, though for the reasons herein stated we decline to issue an injunction. We need not here delineate the factors which could qualify the right of a mother to have an abortion. It is sufficient to state that legislation concerning abortion must address itself to more than a bare negation of that right.

Notice of Protective Appeal to the United States Court of Appeals for the Fifth Circuit, Filed July 24, 1970, by Appellant Jane Roe

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION
Civil Action No. 3-3690-B

JANE ROE,
Plaintiff,

—v.—

HENRY WADE,
Defendant,

—v.—

JAMES HUBERT HALLFORD, M.D.,
Intervenor.

Civil Action No. 3-3691-C

JOHN DOE and MARY DOE,
Plaintiffs,

—v.—

HENRY WADE,
Defendant.

Notice is hereby given that JANE ROE, Plaintiff above named, appeals to the United States Court of Appeals for the Fifth Circuit from that portion of the final judgment entered in this action on the 17th day of June, 1970, denying the injunctive relief prayed for in Plaintiff's Complaint.

July 24, 1970.

By: LINDA N. COFFEE
2130 First National Bank Bldg.
Dallas, Texas 75202
RI 8-1211

Attorney for Plaintiff Jane Roe

Notice of Protective Appeal to the United States Court of Appeals for the Fifth Circuit, Filed July 23, 1970, by Appellant James H. Hallford, M.D.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION
Civil Action No. 3-3690-B

JANE ROE, *Plaintiff,*

—v.—

HENRY WADE, *Defendant,*

—v.—

JAMES HUBERT HALLFORD, M.D., *Intervenor.*

Civil Action No. 3-3691-C

JOHN DOE and MARY DOE, *Plaintiffs,*

—v.—

HENRY WADE, *Defendant.*

Notice is hereby given that JAMES HUBERT HALLFORD, M.D., Intervenor and Plaintiff above named, appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 17th day of June, 1970.

July 23, 1970

By FRED BRUNER
DAUGHERTY, BRUNER, LASTELICK
and ANDERSON
1130 Mercantile Bank Building
Dallas, Texas 75201
742-3941

Attorneys for
Intervenor and Plaintiff,
James Hubert Hallford, M.D.

70 - 40

FILED
NOV 14 1970
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. [redacted]

MARY DOE, *et al*, etc.,

Appellants,

— *v.* —

ARTHUR K. BOLTON, Attorney General of the State of Georgia, *et al*, etc.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

MARGIE PITTS HAMES
210 Brighton Road, N. E.
Atlanta, Georgia 30309

REBER F. BOULT, JR.
CHARLES MORGAN, JR.
5 Forsyth Street, N. W.
Atlanta, Georgia 30303

Attorneys for Appellants

Of Counsel:

ELIZABETH ROEDIGER RINDSKOPF
GALE M. SIEGEL
551 Forrest Road, N. E.
Atlanta, Georgia 30312

TOBIANE SCHWARTZ
153 Pryor Street, S. W.
Atlanta, Georgia 30303

November 17 ,1970

IN THE

SUPREME COURT OF THE UNITED STATES

MARY DOE; PETER G. BOURNE; ROBERT HATCHER; LILLAS L. JAMES; JAMES WATERS; CORBETT TURNER; NEWTON LONG; EDWARD LEADER; WILLIAM H. BIGGERS; GEORGE VIOLIN; PATRICIA S. SMITH; JENNIE WILLIAMS; JUDITH BOURNE; SUZANNE DUNAWAY; JOYCE PARKS; LOU ANN IRION; MARY LONG; J. EMMETT HERNDON; SAMUEL L. WILLIAMS; EUGENE PICKETT; RICHARD DEVOR; DONALD DAUGHTRY; JUDITH ZORACH and KAREN WEAVER, residents of the State of Georgia; PLANNED PARENTHOOD ASSOCIATION OF ATLANTA, INC., a Georgia corporation; and GEORGIA CITIZENS FOR HOSPITAL ABORTION, INC., a Georgia corporation, for and on the behalf of all persons and organizations similarly situated,

Appellants,

vs.

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; LEWIS R. SLATON as District Attorney of Fulton County, Georgia; and HERBERT T. JENKINS, as Chief of Police of the City of Atlanta, Georgia,

Appellees,

CIVIL ACTION

No. 13676

JURISDICTIONAL STATEMENT

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	3
Statement of the Case	4
The Questions Are Substantial	6
I. The Three-Judge Court Should Have Enjoined Future Enforcement of Those Provisions of the Georgia Abortion Statute Which It Declared Unconstitutional Because an Injunction Was Necessary to Effectuate the Declaratory Judgment and to Prevent Irreparable Injury to Important Federal Rights to the Class of Pregnant Women Who Are or Will Be Seeking Abortions and the Class of Physicians Who Are Forced to Reject Such Women as Patients or Fear Prosecution If They Provide the Medical Services They Deem Needed	8
II. The Three-Judge Court Should Have Declared the Procedural Provisions of the Georgia Abortion Statute and Its Further Requirement That Abortions May Be Performed Only at Accredited Hospitals Unconstitutional Facially or in Operation as Violative of Constitutional Guarantees of Due Process and Equal Protection	15
III. Appellant-Physicians, Nurses, Social Workers, Ministers, and Family Planning and Abortion Counseling Organizations Have Sufficient "Standing" and "Collision of Interest" to Challenge the Georgia Abortion Statute	22
Conclusion	25

APPENDIX:

	Page
Opinion of the United States District Court, Northern District of Georgia	1a
Judgment of the United States District Court, Northern District of Georgia	1b
Amended Judgment of the United States District Court, Northern District of Georgia	1c
Notice of Appeal to the Supreme Court of the United States	1d
Amended Notice of Appeal to the Supreme Court of the United States	1e
Text of the Georgia Abortion Statute, Ga. Code § 26-1201-03	1f
Map of Georgia	1g

TABLE OF AUTHORITIES

	Page
Babbitz v. McCann, 310 F. Supp. 293 (E. D. Wis. 1970), *appeal dismissed* 39 U.S.L.W. 3144 (Oct. 12, 1970)	3, 11
Baker v. Carr, 369 U.S. 186 (1962)	23
City of Greenwood v. Peacock, 384 U.S. 808 (1968)	12, 13
Doe v. General Hospital of the District of Columbia, No. 24,011 (D.C. Cir. 1970)	19
Doe v. Randall, 314 F. Supp. 32 (D.Minn. 1970), *appeal docketed, Hodgson v. Randall*, 39 U.S.L.W. 3115 No. 728 (U.S. Sept. 9, 1970)	12
Dombrowski v. Pfister, 380 U.S. 479 (1965)	13, 14, 24
Evans v. Cornman, 398 U.S. 419 420 (1970)	2
Epperson v. Arkansas, 393 U.S. 97 (1968)	24
Flast v. Cohen, 392 U.S. 83 (1966)	23
Gardner v. California, 393 U.S. 367 (1969)	20
Goldberg v. Kelley, 397 U.S. 254 (1970)	2
Griswold v. Connecticut, 381 U.S. 479 (1965)	8, 11, 21
Griffin v. Illinois, 351 U.S. 12 (1956)	20
Gunn v. University Committee to End the War, 399 U.S. 383 (1970)	3
Harman v. Forennius, 380 U.S. 528 (1960)	17
Hodgson v. Minnesota, Minn. , (1970) *appeal docketed*, 39 U.S.L.W. 3115 No. 729 (U.S. Sept. 22, 1970)	12
Loving v. Virginia, 388 U.S. 1 (1967)	11

Mitchell v. Donovan, 398 U.S. 427 (1970) 3

Moore v. Fidelity & Deposit Co., 272 U.S. 317 (1926). 2

Persons v. State, 93 Ga. App. 314 SE 2d (1956) 23

Poe v. Ullman, 367 U.S. 497 (1961) 23

Roe v. Wade, 314 F. Supp. 1127 (N. D. Tex. 1970), *Appeal docketed*, 39 U.S.L.W. 3151 No. 808 (U.S. Oct. 6, 1970) 11, 12

Shapiro v. Thompson, 394 U.S. 618 (1969) 17

Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) 18

Simkins v. Moses H. Cone Memorial Hospital 323 F. 2d (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964) 22

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) 11

Smith v. California, 361 U.S. 147 (1959) 16

State v. Belous, 71 Cal. 2d 996, 458 P. 2d 194, 80 Cal. Rptr., 354 (1969), *cert. denied*, 397 U.S. 915 (1970) 11

Sterling v. Constantin, 287 U.S. 378 (1932) 3

United Public Workers of America v. Mitchell, 330 U.S. 75 (1947) 23

United States v. Jefferson County Bd. of Educ., 372 F. 2d 836 (1966), *aff'd en banc*, 380 F. 2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967) 21

United States v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969), *ques. of juris. postponed to merits*, 397 U.S. 1061, *further juris. questions propounded*, 399 U.S. 923 (1970) 11, 19

BLEED THROUGH

White v. State, 114 Ga. App. 437, SE 2d (1966) 23
Whitus v. Georgia, 385 U.S. 545 (1967) 21
Zwickler v. Koota, 389 U.S. 241 (1967) 13

United States Constitution
First Amendment 1, 13
Ninth Amendment 1
Fourteenth Amendment 1

Statutes:
28 U.S.C. § 1253 ..... 2, 3
28 U.S.C. § 1343 1
28 U.S.C. § 2201 1
28 U.S.C. § 2202 1
28 U.S.C. § 2281 ..... 1, 12, 13
28 U.S.C. § 2283 13
28 U.S.C. § 2284 ..... 1, 12
42 U.S.C. § 1983 ..... 1, 12
Ga. Code § 26-801 13
Ga. Code § 26-1201 ..... 2, 3
Ga. Code § 26-1202 ..... 2, 3, 22
Ga. Code § 26-1203 ..... 2, 3
Ga. Code § 26-3201 13
Ga. Code § 84-916 ..... 6, 13
MODEL PENAL CODE § 230, 3 (Proposed Official Draft; 1962) 7, 10, 11, 12
UNIFORM ABORTION ACT (Second Tentative Draft) 10

Miscellaneous:

Fisher, *Criminal Abortion,* ABORTION IN AMERICA 3-6 (1967) 9

213 J.A.M.A. 359 (July 20, 1970) 10

JOINT COMMISSION ON HOSPITAL ACCREDITATION, ACCREDITED HOSPITALS, Jan. 1, 1970 18

Leavy and Charles, *California's New Therapeutic Abortion Act,* 15 U.C.L.A. L. REV. 1, 5 (1967) 18

M. Calderone, ABORTION IN THE UNITED STATES 180 (1958) 9

Rochat, Tyler & Schoenbucher; *An Epidemiological Analysis of Abortion in Georgia,* U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, PUBLIC HEALTH SERVICE REPORT, (98th Annual Meeting, American Public Health Assoc., Houston, Texas, Oct. 26-30, 1970) 9, 21

STANDARDS FOR HOSPITAL ACCREDITATION, introduction (Dec. 1965) 18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. .....

MARY DOE, *et al*, etc.,

Appellants,

— *v.* —

ARTHUR K. BOLTON, Attorney General
of the State of Georgia, *et al*, etc.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinions of the United States District Court for the Northern District of Georgia are not yet reported. The opinion of the Court dated July 31, 1970, is set out in the Appendix, pp. 1a-15a. The judgment of the Court dated August 24, 1970, is set out in the Appendix, pp. 1b-3b. The amended judgment dated October 13, 1970, is set out in the Appendix, pp. 1c-4c.

JURISDICTION

This action was brought under the first, ninth, and fourteenth amendments of the Constitution of the United States and 42 U.S.C. § 1983. Jurisdiction was conferred by 28 U.S.C. §§ 1343, 2201, 2202, 2281 and 2284.

Appellants brought this class action on April 16, 1970, seeking a declaratory judgment that the Georgia abortion statute, *Ga. Code* §§ 26-1201-03 *et seq.*, was unconstitutional and seeking injunctive relief against its enforcement. A Motion for Temporary Restraining Order was denied on May 4, 1970. A statutory three-judge district court was convened and heard oral argument on June 15, 1970. By opinion dated July 31, 1970, judgment dated August 24, 1970, and amended opinion dated October 13, 1970, portions of *Ga. Code* § 1202 were declared unconstitutional. The court, however, refused to enjoin future enforcement of said Code sections. In its original opinion, judgment, and amended opinion the court denied declaratory and injunctive relief as to the remainder of said statute, holding it to be a valid exercise of state authority, additionally, the district court granted a motion to dismiss all plaintiffs except Mary Doe, thereby denying any declaratory and injunctive relief to doctors, nurses, social workers, ministers, and counsellors. This appeal is from the denial of injunctive relief and denial of relief from the remainder of the statute and to the dismissed plaintiffs. Notice of Appeal was filed in the United States District Court for the Northern District of Georgia on September 18, 1970), (Appendix, pp. 1d-2d). An Amended Notice of Appeal was filed November 3, 1970, (Appendix, pp. 1e-2e).

The jurisdiction of the Supreme Court to review the district court's denial of an injunction by direct appeal is conferred by 28 U.S.C. § 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Evans v. Cornman*, 398 U.S. 419, 420 (1970); *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970); *Moore v. Fidelity & Deposit*

Co. 272 U.S. 317, 321 (1926) and *Sterling v. Constantin*, 287 U.S. 378 (1932).[1]

STATUTE INVOLVED

The statute in question is *Ga. Code* §§ 26-1201-03 hereafter referred to as the Georgia abortion statute. Due to the length of the statute, it is set out in the Appendix, pp. 1f-4f. Those sections of the statute declared unconstitutional by the district court are italicized.

QUESTIONS PRESENTED

1. Whether the three-judge court should have enjoined future enforcement of those provisions of the Georgia abortion statute which it declared unconstitutional in order to effectuate its declaratory judgment and to prevent irreparable injury to the rights of the class of pregnant women who seek safe abortions and the class of

---

[1]The recent line of cases defining the Court's jurisdiction under 28 U.S.C. § 1253 does not affect this case. *Mitchell v. Donovan*, 398 U.S. 427 (1970), involved an action in which plaintiffs originally asked for injunctive relief to get names on a 1968 ballot. On final determination after the election, the court held that because plaintiffs requested injunctive relief only as to the 1968 election there was no case or controversy and declined to issue a declaratory judgment. On appeal this Court ruled that the order appealed from was no more than a denial of a declaratory judgment. *Gunn v. University Committee to End the War*, 399 U.S. 383 (1970) also involved only a declaratory judgment. There the district court indicated plaintiffs were entitled to an injunction but postponed action pending the next session of the legislature. Thus, there was no order or judgment granting or denying an injunction. The present case is also distinguishable from *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970), *appeal dismissed*, 39 U.S. L.W. 3144 (October 12, 1970). There the three-judge district court issued a declaratory judgment but declined to issue an injunction. The defendant, against whom no injunction was issued, was the appellant. Had the plaintiff below, whose request for injunctive relief was denied, appealed that decision, the Supreme Court would have had jurisdiction. Here plaintiffs' request for temporary restraining order and prayer for injunctive relief were expressly denied (Opinion dated July 31, 1970, p. 14-a, and Judgment dated August 24, 1970, p. 3-b). This is an "appeal . . . from an order . . . denying . . . an interlocutory or permanent injunction . . . ." 28 U.S.C. § 1253.

physicians who are forced to refuse such women this medical service because of a reasonable fear of prosecution.

2. Whether the remaining sections of the Georgia abortion statute, as to which the three-judge court denied declaratory and injunctive relief, and which by allowing abortions only when a doctor finds it "necessary" and only after cumbersome procedures without due process standards (1) infringe upon the right of appellant-physicians and members of their class to practice their profession without unreasonable state interference; (2) fail to provide sufficient warning as to the conduct proscribed; and (3) infringe upon the right of appellant Mary Doe and members of her class to decide when to bear children in violation of constitutional guarantees of due process and equal protection.

3. Whether appellant-physicians, nurses, social workers, ministers, and family planning and abortion counselling organizations have sufficient "collision of interest" to challenge the Georgia abortion statute.

STATEMENT OF THE CASE

Mary Doe[2] is a 22 year old woman who was approximately eleven weeks pregnant at the time the complaint was filed in this case. Mrs. Doe and her husband were unemployed, their marriage had been unstable, and during the pendency of this suit, her husband abandoned her. Mrs. Doe sought to terminate her pregnancy because she was emotionally and economically unable to care for and support another child. She is the mother of three other children; her third child was placed with adoptive par-

[2] The facts set forth herein are taken from the complaint, unless otherwise specified, which was taken as true. The court allowed this action to be prosecuted in this fictitious name so as to avoid embarrassment to the plaintiff. Even though the time passed in which Mrs. Doe could have been safely aborted, the court proceeded to resolve the issues on behalf of the class and did not require the substitution of another pregnant plaintiff.

ents at birth and the other two children were removed from her custody by state authorities because of her inability to care for them.

Mrs. Doe applied for an abortion at Grady Memorial Hospital in Atlanta.[3] After a period of three weeks, she was notified that her application had been denied by the hospital's abortion committee because she did not come within one of the three reasons specified in the Georgia abortion statute. This class action was filed in the United States District Court on April 16, 1970, seeking injunctive and declaratory relief based on the unconstitutionality of the statute. Mrs. Doe's application for temporary relief was denied by order dated May 4, 1970.[4]

Appellant-physicians who are obstetricians, gynecologists, psychiatrists, medical school professors and general practitioners of medicine, brought this action on their behalf and on behalf of members of their profession, seeking to declare the statute an unconstitutional infringement on the practice of their profession and the physician-patient relationship, and further asserted the statute unconstitutionally vague in violation of due process requirements. Appellant-physicians are regularly called upon by their patients to perform or arrange for medically induced abortions. Appellants desired to perform or arrange this medical service for their patients, but felt constrained from doing so because of the lack of clarity of the Georgia abortion statute, its criminal sanctions against abortions not authorized by its terms, and the re-

[3] This is the public hospital which furnishes free medical care to indigent residents of Atlanta.

[4] A subsequent application for an abortion through private physicians to a private hospital was approved, but Mrs. Doe did not have funds with which to pay her hospital bill in advance so she was unable to obtain an abortion at the private hospital. (Answers to interrogatories filed June 15, 1970.) Also, she was financially unable to travel to some other state which has less restrictive interpretation of abortion limitations. Her remaining alternatives were to continue her pregnancy or risk her life and health at the hands of a non-medical criminal abortionist.

lated threat of revocation or suspension of their license to practice medicine.[5]

Defendants below raised the issue of "standing" and "justiciability" of the controversy as to the physicians, nurses, ministers, social workers, and organizations. The court found that all plaintiffs had standing, but that only Mary Doe had sufficient "collision of interest" to present a justiciable controversy.

As to the merits of Mary Doe's class action, the three-judge court held that "the concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy." (Appendix, p. 11a). The court ruled that (reasons for an abortion may not be proscribed, but that the quality of the decision as well as the manner of its execution are properly within the realm of state control . . ." (Appendix, p. 13a). Thus, the portion of the statute which allowed only three reasons for abortion (impairment of health of the woman, rape, or fetus malformation) was declared unconstitutional but the remainder of the statute was declared to be a "proper exercise of state power." The remainder of the statute is basically the procedural steps for obtaining an abortion and provisions as to who can perform abortions and where abortions may be performed.

Appellants assert here that the statute as revised by the court below remains as a barrier to the constitutional rights asserted and will obstruct and interfere with such rights unless declaratory and injunctive relief is granted to all plaintiffs.

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents important federal questions which have not been resolved by this Court. The three-judge court's refusal to grant injunctive relief against enforce-

[5] *Ga. Code* § 84-916.

BLEED THROUGH

ment of portions of a statute declared facially unconstitutional raises important issues for enforcement and vindication of constitutional rights. This Court has not in recent years considered the propriety of injunctive relief against future enforcement of criminal statutes except in the area of first amendment rights. Appellants claimed an infringement on such rights, and a decision of this Court is needed to clarify the availability of injunctive relief based on first amendment and other constitutional rights.

Defense of criminal prosecutions in the state courts by physicians is a wholly inadequate means of determining the rights of physicians to perform abortions and the rights of women to decide when to have children. Due to inherent time limitations of pregnancy, there is no time to have the correctness of a physician's decision reviewed prior to performing the act which results in criminal liability, and such would be an unworkable procedure in any event. Thus, appellant-physicians and members of Mary Doe's class need to have the questions presented in this case resolved.

The substantive issues here are of national import and affect the lives and health of thousands of people each year. This case involves some issues raised in four other cases which have been docketed in this Court, but because an entirely different and more modern abortion statute[6] is involved in this case, oral argument and a plenary review by the Court is warranted. Because of the limited function of the Jurisdictional Statement and the complexity of issues, appellants will not attempt to develop all arguments in depth but will show the questions presented are substantial.

---

[6] The Georgia statute is modeled after the American Law Institute MODEL PENAL CODE § 230.3, *et seq.* (Proposed Official Draft 1962). The other cases involve the older statutes which permitted abortions only to "save" or "preserve the life" of the woman. See n. 11-13 for other cases docketed in this Court.

I.

THE THREE JUDGE COURT SHOULD HAVE ENJOINED FUTURE ENFORCEMENT OF THOSE PROVISIONS OF THE GEORGIA ABORTION STATUTE WHICH IT DECLARED UNCONSTITUTIONAL BECAUSE AN INJUNCTION WAS NECESSARY TO EFFECTUATE THE DECLARATORY JUDGMENT AND TO PREVENT IRREPARABLE INJURY TO IMPORTANT FEDERAL RIGHTS TO THE CLASS OF PREGNANT WOMEN WHO ARE OR WILL BE SEEKING ABORTIONS AND THE CLASS OF PHYSICIANS WHO ARE FORCED TO REJECT SUCH WOMEN AS PATIENTS OR FEAR PROSECUTION IF THEY PROVIDE THE MEDICAL SERVICES THEY DEEM NEEDED.

A. The subject matter of this appeal involves substantial federal constitutional questions.

On the merits below, appellant Mary Doe argued successfully that the concept of personal liberty included the right to privacy in deciding when to bear children and that the right to plan one's family included the right to terminate an unwanted pregnancy. The court based its decision primarily on *Griswold v. Connecticut*, 381 U.S. 479 (1965), without adopting either the majority view of the penumbral zone of privacy created by several fundamental guarantees or the concurring opinion concept of personal liberty preserved by the ninth amendment. The statute, insofar as it specified reasons for which an abortion was permitted, was declared overbroad by the court stating:

> This the State may not do, because such action unduly restricts a decision sheltered by the constitutional right of privacy. (Appendix p. 13a)

BLEED THROUGH

The constitutional right of privacy which includes a right to terminate an unwanted pregnancy presents a substantial federal constitutional question of national import and importance. Appellants assert that the judgment below, insofar as it recognizes the right of privacy, should be affirmed and this right accorded constitutional status by this Court.

The status of abortion as a criminal act has resulted in a state and national health problem of immense proportions. Because termination of pregnancy by physicians has virtually been prohibited by law, women have turned to self-induced "coat hanger" abortions or placed themselves in the untrained hands of illegal abortionists. In Georgia alone, there were 205 reported deaths from illegal abortion in the years 1950 to 1969,[7] and a number of these occurred after Georgia had adopted what is characterized as a "liberal" abortion statute. Since these abortions are illegal and subject those performing them to imprisonment for up to ten years there is no way to determine accurately the number of deaths per year they cause, much less to establish the number of women risking such death. Researchers in this area estimate that in the United States 200,000 to 1,000,000 abortions are illegally induced each year.[8] Additionally there are authoritative estimates of 750,000 to 1,000,000 unwanted children born each year. The multitude of psychological, emotional, economic, and sociological problems resulting to the unwilling parents and unwanted children could not possibly be discussed here, but these problems must be

---

[7] Rochat, Tyler & Schoenbucher, *An Epidemiological Analysis of Abortion in Georgia*, in U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, PUBLIC HEALTH SERVICE REPORT (98th Annual Meeting, American Public Health Assoc., Houston, Texas; Oct. 26-30, 1970), Table 1.

[8] For estimates, see Fisher, *Criminal Abortion*, in ABORTION IN AMERICA 3-6 (1967); M. CALDERONE, ABORTION IN THE UNITED STATES 1970), Table 1.

recognized as part of the impact of our abortion laws. One must conclude that abortion statutes, such as the Georgia statute, affect the conduct, health, and happiness of literally millions of Americans each year.

The national significance of the issues involved in this case may be seen from activities in three major areas. First, the position of the medical profession has changed in an effort to rid our country of this health problem. On June 25, 1970, the House of Delegates of the American Medical Association adopted a policy permitting licensed physicians to perform abortions in hospitals or an approved clinical setting upon consultation with two other physicians.[9] The Executive Board of the American College of Obstetricians and Gynecologists in August, 1970, similarly adopted a more liberal policy permitting the performance of an abortion based on the decision of a physician or his patient. If the decision is based on a physician's recommendation then another physician is to be consulted; if the procedure is done on the request of the woman nothing other than her written request is necessary under this new policy.

Secondly, several state legislatures have amended the abortion statutes on their books, most of which had been enacted in the mid-nineteenth century and allowed abortions only to preserve the life of the mother. Since 1967 twelve states, including Georgia, adopted abortion statutes similar to the provisions of the 1962 Draft of the MODEL PENAL CODE, and in 1970, Alaska, Hawaii, and New York removed substantially all limitations on abortions by physicians during the early stages of pregnancy. Recently the Commissioners on Uniform State Laws issued a Second Tentative Draft of a UNIFORM ABORTION ACT which would allow abortions by licensed physicians "within 24 weeks after the commencement of pregnancy,

---

[9] 213 J.A.M.A. 359 (July 20, 1970).

or if after 24 weeks . . ." for the reasons permitted under the MODEL PENAL CODE.

The third area involves recent litigation in state and lower federal courts of the constitutionality of state abortion statutes. The Supreme Court of California, in *State v. Belous*, 71 Cal. 2d 996, 458 P. 2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970), was the first court to recognize the constitutional status of a "fundamental right of the woman to choose whether to bear children . . ." finding this right in the line of Supreme Court cases such as *Griswold, supra, Loving v. Virginia*, 388 U.S. 1, 12 (1967), and *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 536, 1942), which recognized a " 'right of privacy' or 'liberty' in matters related to marriage, family and sex." In *Babbitz v. McCann*,[10] a federal three-judge court recognized that a woman had a "basic right reserved to her under the ninth amendment to decide whether she should carry or reject an embryo which had not yet quickened." Another three-judge court, in *Roe v. Wade*,[11] ruled the Texas abortion statute unconstitutional on the ground that such statutes "deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children." These specific holdings, together with similar comments in *United States v. Vuitch*[12] and in numerous other lower court decisions, illustrate the national significance of the fundamental constitutional rights being claimed in this case.

Although this Court will probably hear argument of the *Vuitch* case this term, and three other cases remain

---

[10] 310 F. Supp. 293 (E.D. Wis. 1970) (per curiam), *appeal dismissed*, 39 U.S.L.W. 3144 (October 12, 1970), for lack of jurisdiction under 28 U.S.C. § 1253.

[11] 314 F. Supp. 1127 (N.D. Tex. 1970), *appeal docketed* 39 U.S.L.W. 3151, No. 808 (U.S. Oct. 7, 1970).

[12] 305 F. Supp. 1032 (D.D.C. 1969), *ques. of juris. postponed to merits*, 397 U.S. 1061, *further juris. questions propounded*, 399 U.S. 923 (1970).

on the docket (*Roe* and two cases involving the Minnesota abortion statute[18]), it is unlikely that a decision in any of those cases will dispose of the issues involved in this case. The cases presently docketed all involve older type abortion statutes which permit abortions only to "save" or "preserve" the life of the woman, while the Georgia abortion statute is patterned after the MODEL PENAL CODE provisions allowing abortions on the basis of other limited factors. Nor do any of the docketed cases involve, as does this case, a partial invalidation of an abortion statute where the reasons for allowing an abortion have been stricken but the procedural mechanisms for legally reaching such decision have been left intact. Because of these unique features, a decision in this case will be important not only to the citizens of Georgia and the other eleven states having versions of the MODEL PENAL CODE abortion statute but also as guidance to state legislatures throughout the nation in this developing area of constitutional rights.

B. **The three-judge court should have enjoined the future enforcement of those portions of the Georgia abortion statute which it declared unconstitutional.**

This action was brought under 28 U.S.C. §§ 2281-84 and 48 U.S.C. § 1983. There was no pending state court proceeding against any of the plaintiffs below. An injunction was denied, however, "on the same basis as such a prayer would be denied were a state proceeding actually in progress...." The court relied upon *City of Greenwood v. Peacock*, 384 U.S. 808, 828 (1968); the quotation excerpted by the court is

> the vindication of defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted . . . that

[18] *Doe v. Randall*, 314 F. Supp. 32 (D. Minn. 1970), *appeal docketed sub nom, Hodgson v. Randall*, 39 U.S.L.W. 3115, No. 728 (U.S. Sept. 22, 1970); and *Hodgson v. Minnesota*, ——— Minn. ———, (1970), *appeal docketed*, 39 U.S.L.W. 3115, No. 729 (U.S. Sept. 22, 1970).

BLEED THROUGH

> those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court.

Reliance on this excerpt is misplaced since the *Peacock* case involved the removal of pending state criminal prosecutions. Certainly federal courts do not enjoin pending state court proceedings except in very limited circumstances because they are expressly prohibited from doing so by the anti-injunction statute, 28 U.S.C. § 2283. But that statute proscribes injunctions "to stay proceedings in a state court." Thus, as this Court has recognized, if there is no state court proceeding the anti-injunction statute is inapplicable.[14]

Congress clearly intended the federal courts to have power to declare state statutes unconstitutional and to enjoin "the enforcement, operation or execution"[15] thereof except in the circumstances to which the anti-injunction statute applies. And this Court has recognized that "Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims."[16]

---

[14] *Dombrowski v. Pfister*, 380 U.S. 479, 484 n. 2 (1965). Since there were no pending state court proceedings in this case appellants did not have to fit within any exception to the anti-injunction statute. However, it should be pointed out that, as in *Dombrowski*, first amendment rights of free speech and expression are involved in this case in addition to what may be a first amendment based right of privacy. Appellant physicians, nurses, ministers, social workers and counselling organizations alleged that the abortion statute interfered with their counselling women who sought their professional help in obtaining safe, speedy, and adequate medical abortions. Since abortions for economic, social, and many physical and emotional reasons were prohibited by Georgia law, counselling persons as to where such an abortion could be obtained and assisting in arrangements was a possible violation of the criminal conspiracy statute, *Ga. Code* § 26-3201 or could make them an accessory under *Ga. Code* § 26-801.

[15] 28 U.S.C. § 2281.

[16] *Zwickler v. Koota*, 389 U.S. 241, 248 (1967).

In view of this duty and the fact that the three-judge court did honor appellants' choice of a forum to the extent of granting declaratory relief on the merits of their asserted constitutional rights, it is inconsistent with sound judicial policy for the court to have failed to resolve the question with finality. If as the three-judge court's quotation suggests, the vindication of the federal rights of persons in the classes represented by appellants is to be left to the state courts, then it should not be done piecemeal. If despite all reasonable expectations state officials undertake to prosecute a physician for violation of those portions of the Georgia abortion statute declared unconstitutional by the federal court, the court cannot then leave the matter to resolution by the state courts without making a mockery of the judgment won by appellants in the federal forum of their choice.

Where, as here, no state criminal prosecution is pending or immediately threatened, potential friction in federal-state relations is at a minimum. Where the federal court has, in a novel and complex area of constitutional adjudication, declared a state statute unconstitutional, its failure to enjoin enforcement of the invalid statute simply invites friction.

Even in situations in which potential federal-state friction is at its greatest, as in *Dombrowski*, this Court has required enjoining state criminal prosecutions where special circumstances indicate that an erroneous initial application of constitutional statutes by the state will result in irreparable injury to important federal rights. The ephemeral time span which pregnant women have in which to exercise their constitutional right of privacy is a similarly important special circumstance[17] justify-

[17] Reference is made to the petition of Jane Roe to Intervene in this case (September 15, 1970). She was denied an abortion at Georgia Baptist Hospital because she did not come within the reasons prescribed by the hospital. The court ruled that the hospital's adoption

Note 17 Continued on page 15.

BLEED THROUGH

ing a coercive order by the federal courts to preclude the possibility of irreparable injury resulting from the delay inherent in allowing an initial state determination.

II.

THE THREE-JUDGE COURT SHOULD HAVE DECLARED THE PROCEDURAL PROVISIONS OF THE GEORGIA ABORTION STATUTE AND ITS FURTHER REQUIREMENT THAT ABORTIONS MAY BE PERFORMED ONLY AT ACCREDITED HOSPITALS UNCONSTITUTIONAL FACIALLY OR IN OPERATION AS VIOLATIVE OF CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION.

A. As a result of the three-judge court's judgment, the Georgia abortion statute is so vague and ambiguous in its terms that it fails to provide sufficient warning of the conduct proscribed thereby violating basic elements of due process guaranteed by the fourteenth amendment.

The statute is set forth in full in the Appendix at pp. 1f-4f and the portion declared unconstitutional is italicized. Excepted from the criminal abortion penalties, under the statute as revised by the court below, are those abortions "performed by a physician duly licensed to practice medicine and surgery . . . based upon his best clinical judgment that an abortion is *necessary* . . . ." (Emphasis added.) Prior to the court's revision, the statute read ". . . based upon his best clinical judgment that an abortion is necessary because: . . ." one of the specified reasons was present, *i.e.*, danger to the life or serious

---

Note 17 Continued from page 14.
of standards or reasons was unconstitutional. See Amended Judgment, Appendix p. 3c. Another suit was filed, *Polly Poe v. Fulton-DeKalb Hospital Authority* Civ. No. 14223 (N.D. Ga. Oct. 7, 1970), alleging denial of an abortion and failure to advise the reason for which it was denied. The injunctive relief requested would prevent multiple suits to enforce the court's decision.

and permanent injury to the woman's health; fetal malformation; or rape. Now the test for obtaining an abortion is that a physician must decide an abortion is "necessary" based upon his best clinical judgment. Thus the statute as revised by the court is more restrictive, more ambiguous, and more vague now than it was before. A physician could reasonably fear that an abortion performed by him for economic, family, emotional or other reasons, good and sufficient to the physician and his patient, might not be considered sufficiently "necessary" under the truncated statute to avoid a criminal prosecution. A statute which places one in peril of his life or liberty may not constitutionally require one to guess at its meaning and the conduct proscribed. *Eg., Smith v. California,* 361 U.S. 147, 151 (1959).

B. **The procedural provisions of the Georgia abortion statute declared constitutional by the three-judge court are so costly, time consuming, cumbersome and devoid of fairness as to deny Mary Doe and members of her class the right to decide when to bear children in violation of the right of privacy and in violation of the due process and equal protection guarantees of the United States Constitution.**

Assuming that the district court correctly held that "the decision [to have an abortion is] sheltered by the Constitution . . ." (Appendix p. 13a), the decision may not be so encumbered with procedural requirements that it becomes an empty right or one exercisable only by the wealthy, the educated, the sophisticated, or the persistent who relentlessly pursue their rights. Again, reference must be made to the time limitations on safely terminating a pregnancy. Pregnancy test results are reliable only after approximately eight weeks,[18] yet an abortion must

[18] Physicians measure pregnancy from the first day of the last menstrual period.

be performed within the first twelve weeks if the safest methods are to be used. Thus, a woman has only about four weeks in which to put together the magic procedural combination under the Georgia abortion statute. This combination requires the woman: (1) to show that she is a resident of Georgia;[19] (2) to convince her physician an abortion is "necessary"; (3) to obtain the opinions of two other physicians who agree that an abortion is "necessary"; (4) to get the decision approved by a majority of a hospital's abortion committee (a minimum of three members), although there are no standards limiting the committee's discretion; and (5) to arrange to have the abortion performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals. Since there is no statutory provision for the woman to appear and be heard at a meeting of the hospital abortion committee, her proposing physician must, as a practical matter, become her advocate and present reasons sufficient to convince a majority of the hospital abortion committee of the need for the abortion. Such advocacy usually requires that the proposing physician and his consultants write extensive requests, reports, and detailed charts since again, in practice, it is difficult for the six physicians involved to meet together for a discussion of each case. A more burdensome process can hardly be imagined.[20] *Cf.* the unconstitutionality of cumbersome procedures where other rights are involved, *eg.*, voting, *Harman v. Forsennius*, 380 U.S. 528, 539-44 (1960);

---

[19] Without extensive argument, appellants contend that residency is not a rational prerequisite for determining if one needs a medical service. *Cf. Shapiro v. Thompson*, 394 U.S. 618 (1969). Such a limitation prevents emergency treatment for a visitor in Georgia who is unable to return to her home state for such service.

[20] Hospital abortion committees are composed of staff members in the OB-GYN specialty, i.e., one's professional competitors, posing a serious conflict of interest problem. Also, in the smaller cities, it is sometimes impossible to have three committee members and three consultants.

parades and demonstrations, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

Considering the limitations of time in which a meaningful decision must be made, this statutory scheme is completely lacking in procedural due process. As stated above, the woman involved has no right to appear before the hospital abortion committee and be heard, nor does she have a recognized right of appeal from its decision. An action in the courts provides no adequate remedy since that decision is subject to the delays of further appeal. In this regard, it should be pointed out that neither the American Medical Association nor the American College of Obstetricians and Gynecologists policy statements require the approval of a committee, much less the approval of a statutory hospital abortion committee.

A final procedural roadblock to obtaining a legal abortion, which was left in the statute by the three-judge court, is the requirement that abortions be performed only in licensed, accredited hospital facilities. The Georgia Department of Health issues licenses to hospitals, but accreditation is granted only by the Joint Commission on Accreditation of Hospitals, a private organization located in Chicago, Illinois. Of the 214 licensed hospitals in Georgia, only 83 have been accredited.[21] Licensed hospitals are permitted to perform general types of surgery. Accredited hospitals are required to maintain, in addition to operating room facilities, a radiology department and facilities for emergency care of mass casualties,[22] neither of which is relevant to abortion services. This artificial and medically unnecessary statutory limitation on the facilities in which abortions

[21] JOINT COMMISSION ON HOSPITAL ACCREDITATION, ACCREDITED HOSPITALS, Jan. 1, 1970.

[22] STANDARDS FOR HOSPITAL ACCREDITATION, introduction (Dec. 1965), as discussed in Leavy and Charles, *California's New Therapeutic Abortion Act*, 15 U.C.L.A.L. Rev. 1, 5 (1967).

BLEED THROUGH

may be obtained further encumbers the right of many residents of Georgia to seek a termination of pregnancy. This additional procedural burden is especially true of indigent women who depend upon the public hospital in the county of their residence but who are unfortunate enough to live in the 103 Georgia counties without an accredited hospital. See map of Georgia which shows counties with accredited hospitals Appendix p. 1g.

The foregoing procedures are costly, involve great expenditure of time by the woman and her physicians and are so burdensome and devoid of fairness as to deprive appellants of basic due process. The actions of hospital abortion committees constitute state action because they are delegated decision making authority under the statute to decide whether an abortion will be performed.

C. The procedural provisions of the Georgia abortion statute declared constitutional by the three-judge court have had the effect in operation of denying equal access to medical services to poor and Negro citizens in violation of the equal protection guaranties of the United States Constitution.

On its face the Georgia statute makes no distinction on the basis of a patient's race, economic status, or social position. Yet, as applied, this statute has systematically come to deny safe medical abortion services to the poor and to the non-white residents of Georgia. Appellants assert that there is a duty on behalf of cities, counties, states, and other governmental bodies which furnish other health services to the indigent to also make abortion services available to the indigent. See *Doe v. General Hospital of the District of Columbia*, No. 24,011 (D.C. Cir. 1970); and *United States v. Vuitch, supra*, 305 F. Supp. at 1035, where such a duty was "declared" even though the court recognized that appropriations would

have to be made. Observance of such a duty is not only being neglected in Georgia, it is being seriously impeded by the remaining requirements of the Georgia abortion statute.

Abortion services have for some time been available to the rich woman; she could travel to other countries and today may travel to New York, California or some other state which has a less restrictive abortion law. And under the Georgia abortion statute, she could usually find without difficulty private physicians and pyschiatrists who would make the necessary examinations to support a finding that termination of pregnancy was necessary to her psychic health. It goes without saying that the majority of women do not enjoy such affluence. Some women lack adequate means to travel to the next county. Such lack of funds, however, controls their access to medical services. The requirement of the Georgia abortion statute that abortion be performed only in accredited hospitals, discussed above, has totally removed the possibility of the less expensive office or clinical abortion facilities in the state.[23]

This creates a situation not unlike having a right to appeal a criminal conviction but not enough funds to pay for a transcript of the trial proceedings necessary to assert such right. Cf. *Gardner v. California*, 393 U.S. 367 (1968); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). As the Court stated in *Griffin* "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has." 351 U.S. at 18-19. Similarly when Georgia had granted a right to terminate an unwanted pregnancy, it may not constitutionally encumber that right

[23] In this regard the three-judge court observed that the State had an interest in preventing establishment of "abortion mills by the occasional opportunistic or unethical practitioner." Surely the court is not referring to specialized medical facilities but rather illegal or non-medical facilities because it will certainly be appropriate to have specialized facilities for this as for other medical services.

with complicated procedures that in practice are available only to the wealthy or the educated.

Not only are the poor people denied equal access to abortion services in Georgia, but statistics also show that whites receive by far the greater number of hospital abortions. During 1968, beginning with enactment of the present Georgia abortion statute in April, 69 whites as compared with only 4 Negroes received abortions; in 1969, the ratio was 147 whites to 21 Negroes; and in 1970 through June, 192 whites compared to 28 Negroes received abortions.[25] Thus, Negro women have received only 11.5 percent of the hospital abortions since enactment of the new law although Negroes represent 28.5 percent of the population. These figures should be considered in conjunction with a racial breakdown of deaths resulting from illegal abortions. Of the 205 reported deaths from 1950 to 1969, 143 or approximately 70 percent were Negro women and during the period 1965 to 1969, 88 percent (22 of 25 deaths) were Negro women.[26] Thus, while the number of legal abortions are increasing, Negro women are receiving a disproportionately small share and at the same time maternal mortality for Negro women is increasing. Even though the statute may not facially deny equal protection or equal access to medical care, these statistics demonstrate such a denial in fact.[27]

What was said by Mr. Justice White in his concurring opinion in *Griswold v. Connecticut, supra,* 381 U.S. at 503, is equally applicable to the abortion statute here:

> [T]he clear effect of these statutes as enforced, is to deny disadvantaged citizens of Connecticut,

---

[25] Rochat, n. 7 *supra*, at Table 8.

[26] *Id.* at Table 1.

[27] Concerning the use of statistics to show exclusion of Negroes in the South in other contexts see, *e.g., Whitus v. Georgia,* 385 U.S. 545, 552 n. 2 (1967); *United States v. Jefferson County Bd. of Educ.,* 372 F.2d 836, 887 (1966), *aff'd en banc,* 380 F.2d 385 (5th Cir.), *cert. denied,* 389 U.S. 840 (1967).

> those without either adequate knowledge or resources, to obtain private counselling, access to medical assistance and up-to-date information in respect to proper methods of birth control.... In my view, the statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendement. (Citations omitted.)

The Georgia abortion statute denies women of Georgia access to needed medical services and its procedural requirements impose undue burdens upon those who seek to avail themselves of their right to decide when to bear children. In so doing it contravenes the due process and equal protection guarantees[28] of the fourteenth amendment. It should be declared unconstitutional and its enforcement enjoined.

III.

APPELLANT-PHYSICIANS, NURSES, SOCIAL WORKERS, MINISTERS, AND FAMILY PLANNING AND ABORTION COUNSELLING ORGANIZATIONS HAVE SUFFICIENT "STANDING" AND "COLLISION OF INTEREST" TO CHALLENGE THE GEORGIA ABORTION STATUTE.

The court ruled that all plaintiffs had "standing" to bring the action contesting the constitutionality of the Georgia abortion statute, noting the possibility that if

---

[28] Other equal protection considerations are involved in *Ga. Code* § 26-1202(e) which permits a hospital to elect not to perform abortions. It is recognized that individual doctors should have this right, as a matter of conscience, but hospitals are fictitious legal entities and not having a conscience as such can lay no claim to exemption for that reason. Public or quasi-public hospitals occupy "state action" status and have an equal protection "duty." Private hospitals receiving Hill-Burton or Medicaid funds would likewise be subject to equal protection responsibilities, *cf. Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), *cert. denied* 376 U.S. 938 (1964).

social workers, ministers, etc., counseled obtaining an abortion not permitted under the statute they could be prosecuted for conspiracy. However, in the absence of a pending prosecution or immediate threat of prosecution against the doctors, social workers, ministers, and other parties desiring to counsel abortions, the court held that there was no adequate "collision of interests" or "exigent adversity" to give the challenge of these parties to the statute the requisite justicibility.

Appellants urge that the reliance of the district court on *Poe v. Ullman*, 367 U.S. 497 (1961) and *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947) in reaching its conclusion was not well founded. Both of those cases involved statutes as to which a long history of failure by the state to seek prosecutions showed the absence of any real threat of enforcement and therefore the absence of any real controversy between the parties. The Georgia abortion statute, however, has not been a dead formality on its books. Numerous persons have been prosecuted and convicted under the abortion statute that preceded the 1968 Georgia statute.[29] And under *Ga. Code* § 26-801, one who intentionally counsels a crime or otherwise aids and abets in its commission is made a party thereto subject to conviction for such action. In the circumstances of an actual history of state enforcement of its abortion statutes, appellants who desire, in the performance of their professions, to counsel abortions have

> "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962), as cited in *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

---

[29] See for example, *White v. State*, 114 Ga. App. 437 151 S.E.2d 832 (1966); *Persons v. State*, 93 Ga. App. 314 91 S.E.2d 358 (1956).

In any event, a failure of the state actively to prosecute appellants and members of their classes who desire to counsel abortion does not alleviate their fear of prosecution for doing so. As this Court stated in *Dombrowski:*

> So long as the statute remains available to the State the threat of prosecution of protected expression is a real and substantial one. 380 U.S. at 494.

So in this case, the real and substantial threat of prosecution for counseling abortions gave appellants a meaningful adversity[30] adequate to place their claim in the context of controversy necessary for judicial resolution. Further, as to the physicians, extensive encroachment on their rights to practice their profession without state interference has already been discussed and this presents concrete adverseness assuring adequate presentation of the issues.

Here an important issue as to justiciability or collision of interest is raised. This Court should review the decision below and lay to rest the uncertainty which arises out of *Poe* and *Mitchell.*

---

[30] This Court found no lack of adversity in *Epperson v. Arkansas,* 393 U.S. 97 (1968) although, as Justice Black pointed out, the statute which was there said to impose a risk of prosecution had never been enforced against anyone in its forty year existence.

CONCLUSION

For the reasons set out in this Jurisdictional Statement, the Court should note probable jurisdiction, and set the case down for plenary consideration with Briefs on the merits and oral argument.

Respectfully submitted,

MARGIE PITTS HAMES
210 Brighton Road, N. E.
Atlanta, Georgia 30309

REBER F. BOULT, JR.
CHARLES MORGAN, JR.
5 Forsyth Street, N. W.
Atlanta, Georgia 30303

Attorneys for Appellants

Of Counsel:

ELIZABETH ROEDIGER RINDSKOPF
GAIL SEIGEL
551 Forest Road, N. E.
Atlanta, Georgia 30312

TOBIANE SCHWARTZ
153 Pryor Street, S. W.
Atlanta, Georgia 30303

APPENDIX

APPENDIX "A"

OPINION OF UNITED STATES DISTRICT COURT GRANTING DECLARATORY JUDGMENT AND DENYING INJUNCTIVE RELIEF

JULY 31, 1970

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

MARY DOE, et al,
Plaintiffs

vs.

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; LEWIS R. SLATON, as District Attorney of Fulton County, Georgia; and HERBERT T. JENKINS, as Chief of Police of the City of Atlanta,
Defendants

CIVIL ACTION

NUMBER 13676

PER CURIAM.

This is an action for declaratory and injunctive relief brought pursuant to 28 U.S.C.A. §2201 and 2202, and 42 U.S.C.A. §1983 and 28 U.S.C.A. §1343. It is a class action attacking Ga. Code Ann. §26-1201, *et seq.* (1969) Georgia's "Abortion Act."

Plaintiffs claim to represent four sub-classes: pregnant women, single or married, wishing legal abortions; licensed physicians who wish to perform or counsel performance of legal abortions; registered nurses who desire to participate in performing or counsel performance of legal abortions; and ministers and social workers who wish to be free to advise abortion in counselling pregnant women.

Plaintiffs seek an order declaring Georgia's Abortion Statute unconstitutional and enjoining its enforcement on various grounds:

(1) the Statute is unconstitutionally vague and indefinite on its face and as applied, failing to provide sufficient warning of the conduct proscribed, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

(2) Georgia's Abortion Statute unconstitutionally abridges a woman's right to decide to terminate an unwanted pregnancy, in restricting that fundamental liberty without an overriding compelling state interest;

(3) the Statute unconstitutionally restricts the right of the physicians, nurses, ministers and social workers to practice their professions;

(4) Georgia's Abortion Statute produces discrimination against poor and non-white women in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

PENDING MOTIONS

Arthur K. Bolton, sued in his official capacity as Attorney General of Georgia has moved for an order dismissing the claim against him on the ground that no relief

could be granted against him since he is not charged generally with the enforcement, application or administration of the Georgia criminal statutes.

As plaintiffs observe, Article VI, § X, Par. II of the Georgia Constitution, Ga. Code Ann. §2-4502 (1933) requires the Attorney General to represent the State in any civil or criminal case when required by the Governor. Furthermore, he may be required to give the Governor advisory opinions on the abortion statute. Ga. Code Ann. §40-1602 (1933). Finally, the Attorney General is head of the Department of Law, which is vested with authority and jurisdiction in all matters of law relating to governmental departments, boards and agencies. Ga. Code Ann. §40-1614 (1943). The Attorney General has sufficient connection with enforcement of the statutes attacked to justify retaining him as a party.[1] See Arneson v. Denny, 25 F.2d 993 (W.D. Wash. 1928); Jackson v. Colorado, 294 F. Supp. 1065, 1072 (D. Colo. 1968); James v. Almond, 170 F. Supp. 331, 341-342 (E.D. Va. 1959); International Longshoremens' & W. U. v. Ackerman, 82 F. Supp. 65, 124 (D. Haw. 1948), *rev'd* on other grounds 187 F.2d 860 (9th Cir. 1951); Revins v. Prindable, 39 F. Supp. 708, 710 (E.D.Ill. 1941). Accordingly, that motion is denied.

The Attorney General has also objected to interrogatories which plaintiffs served for answer by a witness, Roger Rochat, M. D. In view of the disposition of this case made below, no ruling on this motion is necessary.

The motion of Ferdinand Buckley, Esquire, for reconsideration of the revocation of his appointment as guardian *ad litem* will be dealt with in connection with the discussion under MERITS below.

---

[1] The Court is also aware that the Attorney General regularly interprets State criminal laws and decisions in published opinions and circulars to State judges and law enforcement officers.

The motion of the National Legal Program on Health Problems of the Poor to submit a brief as *amicus curiae* is granted.

The defendant Lewis R. Slaton, District Attorney of Fulton County, filed motions seeking orders requiring disclosure of plaintiff's identity, granting a continuance for discovery for a reasonable time thereafter, and requiring plaintiff to submit to a physical and mental examination. In view of the reasons for which it is held that the complaint of this plaintiff presented a justiciable controversy, these motions are directed toward obtaining information which is not relevant to the case. Accordingly, they are denied.

JURISDICTION

A. *Substantial Constitutional Question.*

A three-judge court was convened pursuant to 28 U.S.C.A. § 2281 and 2284. Such action is proper where plaintiffs attack the constitutionality of a state statute, raising a substantial constitutional question, and seek equitable relief against its enforcement. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U. S. 713, 715 (1962).

Plaintiffs here attack the constitutionality of Ga. Code Ann. § 26-1201 *et seq.* (1969) on the grounds that it infringes rights protected by various Amendments to the United States Constitution. They seek an injunction against enforcement. In light of recent cases on the subject of the Constitutional right to an abortion, this Constitutional question appears substantial. *See* Roe v. Wade, ——— F. Supp. ——— (N. D. Tex., No. 3-3690-B, June 17, 1970); Doe v. Randall, ——— F. Supp. ——— (D. Minn., No. 3-70-Civ.-97, May 19, 1970); Doe v. Scott, ——— F. Supp. ——— (N.D. Ill., No. 70-C-395, March

27, 1970); Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970); United States v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969), *app. docketed*, No. 1155 (February 5, 1970); California v. Belous, 71 Cal. 2d 991, 458 P.2d 194 (1969), *cert. den.* 397 U. S. 915 (1970).

B. *Justiciability.*

Standing

By motion to dismiss, Lewis R. Slaton, District Attorney of Fulton County, contends that all plaintiffs other than Mary Doe lack standing to maintain this action. The basis for the claims of these plaintiffs is that because they are not free to perform or counsel the obtaining of abortions, they are unconstitutionally restricted in the practice of their professions.

There are certainly instances in which any of these plaintiffs would have standing to claim a constitutional right to practice his profession, and infringement thereof. For instance, few would dispute that a social worker being prosecuted for conspiracy because he (or she) counselled obtaining an abortion, and referred the client to a physician for the abortion, would have standing to seek a declaratory judgment of his (or her) asserted constitutional right and infringement thereof. *See* Griswold v. Connecticut, 381 U. S. 479 (1965).

But absent prosecution or indictment, that these plaintiffs do have standing is more difficult to see. Whether their claim is otherwise justiciable is irrelevant. Flast v. Cohen, 392 U. S. 83, 100 n. 21 (1968). The sole issue is whether there is a logical link between the status they assert (physician, nurse) and the claim they seek adjudicated, or between their status and both the type of enactment attacked and the nature of the constitutional infringement alleged. 392 U. S. at 102.

Under either test, all the plaintiffs have standing. As physicians, nurses, ministers or social workers they attack a criminal statute potentially applicable to them, on the grounds that it unconstitutionally restricts their right to practice. Accordingly, the motion to dismiss for lack of standing is denied.

Collision of Interests

Article III of the United States Constitution limits the jurisdiction of the federal courts to cases and controversies. And it is well established that in actions for declaratory judgments, a District Court may not render an advisory opinion on the constitutionality of a state statute. Rather there must be "exigent adversity," an actual controversy in which the constitutionality of the statute is drawn into question in a truly adversary context. *See* Golden v. Zwickler, 394 U. S. 103, 108 (1969); Poe v. Ullman, 367 U. S. 497 (1961); United Public Workers of America v. Mitchell, 330 U. S. 75, 89 (1947).

Most akin to the instant case is Poe v. Ullman, 367 U. S. 497 (1961). There, a married couple, a married woman and their physician sought a declaratory judgment that Connecticut's statutes prohibiting the use of contraceptive devices and the giving of medical advice in the use of such devices violated plaintiffs' Fourteenth Amendment rights, depriving them of life and liberty without due process of law. None of the plaintiffs had been indicted or prosecuted under the statutes. There had been only one recorded prosecution for violation of the statutes in the seventy-five years since their enactment, and that single instance occurred twenty years before the declaratory judgment action was brought. The Supreme Court suggested that the lack of a pending prosecution or immediate threat of such prosecution against the particular plaintiffs made the claims non-justiciable, citing United Public Workers of America v. Mitchell, 330 U. S.

75 (1947). 367 U. S. at 501. But the Justices went on to find that the lack of recorded prosecutions, the unchallenged, open, ubiquitous public sales of contraceptive devices showed a deeply embedded State policy against enforcement, amounting to a tacit agreement not to prosecute violators of the statutes. The majority therefore held:

> "It is clear that the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting." 367 U. S. at 507.

However, these three cases seem precedent for the proposition that in the absence of a pending or threatened indictment or prosecution of the particular plaintiffs bringing a declaratory judgment action, a federal court cannot consider the constitutionality of the challenged criminal statute.

However in 1968, the Supreme Court decided Epperson v. Arkansas, 393 U. S. 97 (1968), in which a public school teacher argued that the Arkansas statute prohibiting the teaching of evolution was unconstitutional. There was no pending or threatened indictment or prosecution against the teacher. There was no record of any prosecutions under the challenged statute. The teacher's dilemma was solely that (1) the new biology textbooks she was supposed to use in the approaching term contained a chapter on evolution, and (2) her action for a declaratory judgment in state court, granted on the trial level, had been reversed by the Arkansas Supreme Court. The United States Supreme Court majority reached the merits and reversed the decision of the Arkansas Supreme Court in an opinion which summarily brushed aside the question of justiciability. 393 U. S. at 101-102.

Apparently, then, the majority felt that the appeal presented a "substantial controversy . . . of sufficient immediacy and reality." Golden v. Zwickler, 394 U. S. 103, 108 (1969).

In the instant case, the plaintiffs Mary Doe alleges that having properly applied to the Abortion Committee of Grady Memorial Hospital for a legal therapeutic abortion allowed by Ga. Code Ann. § 26-1202 (1969), she was denied an abortion solely on the grounds that her present situation did not come within the terms of Ga. Code Ann. § 26-1202(a)(1)(1969).

Georgia's Abortion Act defines a criminal abortion as the act performed by a person who administers a substance or uses an instrument or other means with intent to produce a miscarriage or abortion. Ga. Code Ann. § 26-1201 (1969). However, Ga. Code Ann. § 26-1202(a) establishes three circumstances under which an abortion shall not be considered a criminal abortion. And Ga. Code Ann. § 26-1202(b)(1969) prescribes procedure which *must* be followed if an abortion is to be authorized by or performed under 1202(a).

Ga. Code Ann. § 26-1202(b)(1969) provides in relevant part:

> "No abortion is authorized or shall be performed under this section unless each of the following conditions is met:
>
> * * *
>
> (6) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and

> its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose.

Thus, the denial of plaintiff's application for an abortion, on the grounds alleged, was not the decision of a private physician declining to render professional services, occasioned by the mere existence of Georgia's Abortion Act. The statute confers upon the hospital committee power to grant or deny abortions. A decision denying an application for abortion on the ground that the woman's situation does not fall within one of the three enumerated exceptions is an exercise of that power, which allegedly violated plaintiff's constitutional rights. To this extent then, this staute has been invoked against the plaintiff Mary Doe, causing an alleged constitutional deprivation. Here, there has been actual interference with a claimed constitutional right by the decision of a body which the State has vested with power to grant or deny legal abortions. These circumstances put plaintiff and the defendants on opposite sides of a very real and lively controversy, amendable to judicial resolution.

Accordingly, it appears that Mary Doe's complaint, in this context, presents a justiciable controversy. Since the claims of the other plaintiffs do not stand in such a posture, the Attorney General's motion to dismiss must be granted to that extent.

C. *Exhaustion.*

There is no merit to the defendant Slaton's motion to dismiss for failure to exhaust state remedies. It does not appear that there are any administrative remedies for the denial by a hospital committee of an application for an abortion. And however desirable such a requirement

might be for orderly judicial administration, there is no requirement that a litigant in federal court exhaust state judicial remedies, where he is asserting a claim in proceedings other than *habeas corpus* involving a subject over which the federal and state courts have concurrent jurisdiction. As will appear below, the instant case does not involve granting injunctive relief.

THE MERITS

Plaintiff asserts that certain cases leading up to and following Griswold v. Connecticut, 381 U. S. 479 (1965) establish a Constitutional right to privacy broad enough to encompass the right of a woman to terminate an unwanted pregnancy in its early stages, by obtaining an abortion. *See* Stanley v. Georgia, 394 U. S. 557 (1969); Loving v. Virginia, 388 U. S. 1 (1967); Skinner v. Oklahoma, 316 U. S. 535 (1942); Olmstead v. United States, 277 U. S. 438, 478 (1928) (dissenting opinion of Mr. Justice Brandeis); Pierce v. Society of Sisters, 268 U. S. 510 (1925); Meyer v. Nebraska, 262 U. S. 390 (1923). While the Court agrees that the breadth of the right to privacy encompasses the decision to terminate an unwanted pregnancy, we are unwilling to declare that such a right reposes unbounded in any one individual. Rather, we are of the view that although the state may not unduly limit the reasons for which a woman seeks an abortion, it may legitimately require that the decision to terminate her pregnancy be one reached only upon consideration of more factors than the desires of the woman and her ability to find a willing physician.

In Griswold v. Connecticut, 381 U. S. 479 (1965), the Supreme Court held that the decision to use contraceptive devices is an aspect of a relationship lying within a penumbral zone of privacy created by several fundamental constitutional guarantees, and that a state law forbidding the use of such devices unduly invades that area of

protected freedoms with maximum destructive effect upon that relationship. 381 U. S. at 485. In a concurring opinion, Mr. Justice Goldberg differed with the majority only to the extent of stipulating that the right to marital privacy is encompassed in his concept of personal liberty because of the Ninth Amendment, rather than because of penumbral emanations of specific constitutional guarantees.

For whichever reason, the concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy.[2] Like the decision to use contraceptive devices, the decision to terminate an unwanted pregnancy is sheltered from state regulation which seeks broadly to limit the reasons for which an abortion may be legally obtained. However, unlike the decision to use contraceptive devices, the decision to abort a pregnancy affects other interests than those of the woman alone, or even husband and wife alone.

Once conception takes place and an embryo forms, for better or for worse the woman carries a life form with the *potential* of independent human existence.[3] Without

---

[2] We see no connection between this theory and the claimed unlimited right of a woman "to use her body in any way she wishes" read into Griswold by some. There are obvious limitations to the latter such as self abuse, *e.g.* disease, drugs, suicide, etc. and the rights of others in which the state clearly has an interest. Any such theory in its ultimate is flatly rejected.

[3] This view of the impact of conception on the decision not to have children implies that the distinction between a quick and unquick fetus, and even that between embryo and fetus is not relevant here.

And since the Court does not postulate the existence of a new being with federal constitutional rights at any time during gestation, the motion of Mr. Ferdinand Buckley for reconsideration of the order revoking his appointment as guardian *ad litem* for the embryo (or fetus) is denied. Mr. Buckley's motion to intervene in such capacity is also denied. However, he has the Court's appreciation for his participation in this litigation as *amicus curiae*.

positing the existence of a new being with its own identity and federal constitutional rights, we hold that once the embryo has formed, the decision to abort its development cannot be considered a purely private one affecting only husband and wife, man and woman.

A potential human life, together with the traditional interests in the health, welfare and morals of its citizenry under the police power, grant to the state a legitimate area of control short of an invasion of the personal right of initial decision.

The whole thrust of the present Georgia statute[4] is to treat the problem as a medical one. Such approach is reasonable and seemingly sound inasmuch as medical practitioners are in the best position by virtue of training to judge concurrently the basis as well as the risk inherent in such a decision. In this respect, the state moreover has a legitimate interest in seeing to it that the decision—personal and medical—is not one undertaken lightly and without careful consideration of all relevant factors, whether they be emotional, economic, psychological, familial or physical. For example, the legislature might require any number of conditions such as consultation with a licensed minister or secular guidance counselor as well as the concurrence of two licensed physicians or any system of approval related to the quality and soundness of the decision in all its aspects. It certainly has a clear right to circumscribe a decision made by a woman alone or by a woman and a single physician and to guard against the establishment of transient "abortion mills" by the occasional opportunistic or unethical practitioner and the concomitant dangers to his patrons and the public. Such controls and requirements, so long as they do not restrict the reasons for the initial decisions and do not violate the

[4] Apparently patterned after the American Law Institute, Model Penal Code §230.3 (Proposed Official Draft, 1962).

Due Process and Equal Protection Clauses of the Fourteenth Amendment, are properly within the sphere of legislative discretion. In that respect, where abortions may be obtained only from licensed physicians and surgeons, and only after psychiatric consultation, the mere fact that physicians and psychiatrists are more accessible to rich people than to poor people, making abortions more available to the wealthy than to the indigent, is not in itself a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Cf.* Dandridge v. Williams, 397 U. S. 471 (1970); MacQuarrie v. McLaughlin, 294 F. Supp. 176 (D. Mass. 1968), *aff'd* 394 U. S. 456 (1969).

Moreover, there is an overriding interest in the manner of performance as well as the quality of the final decision to abort. Obvious need for control through licensing, sanitation requirements and proper medical standards in the execution of a legal abortion are examples. Again such decisions address themselves to legislative decision based upon informed judgment.

Having decided that the reasons for an abortion may not be proscribed, but that the quality of the decision as well as the manner of its execution are properly within the realm of state control, the present statute must be examined in such light.

Rather than regulating merely the quality of the decision to have an abortion, and the manner of its performance, the Georgia statute also limits the number of reasons for which an abortion may be sought. This the State may not do, because such action unduly restricts a decision sheltered by the Constitutional right to privacy. *See* Griswold v. Connecticut, 381 U. S. 479 (1965); California v. Belous, 71 Cal. 2d 991, 458 P. 2d 194 (1969), cert. den. 397 U. S. 915 (1970). The question becomes a matter of statutory overbreadth.

Based upon the above, the court finds the following portions of George Code §26-1202 to be in violation of the constitutional rights of petitioner:

A. Section (a) beginning with the word "because" on line 5 and through subsection (a)(3) in its entirety.

B. Section (b) subsection (3) beginning with the word "because" on line 6 and through the end of said subsection.

C. Section (b) subsection (6) in its entirety.

D. Section (c) in its entirety.

There being no showing to the contrary, the court further finds the remainder of said Code §26-1202 to constitute a proper exercise of state power within the context of this opinion.[5]

An appropriate formal declaratory judgment may be presented upon request of any party.

ABSTENTION

It is recognized that there is no pending state court proceeding against which the injunction prayed by plaintiff would operate. Nevertheless, the request for injunctive relief is denied, on the same basis as such a prayer would be denied were a state proceeding actually in progress:

> "... the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted ... that those rights will inevitably be denied by

[5] It is not thereby implied that those provisions constitute the only or best means of state control. On the whole, the present system appears unnecessarily cumbersome, a potential hazard under due process and equal protection considerations.

the very act of bringing the defendant to trial in the state court." City of Greenwood v. Peacock, 384 U. S. 808, 828 (1968).

However under the authority of Zwickler v. Koota, 389 U. S. 241 (1967), the Court has proceeded to issue the declaratory relief, in spite of its unwillingness to broadly enjoin future prosecutions under the Act. Accordingly, plaintiff's request for a declaratory judgment is hereby granted. Judgment shall issue in the form described above.

IT IS SO ORDERED.

This the 31 day of July, 1970.

LEWIS R. MORGAN
United States Circuit Judge

SIDNEY O. SMITH, JR.
United States District Judge

ALBERT J. HENDERSON
United States District Judge

APPENDIX "B"

JUDGMENT OF UNITED STATES DISTRICT COURT
GRANTING DECLARATORY JUDGMENT AND
DENYING INJUNCTIVE RELIEF
AUGUST 24, 1970

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al,
Plaintiff

vs.

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; LEWIS R. SLATON, as District Attorney of Fulton County, Georgia; and HERBERT T. JENKINS, as Chief of Police of the City of Atlanta,
Defendants

CIVIL ACTION
NUMBER 13676

JUDGMENT

The action came on for hearing on defendants' motions to dismiss on June 15, 1970, before a three-Judge Court composed of Lewis R. Morgan, United State Circuit Judge, Sidney O. Smith, Jr., and Albert J. Henderson, Jr., United States District Judges.

Plaintiffs' request to introduce evidence in proof of allegations of the complaint was denied; defendants' motions to dismiss were treated as motions for summary judgment; argument was heard on the Court's jurisdiction and the constitutional issues raised. The Court issued its opinion on July 31, 1970.

Having determined that a substantial constitutional question was raised, one which created a justiciable controversy between plaintiff Mary Doe and the defendants, over which question this Court has jurisdiction and which it does not abstain from exercising; and

Having granted plaintiff Mary Doe's request for a declaratory judgment and denied her request for injunctive relief,

Judgment is hereby entered as follows:

1. The following portions of the Criminal Code of Georgia, § 26-1202[1], are declared to be in violation of the constitutional rights of Petitioner Mary Doe, within the context of the aforesaid opinion:

A. Section (a) beginning with the word "because" on line 5 and through subsection (a)(3) in its entirety.

B. Section (b) subsection (3) beginning with the word "because" on line 6 and through the end of said subsection.

C. Section (b) subsection (6) in its entirety.

D. Section (c) in its entirety.

2. The remainder of the said section 26-1202 of the Criminal Code of Georgia is declared to constitute a

[1] It is the intention of this Court that our decision reach the codification of identical provisions of Ga. Code Ann. §26-9925a and corresponding provisions enumerated above if such codification has any force as law.

proper exercise of state power, within the context of t court's opinion.

IT IS THEREFORE ORDERED, that the complaint all plaintiffs except Mary Doe be dismissed; that t above sections of the Georgia Abortion Statute are d clared void on their face for unconstitutional ove breadth; that plaintiffs' application for injunction be di missed; costs of this cause are taxed against defendant

The request for stay of this order pending any appe is denied.

IT IS SO ORDERED.

This the 24th day of August, 1970.

FOR THE PANEL.

SIDNEY O. SMITH, JR.
United States District Jud

APPENDIX "C"

AMENDED JUDGMENT OF UNITED STATES DISTRICT COURT

OCTOBER 13, 1970

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

MARY DOE, et al

vs.

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; et al

CIVIL ACTION

NUMBER 13676

Since the Court's opinion of July 31, 1970, several motions have been filed necessitating this opinion and order.

MOTION OF AMICUS CURIAE

Ferdinand Buckley filed a motion on September 3, 1970, to alter or amend the Court's judgment of August 25, 1970, to rule on several of his earlier motions and prayers. Accordingly, that judgment is hereby amended in the following (See FN) respect:

Mr. Buckley's motion for reconsideration of the order revoking his appointment as guardian *ad litem* for the embryo (or fetus), and his motion to intervene in any representative capacity on behalf of the embryo or fetus is denied. This ruling makes it unnecessary, and the Court declines, to rule on the prayers in the answer and counterclaim Mr. Buckley filed before revocation of his appointment as guardian *ad litem*.

MOTIONS OF JANE ROE

Jane Roe petitions for leave to intervene as a plaintiff, moves for a temporary restraining order, and asks that the Court clarify and enforce its opinion of July 31, 1970. Said petition, and accordingly also the motion and the request are denied for two reasons.

First, the Court is informed by counsel for all concerned that Georgia Baptist Hospital has reconsidered its earlier decision and subsequently granted Jane Roe's application for an abortion. Said action renders the petition of Jane Roe moot, there now being no sufficient collision of interests between Jane Roe and the defendants.

Second, Jane Roe's petition to intervene makes it clear that her controversy was with Georgia Baptist Hospital, and only tangentially with the defendants in this case. Under such circumstances there is no showing that Mary Doe—representing the class of pregnant women denied abortions because of the Georgia statute attacked—could not adequately represent the tangential interest of Jane Roe in this action. *See Allen Calculators, Inc. v. National Cash Register Co.*, 322 U. S. 137, 141 (1944); *Durkin v. Pet Milk Co.*, 14 F.R.D. 374 (W.D. Ark. 1953).

In spite of the above, the motion presents an aspect of the case which justifies some amplification of the previous declaratory judgment. The court concludes that this should be done by way of amendment sua sponte. Rule 60(b)(6); *Klapcott v. United States*, 335 U. S. 601 (1948); *Bros. Incorporated v. W. E. Grace Mfg. Co.*, 320 F.2d 594 (5th Cir. 1963).

The problem relates to the role and function of the "abortion committees" in the several hospitals. Ga. Code § 26-1202(5). The thrust of the original opinion was to carry out the apparent intent of the Georgia legislature

by making the ultimate decision on individual abortions a medical one. However, in line with constitutional principles, the ultimate decision cannot be restricted to the three reasons stated in the statute. This left the abortion committee free to decide whether an abortion was "necessary" on the broader medical basis, namely, the totality of circumstances surrounding each patient.

From the motion it is apparent that those committees who have voluntarily adopted the standards promulgated by the American College of Obstetricians and Gynecologists as controlling have placed themselves in the position of being restricted by the same reasons stated in the statute.[1] What is denied directly cannot be accomplished indirectly. It follows that the abortion committees cannot be limited to the stated reasons as the sole basis for approval of an individual abortion, nor can they so limit themselves by the adoption of such standards. Any such action by a hospital committee is declared to be an unconstitutional exercise of delegated power.

In sum, the statutory processes of approval are left standing. The patient is required to obtain the approval of (1) the certifying physician, (2) the two consulting physicians, and (3) the abortion committee of the ad-

---

[1] The Georgia statute requires the hospital to apply standards promulgated by the Joint Commission on the Accreditation of Hospitals. No such restrictive reasons for approval of an abortion are contained therein. However, the voluntary standards promulgated by the American College of Obstetricians and Gynecologists in part limit the grounds for abortion to the three stated statutory reasons: injury to health of the mother; danger of grave physical or mental defect to the child; and pregnancy due to rape. Any such limiting restrictions, as seen, must fail. Likewise, lack of consent by the husband, while it may freely be considered by the committee, may not be automatically established as an absolute bar.

By way of additional comment, good faith administration of the statute as now constituted would prohibit a committee from secretly restricting abortions to those statutory reasons, which the court has already deleted. To the contrary, all relevant factors should be considered and an informed medical judgment made.

mitting hospital. Failure to obtain approval at any level necessarily precludes abortion on that application. A majority of the abortion committee shall control its action, whether for approval or for disapproval.

To the extent stated herein, the original opinion is modified.

IT IS SO ORDERED.

This the 13 day of October, 1970.

LEWIS R. MORGAN
United States Circuit Judge

SIDNEY O. SMITH, JR.
United States District Judge

ALBERT J. HENDERSON, JR.
United States District Judge

APPENDIX "D"

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE; PETER G. BOURNE; ROBERT HATCHER; LILLAS L. JAMES; JAMES WATERS; CORBETT TURNER; NEWTON LONG; EDWARD LEADER; WILLIAM H. BIGGERS; GEORGE VIOLIN; PATRICIA S. SMITH; JENNIE WILLIAMS; JUDITH BOURNE; SUZANNE DUNAWAY; JOYCE PARKS; LOU ANN IRION; MARY LONG; J. EMMETT HERNDON; SAMUEL L. WILLIAMS; EUGENE PICKETT; RICHARD DEVOR; DONALD DAUGHTRY; JUDITH ZORACH and KAREN WEAVER, residents of the State of Georgia;
PLANNED PARENTHOOD ASSOCIATION OF ATLANTA, INC., a Georgia corporation; and GEORGIA CITIZENS FOR HOSPITAL ABORTION, INC., a Georgia corporation, for and on behalf of all persons and organizations similarly situated,
Plaintiffs,

vs.

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; LEWIS R. SLATON as District Attorney of Fulton County, Georgia; and HERBERT T. JENKINS, as Chief of Police of the City of Atlanta, Georgia

CIVIL ACTION

No. 13676

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that, the above named plaintiffs, hereby appeal to the Supreme Court of the United States from judgment in this action dated the 24th day of August, 1970, in which the plaintiffs' application for an injunction was denied. This appeal is taken pursuant to 28 U.S.C. sec. 1253. This 18 day of September, 1970.

Attorney for Plaintiffs

s / MARGIE PITTS HAMES

MARGIE PITTS HAMES
210 Brighton Road, N. E.
Atlanta, Georgia 30309
355-8998

TOBIANE SCHWARTZ
153 Pryor Street, S. W.
Atlanta, Georgia 30303
524-5811

ELIZABETH ROEDIGER RINDSKOPF
551 Forrest Road, N. E.
Atlanta, Georgia 30312
522-9135

BLEED THROUGH

APPENDIX "E"

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE; PETER G. BOURNE; ROBERT HATCHER; LILLAS L. JAMES; JAMES WATERS; CORBETT TURNER; NEWTON LONG; EDWARD LEADER; WILLIAM H. BIGGERS; GEORGE VIOLIN; PATRICIA S. SMITH; JENNIE WILLIAMS; JUDITH BOURNE; SUZANNE DUNAWAY; JOYCE PARKS; LOU ANN IRION; MARY LONG; J. EMMETT HERNDON; SAMUEL L. WILLIAMS; EUGENE PICKETT; RICHARD DEVOR; DONALD DAUGHTRY; JUDITH ZORACH and KAREN WEAVER, residents of the State of Georgia; PLANNED PARENTHOOD ASSOCIATION OF ATLANTA, INC., a Georgia corporation; and GEORGIA CITIZENS FOR HOSPITAL ABORTION, INC., a Georgia corporation, for and on the behalf of all persons and organizations similarly situated,

Plaintiffs,

vs.

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; LEWIS R. SLATON as District Attorney of Fulton County, Georgia; and HERBERT T. JENKINS, as Chief of Police of the City of Atlanta, Georgia

CIVIL ACTION

No. 13676

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that, the above named plaintiffs, hereby appeal to the Supreme Court of the United States from judgment in this action dated the 24th day of August, 1970, as amended by order entered October 13, 1970, in which the plaintiffs' application for an injunction was denied. This appeal is taken pursuant to 28 U.S.C. sec. 1253. This 30 day of October, 1970.

Attorney for Plaintiffs

s / MARGIE PITTS HAMES

MARGIE PITTS HAMES
210 Brighton Road, N.E.
Atlanta, Georgia 30309
355-8998

TOBIANE SCHWARTZ
153 Pryor Street, S.W.
Atlanta, Georgia 30303

ELIZABETH ROEDIGER RINDSKOPF
551 Forest Road, N.E.
Atlanta, Georgia 30312
522-9135

BLEED THROUGH

APPENDIX "F"

TEXT OF GEORGIA ABORTION STATUTE

Ga. Code § 26-1201. **Criminal Abortion**

Except as otherwise provided in Section 26-1202, a person commits criminal abortion when he administers any medicine, drug or other substance whatever to any woman or when he uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion. (Acts 1968, pp. 1249, 1277.)

26-1202. **Exception**

(a) Section 26-1201 shall not apply to an abortion performed by a physician duly licensed to practice medicine and surgery pursuant to Chapter 84-9 or 84-12 of the Code of Georgia of 1933, as amended, based upon his best clinical judgment that an abortion is necessary *because:*

(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or

(2) The fetus would be very likely be born with a grave, permanent, and irremediable mental or physical defect; or

(3) The pregnancy resulted from forcible or statutory rape.

(b) No abortion is authorized or shall be performed under this section unless each of the following conditions is met:

(1) The pregnant woman requesting the abortion certifies in writing under oath and subject to the penalties of false swearing to the physician who proposes to perform the abortion that she is a bona fide legal resident of the State of Georgia.

(2) The physician certifies that he believes the woman is a bona fide resident of this State and that

he has no information which should lead him to believe otherwise.

(3) Such physician's judgment is reduced to writing and concurred in by at least two other physicians duly licensed to practice medicine and surgery pursuant to Chapter 84-9 of the Code of Georgia of 1933, as amended, who certify in writing that based upon their separate personal medical examinations of the pregnant woman, the abortion is, in their judgment necessary *because of one or more of the reasons enumerated above.*

(4) Such abortion is performed in a hospital licensed by the State Board of Health and accredited by the Joint Commission on Accreditation of Hospitals.

(5) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose.

(6) If the proposed abortion is considered necessary because the woman has been raped, the woman makes a written statement under oath, and subject to the penalties of false swearing, of the date, time and place of the rape and the name of the rapist, if known. There must be attached to this statement a certified copy of any report of the rape made to any law enforcement officer or agency and a statement

by the solicitor general of the judicial circuit where the rape occurred or allegedly occurred that, according to his best information, there is probable cause to believe that the rape did occur.

(7) Such written opinions, statements, certificates, and concurrences are maintained in the permanent files of such hospital and are available at all reasonable times to the solicitor general of the judicial circuit in which the hospital is located.

(8) A copy of such written opinions, statements, certificates, and concurrences is filed with the Director of the State Department of Public Health within ten (10) days after such operation is performed.

(9) All written opinions, statements, certificates, and concurrences filed and maintained pursuant to Paragraphs (7) and (8) of this subsection shall be confidential records and shall not be made available for public inspection at any time.

(c) Any solicitor general of the judicial circuit in which an abortion is to be performed under this section, or any person who would be a relative of the child within the second degree of consanguinity, may petition the superior court of the county in which the abortion is to be performed for a declaratory judgment whether the performance of such abortion would violate any constitutional or other legal rights of the fetus. Such solicitor general may also petition such court for the purpose of taking issue with compliance with the requirements of this section. The physician who proposes to perform the abortion and the pregnant woman shall be respondents. The petition shall be heard expeditiously and if the court adjudges that such abortion would violate the constitutional or other legal rights of the fetus, the court shall so

declare and shall restrain the physician from performing the abortion.

(d) If an abortion is performed in compliance with this section, the death of the fetus shall not give rise to any claim for wrongful death.

(e) Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b) (5). A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person.

26-1203. **Punishment**

A person convicted of criminal abortion shall be punished by imprisonment for not less than one nor more than 10 years. (Acts 1968, pp. 1249-1280.)

FILE COPY

FILED
NOV 5 1970
E. ROBERT SEAVER, CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1970

NO. ~~808~~ 70-18

JANE ROE, JOHN DOE, AND MARY DOE,
Appellants

JAMES HUBERT HALLFORD, M.D.,
Appellant-Intervenor

vs.

HENRY WADE,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

REPLY TO JURISDICTIONAL STATEMENT

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant Attorney General

ALFRED WALKER
Executive Assistant Attorney General

ROBERT C. FLOWERS
Assistant Attorney General

JAY FLOYD
Assistant Attorney General

Attorneys for Appellee
Box 12548
Austin, Texas 78711

HENRY WADE
Criminal District Attorney
Dallas, County, Texas

JOHN B. TOLLE
Assistant District Attorney
Dallas County Courthouse
Dallas, Texas 75202

SUBJECT INDEX

	Page
INDEX TO AUTHORITIES	ii
JUDGMENT AND OPINION BELOW	2
JURISDICTION	2
STATE STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT AND PROCEEDINGS BELOW	2
ARGUMENT:	
I. Appellants' Appeal Should Be Dismissed	4
A. Injunctive Relief as to Appellant Jane Roe	4
B. Injunctive Relief as to Appellant James Hubert Hallford	5
C. Pendency of Appeal in Fifth Circuit	6
II. Consideration of All Constitutional Issues	6
CONCLUSION AND PRAYER	7
CERTIFICATE OF SERVICE	8
APPENDIX A	9
APPENDIX B	10
APPENDIX C	11
APPENDIX D	12
APPENDIX E	15
APPENDIX F	18

INDEX TO AUTHORITIES

CASES

	Page
Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970)	5-6
Brockington v. Rhodes, —— U.S. ——, 90 S.Ct. 206, 24 L.Ed.2d 209 (1969)	5
Brooks v. Briley, 274 F.Supp. 538 (M.D.Tenn. 1967), affirmed, 391 U.S. 361, 88 S.Ct. 1671, 20 L.Ed.2d 647	6
Cameron v. Johnson, 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968)	6
Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968)	5
Florida Lime and Avocado Growers, Inc., v. Jacobsen, 362 U.S. 73, 80 S.Ct. 568, 4 L.Ed.2d 568 (1960)	7
Goldstein v. Cox, —— U.S. ——, 90 S.Ct. 671, 24 L.Ed.2d 663 (1970)	6
Gray v. State, 178 S.W. 337 (Tex.Crim. 1915)	5

INDEX TO AUTHORITIES—Continued

CASES—Continued

	Page
Gunn v. University Committee to End the War in Viet Nam, —— U.S. ——, 90 S.Ct. 2013, 26 L.Ed.2d 684 (1970)	6
Ex parte Levitt, 302 U.S. 633, 58 U.S. 1, 82 L.Ed. 493 (1937)	5
Massachusetts v. Mellon, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923)	5
Mercer v. Theriot, 377 U.S. 152, 84 S.Ct. 1157, 12 L.Ed.2d 206 (1964)	7
Mitchell v. Donovan, —— U.S. ——, 90 S.Ct. 1763, 26 L.Ed.2d 378 (1970)	6
Reece v. Georgia, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77 (1955)	7
Shaw v. State, 165 S.W. 930 (Tex.Crim. 1914)	5
Stefanelli v. Minard, 342 U.S. 117, 72 S.Ct. 118, 96 L.Ed. 138 (1951)	6
Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1939)	7

INDEX TO AUTHORITIES—Continued

TEXAS STATUTES

Pa

Article 1191, Vernon's Annotated Penal Code of the State of Texas----------

Article 1192, Vernon's Annotated Penal Code of the State of Texas----------

Article 1193, Vernon's Annotated Penal Code of the State of Texas----------

Article 1194, Vernon's Annotated Penal Code of the State of Texas----------

Article 1196, Vernon's Annotated Penal Code of the State of Texas---------- 1

UNITED STATES CODE

28 U.S.C., Section 1253----------

28 U.S.C., Section 2283----------

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1970

NO. ----

JANE ROE, JOHN DOE, AND MARY DOE,
Appellants

JAMES HUBERT HALLFORD, M.D.,
Appellant-Intervenor

vs.

HENRY WADE,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

REPLY TO JURISDICTIONAL STATEMENT

Appellee Henry Wade and the State of Texas respectfully move the Court to dismiss Appellants' appeal herein or, in the alternative, to affirm that portion of the judgment denying Appellants injunctive relief. In the further alternative, Appellees move the Court, if the Court assumes jurisdiction of this cause, to consider all constitutional issues raised below including the question of the constitutionality of Articles 1191, 1192, 1193, 1194 and 1196, Vernon's Annotated Penal Code of the State of Texas, hereinafter referred to as the Texas Abortion Laws.

JUDGMENT AND OPINION BELOW

The Judgment of the United States District Court for the Northern District of Texas is included in the Appendix to the Jurisdictional Statement of Appellants at pages 4a-6a, and the Opinion is at pages 7a-20a.

JURISDICTION

Appellants seek to invoke the jurisdiction of this Court under 28 U.S.C., Section 1253.

STATE STATUTES INVOLVED

Appellants correctly specify the Texas statutes under consideration in their Jurisdictional Statement at pages 4-5; however, they have listed them out of numerical order in that they have listed Article 1196 first.

QUESTIONS PRESENTED

A. Whether Appellants are entitled to injunctive relief against the enforcement of the Texas Abortion Laws?

B. Whether the Texas Abortion Laws infringe upon rights guaranteed to women by the Ninth Amendment to the United States Constitution?

C. Whether the Texas Abortion Laws are void because of unconstitutional overbreath?

D. Whether abstention is warranted as to Appellants' request for injunctive relief against the enforcement of the Texas Abortion Laws?

STATEMENT AND PROCEEDINGS BELOW

Appellants have extracted allegations of fact contained in their Complaints to supplement their statement of the nature of the case before the Court. Briefly,

the proceedings were instituted in the United States District Court for the Northern District of Texas, Dallas Division, as a request for a declaratory judgment that the Texas Abortion Laws are unconstitutionally overbroad and vague, and for injunctive relief against their enforcement. Appellant Jane Roe represented herself to be an unmarried pregnant woman. Appellants John and Mary Doe simultaneously filed suit as a married couple seeking the same relief although Mary Doe did not contend she was pregnant. Appellant James Hubert Hallford intervened as a physician and is presently, as well as at the time of filing his intervention suit, under indictment for violation of the Texas Abortion Laws. The named defendant was Appellee Henry Wade, Criminal District Attorney of Dallas County, Texas. The State of Texas sought and obtained leave of the Court to respond to the Appellants' Complaints.

After oral submission, the United States District Court, sitting as a three-judge court, rendered its decision and entered its judgment, which are included in the Appendix to the Jurisdictional Statement at pages 4a-20a.

Thereafter, in chronological order, the following instruments were filed in this Court and in the United States Court of Appeals for the Fifth Circuit, to-wit:

1. Appellees herein gave Notice of Appeal to the Fifth Circuit—appended herein as Appendix A.

2. Appellants herein, Jane Roe and James Hubert Hallford, gave Notice of Appeal to the Fifth Circuit—appended herein as Appendix B and Appendix C (these Notices are referred to as Notice of *Protective* Appeal in the Appendix

to the Jurisdictional Statement at pages 21a-24a).

3. Appellee herein, the State of Texas, gave Notice of Appeal to this Court—appended herein as Appendix D.

4. Appellants herein gave Notice of Appeal to this Court—appended to the Jurisdictional Statement at pages 1a-3a.

5. Appellants herein filed their Motion to Hold Appeal in Abeyance in the Fifth Circuit—appended herein as Appendix E.

6. Appellee herein, Henry Wade, filed Appellant's Motion in Opposition to Motion to Hold Appeal in Abeyance in the Fifth Circuit—appended herein as Appendix F.

ARGUMENT

I.

Appellants' Appeal Should Be Dismissed

A. *Injunctive Relief as to Appellant Jane Roe.*

The United States District Court found that Appellants John and Mary Doe failed to show standing, but that Appellant Jane Roe had standing to bring this lawsuit (Appendix to Jurisdictional Statement at page 5a). Appellant Jane Roe filed her complaint in the District Court on March 3, 1970, and it has now been some eight months since the filing of same. The query is whether there is a justiciable controversy entitling such Appellant to injunctive relief in that the issue sought to be adjudicated has been rendered moot by subsequent developments, i.e., termination of her pregnancy? No justiciable controversy is presented to a federal court

when the parties seek adjudication of moot questions. *Flast* v. *Cohen,* 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). Accord, *Brockington* v. *Rhodes,* —— U.S. ——, 90 S.Ct. 206, 24 L.Ed.2d 209 (1969).

A requirement that must be established before a three-judge Federal court can entertain an action on its merits (and grant injunctive relief) is that the party challenging a statute as invalid must show that he (she) has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement. *Massachusetts* v. *Mellon,* 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923); *Ex parte Levitt,* 302 U.S. 633, 58 U.S. 1, 82 L.Ed. 493 (1937). It can only be logically assumed that Appellant Jane Roe is not in need of an abortion at this time to terminate her pregnancy. Further, Appellant Roe could not be prosecuted in the Texas courts for submission to an abortion, nor could any woman. *Gray* v. *State,* 178 S.W. 337 (Tex. Crim. 1915); *Shaw* v. *State,* 165 S.W. 930 (Tex.Crim. 1914).

This Court may properly conclude that, as to Appellant Jane Roe, no justiciable controversy is presented to invoke the jurisdiction of a federal court that would go to this Court's jurisdiction to review the District Court's denial of injunctive relief as to such Appellant. Accord, *Flask* v. *Cohen,* supra.

B. *Injunctive Relief as to Appellant James Hubert Hallford.*

Appellant Hallford's action is, in effect, an action to enjoin or stay proceedings in the State court where he is under indictments for violating the Texas Abortion Laws. In such instances, this Court has required or sanctioned federal forbearance. *Atlantic Coast Line Railroad Company* v. *Brotherhood of Locomotive En-*

gineers, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970); *Cameron* v. *Johnson,* 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968); *Brooks* v. *Briley,* 274 F.Supp. 538 (M.D.Tenn. 1967), affirmed, 391 U.S. 361, 88 S.Ct. 1671, 20 L.Ed.2d 647.

Historically there has been great reluctance by federal courts to interfere in the operations of a State court. See, e.g., *Stefanelli* v. *Minard,* 342 U.S. 117, 72 S.Ct. 118, 96 L.Ed. 138 (1951). This principle has been codified in 28 U.S.C., Section 2283. None of the statutes which Appellants rely upon as conferring jurisdiction upon this court expressly authorize an injunction to stay proceedings in a state court.

C. *Pendency of Appeal in Fifth Circuit.*

Since the filing of its Notice of Appeal to this Court (Appendix D), Appellees herein have determined that the only forum available to them for appeal from the judgment below is to the Fifth Circuit. *Gunn* v. *University Committee to End the War in Viet Nam,* —— U.S. ——, 90 S.Ct. 2013, 26 L.Ed.2d 684 (1970); *Goldstein* v. *Cox,* —— U.S. ——, 90 S.Ct. 671, 24 L.Ed.2d 663 (1970); *Mitchell* v. *Donovan,* —— U.S. ——, 90 S.Ct. 1763, 26 L.Ed.2d 378 (1970). Appellants herein will not be prejudiced by determination of this appeal by the Fifth Circuit.

II.

Consideration of All Constitutional Issues

In the event this Court should assume jurisdiction of this appeal, Appellees respectfully request this Court to consider all constitutional issues presented below. This Court has previously held that, upon review of a final judgment, it considers all the substantial federal questions determined in the earlier stages of the

litigation. *Mercer* v. *Theriot,* 377 U.S. 152, 84 S.Ct. 1157, 12 L.Ed.2d 206 (1964). Accord, *Florida Lime and Avocado Growers, Inc.,* v. *Jacobsen,* 362 U.S. 73, 80 S.Ct. 568, 4 L.Ed.2d 568 (1960); *Reece* v. *Georgia,* 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77 (1955); *Urie* v. *Thompson,* 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1939).

CONCLUSION AND PRAYER

Appellees submit that Appellants have not shown they are entitled to injunctive relief and move the Court to dismiss Appellants' appeal herein or, in the alternative, to affirm that portion of the judgment of the United States District Court denying injunctive relief to Appellants.

In the further alternative, Appellees move the Court, if the Court assumes jurisdiction of this cause, to consider all constitutional issues raised in the District Court.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant Attorney General

ALFRED WALKER
Executive Assistant Attorney General

ROBERT C. FLOWERS
Assistant Attorney General

JAY FLOYD
Assistant Attorney General

By Jay Floyd
JAY FLOYD

Attorneys for Appellees

Box 12548
Capitol Station
Austin, Texas

CERTIFICATE OF SERVICE

I, Robert C. Flowers, Assistant Attorney General of the State of Texas, certify that copies of Appellees' Reply to Jurisdictional Statement of Appellants have been served on the attorneys for Appellants by depositing said copies in the United States mail, postage prepaid, certified mail, return receipt requested, on this 2nd day of November, A. D. 1970, addressed to Roy Lucas, The James Madison Constitutional Law Institute, Four Patchin Place, New York, New York, 10011, to Norman Dorsen, School of Law, New York University, Washington Square South, New York, New York, 10003, to Linda N. Coffee, 2130 First National Bank Building, Dallas, Texas, 75202, to Sarah Weddington, 3710 Lawton, Austin, Texas, 78731, and to Roy L. Merrill, Jr., Daugherty, Bruner, Lastelick & Anderson, 1130 Mercantile Bank Building, Dallas, Texas, 75201.

Robert C. Flowers

ROBERT C. FLOWERS
Assistant Attorney General

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3-3690-B

JANE ROE, *Plaintiff*
JAMES HUBERT HALLFORD,
Intervenor

vs.

HENRY WADE,
Defendant

NOTICE OF APPEAL

Notice is hereby given that HENRY WADE, Criminal District Attorney of Dallas County, Texas, defendant above named, and THE STATE OF TEXAS, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 17th day of June, 1970.

July 9, 1970.

CRAWFORD C. MARTIN
Attorney General of the State of Texas
Austin, Texas

HENRY WADE
Criminal District Attorney
Dallas County, Texas

JOHN B. TOLLE
Assistant District Attorney
Dallas County Courthouse
Dallas, Texas 75202

Attorney for Defendant,
HENRY WADE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3-3690-B

JANE ROE, *Plaintiff*

vs.

HENRY WADE, *Defendant*

vs.

JAMES HUBERT HALLFORD, M.D.
Intervenor

CIVIL ACTION NO. 3-3691-C

JOHN DOE and MARY DOE,
Plaintiff

vs.

HENRY WADE, *Defendant*

NOTICE OF APPEAL

Notice is hereby given that JANE ROE, Plaintiff above named, appeals to the United States Court of Appeals for the Fifth Circuit from that portion of the final judgment entered in this action on the 17th day of June, 1970, denying the injunctive relief prayed for in Plaintiff's Complaint.

July 24, 1970.

By:_____

LINDA N. COFFEE
2130 First National Bank Bldg.
Dallas, Texas 75202 RI 8-1211

Attorney for Plaintiff
JANE ROE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3-3690-B

JANE ROE, *Plaintiff*

vs.

HENRY WADE, *Defendant*

vs.

JAMES HUBERT HALLFORD, M.D.
Intervenor

CIVIL ACTION 3-3691-C

JOHN DOE and MARY, DOE,
Plaintiff

vs.

HENRY WADE, *Defendant*

NOTICE OF APPEAL

Notice is hereby given that JAMES HUBERT HALLFORD, M.D., Intervenor and Plaintiff above named, appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 17th day of June, 1970.

July 23, 1970.

By----------

FRED BRUNER
DAUGHERTY, BRUNER, LASTELICK
and ANDERSON
1130 Mercantile Bank Building
Dallas, Texas 75201 742-3941

Attorneys for Intervenor and Plaintiff
JAMES HUBERT HALLFORD, M.D.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

CIVIL ACTIONS NOS. 3-3690-B and 3-3691-C

JANE ROE, *Plaintiff*

v.

HENRY WADE, *Defendant*
JAMES HUBERT HALLFORD, M.D.
Intervenor

v.

HENRY WADE, *Defendant*
JOHN DOE and MARY DOE,
Plaintiffs

v.

HENRY WADE, *Defendant*

Before GOLDBERG, Circuit Judge, HUGHES and TAYLOR, District Judges

NOTICE OF APPEAL
to
THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the State of Texas, Responding Party Defendant, Appellant, hereby appeals to the Supreme Court of the United States from that part of the final judgment entered in the above causes on the 17th day of June, 1970, in favor of Plaintiffs, Jane Roe, John Doe and Mary Doe, and Intervenor, James Hubert Hallford, M.D., and against the named Defendant, Henry Wade, and Responding Party Defendant, State of Texas, wherein the Court granted summary declaratory relief finding the Texas Abortion

Laws, Articles 1191, 1192, 1193, 1194 and 1196, Texas Penal Code, unconstitutional.

This appeal is taken pursuant to Title 28, U.S.C., Section 1253.

I.

The Clerk will please prepare a transcript of the record in these causes, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

A. All pleadings of the parties in these causes including all briefs in support of the State of Texas' pleadings.

B. The court reporter's transcription of the proceedings before the Court.

C. All evidentiary items on file in this cause including depositions, stipulations and request for admissions and replies thereto, if any.

D. All orders of the Court.

II.

The following questions are presented by this appeal:

A. Whether the Plaintiffs and Intervenor had standing to challenge the constitutionality of Articles 1191, 1192, 1193, 1194 and 1196, Texas Penal Code?

B. Whether the Plaintiffs and Intervenor failed to state a claim upon which relief could be granted for the reason that they failed to plead facts which raised any substantial constitutional question?

C. Whether the Plaintiffs and Intervenor failed to state a claim upon which relief could be granted for the reason that they failed to show that they suffered

or will suffer any irreparable injury and that they had no adequate remedy at law?

D. Whether Intervenor, James Hubert Hallford, M.D.'s, Complaint is barred by 28 U.S.C. 2283?

E. Whether, as held by the Court, Article 1191, Texas Penal Code, is unconstitutional?

F. Whether, as held by the Court, Article 1192, Texas Penal Code, is unconstitutional?

G. Whether, as held by the Court, Article 1193, Texas Penal Code, is unconstitutional?

H. Whether, as held by the Court, Article 1194, Texas Penal Code, is unconstitutional?

I. Whether, as held by the Court, Article 1196, Texas Penal Code, is unconstitutional?

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant to the Attorney General

ALFRED WALKER
Executive Assistant to the Attorney General

ROBERT C. FLOWERS
Assistant Attorney General

By----------
ROBERT C. FLOWERS

Attorneys for the State of Texas

Box R, Capitol Station
Austin, Texas 78711

APPENDIX E

In The

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 30329

HENRY WADE, Criminal District Attorney of Dallas, Texas,

Appellant,

v.

JANE ROE, et al.,

Appellees.

On Appeal From the United States District Court for the Northern District of Texas

---

MOTION TO HOLD APPEAL IN ABEYANCE

I. INTRODUCTION

The present appeal to this Court was taken by Appellant Wade from a declaratory judgment rendered below by a statutory three-judge federal district court that the Texas Abortion Laws violate the federal constitution by reason of unconstitutional vagueness and overbreadth. The judgment below, while granting declaratory relief, denied an injunction against future enforcement of the aforesaid statutes. From that portion of the judgment, Appellees here have taken an appeal directly to the Supreme Court of the United States pursuant to 28 U.S.C. §1253 (1964 ed.). Appel-

lees make the present motion to hold the appeal in abeyance pending disposition by the Supreme Court. In the event that the Supreme Court's action allows the appeal here to go forward, Appellee respectfully requests an additional 20 days time within which to file a brief, and leave to file a brief of 50 pages.

II. REASONS FOR HOLDING APPEAL IN ABEYANCE

Title 28, U.S. Code §1253, authorizes an appeal from a three-judge district court order "granting or denying . . . an interlocutory or permanent injunction. . . ." The decision below denied such an injunction. While it is unusual that declaratory relief is granted, and an injunction denied, there have been such cases from time to time in the past, and the Supreme Court has heard such appeals. *See, e.g., Carter v. Jury Comm'n of Greene County,* 396 U.S. 320, 328 (1970); *Williams v. Rhodes,* 393 U.S. 23, 26-28 (1968). It is the action on the injunction which governs appealability.

When the appeal goes up properly, the entire case is opened for review. As *Dandridge v. Williams,* 397 U.S. 471 (1970) teaches:

> "The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment. . . ." 397 U.S. at 475 n. 6.

Hence Appellant Wade may contest the declaratory judgment in the Supreme Court by way of defense to the propriety of not granting an injunction. Wade is in no way prejudiced by the holding of the present appeal in abeyance. He need do little more than change the heading on the brief already submitted to this Court.

III. RELIEF REQUESTED

Accordingly, Appellee respectfully requests the following:

(1) That the present appeal be held in abeyance pending disposition of this case by the Supreme Court of the United States in an appeal filed by Appellee (See Jurisdictional Statement attached hereto);

(2) That the record on this appeal be certified to the District Court for transmission to the Supreme Court of the United States for use in the appeal of this case docketed there as No. 808, October 1970 Term;

(3) That in the event this appeal is ultimately allowed to go forward, Appellee be granted an additional 20 days within which to file a brief, and that leave be granted to file a printed brief of 50 pages length, exclusive of indices and appendices.

Respectfully submitted:

ROY LUCAS
Four Patchin Place
New York, N. Y. 10011

Attorney for Appellees.

APPENDIX F

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Cause No. 30329

HENRY WADE,

Appellant

v.

JANE ROE, et al.,

Appellees

APPELLANT'S MOTION IN OPPOSITION TO MOTION TO HOLD APPEAL IN ABEYANCE

Appellant HENRY WADE hereby opposes the motion to hold the appeal in abeyance which was previously filed by appellees herein, and would show the Court:

1.)

Appellees have invoked the jurisdiction of this Court, as the record herein reflects (Record, pp. 21, 22).

2.)

Under authority of *Gunn v. University Committee to End the War in Viet Nam, et al.*, —— U.S. ——, 26 L.Ed.2d 684, 90 S.Ct. ——, the only forum available to appellant for appeal of the order of the District Court herein is this honorable Court. Appellees will be in no way prejudiced by this Court's determination of the appeal from the declaratory judgment herein.

WHEREFORE, appellant prays that appellee's motion to hold this appeal in abeyance be in all things denied.

JOHN B. TOLLE
Assistant District Attorney
Dallas County Courthouse
Dallas, Texas 75202

INDEX

Page

I. THE STATUTE INVOLVED AND THE NATURE OF THE CASE

(A) THE STATUTE 1

(B) THE PROCEEDINGS BELOW 3

II. ARGUMENT

THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT 4

(A) WHETHER THE LOWER COURT SHOULD HAVE ISSUED AN INJUNCTION IS NOT A MATTER TO WHICH THIS COURT NEED DEVOTE ITS FURTHER ATTENTION 5

(B) WHETHER THE REMAINING PROVISIONS OF GEORGIA'S ABORTION LAW RAISE DUE PROCESS AND EQUAL PROTECTION QUESTIONS OF FEDERAL CONSTITUTIONAL MOMENT IS PREMATURE, LACKS STATUS AS A JUSTICIABLE CONTROVERSY, AND DOES NOT LEND ITSELF FOR REVIEW AS A SUBSTANTIAL CONSTITUTIONAL QUESTION 12

(C) THE QUESTION AS TO THE "STANDING" AND "COLLISION OF INTEREST" OF APPELLANTS OTHER THAN "MARY DOE" PRESENTS NO

Page

SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTIONS FOR REVIEW 16

III. CONCLUSION 18

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

Cases:

Abbott Laboratories v. Gardner, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967) 6

American Federation of Labor; Metal Trades Department v. Watson, 327 U.S. 582, 66 S.Ct. 761, 90 L.Ed. 873 (1946) 6, 8, 9

Arroyo v. United States, 359 U.S. 419, 79 S.Ct. 864, 3 L.Ed.2d 915 (1959) 13

Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959) 10

Building Service Employees International Union v. Gazzam, 339 U.S. 532, 70 S.Ct. 784, 94 L.Ed. 1045 (1950) 13

Cameron v. Johnson, 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968) 10

Cavanaugh v. Looney, 248 U.S. 453, 39 S.Ct. 142, 63 L.Ed. 354 (1918) 10

Cline v. Frink Dairy Co., 274 U.S. 445, 47 S.Ct. 681, 71 L.Ed. 1146 (1927) 15

TABLE OF AUTHORITIES—continued

Page

Cases—continued:

Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965) 9

Government and Civic Employees Organizing Committee, CIO v. Windsor, 116 F.Supp. 354 (N.D. Ala. 1953) *aff'd* 347 U.S. 901, 74 S.Ct. 429, 98 L.Ed. 1061 (1954) 6

Irwin v. Dixion, 9 How. 10, 13 L.Ed. 25 (1850) 7

Maryland Casualty Co. v. Pacific Coal and Oil Co., 312 U.S. 270, 61 S.Ct. 510, 85 L.Ed. 826 (1941) 17

Petroleum Exploration v. Public Service Commission, 304 U.S. 209, 58 S.Ct. 834, 82 L.Ed. 1294 (1937) 6

Powell v. McCormick, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969) 17

Public Service Commission v. Wycoff Co., 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952) 10

Reetz v. Bozanich, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970) 13

Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) 15

Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 55 S.Ct. 678, 79 L.Ed. 1322 (1935) 8

Truly v. Wanzer, 5 How. 141, 12 L.Ed. 88 (1847) 10

TABLE OF AUTHORITIES—continued

Page

Cases—continued:

Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353, 51 S.Ct. 476, 75 L.Ed. 1112 (1931) 13

United States v. Petrillo, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877 (1947) 15

United States v. W. T. Grant Co., 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303 (1953) 7

Watson v. Buck, 313 U.S. 387, 61 S.Ct. 962, 85 L.Ed. 1416 (1941) 10

Wells v. Hand, 238 F.Supp. 779 (M.D. Ga. 1965) *aff'd sub nom. Wells v. Reynolds*, 382 U.S. 39, 86 S.Ct. 160, 15 L.Ed.2d 32 (1965) 7

Zenith Radio Corporation v. Hazeltine Research, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969) 9

Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967) 11

STATUTES

Ga. Laws 1968, pp. 1249, 1277-1280 2

Criminal Code of Georgia, §§ 26-1201, -1202, -1203 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 971

MARY DOE, *et al*, etc.,

Appellants,

v.

ARTHUR K. BOLTON, Attorney General of the State of Georgia, *et al*, etc.,

Appellees.

On Appeal from the United States District Court For the Northern District of Georgia

---

MOTION TO DISMISS

The Appellees move the Court to dismiss the instant appeal herein from the judgment of the United States District Court for the Northern District of Georgia, Atlanta Division, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

THE STATUTE INVOLVED AND THE NATURE OF THE CASE

(A) THE STATUTE

This appeal attempts to raise questions concerning the

validity of certain portions of Georgia's 1968 abortion law, both facially and in operation. Ga. Laws 1968, pp. 1249, 1277-1280; Criminal Code of Georgia §§ 26-1201, 1202, and 1203. These sections are set out in the Appendix to Appellant's Jurisdictional Statement, pp. 1f-4f. The portions of the cited law which figure in this appeal prescribe an orderly and careful procedure to safeguard the health and life of the woman to be aborted as well as to assure a measure of caution and deliberation before such a drastic life-destroying step is taken.

Three basic steps are provided. The pregnant woman's doctor, who is to perform the abortion, must state that in his judgment the abortion is necessary and that the woman is a resident of the State. Second, two other physicians must concur in his judgment that the abortion is necessary, based on their separate personal medical examinations of the pregnant woman. Third, the abortion is to be performed in a licensed and accredited hospital. A committee of the hospital's staff, composed of not less than three members, must approve the abortion by majority vote. Although the physician proposing to perform the abortion may not be a member of that committee, the two physicians who concurred with his judgment are not so excluded. Consequently, the statute may be interpreted as requiring the approval of only three physicians, as it may be that the two concurring physicians are the same persons who constitute the approving majority in a hospital committee. The State courts have not been asked to construe this item or, for that matter, any other portion of the abortion statute. These conditions, imposed as preliminary steps to be taken before an unborn child's life is extinguished are contained in subsection (b) of Code Section 26-1202.

(B) THE PROCEEDINGS BELOW

Appellants sought a declaratory judgment invalidating as an abridgment of constitutional rights the entire abortion law of Georgia; they also sought a broad injunction against the law's "enforcement, operation, or execution." Plaintiff-Appellants were the unidentified, assertedly pregnant "Mary Doe", certain physicians who purportedly wished to perform abortions, and nurses, social workers, ministers, family planning and abortion counseling organizations all purportedly desiring to advise pregnant women with respect to abortions. It was not alleged that they were being prosecuted or in any way threatened or acted against by any of the Defendant-Appellees, or by anyone else for that matter, with respect to the statute. Its mere existence constituted the basis of their complaint.

A three-judge court convened, heard argument, and received briefs, all primarily on the questions of facial constitutionality and their jurisdiction in the matter.

On July 31, 1970, the court issued its opinion. It concluded that the case presented a substantial constitutional question; that there was a cognizable, justiciable controversy, but only between the unidentified "Mary Doe" and Defendants; that a pregnant woman has a constitutionally-protected right to decide to abort a pregnancy; that the State cannot proscribe the reasons for abortion but may only control the quality of the decision and its manner of execution; and that the portions of the law which limited the permissible reasons for abortion were unconstitutional. Appendix to Appellants' Jurisdictional Statement, pp. 1-a to 15-a. Appellants' request for injunctive relief was denied, and the declaratory relief offered was

formalized by order and judgment on August 24, 1970. Appellants' Jurisdictional Statement, Appendix, pp. 1-b to 3-b. Subsequent to the Notices of Appeal, the court *sua sponte* modified its original opinion to state that hospital abortion committees cannot limit themselves by the adoption of the same standards which were declared unconstitutionally restrictive in the State's criminal law. It also amended its judgment to deny the motion to reconsider revocation of the guardian ad litem appointment and to deny representative intervention on behalf of the unborn child. The questions presented in this appeal are not based on the court's modification and amendment, and they are therefore basically unrelated.

II.

ARGUMENT

THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

Preliminarily, it must be noted that in attempting to justify and demonstrate the substantiality of the first question proposed by Appellants, with respect to the justification for an injunction, they engraft a general discussion of the issues involved in the whole abortion problem in an effort to clothe their specific question with the substantiality inherent in this currently volatile subject. This, it is submitted, confuses the real question presented and fails to answer the question as to why the contentions raised in this appeal should be fully explored by this Court. In other words, the myriad of issues springing from changes in the states' abortion laws and from the

attitudes of the nation's population are irrelevant in terms of the issue of whether the lower court should have issued an injunction against the enforcement, operation, or execution of Georgia's abortion statute by Appellees against Appellants.

That question is a mere collateral segment of the body of concern surrounding abortion, if indeed it is a segment peculiar to that subject at all. The views of the medical profession, which itself does not establish a state's policy concerning the definition of crime, the policies of other states as implemented through their legislatures' enactments, which under no principle of our federal system may be thrust upon an unwilling, coequal State, and the actual controversies being litigated in various jurisdictions and involving dissimilar statutes have no bearing on the purported "right" to an injunction in this case.

Therefore, the magnitude of the abortion controversy, with all of its complex components and spin-off questions, does not lend weight or substance to the specific question raised here.

(A) WHETHER THE LOWER COURT SHOULD HAVE ISSUED AN INJUNCTION IS NOT A MATTER TO WHICH THIS COURT NEED DEVOTE ITS FURTHER ATTENTION.

Appellants contend that they were entitled to an injunction from the three-judge court, enjoining the "enforcement, operation or execution" of the portions of the state statute declared unconstitutional. This is based on the theory that the anti-injunction statute, 28 U.S.C. § 2283, which specifically prohibits enjoining proceedings in a state court, is not involved since no state pro-

ceedings are pending or threatened. It follows, Appellants contend, that therefore the prohibition does not apply and the court had a wider latitude in granting an injunction.

But such a view completely overlooks the nature of, and prerequisites for, an injunction. A proper analysis of this extraordinary equitable remedy will dispel the notion that a substantial federal constitutional question is involved in the district court's declination of an injunction. The denial was based on the discretionary use of the staying hand of abstention, the court stating that the vindication of the rights of "Mary Doe" should be left to the State courts. Even if the other Appellants had not been dismissed as Plaintiffs for lack of a justiciable controversy, and the denial of injunction applied also directly to them, the same result is required.

The specific prohibition of Section 2283 does not change the basic prerequisites for injunctive relief under Section 2281, nor does it alter the nature of such a remedy. Regardless of what else is required, the granting of an injunction is always within the sound discretion of the trial court. *American Federation of Labor; Metal Trades Department v. Watson,* 327 U.S. 582, 66 S.Ct. 761, 90 L.Ed. 873 (1946); *Government and Civic Employees Organizing Committee, CIO v. Windsor,* 116 F.Supp. 354 (N.D. Ala. 1953), *aff'd* 347 U.S. 901, 74 S.Ct. 429, 98 L.Ed. 1061 (1954); *Abbott Laboratories v. Gardner,* 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); *Petroleum Exploration v. Public Service Commission,* 304 U.S. 209, 58 S.Ct. 834, 82 L.Ed. 1294 (1937). It has been long recognized that injunctive relief is a transcendent or extraordinary power,

to be used sparingly and only in a clear and plain case. *Irwin v. Dixion*, 9 How. 10, 13 L.Ed. 25 (1850). Since an injunction is an extraordinary equitable remedy, an appeal from its denial must establish an abuse of discretion. *United States v. W. T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 97 L.Ed. 1303 (1953). Appellants here have made no such allegation, nor offered any grounds to support such a finding. And as said in *Petroleum Exploration v. Public Service Commission, supra:*

> "To justify the use of the extraordinary power of a court of equity, there must be allegation and proof of threatened injury under some of the recognized sources of equitable jurisdiction."

Despite Appellants' argument, the fact that there is no pending or threatened State action against "Mary Doe" or any of the other Appellants does not open the door to injunctive relief by removing the anti-injunction impediment. Contrarily, it adds fuel to the justification of the injunction's denial. The enactment of Section 2283 did not remove or lessen the general prerequisites for injunctive relief under Section 2281.

There are two elements starkly missing from this case, the absence of which elements not only shows that the lower court's denial hints of no abuse of discretion at all, but going one step further, shows that an injunction would not have been warranted.

The first absent element is irreparable injury. As recognized in *Wells v. Hand*, 238 F.Supp. 779 (M.D. Ga. 1965), *aff'd sub nom. Wells v. Reynolds*, 382 U.S. 39, 86 S.Ct. 160, 15 L.Ed.2d 32 (1965):

> "The controlling question is whether the plaintiffs

> have made a sufficient showing that the need for equitable relief by the injunction is urgent in order to prevent great and irreparable injury. *American Federation of Labor v. Watson*, 327 U.S. 582, 66 S.Ct. 761, 90 L.Ed. 873 (1946). The injunctive relief sought . . . must be measured by the extraordinary circumstances rule and considerations of whether the danger of irreparable loss is both great and immediate." *Id.* 238 F.Supp. at 786.

Stated another way, exceptional circumstances and a clear showing of necessity are required to interfere to prevent the enforcement of a criminal statute. *Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89, 55 S.Ct. 678, 79 L.Ed. 1322 (1935).

The "irreparable injury" claimed in the instant appeal is, to say the least, conjectural and suppositious. No facts whatsoever with respect to these particular Appellants are claimed in support of the cry. One such "irreparable injury" urged is the possibility of state prosecution of "a physician". But Appellants even admit that such an eventuality would only occur "despite all reasonable expectations." Even in Appellants' view, such prosecution is only "potential". Jurisdictional Statement, p. 14. The second "irreparable injury" apparently urged is not specifically identified, although Appellants assert that a special circumstance is the short time span a pregnant woman has in which to procure an abortion. What the irreparable injury to this unidentified group of women would be, without the intervention of a general injunction in the present case, is left to assumption, as is the answer to whether the injury needs prevention by federal injunction. To warrant such intervention, the injury claimed must be "clear and imminent". *American Fed-*

eration of Labor; Metal Trades Department v. Watson, 327 U.S. 582, 66 S.Ct. 761, 90 L.Ed. 873 (1946).

What clear and imminent, great and irreparable loss to "Mary Doe", whoever she is, will result without a permanent injunction? What clear and imminent, great and irreparable loss will result to that body of pregnant women in Georgia which "Mary Doe" presumes to represent? What clear and imminent, great and irreparable loss will result to the physicians, or to the nurses, or to the ministers, or to the social workers, or to the organizations, without an injunction in the present case? The complete absence of answers to these questions in Appellants' case illustrate that an injunction would not be warranted. Far more would be needed to present to this Court for full review a substantial federal constitutional question involving the lower court's refusal of injunctive relief.[1]

Even in *Dombrowski*[2] relied upon by Appellants, the granting of injunctive relief was deemed appropriate because "the denial . . . may well result in the denial of any

[1]Appellants claim that injunctive relief would prevent multiple suits. They offer for illustration the attempted intervention in this case of "Jane Roe", and the independent suit filed by "Polly Poe." But "Jane Roe's" quarrel was with Georgia Baptist Hospital, and "Polly Poe's" suit is against Fulton-DeKalb Hospital Authority. Neither of these organizations were defendants in the instant case so that, even putting aside all other dissimilar circumstances, an injunction against the current Appellees would not enjoin those organizations unless it were shown that they were persons in active concert or participation with Appellees and received actual notice of the injunctive order. Federal Rules of Civil Procedure, 65(d); *Zenith Radio Corporation v. Hazeltine Research,* 395 U.S. 100, 112, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

[2]*Dombrowski v. Pfister,* 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965).

effective safeguard against the loss of protective freedoms of expression, and cannot be justified." Such is obviously not the case here.

The second failure with respect to the request for injunctive relief in this case is the total absence of any threatened or probable act which might cause irreparable injury. Without such, injunctive relief may not be granted. *Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952). See also *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959); *Cavanaugh v. Looney*, 248 U.S. 453, 39 S.Ct. 142, 63 L.Ed. 354 (1918). Not only do Appellants admit that no State criminal prosecution is pending or threatened, they assert no pending, threatened, or probable act of any kind by any of the Appellees against any of them, much less an act that would be prohibited. As early stated by this Court, the injury must be impending and threatened, so as to be averted only by the protective preventive process of injunction, in order for it to issue. *Truly v. Wanzer*, 5 How. 141, 12 L.Ed. 88 (1847). There must be at least a threat of irreparable injury, as required by traditional doctrines of equity. *Cameron v. Johnson*, 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968).

Apparently, Appellants' asserted justification for injunction is the combination of Appellees' capacities as office-holders, combined with the existence of a State criminal statute declared partially unconstitutional. Such does not warrant injunctive relief. As held in *Watson v. Buck*, 313 U.S. 387, 61 S.Ct. 962, 85 L.Ed. 1416, (1941), even a general statement that an officer stands ready to perform his duty to prosecute violators of a

criminal statute is not the equivalent of a threat that prosecutions are to be begun immediately, in such numbers, or in such manner as to indicate the virtual certainty of that extraordinary injury which alone justifies equitable suspension of proceedings in criminal courts under an invalid statute.

Much less, then, can Appellants suggest that this Court review the denial of injunction and reverse it as an abuse of discretion. In the absence of any claim that the statute is being, or will be, asserted to violate any constitutionally protected rights of the Appellants in their various capacities, it is submitted that an injunction would be completely unappropriate, so that its denial need not be reviewed.

As recognized by this Court in *Dombrowski v. Pfister, supra:*

> "It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." 380 U.S. at 484-485.

Appellants' contention is that since part of the statute was declared unconstitutional, an injunction is mandated against its enforcement, operation, or execution. Such a proposition presents no substantial federal constitutional question, because if Appellant's position were correct, an injunction against future enforcement would automatically be required in every case where a statute's constitutionality is rejected. And such is not the law. As noted in *Zwickler v. Koota,* 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967), the appropriateness and merits

of a declaratory judgment, and the propriety of issuing an injunction, are to be decided irrespective of each other.

(B) WHETHER THE REMAINING PROVISIONS OF GEORGIA'S ABORTION LAW RAISE DUE PROCESS AND EQUAL PROTECTION QUESTIONS OF FEDERAL CONSTITUTIONAL MOMENT IS PREMATURE, LACKS STATUS AS A JUSTICIABLE CONTROVERSY, AND DOES NOT LEND ITSELF FOR REVIEW AS A SUBSTANTIAL CONSTITUTIONAL QUESTION.

(1) Appellants propose that the Court examine the statute in its new posture, with the exclusion of the portions struck by the lower court. The judicial surgery undertaken by the three-judge court has left the statute in a different frame and has vastly changed the nature of the statute so that it now takes on a more health-oriented primary purpose. Such a drastic change should not, it is submitted, subject the remainder to scrutiny by this Court at the first instance. The lower court viewed the unchanged statute as an attempt to treat abortion as a medical problem. Opinion of the District Court, Appellants' Jurisdictional Statement, p. 12-a. Georgia, however, had viewed it as more than merely medical, and prescribed criminal sanctions for all but specified types of abortions.

The judicial conversion of the statute should first be opened to State examination. The legislature, which has not met since the declaratory judgment was rendered, should have an opportunity to review and possibly revise

the statute. As this Court has on numerous occasions repeated:

> "We construe a criminal statute. 'It is the legislature, not the Court, which is to define a crime, and ordain its punishment.' " *Arroyo v. United States,* 359 U.S. 419, 79 S.Ct. 864, 3 L.Ed.2d 915 (1959), citing a line of cases.

The legislature should be afforded time to adjust the remaining provisions to the policy of the State. This Court has traditionally left matters of State policy to those governments. As was said in *Building Service Employees International Union v. Gazzam,* 339 U.S. 532, 70 S.Ct. 784, 94 L.Ed. 1045, (1950):

> "The public policy of any state is to be found in its constitution, acts of the legislature, and decisions of its courts. 'Primarily, it is for the law makers to determine the public policy of the State.' *Twin City Pipe Line Co. v. Harding Glass Co.,* 283 U.S. 353, 357, 75 L.Ed. 1112, 1116, 51 S.Ct. 476, 83 ALR 1168."

The State appellate courts have not yet construed the abortion law adopted in 1968, either in its entirety or as altered in the proceedings below. The construction of State statutes is primarily the concern of State courts. Here, there has been no authoritative declaration by the State, and the State's construction could conceivably avoid any decision under the Fourteenth Amendment. Such was the case in *Reetz v. Bozanich,* 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970).

The prematurity of a substantial federal constitutional question is demonstrated by Appellants' own argument. They have construed the new law in such a way that it is favorable to their "burdensome" argument. Appellants'

construction is not authoritative nor substantiated by fact. For example, it is claimed that the pregnant woman has no right to appear before the hospital abortion committee[3]. This detail is a subject on which the statute is silent and the Appellants vociferous. A construction has not been sought from the State courts. No reason is given why the State would interpret and construe the statute contrary to constitutional requirements, nor is it contended that due process *could not* be afforded under the procedure prescribed. Appellants' objection, postulated without proof, may well be open to settlement without involving matters of constitutional magnitude. Consequently, there is no substantial federal constitutional question which compels full review by this Court presently.

(2) Even if the Court would agree that the statute is ripe for this ultimate review, the charge of vagueness and ambiguity is unsubstantial.

The lower court modified the statute so that its concern is with medical matters primarily. Appellants complain that the test is so vague and ambiguous that it violates due process. According to the statute, as modified by the court, an abortion is permitted where it is deemed necessary in the best clinical judgment of a duly licensed physician-surgeon. Taking this criterion in its context, and considering additionally that an abortion will not be performed except where two additional physician-surgeons independently come to the same conclusion of necessity, and a hospital committee approves it, it is obvious that the test is not so vague as to fail to pass constitutional muster.

---

[3]Appellants' Jurisdictional Statement, p. 18.

The due process clause of the Fourteenth Amendment to the federal Constitution requires a State to frame its criminal statutes so "that those to whom they are addressed may know what standard of conduct is intended to be required." *Cline v. Frink Dairy Co.*, 274 U.S. 445, 458, 47 S.Ct. 681, 71 L.Ed. 1146 (1927). It is explicit in the statute that, before an abortion may be performed, the physician-surgeon must have concluded, upon an application of his best clinical judgment, that it is necessary. It is only the performance of an abortion without this prerequisite finding, that is proscribed. It is patent that such a test does not fail to give adequate warning of the conduct proscribed. It is patent that a doctor's finding of necessity for an operation, as judged by clinical standards in a medical frame of reference, do not fail to give adequate warning of the conduct proscribed.

This Court has recognized that lack of precision in criminal statutes is not itself offensive to the requirements of due process. In *Roth v. United States*, 354 U.S. 476, 491-492, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), *reh. den.*, 355 U.S. 852, the Court quoted from the *Petrillo* case.[4]

> "'. . . [T]he constitution does not require impossible standards'. All that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice. . . .'"
>
> * * *
>
> "'. . . That there may marginal cases in which it is difficult to determine the side of the line on which a particular situation falls is not sufficient reason to

[4] *United States v. Petrillo*, 332 U.S. 1, 7, 8, 67 S.Ct. 1538, 91 L.Ed. 1877, 1883 (1947).

hold the language too ambiguous to define a criminal offense. . . .'"

(3) The claims of "Mary Doe" and the class she claims to represent with respect to purported due process and equal protection violations, present no question for review. None of the arguments are based on a concrete body of facts. The total absence of a proven set of circumstances leaves a void which prevents the subjection of nebulous propositions to the revealing light of cold, hard fact which would comprise a real case or controversy. There is no frame of reference to relate theory to. Consequently, the appeal presents only a general discussion of the pros and cons of unbridled abortion. Such a situation lacks that crystalized adverseness which would remove it from the realm of the merely hypothetical.

Moreover, the procedure for obtaining an abortion is patently defendable as an attempt to surround the irreversible decision, in which the termination of the life of another is involved, with care and caution.

(C) THE QUESTION AS TO THE "STANDING" AND "COLLISION OF INTEREST" OF APPELLANTS OTHER THAN "MARY DOE" PRESENTS NO SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTIONS FOR REVIEW.

Appellants, physicians, nurses, social workers, ministers, and counselling organizations question the lower court's conclusion that their challenge to the statute lacked the requisite justiciability. The Court was right. There is no assertion of dispute between any of the Appellants and any of the Appellees, except with respect to their opinions concerning the statute. No adverse rela-

tionship was asserted. Since the availability of declaratory relief depends on whether there is a "live dispute between the parties", and this is absent in the current case, nothing remains for this Court to review. *Powell v. McCormick*, 395 U.S. 486, 517-518, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). As held by this Court in *Maryland Casualty Co. v. Pacific Coal and Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826, 828 (1941):

> "[There must be] a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

Appellants claim a "personal stake" by virtue of the conspiracy and the aiding and abetting statutes. Yet they point to no case in Georgia under either the old Georgia abortion statute or the presently-challenged one, illustrating a possibility of prosecution for conspiring to perform an abortion or for aiding or abetting in its performance by counselling or otherwise. The "collision of interest" is consequently merely conjectural.

Moreover, the question of the dismissed Plaintiffs' standing is not of great importance since the lack of a justiciable controversy as to them did not prevent the court from issuing a declaratory judgment favoring their contentions.

CONCLUSION

WHEREFORE, Appellees respectfully submit that the questions upon which this cause depends are so unsubstantial as not to need further argument, and Appellees move the Court to dismiss the appeal from the United States District for the Northern District of Georgia.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

HAROLD N. HILL, JR.
Executive Assistant Attorney General

MARION O. GORDON
Assistant Attorney General

DOROTHY T. BEASLEY
Assistant Attorney General
Attorneys for Arthur K. Bolton

TONY H. HIGHT
Attorney for Lewis R. Slaton

HENRY L. BOWDEN

RALPH H. WITT
Attorneys for Herbert T. Jenkins

Please Serve:
MARION O. GORDON
P. O. Address:

132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334

CERTIFICATE OF SERVICE

I, Marion O. Gordon, Attorney of Record for one of the Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I served the foregoing Motion to Dismiss on the Appellants by depositing copies of the same in a United States mailbox, with first class postage prepaid, addressed to counsel of record at their post office addresses:

MARGIE PITTS HAMES
210 Brighton Road, N.E.
Atlanta, Georgia 30309

REBER F. BOULT, JR.
CHARLES MORGAN, JR.
5 Forsyth Street, N.W.
Atlanta, Georgia 30303

ELIZABETH ROEDIGER RINDSKOPF
GAIL M. SEIGEL
551 Forrest Road, N.E.
Atlanta, Georgia 30312

TOBIANE SCHWARTZ
153 Pryor Street, S.W.
Atlanta, Georgia 30303

This 24 day of December, 1970.

MARION O. GORDON
Of Counsel for Appellees

SUBJECT INDEX

Page

Motion for Leave to File Brief Amici Curiae in Support of Appellants 1

Brief of Amici Curiae 5

Summary of Argument 5

Argument 8

I.

The Georgia Abortion Law Infringes Upon the Right to Marital and Individual Privacy Without a Compelling State Interest 8

A. The Statute Infringes Upon the Right to Privacy 8

1. Marital Privacy 8

2. The Right of Privacy of the Individual Woman 11

B. The Statute Infringes Upon Fundamental Constitutional Rights Without Serving Any Compelling State Interest 14

1. The Statute Serves No Health Interest of the State; On the Contrary, It Has Created a Severe Health Problem 15

a. The History of the Abortion Statute 15

b. The Adverse Effect Upon Health of the Georgia Law 16

2. The State Has No Valid Interest in Indirectly Legislating Morality, and the Statute Does Not Actually Serve Any Moral Purpose 17

Page

3. The State Has No Interest in Increasing Its Population; On the Contrary, Its Interest, if Any, Is in Limiting Population Growth 18

4. The State Has No Interest in Requiring That All Embryos Develop and Be Born 19

a. The Law Has Never Restricted Abortions for the Purpose of Protecting the Embryo 19

b. There Is No Legal Recognition of the Fetus as a Person; Live Birth Is Required Before Any Rights Attach 20

c. The View That "Human Life" Commences With Conception Is a Philosophical Conclusion Not Supported by Scientific Evidence 20

5. Conclusion 21

II.

The Application and Effect of Restrictive Abortion Laws, Such as the Georgia Abortion Law, Results in Discrimination Against Poor and Non-White Women in Exercising Their Fundamental Interest in Marital and Individual Privacy, Denying to Them the Equal Protection of the Laws 22

A. Factual Data Demonstrate Discrimination Against the Poor and Non-White 22

B. As a Result of the Disproportionate Unavailability of Hospital Abortions to Them, the Poor and the Non-White Resort to Unsafe Criminal Abortions Which

Page

Lead to High Mortality and Morbidity Rates 29

C. Where Abortion Restrictions Have Been Eliminated, the Poor and the Non-White in Fact Receive Abortion Services in a Non-Discriminatory Manner 31

D. The Impact of the Restrictive Abortion Law Effectively Denies Equal Protection to the Poor and Non-White 32

III.

Where the State Has Permitted Abortions to Take Place in Certain Hospitals Under Certain Conditions, but Has Delegated Unreviewable Authority Without Standards to a Private Body to Decide in Which Hospitals Abortions May Take Place, and Has Delegated Unreviewable Authority to Physicians and Committees of Physicians to Decide Under Which Conditions Abortions May Take Place, and Said Physicians Have Compelling Reasons to Skew Their Decisions Against Granting Abortions, and Where Such Delegations of Authority Are Likely to Result and in Fact Result in Discrimination in Obtaining Abortion Against the Poor and Non-White, the State Has Denied to the Poor and Non-White the Equal Protection of the Laws 37

A. Restricting Lawful Abortions to Accredited Hospitals Results in Discrimination Against the Poor and Non-White 37

B. Delegation of Authority to Physicians and Their Committees to Approve Abortions at Their Peril Results in Discrimination Against the Poor and the Non-White 43

IV.

Page

Georgia's Statutory Option for Hospitals to Reject Abortion Patients, to the Extent It Is Exercised by Public or Publicly-Subsidized Hospitals, Sanctions a Denial of Equal Protection to the Class of Patients Requiring Abortion, Having a Particularly Severe Impact on the Poor and Non-White 48

V.

Conclusion 52

TABLE OF AUTHORITIES CITED

Cases	Page
Babbitz v. McCann, 310 F. Supp. 293, app. dism. per cur., 400 U.S. 1	13
Baired v. Eisenstadt, 429 F. 2d 1398, prob. juris. 401 U.S. 934	17, 18
Bates v. Little Rock, 361 U.S. 516	14
Brooks Estate, In re, 32 Ill. 2d 361, 205 N.E. 2d 435	13
Carter v. Carter Coal Co., 298 U.S. 238	38
Communist Party of U.S. v. SACB, 367 U.S. 1	38
Dandridge v. Williams, 397 U.S. 471	36, 42, 49
Doe v. Gen. Hosp., 313 F. Supp. 1170, 434 F. 2d 423	24
Douglas v. California, 372 U.S. 353	33, 34
Edwards v. California, 314 U.S. 160	24
Epperson v. Arkansas, 393 U.S. 97	21
Erickson v. Dilgard, 44 Misc. 2d 27, 252 N.Y.S. 2d 705	13
Gardner v. California, 393 U.S. 367	34
Gomillion v. Lightfoot, 364 U.S. 339	34
Griffin v. County School Board of Prince Edward County, 377 U.S. 218	51
Griffin v. Illinois, 351 U.S. 12	33, 42
Griswold v. Connecticut, 381 U.S. 479	8, 9, 10 11, 18, 52
Harper v. Virginia Bd. of Elections, 383 U.S. 663	33, 42
Hobson v. Hansen, 269 F. Supp. 401	34
Jackson v. Denno, 378 U.S. 368	46

Page

Jacobson v. Massachusetts, 197 U.S. 11 13
James v. Valtierra, 91 S. Ct. 1331 .....51, 52
Long v. District Court of Iowa, 385 U.S. 192 34
Loving v. Virginia, 388 U.S. 1 9
Mayberry v. Pennsylvania, 400 U.S. 455..... 46
McGautha v. California, 91 S. Ct. 1454 .....38, 39, 41
Meyer v. Nebraska, 262 U.S. 390 9
Murchison, In re, 349 U.S. 133 46
NAACP v. Alabama, 377 U.S. 288 41
Olmstead v. United States, 277 U.S. 438 11
Patton v. Mississippi, 332 U.S. 463 34
People v. Belous, 71 Cal. 2d 954, cert. denied, 397 U.S. 915 .....12, 16, 20, 30, 46
Pierce v. Society of Sisters, 268 U.S. 510 8
Pres. & Directors of Georgetown College, Inc. v. Jones, 231 F. 2d 1000, cert. denied, 377 U.S. 978 13
Red Lion Broadcasting Co. v. FCC, 399 U.S. 367 .....39, 40
Reitman v. Mulkey, 387 U.S. 369 51
Rinaldi v. Yeager, 384 U.S. 305 34
Sams v. Ohio Valley Gen'l Hosp. Assn., 413 F. 2d 826 49
Schecter Poultry Corp. v. U.S., 295 U.S. 495 38
Shapiro v. Thompson, 394 U.S. 618 ....33, 36, 42, 50
Simkins v. Moses H. Cone Memorial Hosp., 323 F. 2d 959, cert. denied, 376 U.S. 938 49
Skinner v. Oklahoma, 316 U.S. 535 8
Smith v. Texas, 311 U.S. 128 34

Page

Smuck v. Hobson, 408 F. 2d 175 34
State v. Murphy, 27 N.J.L. 112 15
Terry v. Ohio, 393 U.S. 1 11
Thornhill v. Alabama, 310 U.S. 88 41
Tumey v. Ohio, 273 U.S. 510 46
United States v. George, 239 F. Supp. 752 14
United States v. Grimaud, 220 U.S. 504 39
United States v. Rock-Royal Co-Op., 307 U.S. 533 .. 38
United States v. Vuitch, 91 S. Ct. 1294 .....44, 45
Williams v. Oklahoma City, 395 U.S. 458 34
Yick Wo v. Hopkins, 118 U.S. 356 .....33, 41, 42

Miscellaneous

New York Times (June 26, 1970), p. 1 35
United States Department of Health, Education, Welfare, Hill-Burton Project Register (1969), pp. 80-92 49

Statutes

Code of Federal Regulations, Title 45, Sec. 220.20.. 19
Code of Federal Regulations, Title 45, Sec. 220.21 19
Georgia Code Annotated, Sec. 26-1201 43
Georgia Code Annotated, Sec. 26-1202(a) 43
Georgia Code Annotated, Sec. 26-1202(b) 29
Georgia Code Annotated, Sec. 26-1202(b)(3) 29, 43
Georgia Code Annotated, Sec. 26-1202(b)(4) 29, 37, 38, 49, 40
Georgia Code Annotated, Sec. 26-1202(b)(5) 29, 43

Page

Georgie Code Annotated, Sec. 26-1202(b)(6) 29

Georgia Code Annotated, Sec. 26-1202(c) 29

Georgia Code Annotated, Sec. 26-1202(e) 48

Georgia Code Annotated, Sec. 26-1203 43

United States Code, Title 42, Sec. 291 48

United States Code, Title 42, Sec. 291c(e) 48

United States Code, Title 42, Sec. 705(a)(12) .. 17

United States Code, Title 42, Sec. 1396 ....36, 48, 49

United States Code, Title 42, Sec. 1396a(a)(2) .. 50

United States Constitution, Fourteenth Amendment 7, 9, 41, 53

Textbooks

American College of Obstetrics & Gynecology, Policy on Abortion, Medical Tribune (Oct. 12, 1970), p. 1 35

15 American Law Reports 3d (1967), p. 992 20

American Medical News (July 12, 1971), p. 9 32

Bumpass and Westoff, The Perfect Contraceptive Population, 169 Science (1970), pp. 1177, 1179 23

Clark, Religion, Morality and Abortion: A Constitutional Appraisal, 2 Loyola University (Los Angeles) Law Review (Apr. 1969), p. 1 .....10, 45

Clark, Religion, Morality and Abortion: A Constitutional Appraisal, 2 Loyola University (Los Angeles) Law Review (1969), p. 7 45

Clark, Religion, Morality and Abortion: A Constitutional Appraisal, 2 Loyola University (Los Angeles) Law Review (Apr. 1969), p. 9 10

3 Coke on Institutes (1648), p. 50 15

BLEED THROUGH

Page

Gold, et al., Therapeutic Abortions in New York City: A 20-Year Review, 55 American Journal of Public Health (1965), pp. 964, 966 26

Guttmacher, "The Shrinking Non-Psychiatric Indications for Therapeutic Abortion (Rosen ed.), Therapeutic Abortion (1954), p. 12 27

Hall, Abortion in American Hospitals, 57 American Journal of Public Health (1967), p. 1933 ..16, 17, 25

Hall, Abortion in American Hospitals, 57 American Journal of Public Health (1967), p. 1934 ....16, 17, 25, 30

Hall, Abortion Laws: A Call for Reform, 18 DePaul Law Review (1969), pp. 584, 585 16

Hall, Therapeutic Abortion, Sterlization and Contraception, 91 American Journal of Obstetrics and Gynecology (1965), pp. 518, 519 .....25, 28

Hall, Therapeutic Abortion, Sterilization and Contraception, 91 American Journal of Obstetrics and Gynecology (1965), p. 522 28

82 Harvard Law Review (1969), pp. 1065, 1130 22

82 Harvard Law Review (1969), p. 1178 35

Kauper, Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case, 64 Michigan Law Review (1958), pp. 235, 258 9

Kleegman, Planned Parenthood: Its Influence on Public Health and Family Welfare (Rosen ed), Abortion in America (1967), pp. 254, 256 27

Page

Kummer, A Psychiatrist Views Our Abortion Enigma, The Case for Legalized Abortion Now (Guttmacher ed. 1967), p. 114 17

Lader on Abortion (1966), pp. 29-30 47

Leavy & Kummer, Criminal Abortion: Human Hardship and Unyielding Laws, 35 Southern California Law Review (1962), p. 123 30

Mandy, Reflections of a Gynecologist (Rosen ed.), Abortion in America (1967), pp. 288-289.. 27

Means, The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality, 14 New York Law File (1968), pp. 411, 420, 453 .. 19

Moritz & Thompson, Septic Abortion, 95 American Journal of Obstetrics and Gynecology (1966), p. 46 17

New York Penal Law (McKinney Supp. 1970), Sec. 125.05 31

Niswander, Medical Abortion Practices in the United States, in Smith (ed), Abortion and the Law (1967), p. 53 25

Packer, The Limits of the Criminal Sanction (1968), p. 344 29

Prosser on Law of Torts (4th ed. 1971), p. 336 .. 20

Rosen, A Case Study in Social Hypocrisy (Rosen ed.), Abortion in America (1967), pp. 299, 306-307 28

Rosen, Psychiatric Implications of Abortion: A Case Study in Social Hypocrisy, 17 Wisconsin Res. Law Review (1965), pp. 435, 450 30

Page

Silver & Worthington, Regulation of Quality of Care in Hospitals, 35 Law & Contemp. Problems lems (1970), pp. 305, 310-311 38

Silver & Worthington, Regulation of Quality of Care in Hospitals, 35 Law & Contemp. Problems (1970), p. 325 40

Tietz, Morality With Contraception and Induced Abortions, 45 Studies in Family Planning (Sept. 1969), p. 6 16

Tietze, Therapeutic Abortions in the United States, 101 American Journal of Obstetrics and Gynecology (1968), pp. 784, 786 26

Williams, The Sanctity of Life and the Criminal Law (1957), p. 197 21

IN THE

Supreme Court of the United States

October Term, 1971
No. 70-40

MARY DOE, *et al.*, etc.,

Appellants,

vs.

ARTHUR K. BOLTON, Attorney General of the State of Georgia, *et al.*, etc.,

Appellees.

On Appeal From the United States District Court for the Northern District of Georgia.

Motion for Leave to File Brief Amici Curiae in Support of Appellants.

The National Legal Program on Health Problems of the Poor, the National Welfare Rights Organization and the American Public Health Association hereby respectfully move the Court for leave to file their attached brief *amici curiae* in support of appellants in the above-entitled matter.

The National Legal Program on Health Problems of the Poor is a law reform center funded by the U.S. Office of Economic Opportunity to provide support for OEO Legal Services programs across the country in

cases involving health problems of the poor, and to provide, through education, research and legal representation, assistance in the preparation of important litigation in health law. In that capacity, the Program participated as *amicus curiae* in this case in the court below. The Program is based at UCLA School of Law.

The National Welfare Rights Organization is a voluntary association with 125,000 members in 50 states, organized to represent the interests of low income people and welfare recipients with regard to redress of legal grievances, to act as a spokesman for such people and to educate and inform them of their legal rights.

The American Public Health Association is a voluntary association of professionals and others in the field of health care who are concerned about improving the quality and the means of providing for the health care of the American people. The APHA works to identify and study these problems, and to communicate its concerns to the government and the public.

These organizations share the view that restrictive state abortion laws, such as the Georgia statute here under review, have a negative effect on the health and well-being of American women, and have a particularly severe impact on the nation's poor and non-white populations. It is the poor and non-white who suffer most from limited access to legal abortion, and it is they who incur greatly disproportionate numbers of deaths and crippling injuries as a result of being forced to seek criminal abortion.

There are a number of grounds for constitutional challenge to the abortion law here under review. *Amici* request leave to file this brief at the invitation of counsel for appellants, in order to present in some depth the argument that the discriminatory application and effect of the abortion law denies to the poor and non-white the equal protection of the law.

It is the understanding and belief of *amici* that this argument will not be developed in any detail in the principal briefs for appellants, and that appellants rely on the within brief for this purpose. Therefore, the equal protection analysis and issues raised in this brief will not be repetitious of other arguments.

Respectfully submitted,

ALAN F. CHARLES,
National Legal Program on
Health Problems of the Poor,
UCLA School of Law,
Los Angeles, Calif. 90024,

SUSAN GROSSMAN ALEXANDER,
National Legal Program on
Health Problems of the Poor,
UCLA School of Law,
Los Angeles, Calif. 90024,
Attorneys for Amici Curiae.

BRIEF OF AMICI CURIAE.

Summary of Argument.

A woman who seeks an abortion is asserting certain fundamental rights which are protected by the Constitution. Among these are the rights to marital and family privacy, to individual and sexual privacy; in sum, the right to choose whether to bear children or not. These rights are abridged by the state's restriction of abortions to limited circumstances. To justify such an abridgment, the state must demonstrate a compelling interest; no such compelling interest exists to save the Georgia abortion law.

The state's interest in protecting the woman's health no longer supports the restrictions on abortion set forth in the Georgia statute. Medical science now performs abortions more safely than it brings a woman through pregnancy and childbirth. Any state interest in discouraging non-marital sexual relationships must be served by laws penalizing these relationships, and not by an indirect, overly broad prohibition on abortion. There is no evidence, in any case, that abortion laws deter such sexual relationships. The state's purported interest in expanding the population lacks any viability today; government policy in every other area is now squarely against it. And any purported interest in permitting all embryos to develop and be born is not supported anywhere in the Constitution or any other body of law.

Because of its restrictions, the Georgia statute denies to poor and non-white women equal access to legal abortions. It is an undeniable fact that abortion in Georgia and in virtually every other state in the United States is far more readily available to the white,

paying patient than to the poor and the non-white. Studies by physicians, sociologists, public health experts, and lawyers all reach this same conclusion. The reasons for it are not purely economic, *i.e.*, that because abortion is an expensive commodity to obtain on the medical marketplace, it is therefore to be expected that the rich will have greater access to it. It is also because in the facilities which provide health care to the poor, abortion is simply not made available to the poor and non-white on the same conditions as it is to paying patients. As a result, the poor resort to criminal abortion, with its high toll of infection and death, in vastly disproportionate numbers.

Largely to blame are restrictive abortion laws, such as the Georgia statute, in which the legislature has made lay judgments about what conditions must exist before abortions can be legally performed, and has delegated the authority to make such decisions to physicians and committees of physicians with the threat of felony punishment if they err on the side of granting abortion. Unlike more privileged women, poor and non-white women are unable to shop for physicians and hospitals sympathetic to their applications, cannot afford the necessary consultations to establish that their conditions qualify them for treatment, and must largely depend on public hospitals and physicians with whom they have no personal relationship, and who operate under the government's eye, for the relief they seek. The resulting discrimination is easily demonstrated.

The state has confounded the unequal treatment of the poor and non-white by requiring that abortions may only be performed in hospitals accredited by the Joint Commission on Accreditation of Hospitals, thus severely limiting the number of hospitals to which the poor and non-white may have access, without any legitimate state purpose for doing so. The state has also worsened the discriminatory treatment of the poor and non-white by permitting all hospitals to arbitrarily reject abortion patients, including hospitals which have federal constitutional responsibilities not to discriminate by virtue of their public or publicly-subsidized status.

In the absence of any compelling state interest, the harsh discriminatory effect on the poor and the non-white resulting from the operation of the Georgia abortion law denies to poor and non-white women the equal protection of the laws in violation of the Equal Protection Clause of the Fourteenth Amendment.

ARGUMENT.

I.

THE GEORGIA ABORTION LAW INFRINGES UPON THE RIGHT TO MARITAL AND INDIVIDUAL PRIVACY WITHOUT A COMPELLING STATE INTEREST.

A. The Statute Infringes Upon the Right to Privacy.

The right to privacy has been recognized as a constitutionally protected right. The Georgia abortion statute infringes on the right to marital privacy and the woman's right to individual privacy.

1. Marital Privacy.

In *Griswold v. Connecticut*, 381 U.S. 479, this Court recognized the right to marital privacy when the Court voided a state statute prohibiting dissemination of contraceptive information and devices. The Court defined the right to privacy in terms of the right to personal solitude and autonomy and applied it to a "zone of privacy in marriage," thereby setting forth a right that may not be disturbed by the state without a compelling and valid interest.

The explicit recognition in *Griswold* of a right of marital privacy is but one decision in a line of decisions, dating over fifty years, giving constitutional protection to various rights in the procreative, marital and family context, none of which is explicitly enumerated in the Bill of Rights. These decisions include *Skinner v. Oklahoma*, 316 U.S. 535, 536 ("the right to have offspring" is a constitutionally protected "human right"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (the right to send one's children to private school is derived from "the liberty of parents and guardians to direct the upbringing and education of children

under their control"); and *Meyer v. Nebraska*, 262 U.S. 390, 399 (the liberty guaranteed by the Fourteenth Amendment denotes "the right of the individual to . . . marry, establish a home and bring up children"). More recently, *Loving v. Virginia*, 388 U.S. 1, 12, specifically held that the Due Process Clause of the Fourteenth Amendmant protects "the freedom to marry . . . as one of the vital personal rights essential to the orderly pursuit of happiness by free men".

Recognition of the right of privacy asserted in the case now before the Court thus would not usher in a vast increase in judicial power. What has been said pertaining to *Griswold* applies here:

> It required no judicial roving at large to reach the conclusion that the freedom of the marital relationship is a part of the bundle of rights associated with home, family, and marriage—rights supported by precedent, history and common understanding. . . . In exercising its powers in *Griswold* to protect a fundamental personal liberty, the Court, far from advancing to a new milepost on the high road of judicial supremacy, was treading a worn and familiar path. Kauper, "Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The *Griswold* Case," 64 *Mich. L. Rev.* 235, 258 (1958).

This Court, in *Griswold*, endorsed the contention that certain areas of one's life are so personal that they are nobody else's business; that there is a right to simply withdraw into personal intimacy without hindrance by the State, and a right to protection of this private sphere. Without any 'invasion' of the marital bedchamber, and without any attempt by the state to

obtain incriminating evidence, the Court held the Connecticut statute to be an invasion of the protected "zone of marital privacy." Surely, the State had no interest in invading the sanctity, or privacy, of any other decisions involving family planning.

> Griswold's act was to prevent formation of the fetus. This, the court found, was constitutionally protected. If an individual may prevent conception, why can he not nullify that conception when prevention has failed? Clark, "Religion, Morality and Abortion: A Constitutional Appraisal," 2 *Loyola U. (L.A.) L. Rev.* 1, 9 (Apr. 1969).

The Georgia statute, by limiting the authorization of abortions to certain situations, puts limits upon the married couple's fundamental right to decide whether or not to bear a child, at the instant when an ovum is fertilized. Until that moment, the couple has complete freedom of choice as to when, whether, and how often they shall produce children. But once fertilization occurs, their freedom of choice ends and they may not choose *not* to have a child. The state thus invades, and even supersedes, a married couple's constitutional right to control the use of their procreative powers. Under *Griswold* it is surely not the means of control, but the *power* to control which is significant.

The existence and enforcement of this statute allows the state to intrude into the very essence of the marital relationship and indeed to affect the very course and fate of the marriage itself. As did the Connecticut anti-contraceptive statute, the Georgia abortion statute unconstitutionally "operates directly on an intimate relation of husband and wife." 381 U.S. at 483.

2. The Right of Privacy of the Individual Woman.

The right to privacy, to seclusion and autonomy, established as to married couples in *Griswold, supra,* surely belongs to individuals as well.

The right of a woman to control her own body, specifically whether or not to continue a pregnancy, is inherent in the decision in *Terry v. Ohio,* 393 U.S. 1, 8-9, that "no right is more sacred . . . than the right of every individual to the possession and control of his own person. . . ." *See also Olmstead v. United States,* 277 U.S. 438, 478 (Brandeis, J., dissenting).

The right of the woman to decide whether to terminate an unwanted pregnancy follows inexorably from the broad principle that she is entitled to be "let alone" by the state and its agents. For a state to adopt such provisions as the State of Georgia has done in this statute represents an impermissible intrusion into her right to her personal integrity and is a deprivation of her personal liberty. By compelling her, against her will, to continue a pregnancy, the woman may be adversely affecting the essential direction and quality of her own life (and perhaps the lives of others with whom she lives and works, as well). If a woman is viewed as an individual entity, and not as a vessel for propagation, each time she determines whether to bear a child or not, she is without doubt making a truly fundamental choice of her life. Women are no longer a vehicle for a determination by others that supervening social interests require their frequent childbearing for the purpose of adding to the population. Through the medium of the abortion law, however, they are subject to the determination of society in general, which (so far as the lawmaking process is concerned)

is largely male, that no woman may make for herself the decision not to complete a pregnancy to term when she does not desire to. As set out below, the state has no compelling interest in demanding that a woman should carry an unwanted child.

Several courts have acknowledged that the woman's right to her physical integrity requires that she be allowed to make the decision as to the termination of her pregnancy without hindrance by the state. These cases stand for the proposition that abortion statutes are wholly inconsistent with the existence of a right so fundamental in nature, and are, therefore, unconstitutional. In one of these cases was the state's interest in the policy expressed in the challenged abortion statute considered to be of sufficiently compelling nature to justify legislative efforts to circumscribe a woman's right to decide, after consultation with her physician, to terminate her pregnancy.

In *People v. Belous*, 71 Cal. 2d 954 (1969), *cert. denied*, 397 U.S. 915, for example, the Supreme Court of California, in striking down as unconstitutional the pre-1967 abortion law of California, stated:

> The rights involved in the instant case are the woman's right to life and to choose whether to bear children. The woman's right to life is involved because childbirth involves risks of death.
>
> The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this Court's repeated acknowledgment of a "right of privacy" or "liberty" in matters related to marriage, family, and sex. 71 Cal. 2d at 963 (footnotes and citations omitted).

See also *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970), *appeal dismissed per curiam*, 400 U.S. 1, where the court said:

> The police power of the state does not . . . entitle it to deny to a woman the basic right reserved to her under the Ninth Amendment to decide whether she should carry or reject an embryo which has not quickened. 310 F. Supp. at 302.

The right "to be let alone" has, to be sure, been qualfied in a few cases involving physical intrusion into the body, but only where the state interest has been compelling, that is, where the exercise of that right has threatened the rights of other members of society. For example, the power of the state to require vaccinations and to quarantine persons suffering from contagious diseases, although upheld, has been limited to situations involving "great dangers", and "the safety of the general public." *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1904). In *Jacobson*, even so minor an infringement of liberty and of the individual's sovereignty over his body as vaccination was held to require a strong justification.

Also supporting the individual's right to control his own body are recent cases which have upheld the individual's right to refuse medical treatment, even though such a refusal will clearly result in death. See *e.g.*, *Erickson v. Dilgard*, 44 Misc. 2d 27, 252 N.Y.S. 2d 705 (Nassau County Sup. Ct. 1962); *In re Brooks Estate*, 32 Ill. 2d 361, 205 N.E. 2d 435 (1965).

In a case where blood transfusions were permitted without the patient's consent, *Pres. & Directors of Georgetown College, Inc. v. Jones*, 231 F. 2d 1000 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978, the

court based its order on two grounds: (1) the state had an interest in preserving the life of a woman whose small child might become a public charge if she died; and (2) the patient was too weak from loss of blood to be capable of making a competent decision. This case was followed in *United States v. George*, 239 F. Supp. 752 (D. Conn. 1965), in which blood transfusions were ordered while the patient was semiconscious, but withdrawn several days later when the patient regained consciousness.

These cases demonstrate that an individual has a right to refuse medical treatment unless the state's interest is so great that the rest of society will be endangered absent such treatment. Similarly, the state has no right to *prevent* an individual woman from obtaining medical treatment she *desires*, where that treatment represents no danger to the community as a whole.

B. The Statute Infringes Upon Fundamental Constitutional Rights Without Serving Any Compelling State Interest.

> Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling. *Bates v. Little Rock*, 361 U.S. 516, 524.

The Georgia abortion statute does not serve any compelling state interest to justify its infringement upon constitutionally protected rights. The statute does not serve any valid health purpose; instead it causes a severe health problem. The state has no valid interest in regulating morality indirectly through an abortion statute. The state has no valid interest in increasing population through an abortion statute. And the state has

no interest in requiring that all embryos develop and be born.

1. The Statute Serves No Health Interest of the State; On the Contrary, It Has Created a Severe Health Problem.

Because a state has a valid interest in protecting the health of its citizens, one frequently-asserted justification for restrictive abortion laws has been the state's concern with preserving the health of the woman because of the medical dangers associated with abortion in the past. Indeed, the history of abortion legislation in the United States shows that such a concern was a primary, if not the sole, reason for the passage of such restrictive laws during the nineteenth century. But current medical knowledge and techniques have drastically reduced the hazards of abortion, and any such state interest has disappeared. Now, pregnancy itself may be more harmful to woman's health than an abortion performed under medically approved conditions.

a. The History of the Abortion Statute.

Abortion before "quickening" (*i.e.*, when the first fetal movements are felt by the pregnant woman, usually about the fourth or fifth month) was not a crime under the common law of England; even after quickening, abortion was only a misdemeanor. 3 Coke, *Institutes* 50 (1648). American law followed suit until the nineteenth century, when legislation making abortion prior to quickening a crime began to appear. These new laws were designed to protect the health of the woman, as *State v. Murphy*, 27 N.J.L. 112, 114 (Sup. Ct. 1858) declared:

> The design of the [abortion] statute was not to prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts.

The risk of even hospital abortions in the 19th century was formidable, but it is now safer for a woman to have a hospital therapeutic abortion during the first trimester than to bear a child. *People v. Belous, supra* at 965.

> "At the time the abortion laws were passed, the laws made some medico-legal sense. But now, in view of the progress of medical science, these laws . . . make no sense whatsoever." Hall, "Abortion Laws: A Call for Reform," 18 *DePaul L. Rev.* 584, 585 (1969). The rate of maternal mortality from complications of or associated with pregnancy and childbirth (excluding induced abortion) is 18 deaths per 100,000 live births, while the rate of mortality associated with legal abortions performed in hospitals at an early stage of gestation is three deaths per 100,000 abortions. Tietze, "Mortality with Contraception and Induced Abortions," 45 *Studies in Family Planning* 6 (Sept. 1969).

There is no longer any health interest served by Georgia's abortion statute.

b. The Adverse Effect Upon Health of the Georgia Law.

Present restrictive abortion laws, instead of protecting the health of women, have produced a result in direct conflict with that goal. When unable to obtain competent medical treatment, meeting proper medical standards, in appropriate medical facilities, women commonly resort to abortions performed under "back-alley" conditions which often lead to illness and death. The law has thus created "a public health problem of pandemic proportions." Hall, "Abortion in American

BLEED THROUGH

Hospitals," 57 *Am. J. Pub. Health* 1933, 1934 (1967). The number of criminal abortions performed annually in the United States is not known but has been estimated at from 200,000 upwards. The incidence of infection and permanent physical damage is high, and death is a constant threat. Recent studies reveal a high —and increasing—incidence of infected abortions in the hospitals studied (primarily large city hospitals) and describe such septic abortions as a chief cause of maternal deaths. *See, e.g.*, Moritz & Thompson, "Septic Abortion," 95 *Am. J. Obst. & Gynec.* 46 (1966).

It is thus clear that illegal abortions present a significant health problem. By making abortion a crime (unless it comes within the categories of the existing law), the state has succeeded in making highly dangerous a form of conduct which serves a necessary function for society and which can be performed safely under the proper medical conditions. *See* Kummer, "A Psychiatrist Views Our Abortion Enigma," in *The Case for Legalized Abortion Now* 114 (Guttmacher ed. 1967). The Georgia statute is thus contrary to, rather than in furtherance of, any state interest in protecting the health of its women.

2. The State Has No Valid Interest in Indirectly Legislating Morality, and the Statute Does Not Actually Serve Any Moral Purpose.

It is sometimes asserted that the State has a moral interest in prohibiting abortion because the availability of abortions will tend to encourage promiscuity. If the Georgia legislature is concerned with deterring fornication and adultery, it may enforce statutory prohibitions of and penalties for those acts themselves. "It may not do so, however, by making the penalty a personally, and socially, undesired pregnancy." *Baird v. Eisenstadt*,

429 F. 2d 1398, 1402 (1st Cir. 1970), *prob. juris. noted*, 401 U.S. 934.

Even if some state interest in circumscribing promiscuity could be shown, there is no evidence that promiscuity has been decreased or even affected by the existence of abortion laws. If the prevention of such conduct were indeed one purpose of the legislation, the statutory scheme is too indirect to accomplish the legislative intent. Since married women who conceive unwanted pregnancies by their husbands are equally subject to the act, the method of control is not limited to the "evil" sought to be regulated. The statute involved here does not purport to distinguish between married and unmarried women. Even where premarital or extramarital relationships are banned, as in Connecticut at the time of the *Griswold* opinion, a ban on abortions by married couples in no way reinforces the state's ban on other sexual relationships. "At most [such a] broad ban is of marginal utility to the declared objective." *Griswold v. Connecticut, supra* at 506 (White, J., concurring).

3. The State Has No Interest in Increasing Its Population; On the Contrary, Its Interest, If Any, Is in Limiting Population Growth.

In view of the increasing public concern over our rapidly multiplying population, any supposed state interest in increasing the number of lives in being can hardly be raised as a justification for the prohibition of abortion. Indeed, the growing emphasis of both federal and state agencies upon preplanning of families and limitation of their size makes mainifestly inconsistent treating the termination of pregnancy as a crime, while

BLEED THROUGH

birth control devices are not merely permitted but are openly promoted and encouraged by the government. *See, e.g.*, 42 U.S.C. 705(a)(12); 45 C.F.R. 220.20, 220.21.

4. The State Has No Interest in Requiring That All Embryos Develop and Be Born.

There is not now, nor has there ever been, a state interest which requires that all embryos develop and be born.

a. The Law Has Never Restricted Abortions for the Purpose of Protecting the Embryo.

The English common law, followed in this country until the advent of statutory law, permitted abortion before quickening with the woman's consent. The woman's right to abort her pre-quickened fetus was thus "an ancient common-law liberty" of which she was not deprived until the nineteenth century. Means, "The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality," 14 *N.Y.L.F.* 411, 420, 453 (1968). Even under the current Georgia statute, the woman is not prosecuted or punished for her complicity in obtaining an illegal abortion or for aborting herself.

If anything, the historical development of the abortion statutes reflects an interest in protecting the well-being of the woman. "The new statutes were inspired by reverence for life, to be sure; but the life they revered was the pregnant woman's, not that of the unquickened foetus." *Id.* at 508.

b. There Is No Legal Recognition of the Fetus as a Person; Live Birth Is Required Before Any Rights Attach.

All of the statutes and rules which are generally relied upon to show that an embryo or fetus is legally equivalent to a born child "require a live birth or reflect the interest of the parents." *People v. Belous, supra* at 968, 968 n. 12.

(1) No recovery is permitted for injuries negligently inflicted upon a fetus by a third person unless the fetus is *born alive*. Prosser, *Law of Torts* 336 (4th ed. 1971).

(2) No recovery whatsoever is permitted in many states for wrongful death where there is a stillbirth. Even in those jurisdictions which recognize such a cause of action, it is a recognition on behalf of the parents, who have suffered a distressing wrong in the loss of a child whose birth they desired. *Id.* at 337. Moreover, every one of those cases requires that the injury have occurred when the fetus was *viable* (the cases say "quick"). *See* 15 A.L.R. 3d 992 (1967).

(3) The fetus has no property rights; it must be *born alive* to take property. *See, e.g., People v. Belous, supra,* at 968 n. 12.

c. The View That "Human Life" Commences With Conception Is a Philosophical Conclusion Not Supported by Scientific Evidence.

The view that human life commences with conception cannot be supported by any scientific evidence one way or the other. At what point a fetus becomes a "human being" is a subject more fitting for philosophical debate than for scientific judgment. Precisely because human development is a continuum, any choice

BLEED THROUGH

of a starting point for an individual human being is largely arbitrary. Choosing the point of fertilization of the egg by the sperm is no more logical or meaningful than choosing any other.

> It is said that, as a biological fact, life begins with the fertilized ovum. But in one sense 'life' began in the prehistoric slime and has been continuous since. The question is not when life begins but when human personality begins. This is where the phrase 'the unborn child' subtly begs the question.
>
> . . .
>
> The phrase 'unborn child' can be used, without offense to common sense, in respect of the viable foetus, that is, after about the seventh month of pregnancy, when the foetus is capable of surviving apart from the mother. But the further one goes back in the development of the foetus the more questionable its application becomes. Williams, *The Sanctity of Life and the Criminal Law*, 197 (1957).

The existence of a conceptus cannot be equated with the life of a grown woman. This woman is—beyond dispute—a human being. To equate her life and her constitutional rights with those of a non-viable fetus is to make a moral judgment. Any individual is entitled to adopt such a moral judgment for guidance in his or her private life, but it is surely a judgment which he cannot enforce upon others through legislation. *See Epperson v. Arkansas*, 393 U.S. 97.

5. Conclusion.

A single conclusion is dictated by all of the above: the Georgia abortion statute serves no compelling state interest. Because it fails to serve any compelling state interest, its invasion of fundamental rights is in clear violation of the Federal Constitution.

II.

THE APPLICATION AND EFFECT OF RESTRICTIVE ABORTION LAWS, SUCH AS THE GEORGIA ABORTION LAW, RESULTS IN DISCRIMINATION AGAINST POOR AND NON-WHITE WOMEN IN EXERCISING THEIR FUNDAMENTAL INTEREST IN MARITAL AND INDIVIDUAL PRIVACY, DENYING TO THEM THE EQUAL PROTECTION OF THE LAWS.

While *amici* contend that to receive proper medical care in the form of an abortion approved and performed by a physician is, by itself, a fundamental interest protected by the Constitution (Part I, *supra*), it is not necessary for abortion to be declared a constitutional right to hold that its discriminatory denial violates guarantees of equal protection. Even when an interest is not found to be fundamental under the Due Process Clause, it may be deemed fundamental under the Equal Protection Clause, and unequal treatment with respect to that interest upheld only on a very strong showing of justification. Note, "Developments in the Law—Equal Protection," 82 *Harv. L. Rev.*, 1065, 1130 (1969).

A. Factual Data Demonstrate Discrimination Against the Poor and Non-White.

The State of Georgia has established a set of categories describing the circumstances under which women may obtain abortions within the State. On their face, these categories allow this treatment for all women who are similarly situated with respect to those circumstances, and excludes from this treatment all others.

Presumably, therefore, those women who qualify for a legal abortion according to the terms of the statute should be able to obtain one, regardless of their race

BLEED THROUGH

or socio-economic status. There is nothing demonstrable in the differences of skin color or economic condition which suggests that a substantially smaller proportion of the poor or the non-white fall into these categories than do the white and the non-poor, or that the poor and non-white have a substantially different moral attitude on abortion.

On the contrary, a recent study of births occurring between 1960 and 1965 led investigators to conclude that one-third of Negro (as contrasted with one-fifth of white) births were unwanted. "This high level of unwanted births among Negroes indicates the magnitude of the burden of unwanted dependents that is borne by this population. . . ." Bumpass and Westoff, "The Perfect 'Contraceptive' Population," 169 *Science*, 1177, 1179 (1970). Unwanted births were in general more than twice as high for families with incomes of less than $3000 as for those with incomes of over $10,000; this differential was "particularly marked among Negroes." *Id.* The results indicated, in the view of the investigators, that there is a "coincidence of poverty and unwanted births rather than a propensity of the 'poor' to have unwanted children." *Id.*

One explanation for this high level of unwanted births among the poor and the non-white is surely the fact that they do not have equal access to abortions. Data demonstrate that the poor and the non-white do not receive this medical treatment on the same terms as do others. They thus suffer a particularly harsh and adverse effect from the operation of this statute, as they do from that of the other restrictive abortion laws which have existed and currently exist in the United

States. Dr. Alan F. Guttmacher has summed up the evidence:

> Both in regard to incidence and indications between patients on private and clinic services in voluntary and municipal hospitals . . . it has long been apparent . . . that municipal hospitals follow the letter of the law of the abortion statute much more exactly than voluntary hospitals, and also that private patients are generally treated by a more lenient interpretation of the law than service patients. Guttmacher, "Abortion—Yesterday, Today and Tomorrow," in Guttmacher (ed.), *The Case for Legalized Abortion Now* (1967).

The additional burdens placed upon indigent women by public hospitals before these women can obtain abortions (obtainable with far greater ease elsewhere by those who can pay) have been discussed by the two federal courts which examined the procedures at the District of Columbia General Hospital, *Doe v. Gen. Hosp.*, 313 F. Supp. 1170 (D.D.C. 1970), 434 F. 2d 423 and 434 F. 2d 427 (D.C. Cir. 1970). Because the poor rely primarily upon public hospitals for their medical services, denials or delays at those institutions are tantamount to a denial of prompt medical care solely because these women are without funds. "[T]he mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color." *Edwards v. California*, 314 U.S. 160, 184 (Jackson, J., concurring). Yet that state has led to very different medical treatment where restrictive abortion laws exist.

Dr. Robert E. Hall has collected and reported data supporting this conclusion. In New York City, between 1960 and 1962, Dr. Hall found that:

BLEED THROUGH

> . . . the ratio of therapeutic abortions to live births in the proprietary hospitals was 1:250; on the private services of the voluntary hospitals, 1:400; on the ward services of the same voluntary hospitals, 1:1,400; and in the municipal hospitals, 1:10,000. The same inequity pertains to ethnic origin. The rate of therapeutic abortions per live births among white women in New York is 1 per 380, among nonwhites 1 per 2,000, and among Puerto Ricans 1 per 10,000. Hall, "Abortion in American Hospitals," 57 *Am. J. Pub. Health* 1933, 1934 (1967).

In a survey of 65 randomly selected major American hospitals, Dr. Hall similarly discovered that the rate of therapeutic abortions was *3.6 times higher on the private services* of these hospitals than on their ward services. Hall, "Therapeutic Abortion, Sterilization and Contraception," 91 *Am. J. Obst. & Gynec.* 518, 519 (1965).

Kenneth R. Niswander has substantiated similar data from a study of Buffalo, New York, hospitals. Niswander, "Medical Abortion Practices in the United States," in Smith (ed.), *Abortion and the Law* 53 (1967).

Furthermore, he has written:

> Hospitals vary greatly in their abortion practices. At the Los Angeles County Hospital, which treats only clinic patients . . . from 1946 to 1951 there was an incidence of one therapeutic abortion per two thousand eight hundred sixty-four (2,864) deliveries. At the opposite extreme, one finds reputable hospitals permitting abortion for one out of every 35-40 deliveries. The variation in the hospitals surveyed by [Robert E.] Hall extended from

no abortions in 24,417 deliveries to one in 36 deliveries. It seems inconceivable that medical opinion could vary so widely. *Socioeconomic factors must be playing a major role in the decision to abort in certain institutions. Id.* at 54-55 (emphasis added).

Data collected from New York City by other investigators for the period 1951-1962 revealed that:

> Therapeutic abortion occur[red] most frequently among the white population by a considerable margin. The white ratio [was] more than *five times* that among the nonwhites and *26 times* that among the Puerto Ricans. (Well over 90 per cent of all therapeutic abortions in New York City [were] performed on white women.) *Gold, et al.*, "Therapeutic Abortions in New York City: A 20-Year Review," 55 *Am. J. Pub. Health* 964, 966 (1965) (emphasis added).

A nationwide survey of all short-term general hospitals participating in the Professional Activities Survey from 1963 to 1965 led to this conclusion:

> . . . [T]he incidence of therapeutic abortion was almost twice as high among white women as among the nonwhite group. . . . Tietze, "Therapeutic Abortions in the United States," 101 *Am. J. Obst. & Gynec.* 784, 786 (1968).

Similar statistics and conclusions appear throughout the literature in this area:

> Perhaps the greatest injustice resulting from our present policies is the creation of a double standard for private and indigent patients. . . . Almost universally greater consideration is extended to the

BLEED THROUGH

private patient for a multitude of reasons which, not infrequently, include a recognition of their social and economic prestige. Mandy, "Reflections of a Gynecologist," in Rosen (ed.), *Abortion in America* 288-89 (1967).

* * *

The rich and the poor, it should be noted, are not treated alike: many ethical physicians, for instance, are much more lenient in their application of indications for therapeutic abortion to private patients than to indigent patients on municipal hospital services. It is the 'private practice' patient, therefore, who can more readily obtain a therapeutic abortion. Kleegman, "Planned Parenthood: Its Influence on Public Health and Family Welfare," in Rosen (ed.), *Abortion in America* 254, 256 (1967).

A partial explanation for the marked disparity in these figures appears to lie in the far lower incidence of abortions performed for psychiatric reasons among poor and non-white women. In an era when *non*-psychiatric medical reasons for abortions have steadily decreased (Guttmacher, "The Shrinking Non-Psychiatric Indications for Therapeutic Abortion" in Rosen (ed.), *Therapeutic Abortion* 12 (1954)), a steadily increasing number of abortions have been performed for psychiatric reasons. Poor and non-white women have not been the recipients of this treatment, however, to the same extent as their white and wealthier sisters. As Hall wrote in 1965, the discrepancy documented above

> . . . may be attributed to the higher incidence of abortions for psychiatric indications among pri-

> vate patients. Whereas at Sloane Hospital [for Women, in New York City] one therapeutic abortion was performed for psychiatric reasons per 1,149 deliveries on the ward service, the comparable ratio for the private service was one per 104. . . . It would appear therefore that private patients with unwanted pregnancies are more often referred for primary psychiatric evaluation and/or that psychiatric justification for abortion is more easily obtained for private patients. Hall, "Therapeutic Abortion, Sterilization and Contraception," 91 *Am. J. Obst. & Gynec.* 518, 519, 522 (1965).

Dr. Hall's survey of 65 major hospitals confirms the same wide discrepancy in granting psychiatrically-related abortions. (Hall, *op. cit.* at 518.)

Why has this phenomenon occurred? Perhaps because

> ". . . by the very nature of things, ward patients are less likely to have the necessary consultations requested, including the psychiatric, and to have the necessary recommendations made and accepted by a hospital board, than are their well-to-do sisters. Ethical and conscientious physicians decry this fact, but nevertheless find it impossible to controvert. . . . Rosen, "A Case Study in Social Hyprocrisy," in Rosen (ed.), *Abortion in America* 299, 306-07 (1967).

"Reform" legislation such as that in issue here is far from a complete answer to this problem. As one writer has noted:

> . . . [I]t must be recognized that moderate reform is essentially middle-class reform. It benefits

BLEED THROUGH

those who are sufficiently well-educated, well-connected and well-financed to take advantage of the liberalized law. Where will the ghetto dweller find a psychiatrist to testify that she runs a grave risk of emotional impairment if she is forced to give birth to her *n*th baby? Packer, *The Limits of the Criminal Sanction* 344 (1968).

The Georgia statute's onerous requirements of consultation and review, moreover, limit access to legal abortion to those who can afford all the unnecessary services mandated by the statute. See §§26-1202(b)-(3), (4), (5) and (6), 26-1202(c), Ga. Code Ann. These provisions require a woman to retain a physician to approve her request, retain two other physicians to review and concur in that approval, have access to a licensed and accredited hospital and a committee therein to further approve the application, and possibly be prepared to defend her request in a court action brought by relatives of the fetus to the second degree (which may include persons who are total strangers to her). Only the latter provision was struck down by the court below. *See* Appellant's Jurisdictional Statement herein, App. F., pp. 2f, 3f, 4f.

B. As a Result of the Disproportionate Unavailability of Hospital Abortions to Them, the Poor and the Non-White Resort to Unsafe Criminal Abortions Which Lead to High Mortality and Morbidity Rates.

While socioeconomic conditions never *per se* legally warrant therapeutic abortion, socioeconomic status nevertheless frequently determines whether or not an abortion will be performed, and if performed, whether that self-same abortion will be

therapeutic or criminal. Rosen, "Psychiatric Implications of Abortion: A Case Study in Social Hypocrisy," 17 *W. Res. L. Rev.* 435, 450 (1965).

Criminal abortion has been described as the greatest single cause of maternal mortality in the United States; it is one of the greatest causes of disease, infection, and resulting sterilization as well. *See* Leavy & Kummer, "Criminal Abortion: Human Hardship and Unyielding Laws", 35 *So. Cal. L. Rev.*, 123 (1962); *see also People v. Belous, supra* at 965-966. The poor and the non-white suffer disproportionately from the "back-alley" abortionists, whose services they seek out in lieu of the medically safe hospital abortions generally denied them.

California, the only state known to officially compile such figures, in its most recent published report notes that approximately 7 percent of that state's non-white female population subjected themselves to criminal abortion in 1968, as opposed to only 1½ percent of the state's white female population. (California Dept of Public Health, *Third Annual Report on the Implementation of the California Therapeutic Abortion Act*, Tab. 4 (1970).

The often tragic results of these abortions are also documented. In their New York study, Drs. Gold, *et al.*, *op. cit.* at 970-71, noted that the ratio of criminal abortion deaths per 1,000 live births was 4.0 for white women and 16.2 for non-whites. Likewise, Dr. Hall's 1960-62 study led him to conclude that approximately half of the puerperal deaths among New York's Negroes were due to criminal abortions as opposed to only a quarter of the puerperal deaths among white women. Hall, *op. cit.*, 57 *Am. J. Pub. Health* at 1934.

BLEED THROUGH

In Georgia itself, non-hospital abortions caused the deaths of 205 residents between 1950 and 1969. Of these 205 non-hospital abortion deaths, 143 (70%) were of black women. Of the 25 Georgia women who died as a consequence of legal abortions between 1965 and 1969, 22 (88%) were black. While the abortion mortality rate for white Georgia women fell 80% from 1950-54 to 1965-69 (partially reflecting adopting of the instant, "reform" law in 1968), abortion mortality among black Georgia women declined by only 33% between the same two five-year periods. "Non-hospital abortion mortality in Georgia is primarily a black health problem." U.S. Dep't of HEW, Public Health Service, Center for Disease Control, *Abortion Surveillance Report* 10 (1970), citing Rochat, *et al.*, Division of Maternal Health, Georgia Dep't of Public Health, "An Epidemiological Analysis of Abortion in Georgia" (1970).

C. Where Abortion Restrictions Have Been Eliminated, the Poor and the Non-White in Fact Receive Abortion Services in a Non-Discriminatory Manner.

In sharp contrast to the above data has been the experience in New York State since July 1, 1970, when categorical restrictions on abortion were eliminated. *See* N.Y. Pen. Law §125.05 (McKinney Supp. 1970). On April 5, 1971, New York City health officials reported that the city's public hospitals, which restricted abortions to city residents, were performing an average of 511 a week, and the "vast majority" of those women would be unable to afford abortions in private hospitals. *N.Y. Times*, Apr. 6, 1971, at 25.

A later report, issued on June 29, 1971, was even more revealing:

> In the first six weeks, non-whites and Puerto Ricans, who had little access to legal abortions prior to the law, received half the abortions done on women in [New York City]. In the first nine months, 31% of the city's abortions done on state residents were reimbursable under Medicaid. *American Medical News*, July 12, 1971, at 9.

It is clear from this evidence that where the law has eliminated restrictions on the obtaining of abortions, the poor and non-white women who were previously unble to exercise the financial and other kinds of leverage required to have a "therapeutic" abortion, are able to obtain medically safe abortions on an equal basis with all other women, and they do obtain them to at least the same extent as their more privileged sisters. One result has been a drop in the maternal mortality rate: New York City hospitals now report treating far fewer victims of "botched" illegal abortions than they did in years past. "The maternal mortality rate—to which criminal abortions have always contributed a major portion—is now at a record low of 2.3 per each 10,000 live births, compared with 5.2 . . . at this time last year." *Id.*

D. The Impact of the Restrictive Abortion Law Effectively Denies Equal Protection to the Poor and Non-White.

It has been amply demonstrated above that poor and non-white women are not treated equally with other women in obtaining lawful abortions. However

neutral its facial appearance, and however unexceptionable its underlying intent, the practical effect of a statute in denying equal treatment to classes of persons, such as the poor or the non-white, must be measured by the Court.

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. *Yick Wo v. Hopkins,* 118 U.S. 356, 373-74.

The standard articulated in *Yick Wo* has been consistently applied by this Court. Moreover, it has been applied to statutes which have a natural discriminatory effect, whether or not there is evidence of any "evil" public administration.

Where the class affected is the poor, *see Griffin v. Illinois,* 351 U.S. 12 (state's provision of criminal appeal, but not of free transcript held to be an effective denial of equal protection to poor defendants); *Harper v. Virginia Bd. of Elections,* 383 U.S. 663 (state's exaction of a poll tax from all voters held to be an effective denial of equal protection to poor voters); *Shapiro v. Thompson,* 394 U.S. 618 (state's refusal to make welfare payments to residents of less than one year held to be an effective denial of equal protection to poor recent residents and to the foreign poor who wish to travel to the state); *Douglas v. California,* 372

U.S. 353 (state's provision of criminal appeal, but where appellate court decides in advance of hearing whether appointment of counsel for indigent would be "helpful", held to be an effective denial of equal protection to poor defendants). *See also Williams v. Oklahoma City*, 395 U.S. 458; *Gardner v. California*, 393 U.S. 367; *Long v. District Court of Iowa*, 385 U.S. 192; *Rinaldi v. Yeager*, 384 U.S. 305; *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F. 2d 175 (D.C. Cir. 1969).

Where the class affected is non-white, see *Gomillion v. Lightfoot*, 364 U.S. 339 (state's drawing of voting district lines which effectively excluded Negroes from a city district held to be an effective denial of equal protection to Negroes); *Patton v. Mississippi*, 332 U.S. 463, and *Smith v. Texas*, 311 U.S. 128 (state's facially neutral system of jury selection was administered to largely exclude Negroes held to be an effective denial of equal protection to Negroes).

The impact of the cases cited immediately above is that, while the state may not be bound to confer the benefit at issue (here, the categorical exceptions to its basic anti-abortion statute), if it chooses to do so it is obliged not to effectively preclude enjoyment of the benefit to classes like the poor and non-white. Thus, in *Griffin v. Illinois, supra*, the state was not obliged by due process to provide appeals from criminal convictions, but since it had chosen to do so, it could not provide them in a manner that effectively denied poor persons access to the appeal process.

BLEED THROUG

> The effect of the [Griffin] decision is to require Illinois to take account of economic inequities not of its own creation. Note, "Developments in the Law—Equal Protection," *supra*, 82 *Harv. L. Rev.* at 1178.

If the State of Georgia had chosen not to regulate the medical practice of abortion, the prevailing standards of medical practice in the United States today would sanction its performance without categorical restrictions. *See* AMA, *Policy Regarding Abortion* (Resolution of AMA House of Delegates, June 25, 1970) discussed in "AMA Eases Abortion Rules," *N.Y. Times*, June 26, 1970, at 1; American College of Obstetrics & Gynecology, *Policy on Abortion*, discussed in *Medical Tribune*, Oct. 12, 1970, at 1. It is true that the poor and non-white would still be limited in obtaining treatment by the natural factors of inability to pay, not having a family physician, and the limited number of free or subsidized-care facilities in their communities. Nevertheless, it is clear that the state's entry into the field has aggravated the natural limitations of the poor and the non-white by imposing artificial limitations, as well as onerous and costly procedural requirements. The state has elected, first, to penalize the provision of abortion services by everyone, including physicians. It has then permitted physicians to provide this treatment for certain statutory categories of qualified women. At the same time, the state has prescribed necessary steps to secure qualification which are so burdensome as to make it extremely difficult for the

poor and non-white to qualify. This results in an effective denial of equal protection to the poor and non-white.

We have contended (Part I, *supra*) that abortion to a woman is a fundamental interest, and it is being restricted by the state without a compelling state interest. The discrimination in the application and effect of the statute likewise lacks a compelling state interest, or even any rational connection to a legitimate state purpose.

In sanctioning the vastly disproprotionate exclusion of the poor and non-white from abortion services, the state cannot assert that its purpose is to cut down the number of abortions. Where abortion is otherwise lawful, and the poor or non-white woman legally qualifies, the state has no interest in eliminating that which it does not prohibit. The impact on the poor and non-white cannot be justified in terms of state budget-saving, since restrictive abortion laws do not bear any rational relation to the allocation of state resources, and they are clearly not a mere economic regulation. *See Dandridge v. Williams,* 397 U.S. 471. Even were budget-saving asserted, in that medical care for the poor and non-white is often subsidized by public funds (*e.g.,* the Medicaid program, 42 U.S.C. 1396 *et seq.*), it cannot be accomplished by arbitrarily selecting classes to suffer the deprivation. *Shapiro v. Thompson,* 394 U.S. 618.

BLEED THROU

III.

WHERE THE STATE HAS PERMITTED ABORTIONS TO TAKE PLACE IN CERTAIN HOSPITALS UNDER CERTAIN CONDITIONS, BUT HAS DELEGATED UNREVIEWABLE AUTHORITY WITHOUT STANDARDS TO A PRIVATE BODY TO DECIDE IN WHICH HOSPITALS ABORTIONS MAY TAKE PLACE, AND HAS DELEGATED UNREVIEWABLE AUTHORITY TO PHYSICIANS AND COMMITTEES OF PHYSICIANS TO DECIDE UNDER WHICH CONDITIONS ABORTIONS MAY TAKE PLACE, AND SAID PHYSICIANS HAVE COMPELLING REASONS TO SKEW THEIR DECISIONS AGAINST GRANTING ABORTIONS, AND WHERE SUCH DELEGATIONS OF AUTHORITY ARE LIKELY TO RESULT AND IN FACT RESULT IN DISCRIMINATION IN OBTAINING ABORTION AGAINST THE POOR AND NON-WHITE, THE STATE HAS DENIED TO THE POOR AND NON-WHITE THE EQUAL PROTECTION OF THE LAWS.

Two other aspects of the Georgia abortion law result in an effective denial of equal protection to the poor and the non-white. One is the requirement that abortions, to be lawful, must be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals. The second is the provision that other physicians must approve the procedure.

A. Restricting Lawful Abortions to Accredited Hospitals Results in Discrimination Against the Poor and Non-White.

§26-1202(b)(4), Ga. Code Ann., provides that abortions can only be performed in state-licensed hospitals which are also accredited by the Joint Commission on Accreditation of Hospitals (JCAH). Eighty-three of 214 state-licensed hospitals in Georgia are so

accredited, leaving 103 Georgia counties without an accredited hospital. *See* Appellant's Jurisdictional Statement herein, p. 18, App. G.

The JCAH is a private, voluntary national accrediting body located in Chicago, Illinois. It surveys and accredits only those hospitals which request this sevice. *See* Silver & Worthington, "Regulation of Quality of Care in Hospitals," 35 *Law & Contemp. Problems*, 305, 310-11 (1970).

The state has delegated to this private body the authority to choose which Georgia hospitals may lawfully perform abortions. It is instructive to compare this delegation of authority with the three broad areas of delegation which have traditionally been upheld as constitutionally valid. See *McGautha v. California*, ... U.S. ...., 91 S. Ct. 1454, 1499-1504 (1971) (Brennan, J., dissenting).

First, the Georgia legislature has not delegated this power to select which of its hospitals may perform abortions under reasonably fixed statutory standards. *McGautha v. California, supra*, 91 S. Ct. at 1502, citing *Communist Party of U.S. v. SACB*, 367 U.S. 1; *U.S. v. Rock-Royal Co-Op.*, 307 U.S. 533. The legislature has provided no standards at all, and indeed the JCAH would not be bound to accredit by state-fixed standards. Nor has the state impliedly incorporated by reference the fixed and existing standards of an expert body. *See, e.g., Schecter Poultry Corp. v. U.S.*, 295 U.S. 495; *Carter v. Carter Coal Co.*, 298 U.S. 238. The JCAH standards are subject to change, and have in fact been changed since the adoption of §26-1202 (b)(4), Ga. Code Ann. See JCAH, *Accreditation Manual for Hospitals 1970* (1971), setting forth new

BLEED THROUG

accreditation standards which went into effect July 1, 1971.

Second, the Georgia legislature has not delegated a rule-making power to technical experts, under generally declared policy goals, by which the rule-making process itself serves to illuminate the policy decisions being made and allows for meaningful legislative supervision or review. *McGautha v. California, supra,* 91 S. Ct. at 1502-03, citing, *e.g., U.S. v. Grimaud,* 220 U.S. 504 (Dept. of Agriculture's rule-making power to "improve and protect" the national forests); *Red Lion Broadcasting Co. v. FCC,* 399 U.S. 367 (the "fairness" doctrine). Again, of course, the JCAH would not be bound by state-fixed policy goals even if they were declared in the statute, which they are not. If § 26-1202(b)(4), Ga. Code Ann., may be read to support an inference that the state is concerned about the quality or integrity of the facility performing abortions, this concern would seem to be satisfied by the requirement of state licensing. The legislature obviously has the power of supervision and review of its state licensing standards, which is a critical reservation of legislative power in a valid delegation of authority. 91 S. Ct. at 1503. The state has no such power of review over the rule-making functions of JCAH, and indeed the rule-making functions of JCAH are in no wise guided by any express or inferable purpose in the Georgia law.

Even assuming an inferable and legitimate state purpose in the quality and integrity of facilities performing abortions which, *arguendo,* might not be satisfied by state licensing requirements, the delegation of this authority to JCAH would seem facially to be an irrational classification. The JCAH *Accreditation Manual for Hospitals, supra,* contains no special provisions for

abortion services, nor does it even mention the word. To the extent that the quality and integrity of the facility are concerned, the JCAH accreditation requirement would also seem to be an irrational classification for the performance of abortions because there is no articulated nor understandable reason why abortion requires a different quality or integrity of hospital organization than more difficult and dangerous forms of medical treatment, such as neurosurgery, open heart surgery or organ transplants. For all such medical services, the people of Georgia may choose to enter a state-licensed or a licensed and accredited hospital. For abortion alone, the women of Georgia are not allowed to enter a state-licensed hospital unless it is also accredited.

Third, the rule-making or adjudicative functions here delegated by the Georgia legislature to JCAH (*i.e.*, to adopt standards for and to decide which hospitals qualify to perform abortions) are not premised "upon an explanation of both the findings and reasons for a given decision", establishing a body of precedent from which general principles may be deduced. 91 S. Ct. 1503-04, again citing *Red Lion Broadcasting Co. v. FCC, supra.* In fact, the "findings and reasons" for JCAH accreditation decisions are treated by JCAH as confidential, and are not even shown to the Secretary of Health, Education and Welfare for Medicare certification purposes, much less to the Georgia legislature. *See* Silver & Worthington, *op. cit., supra* at 325.

For the foregoing reasons, *amici* contend that the Georgia legislature, in §26-1202(b)(4), Ga. Code

Ann., has delegated its authority to select which hospitals may perform legal abortions in Georgia in a manner violative of the Due Process Clause of the Fourteenth Amendment. *McGautha v. California, supra,* 91 S. Ct. at 1500, n. 22; *Yick Wo v. Hopkins,* 118 U.S. 356.

The impact of this invalid delegation of authority is to create a classification of hospitals which serves no legitimate state purpose, and which has the practical effect of denying abortion services to a significant number of poor persons in Georgia, denying to the poor the equal protection of the laws under the Fourteenth Amendment.

We have already discussed the lack of a rational connection between any legitimate state purpose concerned with the quality and integrity of a hospital facility in the performance of abortion and the JCAH accreditation requirement. Granting the legitimacy of such a state concern, it cannot be accomplished through an unconstitutional and arbitrary means (the unreviewable delegation to JCAH), particularly when it might be accomplished properly, as through state licensing with articulated or legislatively reviewable standards. *Yick Wo v. Hopkins, supra; McGautha v. California, supra* (Brennan, J., dissenting); *See also NAACP v. Alabama,* 377 U.S. 288; *Thornhill v. Alabama,* 310 U.S. 88.

There would seem to be no legitimate state purpose served in cutting down the number of abortions by limiting the hospitals in which they can be performed (83

of 214 licensed hospitals, *supra*), in that the concern here is with abortions which are otherwise legal under state law. There is obviously no legitimate purpose served in prohibiting that which is lawful.

There are no state economic, or budget-saving purposes served in the accreditation requirement *per se*, and there is no demonstrable connection between this classification and a rational allocation of state resources. *See Dandridge v. Williams*, 397 U.S. 471.

On the other hand, the practical discriminatory effect of this irrational classification on the poor is clear. A poor woman who resides in one of 103 Georgia counties without a JCAH accredited hospital, but which may have a ready, willing and able state-licensed hospital, and who qualifies for an abortion according to law, bears a double burden. She must not only obtain the funds necessary to travel to another county, she must also find another accredited hospital, able and willing to perform the service free or through a publicly-subsidized program.

Even though the accreditation statute has no facial discriminatory intent as to the poor, its practical effect must be measured. *Yick Wo v. Hopkins, supra.* Proper and lawful medical care must be viewed as fundamental to the right to life. Where access to proper and lawful medical care is conditioned by the state by creation of a classification, serving no legitimate or rational state purpose, which has the effect of denying that care to a particular group such as the poor, the effect of that classification is to deny equal protection of the laws to the poor. *See Shapiro v. Thompson*, 394 U.S. 618; *Harper v. Virginia Bd. of Elections*, 383 U.S. 663; *Griffin v. Illinois*, 351 U.S. 12.

B. Delegation of Authority to Physicians and Their Committees to Approve Abortions at Their Peril Results in Discrimination Against the Poor and the Non-White.

The Georgia legislature has created certain protected classes of women who may receive legal abortion: those who would suffer life or permanent health threatening consequences, those who are likely to bear defective children, or those who have been the victims of sexual assault. §26-1202(a), Ga. Code Ann. The court below struck down the specification of these classes but retained the general classification of women for whom abortion is deemed "necessary". *See* Appellant's Jurisdictional Statement herein, App. F, p. 1-f.

The legislature has then delegated its authority to determine who falls into these classes, and under what circumstances, to physicians and hospital committees made up of physicians. Two physicians other than the woman's own must concur in the finding, and this concurrence must in turn be approved by a committee of at least three additional physicians in the accredited hospital which is to perform the abortion. §26-1202(b)(3) and (5). This statutory procedure was not invalidated by the court below.

Abortion is otherwise criminal in Georgia, punishable by a one to ten year prison term. §§26-1201, 26-1203, Ga. Code Ann.

Abortions performed outside of the Georgia abortion law (§26-1201 *et seq.*) or performed in error under the statute are criminal abortions. Physicians may clearly be prosecuted even though excepted under the statute, since a prosecutor and jury may not agree with the physician as to the "necessity" of the abortion or the

presence of the life or health-threatening conditions or other circumstances specified in the law. The burden of going forward with the evidence to prove non-necessity may be on the prosecution, but the decisions of physicians are not immune from prosecution. *See U.S. v. Vuitch,* .... U.S. ...., 91 S. Ct. 1294, 1298; *but cf. U.S. v. Vuitch,* 91 S. Ct. 1294, 1311-12 (Stewart, J., dissenting in part).

The Georgia legislature has assigned to these physicians the task of determining whether a woman falls into one of the specified categories at their peril. The court below did not eliminate the peril, but merely limited the category for decision to the word "necessary." In either case, a prosecutor may choose to disagree with the determination in favor of the woman, and a "second-guessing lay jury" may choose to convict. *See U.S. v. Vuitch, supra,* 91 S. Ct. at 1312 (Stewart, J., dissenting in part).

It must be noted here that so long as this second-guessing of medical judgment is permitted, the mere existence of a moral temper adverse to abortion in the prosecutor's office or in the community may have a heavy influence on the making of that judgment. The majority in *Vuitch* suggest that this "danger exists in all criminal cases, not merely those involving abortions." *U.S. v. Vuitch, supra,* 91 S. Ct. at 1299, n. 7. This is not so. In virtually all criminal cases the factual issue for the jury to decide is whether or not the defendant committed the criminal act charged, the act and the crime being one and the same. In abortion cases, com-

mission of the act of abortion by the physician, or its abetment by the committee, may be conceded. The criminality of the act under the statute is, in every case, a matter of qualitative judgment. This is not to say that *voir dire* of jurors and the watchfulness of judges does not help blunt the danger (*U.S. v. Vuitch, id.*) but it does point up the danger to physicians in a hostile environment when it is not their commission or abetment of the act which may be criminal, but the quality of their expert judgment. This "danger" does not exist in all criminal cases. Mr. Justice Clark has added:

> . . . [D]octors face an uncertain fate when performing an abortion. This uncertainty will continue unless the legislatures or courts provide relief from liability. Clark, "Religion, Morality and Abortion: A Constitutional Appraisal", 2 *Loy. U. (L.A.) L. Rev.* 1, 7 (1969).

On the other hand, no prosecution or penalty exists for physicians who decide that the woman is not qualified for an abortion. In considering the slanted consequences of this kind of legislative delegation, the California Supreme Court, in that state's landmark abortion case, said:

> The inevitable effect of such delegation may be to deprive a woman of an abortion when under any definition [of the statutory categories] she would be entitled to such an operation, because the state, in delegating the power to decide when an abortion is necessary, has skewed the penalties in one direction: *no* criminal penalties are imposed where the doctor refuses to perform a necessary operation, even if the woman should in fact

> die. . . . The pressures on a physician to decide not to perform an absolutely necessary abortion are . . . enormous. . . . *People v. Belous, supra* at 973.

Amici do not suggest that every physician faced with the possibility of prosecution, and with having his own medical judgment subjected to lay public review, cannot nevertheless render a fair decision on the merits of an application for abortion. But the risk to be run that the average physician will not be able "to hold the balance nice, clear and true" is substantial, and its impact on Due Process plain. *Tumey v. Ohio*, 273 U.S. 510, 532. This kind of risk of a skewed decision by a personally interested decision-maker has regularly been held to be an invalid delegation of authority. *See In re v. Murchison*, 349 U.S. 133; *Mayberry v. Pennsylvania*, 400 U.S. 455; *Jackson v. Denno*, 378 U.S. 368; *Tumey v. Ohio, supra.*

Furthermore, the decision-making process under this delegation of authority has all the aspects of a star chamber proceeding. Time is obviously of the essence in considering an application for abortion, and there is no appeal from an abortion committee's decision. The decision is made in private, with no provision for personal appearance by the applicant. And in this situation, the question to be decided may be one of life or death, the most fundamental of all human rights.

Where a poor, non-white woman is in need of abortion, the delegation of this authority results in a denial of equal protection, because the poor woman is re-

stricted by her economic circumstances to seeking abortion in an accredited hospital willing or otherwise obliged to treat indigents. Nothing in the law or in common medical practice prevents the affluent woman from consulting with any physician and going to any accredited hospital most likely to provide the desired treatment. The denial of abortion to a poor woman under these circumstances has the effect of a decision *res judicata*. The more affluent woman may shop among hospitals and doctors until she finds those who will favor her application, even if it has been rejected elsewhere.

> The most disastrous result of the abortion committee system has been the economic and social discrimination against one group—the ward patients. In large cities the poor . . . are virtually denied the same medical care as the privileged few. Lader, *Abortion* 29-30 (1966).

The abortion practices of hospitals treating the poor, as compared with the same practices respecting the affluent (Part II, *supra*), reflect the discriminatory result of this delegation of authority. Thus, in effect, a denial of equal protection results when a statute conferring a right to an abortion upon certain kinds of women operates to confer decision-making authority as to the affluent upon numerous abortion-providers, but in effect results in limiting decision-making authority as to the poor to one (or none) or a very few lawful abortion providers with substantial and compelling interests impairing their ability to decide impartially whether a woman is entitled to an abortion.

IV.

GEORGIA'S STATUTORY OPTION FOR HOSPITALS TO REJECT ABORTION PATIENTS, TO THE EXTENT IT IS EXERCISED BY PUBLIC OR PUBLICLY-SUBSIDIZED HOSPITALS, SANCTIONS A DENIAL OF EQUAL PROTECTION TO THE CLASS OF PATIENTS REQUIRING ABORTION, HAVING A PARTICULARLY SEVERE IMPACT ON THE POOR AND NON-WHITE.

§26-1202(e), Ga. Code Ann., permits hospitals to elect to refuse patients seeking abortion services.

Appellants and *amici* have no quarrel with the notion that individual physicians with religious or moral objections may choose not to perform abortions. *See* Appellant's Jurisdictional Statement herein, p. 22. Hospitals, however, are fictitious entities, without religious or moral scruples *per se*. Indeed, the statute does not suggest religious or moral reasons as the standard for hospitals in exercising this option; the statute permits its exercise at whim.

Hospitals which are publicly owned or operated, which are recipients of Hill-Burton federal construction subsidies (42 U.S.C. 291 *et seq.*), or which participate in the federal Medicaid program and receive federal Medicaid funds (42 U.S.C. 1396 *et seq.*) have sufficient public nexus to be engaged in state action, prohibiting them from denying equal protection of the law to irrationally selected classes of persons. When these particular kinds of hospitals choose to deny services to a class of patients, the impact on the poor is clear, since publicly owned hospitals largely serve the poor, Hill-Burton hospitals have a statutory obligation to provide service to the poor (42 U.S.C. 291c(e)) and

Medicaid funds are devoted exclusively to welfare recipients or the medically indigent related to welfare categories (42 U.S.C. 1396).

Hospitals which have received Hill-Burton subsidies have been held to be bound by constitutional equal protection requirements. The same public nexus analysis would seem to apply to publicly owned hospitals and those receiving federal Medicaid funds. *See Simkins v. Moses H. Cone Memorial Hosp.*, 323 F. 2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938; *Sams v. Ohio Valley Gen'l Hosp. Assn.*, 413 F. 2d 826 (4th Cir. 1969).[1]

Simkins involved refusing admission of black doctors and their patients to Hill-Burton funded private hospitals. It was held that this amounted to state action in violation of the equal protection clause. The finding was perhaps made easier because the inherently suspect classification of race was present. In *Sams*, however, there was no inherently suspect class, but merely a refusal by the Hill-Burton funded private hospital to grant staff privileges to doctors whose offices were located outside the county. Relying solely on the test of a rational basis for the classification (*see e.g., Dandridge v. Williams, supra*) the court could find none. The court gave particular weight to the consequences of the policy for a patient living in the county being denied hospital service because his physician's office was across the county line. 413 F. 2d at 829.

The impact of the state-sanctioned policy under consideration here, to turn away the class of patients who require abortion service, is similar. Where those patients

---

[1]There are more than 190 Hill-Burton funded hospitals in Georgia, which is about 75% of all its licensed hospitals. See U.S. Dep't of HEW, *Hill-Burton Project Register* 80-92 (1969).

are poor, it will have the tragic consequence of denying them any treatment at all. Where a public, a Medicaid or a Hill-Burton hospital, which otherwise cares for the poor and is capable of rendering abortion services (*e.g.*, by having an obstetrical staff, etc.), and which is the only conveniently located licensed and accredited hospital for an indigent who legally qualifies for an abortion, and who has a ready, willing and able staff physician to perform it, chooses to reject all abortion patients as a class, then that indigent abortion patient is denied equal protection of the law.

There is no legitimate state purpose served in sanctioning an elimination of abortion services in such a hospital. One state purpose might be to cut down the number of abortions. But where state law permits abortion, and where the patient is eligible for the service under state law, there would seem to be no legitimate state purpose served in denying her the treatment.

Another such purpose might be to save state funds, to the extent they are involved in supporting a public hospital, or in the state matching funds under Medicaid (42 U.S.C. 1396a(a)(2)). But state budget-saving is not a legitimate state purpose when the class to suffer the deprivation of the state funds is arbitrarily and unreasonably selected. *See Shapiro v. Thompson, supra.*

Another such purpose might be religious or moral objection to abortion. But no such standard is articulated in the statute, perhaps in recognition of the fact that hospitals cannot, as ficitious entities, have religious or moral scruples. Without such an articulated standard, however, the statute clearly permits public, Hill-Burton and Medicaid hospitals to exclude abortion patients for any reason at all, which would seem

clearly offensive to the constitutional responsibilities of those hospitals. Thus, abortion patients might be excluded from an otherwise nonsectarian public or publicly-subsidized hospital solely because of the religious objections of the current administrator, or medical director, or the currently sitting majority of the board of directors.

The state may assert that it has not dictated the elimination of abortion services, but has only permitted hospitals to choose not to render them. The issue here is not what the rights of the parties might be were the state law silent on this subject, and an individual hospital decided to discriminate against abortion patients. The issue here takes for granted the legality of abortion in Georgia, at least under specified circumstances, and the state's permission under express color of law for hospitals to turn away this class of patients. The state should not be allowed to expressly permit by law an arbitrary discrimination against a class, without a legitimate state purpose, where it could not compel the same. *See Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (state law permitted, by local option, the closing of schools, where purpose was to discriminate against the class of Negro students); *Reitman v. Mulkey*, 387 U.S. 369 (state law permitted the conveying of property to anyone the conveyor might choose, where the purpose was to authorize discrimination in housing).

It may be contended that this statutory provision of "choice" to exclude abortion patients and thus to effectively deny treatment to the poor and non-white is more closely analogous to the situation in *James v. Valtierra*, ... U.S. ....., 91 S. Ct. 1331, where man-

datory referenda for low-cost housing projects were upheld against a claim that they permitted voters to discriminate against the poor. But the Court, in *James*, placed heavy reliance on the procedure there involved (a "democratic" election) and on the legitimate public purposes served thereby (giving the people a voice in approving huge expenditures of public funds and a consequent lowering of tax revenues, and a voice in general community planning). 91 S. Ct. at 1334. Here, as mentioned, the only procedure provided is the whim of the hospital, and there is no such legitimate state purpose served in excluding these patients.

V.

CONCLUSION.

The equal protection infirmity of a statute whose burden is felt more acutely by the poor has been noted in Mr. Justice White's concurring opinion in *Griswold v. Connecticut, supra* at 503:

> [T]he clear effect of these statutes as enforced is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control. . . . In my view, a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment. *Yick Wo v. Hopkins*, 118 U.S. 356; *Skinner v. Oklahoma*, 316 U.S. 535; *Schware v. Board of Bar Examiners*, 353 U.S. 232; *McLaughlin v. Florida*, 379 U.S. 184, 192.

Because this Georgia statute, like all restrictive abortion laws, has the clear effect of denying poor and nonwhite citizens of Georgia equal access to safe hospital abortions without any justification whatsoever, it violates the Equal Protection Clause of the Fourteenth Amendment.

Respectfully submitted,

ALAN F. CHARLES,
National Legal Program on
Health Problems of the Poor,

SUSAN GROSSMAN ALEXANDER,
National Legal Program on
Health Problems of the Poor,
Attorneys for Amici Curiae.

TOPICAL INDEX

	Page
Motion For Leave To File A Brief As Amicus Curiae	1
Brief Of Amicus Curiae Robert L. Sassone In Support Of Respondent	3
The powers of a sovereign state include the power to limit the reasons for abortion	4
In areas other than abortion the right to privacy is a relative right, not an absolute right	4
The right to life is the most nearly absolute right	5
In areas other than abortion the right to privacy is insufficient reason to take the life of another human being	6
Burden and degree of proof	7
The scope of the right to privacy in the area of abortion should be determined in part by comparing the conflicting rights and by determining the results likely to follow if various alternatives are adopted	7
Loosening abortion laws may have significant unforeseen future effects	8
Abortion is only the opening wedge of a broad based attack on the right to live	9
The protection of the right to life should be based on current medical knowledge (which indicates that a 10-ounce child	

TOPICAL INDEX

Brief of Amicus Curiae (cont'd)	Page
can survive), not medical knowledge hundreds of years old	11
Abortion has caused emotional disturbances in non-Christian Japan among about 80% of abortion patients	14
In Japan, the physical abnormality rate following abortion has been about 29%	15
Abortion on demand has not been made socially desirable by a change in what people believe is right	16
Permissive abortion laws are unlikely to reduce the numbers of battered children	17
Deaths from pregnancy are not sufficient reason to forbid abortion limitation laws	18
The woman's health is not a justification for abortion	20
A negative feeling in early pregnancy is common but temporary	23
Medical complications of induced abortion	25
Tables:	
Legal Abortion Mortality Rates	27
Incidence Of Pelvic Infection Following Legal Abortion	28
Incidence Of Major Hemorrhage Following Legal Abortion	30
Incidence Of Uterine Perforation As A Result Of Legal Abortion	31
Incidence of Menstrual Disturbance Following Legal Abortion	32

TOPICAL INDEX

Brief of Amicus Curiae (cont'd)	Page
Techniques of induced abortion	36
Permissive abortion laws do not decrease the criminal abortion rate	42
Table: Effect of criminal abortion rate	42
Incest and rape cause few pregnancies	46
Abortion on demand does not fulfill the requirements for a good law dealing with a complex social, biological, economic, and moral issue	48
A high abortion rate correlates with a high suicide rate	50
Permissive abortion laws might increase venereal disease damage	51
The abortionists have interpreted *United States v. Vuitch*, 91 S.Ct. 1294, 28 L.Ed.2d 601 (1971), as permitting abortion on demand	52
The abortionists interpret "abortion for mental health reasons" to mean abortion on demand	52
Conclusion	54

TABLE OF AUTHORITIES CITED

Cases	Page
Ballard v. Anderson, 4 Cal.3d 873, 484 P.2d 1345, 95 Cal.Rptr. 1 (1971)	8
United States v. Vuitch, 91 S.Ct. 1294, 28 L.Ed.2d 601 (1971)	52, 53
Statutes and Related Material	
Declaration of Independence	5
United States Constitution	
Amend. IX	4
Amend. X	4
Amend. XIV	5
Congressional Record, Jan. 29, 1971	48, 49
California Health & Safety Code § 25954	53
HB 3184, Florida (Oct. 1969)	9
SB 1421-70, Hawaii (Feb. 4, 1970)	9
Declaration of the Rights Of A Child, General Assembly of the United Nations, Nov. 20, 1959	5, 6
Legal Textbooks	
Perkins, Criminal Law, 2d Ed., 1969, p. 31	11
Prosser on Torts, 3rd Ed., 1964, Chapter 22	4, 6

TABLE OF AUTHORITIES CITED

Medical Reports, Bulletins, Magazines, etc.	Page
"American Medical News," March 29, 1971, p. 6 ..	52
California Medicine, Sept. 1970, pp.67, 68	9, 10, 49
KOYA, MURAMATSU, Bulletin of the Institute of Public Health (Japan) IV, No. 1-2, Sept. 1954	19
New England Journal of Medicine, July 14, 1969	41
"Our Role In The Generation, Modification And Termination Of Life," Archives of Internal Medicine, 1969	11
"Japan's 22 Year Experience With A Liberal Abortion Law," Dr. Yokichi Hayasaka, et al., pp. 4, 5, 6	14, 15, 16
"Induced Abortion: A Documented Report," by T. W. Hilgers, M.D., P. N. Shearin, M.D. (Presented to Minnesota State Legislature) Jan. 1971	20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

Statistical Reference Books

"Vital Statistics of the U.S., 1967, Vol. II, Mortality, Part A," pp. 1-7	51
United Nations Demographic Yearbooks 1965-1969	50
Guinness Book of Records	12

TABLE OF AUTHORITIES CITED

Reference Books — **Page**

"Love and Curing The Neurotic," Arlington House, 1971 20

Rice, "The Vanishing Right To Live," p. 39 42

Shaw, "Abortion on Trial," p. 144 42

Gordon Rattray Taylor, "The Biological Timebomb," pp. 37, 38, 207 12

"Handbook on Abortion," Dr. & Mrs. J. C. Willke, Hiltz Publishing Co., 1971 .....
.....13, 17, 20, 27, 43, 44, 45, 46, 47, 48

Magazines

"Alive In An Artificial Womb," Life, August 28, 1964 12

"Control of Population," Life, Feb. 20, 1970 11

"Abortion and The Law," Newsweek, April 13, 1970 11

Robert A. Harper, OB-GYN News, Nov. 1, 1969 .. 11

"The Tragedy of The Commons," Science, December 13, 1969 11

Newspaper Articles

Chicago Tribune, May 2, 1970 41

Life In America, May 1971 52

TABLE OF AUTHORITIES CITED

Newspaper Articles (cont'd)	Page
Los Angeles Times, TV magazine, Nov. 18, 1970, p. 17	53
Los Angeles Times, April 1, 1971, Part 4, p. 4	51
Los Angeles Times, Sunday, June 20, 1971, p. A3	13
Los Angeles Times, May 13, 1971, Part IV, p. 23	16, 17
Los Angeles Times, May 25, 1971, Part 4, p. 4	51
New York Times, May 19, 1971, p. 1	8

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 70-18

JANE ROE, *et al.*,

Petitioners,

vs.

HENRY WADE,

Respondent.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Robert L. Sassone hereby respectfully moves for leave to file a brief amicus curiae in this case. The consent of the attorneys for the parties has been obtained.

The interest of Robert L. Sassone in this case arises from the fact that he is the President of LIFE (League for Infants, Fetuses, and the Elderly, an organization of over a thousand individuals, including many clergymen, doctors and attorneys). The members of LIFE fear that declaring abortion control laws unconstitutional may lead to lessened respect for the value of human life.

Certain of the individual members of LIFE have examined certain of the recent lower court decisions and briefs relating to the constitutionality of abortion control laws. These

examinations have indicated that certain statistical, medical and sociological arguments by defendants have not been answered, or that the answers have omitted important data. In addition, arguments in favor of the right to live of the unborn have omitted important data. The rights of the unborn are relevant in determining the constitutionality of the abortion control law in question, because abortion involves a balancing of rights, not a mere consideration of only the rights of the mother.

The present brief sets forth data in short sections which may be read separately if the Court feels that the data in any of the individual sections is relevant and not adequately set forth elsewhere.

Respectfully submitted,

ROBERT E. DUNNE,

Attorney for Amicus Curiae.

Dated: July 28, 1971.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970
No. 70-18

JANE ROE, *et al.*,

Petitioners,

vs.

HENRY WADE,

Respondent.

BRIEF OF AMICUS CURIAE ROBERT L. SASSONE IN SUPPORT OF RESPONDENT

The Powers Of A Sovereign State Include The Power To Limit The Reasons For Abortion.

Nearly every nation at some time or other has forbidden or strictly limited the power of a woman to obtain an abortion. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Accordingly, unless it is shown that the Constitution prohibits states from limiting the reasons for abortion, the states have that power. Those nations, such as England, which respect rights not enumerated in a formal constitution afford a precedent for the scope of protection which should be afforded women seeking an abortion because of a right to privacy guaranteed by the Ninth Amendment, since the Ninth Amendment reserves to the people those rights of the people not enumerated in the Constitution. A search of the laws of other nations has not indicated any other nation which has defined the inherent rights of the people to include a right to privacy in women sufficiently broad to prevent the state from regulating the reasons for obtaining an abortion.

In Areas Other Than Abortion The Right To Privacy Is A Relative Right, Not An Absolute Right.

Numerous examples in Tort and Criminal Law indicate that the right to privacy is a relative right.[1] A woman cannot in privacy, even though she harm no other person, legally

---

[1] Tort Law limitations on the Right of Privacy are outlined in Prosser on Torts, 3rd Edition, 1964, Chapter 22.

utilize or even possess certain forbidden drugs such as LSD or heroin. The right to privacy was considered a mere relative right by the framers of the Constitution. Had they not considered the right to privacy a mere relative right, they would not have carefully defined additional protection for the small portion of the right to privacy protected by the guarantee against unreasonable search and seizure.

The Right To Life Is The Most Nearly Absolute Right.

The right to life forms the foundation for nearly all other rights. Remove the right to life and the other rights become valueless. The preciousness of this right to the unborn may be surmised from the following:

"We hold these truths to be self-evident; that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these rights are life . . . that to secure these rights, governments are instituted among men . . . . " Declaration of Independence.

"Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction that equal protection of the laws." Fourteenth Amendment, Constitution of the United States.

"The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." Declaration of the Rights of a Child, General Assembly of

the United Nations, November 20, 1959.

In Areas Other Than Abortion The Right To Privacy Is Insufficient Reason To Take The Life Of Another Human Being.

In areas other than abortion the right to privacy does not give the right to take the life of another human, even an invading inferior human being. There is a dispute as to the seriousness of the imposition on the woman *by her unborn baby*. The extent of the woman's right to privacy should be determined in part by the seriousness of the invasion of that right to privacy. Analogous in some ways to the invasion of a mother's body by an unwanted unborn baby is the invasion of a building by a trespasser or a petty thief, where the thief's right to live is protected. "But spring guns and other man-killing devices are not justifiable against a trespasser or even a petty thief."[2]

When we apply the well-tested common law policy relating to traps to abortion, we find that the case for the preservation of life is stronger in many ways in the case of abortion, where the baby is invited in by actions by the woman.

In the case of the traps, the person whose right to privacy is being invaded is entirely powerless to prevent the invasion in many cases, since the measures necessary to make property thief-proof cost more than most persons can afford. In the case of abortion, the mother not only has the power to prevent the pregnancy, she had to actively participate in a sexual act before the conception could

---

[2] *Ibid.* p. 118.

occur. In addition, after participating, she had to refrain from taking steps, such as a morning-after pill or D & C, to prevent implantation. In the case of traps, the protected invader of privacy may well be guilty of a criminal act, yet he still is protected. In the case of abortion, the victim is personally entirely innocent, regardless of the acts of his parents.

Burden And Degree Of Proof.

Whenever a human being is faced with the legal loss of his life, the burden of proof that that person should lose his life lies with those who are attempting to take his life, and the burden of proof is not a mere preponderance of the evidence. The Court should not do less in the case of innocent unborn humans than it does for more mature humans who are accused of serious crimes. Before defining the law to permit the killing of millions of unborn children, the Court should require the pro-abortionists to prove their case beyond a reasonable doubt.

The Scope Of The Right To Privacy In The Area Of Abortion Should Be Determined In Part By Comparing The Conflicting Rights And By Determing The Results Likely To Follow If Various Alternatives Are Adopted.

The issue of abortion is more than a question of the freedom of a woman to control the reproduction functions of her body. It is also a question of those circumstances under which a human being may be permitted to take the

life of another. Granting an absolute right to aborton because of the right to privacy will cause abortion on demand to exist, the advantages and disadvantages of abortion on demand may be analyzed in part by analyzing the experience of the large nations which have had sufficiently large volume of abortions over a sufficiently long period of time under carefully monitored conditions.

Loosening Abortion Laws May Have Significant Unforeseen Future Effects.

In *Ballard v. Anderson,* 4 Cal.3d 873, 484 P.2d 1345, 95 Cal.Rptr. 1 (1971), the California Supreme Court ruled that the 1967 California Abortion Law permits a minor of any age to get an abortion without parental knowledge or consent, a result not mentioned during debate in 1967. A New York court has held that New York cannot limit medicaid for abortions to abortions for medical reasons.[3] Neither of these events were foreseen or discussed at the time the respective abortion laws were being discussed. Declaring abortion laws unconstitutional may cause unforeseen, possibly unwanted, future events. Will a 12 or 13 year old girl then have the right to become pregnant and to get an abortion without parental knowledge and consent, such as happened in California? If the minor is permitted to get an abortion, does not her right to privacy give her a right to be sterilized without parental knowledge or consent? Will not more unborn Americans be executed in a relatively few years than the number of Jews by the Nazis? Will not a woman,

---

[3]New York Times, May 19, 1971, page 1.

have a right to deliberately conceive a child, then kill that child by means of abortion, for purposes such as toxicity tests? It is probable that the unforeseen results from giving a woman an absolute right to privacy in the area of abortion will be far more imaginative than the few possibilities suggested herein. If the Court permits abortion for no reason, where will it logically be able to draw a line when the same anti-life arguments are extended?

Abortion Is Only The Opening Wedge Of A Broad Based Attack On The Right To Live.

The scope and severity of the attacks on the right to live are such that if the right to live is destroyed in a particular small area, it may be impossible to prevent the right to live from being destroyed in other areas. HB 3184, prefiled October, 1969, by Representative Sackett in Florida, and introduced annually since, would permit three doctors and one judge to order the execution of persons they felt deserving of execution. SB 1421-70, introduced by Nadao Yoshinaga, February 4, 1970, in Hawaii, the week after Hawaii passed its aborton-on-demand law, provides that every woman giving birth to her second child must be sterilized regardless of her opinions or belief or those of her doctor. These two bills, if passed, would make legal in America a large percentage of the actions of the Nazis which were labeled atrocities in the 1940's. There is sufficient pressure, however, to go far beyond these two bills in America today. The California Medical Association has stated in an an editorial: "The traditional western ethic has always placed great emphasis on the intrinsic worth and equal value of every human life

regardless of its stage or condition . . . . This traditional ethic is still clearly dominant, but there is much to suggest that it is being eroded at its core and may eventually even be abandoned . . . . It will become necessary and acceptable to place relative rather than absolute values on such things as human lives . . . . The process of eroding the old ethic and substituting the new has already begun. It may be seen most clearly in changing attitudes toward human abortion. In defiance of the long held Western ethic of intrinsic and equal value for every human life regardless of its stage, condition or status, abortion is becoming accepted by society as moral, right and even necessary . . . . Since the old ethic has not yet been fully displaced it has been necessary to separate the idea of abortion from the idea of killing, which continues to be socially abhorrent. The result has been a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous whether intra- or extra-uterine until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they were not often put forth under socially impeccable auspices. It is suggested that this schizophrenic sort of subterfuge is necessary because while a new ethic is being accepted the old one has not yet been rejected. . . . Medicine's role with respect to changing attitudes toward abortion may well be a prototype of what is to occur . . . . One may anticipate further development of these roles as the problems of birth control and birth selection are extended inevitably to death selection and death control whether by the individual or by society."[4]

[4]California Medicine, September 1970, pp. 67, 68.

Whether it be best sellers such as "Population Bomb," which likens human beings to a cancer which must be removed–even though the operation will require many cruel and apparent heartless decisions, TV talk shows, magazine articles[5], or talks at schools, etc., general principles are being proposed for America today which are broad enough to encompass most of the worst acts of the Nazis. It is very possible that today in America the right to live may be whittled away by a series of small steps, each justified for varying reasons, so that the sum result of all those steps will be undesirable. The first and most difficult step is to establish in the law, as the Court is being asked to do in this case, that a certain class of human beings are subhumans whose lives may be taken with no more justification than needed to step on an ant. Once that first large step is taken, and the right to privacy becomes a license to kill, the subsequent small steps may come easily, rapidly and inevitably.

The Protection Of The Right To Life Should Be Based On Current Medical Knowledge (Which Indicates That A 10-Ounce Child Can Survive), Not Medical Knowledge Hundreds Of Years Old.

All would agree that "shooting or otherwise damaging a corpse is not homicide."[6] An apparently drowned child would have been pronounced dead in years past, and a court

---

[5]"Control Of Population," *Life*, Feb. 20, 1970; "The Tragedy Of The Commons," *Science*, Dec. 13, 1968; "Our Role In The Generation, Modification And Termination Of Life," *Archives of Internal Medicine*, 1969; "Abortion And The Law," *Newsweek*, Apr. 13, 1970; Robert A. Harper in *OB-GYN News*, Nov. 1, 1969, and many others.

[6]Perkins, Criminal Law, 2d Ed. 1969, p. 31.

in those days would exonerate from homicide one who cut off the child's head a moment after the heart stopped. Would this be just today, when we have modified the definition of a corpse because of advances in techniques for life revival, restoration and resuscitation, such as artificial respiration, open heart massage, transfusions, transplants, and a variety of life-restoring stimulants, drugs and new surgical methods.

The "quickening" barrier for fetus survival was long ago broken. In the 1930's, a ten-ounce premature infant survived its early birth to grow to become a normal size adult.[7] This Court should not disregard the medicine of the 1930's and hold that a woman's right to privacy gives her a license to kill her unquickened unborn child because that child would have been too small to have survived in 1600. Nor should this Court rule that a nine-ounce child can be killed by its mother, because the "nine-ounce barrier" for premature infants is no more sacred than the "four-minute mile barrier" was for runners.

Experiments going back into the early 1960's[8] have indicated that artificial wombs for unborn humans are only a matter of time. It is expected that before the present decade ends,[9] that is, sometime before 1980, any unborn human being, perhaps even those weighing less than one ounce, old enough to have developed a placenta, may be removed from its mother, placed in an artificial liquid environment, fed food and oxygen from a heart-lung

---

[7]Guinness Book of Records.

[8]"Alive In An Artificial Womb," an article in *Life Magazine*, August 28, 1964.

[9]Gordon Rattray Taylor, "The Biological Timebomb," pp. 37, 38, 207.

machine through its placenta, and enabled to develop until it can breathe and eat like a normal newborn child. This year, in Sydney, Australia, Richard Brodrick, a child only six inches long, nearly survived.[10] In a matter of a few short years, any woman wishing to terminate an early pregnancy will be able to terminate the pregnancy without the death of the child. The doctor will be able to carefully remove the placenta and child and give the child a chance to live, if the law protects the child.

" 'Responsible' physicians would hope not to abort a mother whose baby would be over one pound. But -- one of our colleagues recently witnessed a four pound baby killed by the salt method and delivered stillborn. Another practice is that of some so-called physicians in New York City and elsewhere of injecting salt solution and immediately sending the mother home. Within two weeks in Cincinnati two babies weighing three-and-a-fourth and three-and-three-fourths pounds were delivered dead from mothers who had had this procedure."[11]

Unless it sustains strong abortion laws, the Court will, in effect, make a new legal definition–the subhuman who can be killed with impunity. It will then be much easier to increase the scope and variety of those innocents falling within the "subhuman class" than it was to establish the first class of innocent, legal subhumans.

---

[10] Los Angeles Times, Sunday, June 20, 1971, p. A3.

[11] "Handbook On Abortion," Dr. & Mrs. J. C. Willke, Hiltz Publishing Co., 1971, p. 29.

Abortion Has Caused Emotional Disturbance In Non-Christian Japan Among About 80% Of Aborton Patients.[12]

"The average of six surveys in Japan indicates that most women with abortion experience do not approve of it without reserve. The 1963 survey by the Aichi Committee on the Eugenic Protection Law indicates that 73.1% of the women who experienced abortion felt 'anguish' about what they did. In the 1964 survey of Dr. Kaseki, 59% responded that they felt abortion was something 'very evil' and only 8% said they don't think it should be called something bad. In the Gamagori City survey, 65% had some reason to be sorry. In the 1968 survey of the Nagoya City area, 67% of the women responded that they felt the fetus is an individual human being from the beginning, not a part of the mother. 42% of the women in the survey responded that abortion is not good. In addition another 57% that it is not good but it couldn't be helped; and only 1% didn't know whether to call it bad or good. In the 1969 survey by the Prime Minister's Office, 88% answered that abortion is bad, or it is not good but cannot be helped.

"In the 1965 Mainichi survey, only 18% responded that they 'did not feel anything in particular' when they experienced abortion for the first time; 35.3% felt 'sorry about the fetus'; 28.1% felt they did something wrong; 4.3% worried about fecundity impairments; 6.5% had other answers, and 7.9% did not answer." *Ibid.*

---

12. "Japan's 22 Year Experience With A Liberal Abortion Law," Dr. Yokichi Hayasaka, *et al.*, p. 4.

In Japan, The Physical Abnormality Rate Following Abortion Has Been About 29%.

"All public opinion surveys taken indicate that several million women in Japan believe that their health has been harmed by abortion; that is, legal abortion. The surveys cover a total of 16-17 million married women, not counting the unmarried, among whom many have also experienced abortion. If roughly half of them have experienced at least one abortion (which is a conservative estimate); and if 30% of them have adverse health effects as a result, the number of women affected is already above 2.5 million; there are more if we also count the unmarried, and those who have moved into the higher age categories.

"This appears to be the picture which emerges from the public opinion surveys. In the 1959 Mainichi survey, 28.4% of those who had abortion reported 'some kind of bad effect'; in the 1963 Aichi survey, 13% indicated damage from the operation; in the 1964 Welfare Ministry survey, 24.1% indicated that they were physically unwell since the operation; in the 1965 Mainichi survey, 18.5% indicated (after only one abortion) that they were physically unwell after the operation; in the 1968 Nagoya survey by Women's Associations, 59% indicated that they were severely troubled with adverse after-effects, or in less good health; and in the 1969 survey of the Office of the Prime Minister, 31% indicated that some kind of physical abnormality came about as a result of abortion; this averages to 29% in the six surveys; not counting those who did not reply to this question.

"In the 1965 Mainichi survey, the percentage of complaints is seen to rise with the number of abortions experienc-

ed: 18.5% indicate that they were physically unwell after one operation; 22.7% after two; 40.4% after three; 51.7% after four operations. . . .

"The 1969 survey of the Office of the Prime Minister indicates the following list of complaints: 9.17% sterility (after 3 years); 14.8% habitual spontaneous abortion; 3.9% extra-uterine pregnancies; 17.4% menstrual irregularities; 20% abdominal pains; 19.7% dizziness; 27.2% headache; 3.5% frigidity; 13.5% exhaustion; 3.6% neurosis.

"Even though the operating physician performs everything normally the woman experiences a sudden change from the pregnant state to the non-pregnant state. Her body has been functioning at high capacity to provide nourishment for the developing fetus and to dispose of wastes. When the fetus is wrenched out of her body, the reason for this prodigious physical activity is suddenly removed. Dr. Y. Moriguchi compares it to slamming emergency brakes on a train which is going at full speed (Katorikku Shingaku, Jochi University, II, II, 4, pp. 353-362). As a result the syndrome of the unbalanced sympathetic nervous system may appear (see Dr. Nakatsu "Mistakes in Abortion and Prognosis" in OBSTETRICS AND GYNECOLOGY, Sept. 1960, pp. 53-59)."[13]

Abortion On Demand Has Not Been Made Socially Desirable By A Change In What People Believe Is Right.

An article on a Lou Harris poll of 4,000 Americans[14]

---

[13] *Ibid.* pp. 5, 6.

[14] Los Angeles Times, May 13, 1971, Part IV, p. 23.

states: "And from what they answered, it appears the 1970's woman is as straitlaced as ladies of Victoria's day . . . . 65% of the women interviewed think premarital sex is immoral. More astounding, 54% of the men think so, too.

"Also shot down as socially unacceptable: trial marriages (77% of the women oppose and 69% of the men) and bearing children out of wedlock (85% of the women, 82% of the men oppose). In fact, 89% of the women and 87% of the men think society would fall apart without the institution of marriage."

Permissive Abortion Laws Are Unlikely To Reduce The Numbers Of Battered Children.

". . . Dr. Edward Lenoski, Professor of Pediatrics at the University of Southern California, did a four-and-a half year study of 400 battered children. He determined that 90% of the battered children in his study were planned pregnancies. Ninety per cent is far above average for planned pregnancies. Most of our readers undoubtably deeply cherish and love the children that they have been given. How many of you, however, actually planned the conception of 90% of them? We could apparently kill all 'unwanted' babies in the early stages of pregnancy, but still not significantly reduce the numbers of battered children.

"Dr. Lenoski has also determined that since the advent of the contraceptive pill (which has certainly reduced unwanted pregnancies), child beating is up threefold."[15]

15."Handbook On Abortion," Dr. & Mrs. J. C. Willke, Hiltz Publishing Co., 1971, Cincinnati, p. 49.

Deaths From Pregnancy Are Not Sufficient Reason To Forbid Abortion Limitation Laws.

United States Vital Statistics indicate a death rate per pregnancy caused by deliveries and complications of pregnancy, childbirth and the pur perium of 28 per hundred thousand in 1967. Some mothers, however, have less than adequate medical care during pregnancy. The true risk of pregnancy, given mediocre medical care, is probably closer to 10 deaths per hundred thousand births. United States Vital Statistics indicate that the death rate per hundred thousand live births among white New England women during 1965-67 was 10.8 per hundred thousand live births. The death rate among women receiving inadequate medical care is probably 5 to 10 times as high or perhaps even higher, as can be seen by the nationwide non-white death rate of 69.5 per hundred thousand live births in 1967. Those white women in New England who did not receive adequate medical care probably had a death rate far higher than 10 per hundred thousand live births, although no such statistics are available in the United States Vital Statistics. Accordingly, the death rate per hundred thousand live births for women receiving adequate medical care was probably less than 10 per hundred thousand live births in the period 1965-67. In addition, the long term trend in death rates from pregnancy since the 1920's has been a reduction by more than 50% in the death rate from pregnancy each 10 years. There is some evidence that the long term trend is slowing down, but if it holds, the death rate for women receiving adequate medical care in the years 1973-75 will be about 5 per 100,000 live births.

In comparing the death rates caused by abortion and pregnancy, it should be noted that in the case of legal abortions, the woman is generally given what is considered to be adequate medical care. Accordingly, no improvement in medical care based on today's knowledge is likely to significantly reduce the death rate from abortion.

While United States Vital Statistics list nearly 1,000 deaths from pregnancy and related causes in 1967 and 1968, with only 130 deaths from abortion in 1968 and 160 in 1967, abortion is not thereby shown to be safer. The pregnancy death quantities are deceivingly high because all abortion deaths are *included* in maternal mortality figures, as well as a number of women who die during or after pregnancy of kidney disease, high blood pressure, and stroke conditions that might have claimed them whether they were pregnant or not. In addition, the risk from one pregnancy is spread over about 12 months. If aborted, the woman may become pregnant again soon, as indicated by the following table by KOYA, MURAMATSU, Bulletin of the Institute of Public Health, (Japan) IV, No. 1-2, Sept. 1954, for women not using contraceptives.

Months	Percentage Pregnant	
	After abortion	After childbirth
3	19.2% (448)	0.0% (354)
6	32.8%	2.5%
9	43.5%	8.5%
12	50.0%	16.9%
15	60.0%	26.3%

The Woman's Health Is Not A Justification For Abortion.

The experience of nearly every area where comprehensive statistics have been kept indicates that abortion is far more likely to cause death, emotional harm, mental harm, and physical harm to the woman than continuation of the pregnancy.[16] Willke lists Sweden's abortion death rate at 40 per hundred thousand, England's at 75 per hundred thousand, and points out that Maryland's initial rate the first year was 77 per hundred thousand and New York's is low because of the women who go home to die. They also point out why the low abortion death rates from Communist nations are "worse than useless"(p. 64).

The reasons why abortion causes mental harm to the mother have been stated by Conrad W. Baars, M.D.[17], who stated that a woman who is pregnant and has an abortion is going to be deprived of the most important psychological help, namely, the love of her child; they frequently think it will help, but it is actually pushing them back into loneliness; the essence of love is the affirmation of another, nothing is less affirming than the denial of the child by abortion which kills another human; the strong disaffirming of another, who is closer to her at that time than anyone else, can have strong adverse effects.

Hilgers has stated:[18] "In Colorado, 71.5% of all abortions are being done for psychiatric reasons. The

---

[16] *Ibid.* pp. 37-51, 62-73.

[17] "Love and Curing The Neurotic," Arlington House, 1971.

[18] "Induced Abortion: A Documented Report," T. W. Hilgers, M.D., P. N. Shearin, M.D. Presented to Minnesota State Legislature, January 1971, pp. 16, 17.

similar figures for California (1969) and Oregon are 90% and 97% respectively." (Note: In 1970 in California the rate went to 98%. See *infra.*) Hilgers continues:

"One would get the impression that mental illness in the pregnant woman is extremely common and very serious when present. However, in fact, in all of these states, the 'mental helath' clause has distinctly been abused. This abuse, Doctor Cavanaugh says, has led to a decline in the quality of patient care and a gross dishonesty in medical practice–particularly psychiatry. We must, therefore, look carefully at the psychiatric problems associated with pregnancy.

"Noyes and Kolbe's textbook of psychiatry states that 'experience does *not* show that pregnancy and the birth of the child influence adversely the course of schizophrenia, manic depressive illness or the majority of psychoneuroses.' On the other hand, those psychoses which are initiated by pregnancy rarely persist. Patients tend to recover after a comparatively short period of time and in some cases may recover spontaneously before full term is reached. Women who show permanent impairment of mentality following childbirth belong to the class of potentially psychotic for whom pregnancy is merely an ancillary factor in the pathogenesis of the psychosis. In such women, an induced abortion cannot be curative and it may have unresolved conflicts with guilt and added depression which is more harmful than the continuation of the pregnancy–(see section on complications–psychiatric sequelae).

"There is evidence to suggest that serious mental disorders arise following abortion more often in women with real psychiatric problems and that paradoxically, the very

women for whom legal abortion may seem justifiable are also the ones for whom the risk is highest for post-abortion psychic insufficiency.

"It should be pointed out that suicide in the pregnant woman is *extremely* rare. In fact, it is about 1/6th the rate seen in nonpregnant women of the same age. Furthermore, as Asche pointed out, it is virtually impossible to ascertain accurately whether a woman is suicidal. In the State of Minnesota, the Minnesota Maternal Mortality Committee, reported only 14 suicides associated with pregnancy in well over 1.5 million live births between 1950-1966. (The Minnesota Maternal Mortality Committee studies *in detail* all deaths in women which occur during pregnancy or within a period 90 days *following* delivery). Ten of these 14 *had delivered* before the suicide, and all 14 were married. In retrospect, these deaths probably could have been prevented if adequate psychiatric care had been obtained and utilized. The explanation of why so few pregnant women commit suicide appears to be that women–including the unwed–receive a good deal more attention from society when pregnant than when not pregnant. Also, there may be certain physiologic and instinctive factors which manifest themselves in greater maternal protectiveness.

"Eminent psychiatrists from throughout the world agree that, if *all* the evidence is taken into *careful* consideration, few neurotic or psychotic women are *ever* benefited by termination of pregnancy and that the few that would be are extremely difficult to select.

"When abortion is substituted for adequate psychiatric care (and there is much evidence to suggest that this is happening), then there is a distinct danger of minimizing established

psychotherapeutic principles. Unfortunately, it is the distressed woman who ultimately faces the full impact of this minimization. She is the one who cries out for help and she is also the one who is turned away."

Even assuming *arguendo* that abortion helped some types of illness, and abortions for mental health reasons were limited to the mentally ill instead of being used as a vehicle for abortion on demand, difficulties might arise from establishing the principle that the life of one person should depend on the judgment of another person who is mentally ill, because that person is mentally ill.

A Negative Feeling In Early Pregnancy Is Common But Temporary.

Hilgers states:[19] "Based on the knowledge that the majority of women who have a negative or ambivalent reaction to their pregnancy during its early stages do, in fact, as the pregnancy advances, develop a more positive acceptance of the pregnancy, supportive care of the pregnant woman becomes all the more reasonable. Much has been said of the unwanted child, yet the majority of women who expressed ambivalent or rejecting attitudes toward the pregnancy in the early months, now, in the third trimester, express positive, or at least more accepting, attitudes toward the baby.

"Indeed this phenomenon of early rejection and later acceptance has been spelled out by Gardiner in *Williams Obstetrics*, 13th edition, 1966:

[19] *Ibid.* pp. 36, 37.

" 'The initial acceptance and adaptation to the pregnancy by the particular patient will depend upon the implications regarding future responsibilities and future personal and intrapersonal relationships engendered by the pregnancy. At that stage (the first three months), the pregnancy exists only as an abstraction and can be accepted or rejected depending upon the character and personal significance of future implications . . . .

" 'So real and life-threatening are these emotional reactions to these women that they not only reject the existence of the pregnancy before they, themselves, are engulfed and destroyed. Under the spell of this distorted thinking and reasoning, the medical hazards of instrumental abortion fade into insignificance.

" 'It is *not unusual* (however) for women who will become good mothers, or those who have already demonstrated their excellent maternal qualities with their older children, to react initially to the diagnosis of pregnancy with resentment, frustration and depression, only to express *strong, genuine, positive feelings* of acceptance as the pregnancy advances and fetal movements appear.'

"Considering this, it seems fair to ask what happens if their fearful request for abortion is denied. Hook reported that of 249 women refused an abortion in Sweden, 86% gave birth, 11% had induced abortions (22% had threatened to do so), and 3% had spontaneous abortion. Of this group

12% had threatened suicide but no suicides or suicide attempts occurred. Kolstad reported that of 113 women refused abortion in Norway and who carried the pregnancy to term 84% were glad that the pregnancy was not terminated, 9% were uncertain as to their feelings, and only 7% were discontented. Furthermore, Murdock showed that by supporting pregnant women throughout their pregnancy, the pressures for abortion were significantly decreased. He suggested that the pregnancy carried to term may have been a positive factor in the mother's return to normalcy."

Medical Complications Of Induced Abortion.

Hilgers states:[20] "The American College of Obstetricians -- Gynecologists has stated: 'The inherent risk of a therapeutic abortion are serious and may be life-threatening, this fact should be fully appreciated by both the medical profession and the public. In nations where abortion may be obtained on demand, a considerable morbidity and mortality has been reported.'

"This is suppored by a statement issued by the Royal College of Obstetrician-Gynecologists (Great Britain): 'Those without specialists' knowledge, and these include members of the medical profession, are influenced in adopting what they regard as a humanitarian attitude to the induction of abortion by a failure to appreciate what is involved. They tend to regard induction of abortion as a trivial operation, free from risk. In fact, even to the expert working in the best conditions, the removal of an early pregnancy after

---

[20] *Ibid.* pp. 23-31.

dilating the cervic can be difficult, and is not infrequently accompanied by serious complications. This is particularly true in the case of the woman pregnant for the first time. For women who have a serious medical indication for termination of pregnancy, induction of abortion is extremely hazardous and its risks need to be weighed carefully against those involved in leaving the pregnancy undisturbed. Even for the relatively healthy woman, however, the dangers are considerable."

Under the heading "Mortality Rates" Hilgers states:

"Obviously, the worst complication resulting from a legal abortion is death itself. In Table I you will see listed the *legal abortion* mortality rates for several countries which have eliminated the legal safeguards to abortion. Included also are the 10 maternal deaths which New York City had during the *first 3 months* following enactment of their law.

"In the majority of countries, including New York State, a woman is more likely to die from legal abortion than she is if she were to carry the pregnancy to term (this is in contradiction to what proponents of abortion would have us believe). It must be emphasized that these figures are for *legal* abortion, done by licensed physicians in fully accredited medical facilities. The tragedy is that these deaths are preventable simply by having a strong abortion law. In Minnesota, this tragedy is compounded by the fact that there is probably no safer place in the world for a woman to have her baby."

Table I, referred to above, is as follows:

Legal Abortion Mortality Rates

Country/State	Deaths/100,000 legal abortions
Finland	66
Denmark	41.4
New York City	greater than 40
Sweden	39.2
Great Britain	30
Yugoslavia	10
Japan	7
Hungary	7
Czechoslovakia	2.5

"(Those countries with extremely low death rates have laws which generally do not allow abortion after 3 months and, as such, are not comparable to present changes in United States abortion laws.)

"Addendum: Minnesota Maternal Mortality Rate = 14/100,000 live births."

(Note: Willke criticizes the accuracy of the low rates in Communist nations and points out maternal mortality rate includes abortion deaths as well as others which may have happened if the woman were not pregnant, while abortion excludes those who die elsewhere and some of those whose death is caused only indirectly by abortion, such as by hepatitis.)

Hilgers continues: "There are a whole host of major complications resulting from legal abortion which at their

worst cause death, but much more frequently result in either temporary or permanent damage to the woman or her offspring. Again, using the world's medical literature as documentation, these complications will be presented in some detail. They will, however, be limited to the 4 main methods through which abortion is procured in the United States: dilation and curettage, suction curettage, saline instillation and hysterotomy.

"Infection--Pelvic infection is a common sequel to legal abortion. While the incidence varies slightly from country to country, consensus reveals an astonishing high rate. (See Table II)."

Table II, referred to above, is as follows:

The Incidence Of Pelvic Infection Following Legal Abortion

% EARLY INFECTION	% LATE INFECTION	METHOD	COUNTRY
5.0	-	D & C	Germany
5.0	15.0	D & C	Czechoslovakia
4.9	-	D & C	Czechoslovakia
4.0-5.0	12-15	D & C	Czechoslovakia
5.0	-	D & C	Rumania
7.0	-	D & C	USSR
2.6	9.7	D & C	Poland
	28.2	D & C	USSR
	12.0	D & C	USSR
2.0	-	D & C	Bulgaria
1.6-2.3	-	Saline	Sweden
15.4	-	Saline	Great Britain
10.4	-	Saline	Japan
1.0	-	Saline	Denmark
2.0	-	Suction	Great Britain
3.9	-	Suction	Czechoslovakia
5.0	-	Suction	Germany
10.0	-	All methods	Great Britain

Hilgers further states: "The incidence appears to be highest 2 - 3 weeks after the abortion at a time when the patient has been lost to follow-up. There is also good evidence to suggest that the *young* woman pregnant for the *first* time stands a much greater risk of infection (15.8%).

"These infections are the direct result of the instrumentation involved in the abortive technique and are manifest as salpingitis (infection in the fallopian tubes) or endometritis (infection in the lining of the womb). When out of control, these infections can cause septic shock with rapid death or pelvic thrombophlebitis (inflammation and blood clot formation in the pelvic veins) with sudden death by pulmonary embolus (blood clot from the pelvic veins which dislodges and is carried to the lungs). These infections can also result in sterility because they scar the tubes to a point where they no longer function properly.

"**Hemorrhage**–Major hemorrhage is another complication and can result in death by exsanguination. Again, the incidence is much too high to be acceptable from a medical standpoint. (See Table III)."

Table III, referred to above, is as follows:

Incidence Of Major Hemorrhage Following Legal Abortion

% MAJOR HEMORRHAGE	METHOD	COUNTRY/STATE
2.3	D & C	Germany
5.0	D & C	Czechoslovakia
8.6	D & C	Rumania
2.6	D & C	Poland
14.2	D & C	USSR
5.9	D & C	Bulgaria
21.0	All methods	Great Britain
8.0	All methods	Colorado
3-7.8	Saline	Sweden
15.4	Saline	Great Britain
3.6	Saline	Japan
2.0	Saline	Denmark
3.8	Suction	Great Britain

Hilgers continues: "To think that this won't happen in America is naive. During the first year of Colorado's new abortion law, 8% of patients needed one or more blood transfusions (most of these abortions were done by dilation and curettage, or suction curettage). It should be mentioned that every time a blood transfusion is given, there are certain inherent risks, e.g., allergic reactions and serum hepatitis.

"Uterine Perforation--Perforation of the uterus can occur as a sequel to dilation and curettage. This occurs primarily because the surgeon operates by 'touch' alone and not under direct vision. Secondarily, the pregnant uterus is much softer than the non-pregnant uterus, lending itself to easier perforation. The incidence of perforation throughout the world is presented in Table IV."

Table IV, referred to above, is as follows:

The Incidence Of Uterine Perforation As A Result Of Legal Abortion

% PERFORATION	COUNTRY/STATE
0.11-0.28	Germany
0.14-0.80	Poland
0.10-0.18	Rumania
0.45	Czechoslovakia
0.20	Poland
1.2	USSR
0.4	Bulgaria
1.2	Great Britain
1.2	New York City
1.2	Colorado

Hilgers then states: "It is sad to note that New York City and Colorado are both experiencing relatively high rates of uterine perforation (1.2%). If in the process of perforation, the bowel or a blood vessel is torn, overwhelming infection and/or hemorrhage may occur which require an exploratory abdominal operation (30-65% with a perforation will need this operation). Subsequent pregnancy following a perforation is put in jeopardy because the perforation scar may rupture as the uterus expands.

"**Menstrual Disturbances**–Menstrual disturbances following abortion are not infrequent. (See Table V). This usually means gross irregularity in the appearance of the menstrual period, heavy bleeding with the menses or complete absence of menstruation. These disturbances may persist for many years. They are mostly the result of endouterine adherences or infection. This may lead to a number of more technical problems which need not be detailed here."

Table V, referred to above, is as follows:

The Incidence Of Menstrual Disturbance Following Legal Abortion

% MENSTRUAL DISTURBANCES	COUNTRY/STATE
3.1	Hungary
2.0	Czechoslovakia
1.0	Czechoslovakia
11-12 (5 year follow-up)	USSR
2.2	USSR
6.0	USSR
5.2	Poland

Under the heading "Subsequent Pathologic Pregnancies" Hilgers states: "Subsequent pregnancies are more often pathologic following abortion and this without question represents one of the most serious complications of induced abortion. The prematurity rate in Czechoslovakia prior to abortion on demand was 5% (not much different from the United States). Several years later, this had increased to 14%. Hungary and Japan have reported similar trends. The incidence in any one individual seems to be well correlated with the number of abortions a woman has; Hungarian studies reveal that the likelihood of premature delivery after one abortion increased to 12%; after two abortions–15%; and after three abortions –24%. It should be pointed out that prematurity is the leading cause of infant death in the United States, and one of the *major contributors* to *mental and motor retardation.* The authors are not aware of any studies which have been done regarding psychiatric sequelae following premature

birth as the result of a previous abortion, but would suspect a high correlation.

"A number of countries have reported a significant increase in incidence of ectopic pregnancies (pregnancies which occur someplace other than in the womb). In fact, Japan sees ectopic pregnancies in 3.9% of women, which is 4 to 8 times more frequent than in the United States. Ectopic pregnancies are not infrequently life threatening because of rupture and hemorrhage. Again, tubal malfunction secondary to infection seems to be the prime cause.

"Spontaneous abortions and fetal death before the onset of labor are reported to be significantly more common following legal abortion in those countries with weak abortion laws. Complicated labors (prolonged labor, placenta previa, adherent placenta) and excessive bleeding at the time of delivery are also more common when compared to women who have not had legal abortions. These all result in increased obstetrical intervention.

"**Transplacental Hemorrhage**–It has long been known that a woman who is Rh-negative is very susceptible to a special kind of problem if her consort is Rh-postive. Any given pregnancy may be a stimulus for the mother to develop antibodies against the baby's red blood cells (i.e., she becomes sensitized) so that in a subsequent pregnancy, these antibodies may destroy the baby's red blood cells resulting in an anemia in the unborn child which may be life-threatening. This sensitization occurs through the leakage of the baby's red blood cells into the mother's circulation (transplacental hemorrhage) usually at the time of delivery. Therefore, first born children are rarely affected. In spontaneous abortion, this sensitization *rarely* occurs.

However, with *all* methods of induced abortion sensitization has been reported to occur in 3 - 10% of Rh-negative women. Recent advances have allowed us to prevent this complication in 100% of women treated. However, because tests on the fetus cannot be performed to rule out sensitization of the mother, a number of women, who have not become sensitized, will be needlessly subjected to this expensive treatment.

"Sterility—There are a number of complications which do not appear immediately following the abortion. Poland has reported that 6.9% of women were sterile 4 to 5 years after abortion. Japan has reported 9.7% with subsequent sterility on 3 year follow-up and other countries have had similar experience. This appears to be the result of inadequate regeneration of the lining of the womb following dilation and curettage and/or infection as previously mentioned. There is evidence also to suggest that the sterility may have an adverse psychological effect on the woman. As Jeffcoat stated, 'If this happens when a first pregnancy is interrupted for non-recurrent indication, such as rubella or fleeting psychological upset, the situation is tragic.'

"Miscellaneous—A number of miscellaneous complications occur which deserve mention. (1) The Czech's have reported that 33% of patients had decreased sexual libido 9 months after the abortion. Similarly, a study from Poland showed 14% to have decreased libido 4 to 5 years after the abortion. This is theoretically related to the psychotraumatic experience of the interruption and emotional weakness that follows. (2) Changes in the coagulability of the blood following legal abortion, although rare, have been reported. (3) Most pregnancies following hyster-

otomy will need delivery by Caesarean section to eliminate the possibility of rupture of the hysterotomy scar. (4) Endometreosis is a common sequel to hysterotomy. (5) A particular problem associated with suction curettage appears to be perforation of the bladder.

"Psychiatric Sequelae–The psychiatric sequelae of induced abortion are most difficult to elucidate. Reports on the incidence of emotional difficulties following abortion vary from 0 - 85%. The true figure lies someplace in between. The difficulties appear to be more common in mature and motherly women than in the more immature, psychopathic and unmotherly. This may be because the husband is most often the prime mover to an abortion in the married woman and in the unmarried, parents and friends are prime movers. As previously mentioned, the woman with real psychiatric illness prior to an abortion is at greater risk to develop significant problems post-abortion than is the psychiatrically 'stable' woman.

"Martin Ekblad interviewed 479 women prior to abortion and again 2-1/2 to 3 years later. At follow-up, he found *10%* felt the operation unpleasant; *14%* had mild self reproach; and *11%* had serious self reproach and self regret. This is perhaps the best single study which has been conducted in this area.

"Seigfried, in 1951, studied 61 women, 2 years after abortion, and found *13%* to have serious self reproach. Beck, in 1964, studied 50 women 4 months after legal abortion and 9 had suppressed remorse which was expressed as various psychosomatic symptoms such as abdominal discomfort, vomiting, pruritis vulvae, dysmenorrhea, frigidity, headache, insomnia, fatigue, etc. Niswander and Patter-

so in 1967 studied 17 women, 8 months post-abortion for rubella. Eleven of the 17 reacted unfavorably and 8 had long term negative experience.

"It would appear that 15 - 25% of all women undergoing legal abortion will have some long term psychologic reaction. According to Helene Deutsch, the pregnant woman can initially deny the unborn child, but once she admits she is pregnant, she feels an unconscious attachment to him. The longer she stays pregnant, the more the child becomes a part of her. As a result, after abortion, many women feel that part of them is gone."

Techniques Of Induced Abortion.

Abortion can best be appreciated by seeing one from over the doctor's shoulder; nevertheless, some of the potential for damage can be understood by reading the following by Hilgers.[21]

"Potts has reported on the many ways of producing an abortion in a pregnant woman, many of them of only theoretical utility. He has described certain medical methods, including agents that destroy the fetus or placenta such as X rays, antimitotics and antimetabolites, together with agents that interfere with the maternal reaction to pregnancy such as monoamine oxidase inhibitors, non-steroidal estrogens, and immunological methods. Recent reports by Karim and Roth-Brandel and others reveal their use of a new abortifacient agent, prostaglandin, which when administered by continuous intravenous drip usually induces premature labor

---

[21] *Ibid.* pp. 18-22.

and results in abortion. Its side effects are presently being studied.

"Surgical techniques of abortion are of three general types: (1) scraping out or sucking out the fetus and its membranes from the uterus through the cervix and vagina after the cervix has been dilated with an instrument; (2) stimulation of premature labor and delivery, with or without ensuring the death of the fetus before delivery; and (3) hysterotomy, or direct surgical incision into the uterus with removal of the fetus, membranes and placenta.

"Presently available tests for pregnancy are usually unreliable until at least two weeks after a missed menstrual period, meaning that the human embryo is at least four weeks old when its existence is first discernible. One factor which frequently tends to delay the diagnosis of pregnancy is the slight vaginal bleeding often seen in early pregnancy and which the pregnant woman may mistake for a menstrual period. Another such delaying factor is the more or less constitutional menstrual irregularity which may lead a woman to accept the absence of menstrual period for a month or more.

"During the first twelve weeks of pregnancy, corresponding in practice, therefore, to an embryonic-fetal age of four to twelve weeks, abortionists rely upon dilation of the cervix and sharp curettage alone or suction curettage, which is usually followed by sharp curettage to ensure that no remnants of the fetus are left behind. In this procedure the woman is placed on her back on the operating table, her knees apart and hips and knees bent. She may be given general anesthesia, local anesthesia—by injections alongside the cervix (usually the only pain-sensitive structure involved)

or no anesthesia, depending on the size of the uterus and cervix, the ease with which it dilates, the age of the fetus (and therefore its size), and the preference of the operating doctor.

"The vagina is then cleansed with an antiseptic solution. A toothed instrument is clamped onto the cervix which is pulled toward the operator. The canal through the cervix is found with a long thin instrument called a sound, and then widened, usually by passing a series of progressively larger probes or dilators through it until it can admit the sharp curved curette or the tubular suction curette. Curettes for abortion range in size from 3.5 mm to 15 mm or about 1/8 inch to 5/8 inch, the larger sizes being necessary to tear through and scrape or suck out the tissues of the fetus, placenta, and membranes in the later stages of this first twelve week period of gestation. During the period from the fourth through the twelfth week of pregnancy the fetus has grown from 1/5 inch to 3-1/2 inches, has differentiated its organ systems, has arms and legs, has fingers and toes each provided with nails. Centers for bony development have appeared and begun to deposit bone in the skeleton which has been cartilage up to now. It may be of interest to the reader to read from the respected *Williams Obstetrics*, thirteenth edition, 1966, page 192: 'A fetus born at this time may make spontaneous movements if still within the amniotic sac or if immersed in warm saline.'

"If sharp curettage has been done, the pieces of the fetus with its membranes are placed on a sponge or in a pan and sent to the pathologist for identification. In suction curette equipment there is usually a glass jar

placed in line with the suction apparatus so that fetal parts will be trapped and not interfere with the machinery. In this case the glass bottle is simply unscrewed and sent to the pathologist.

"Stimulation of premature delivery, by a variety of means, is the method of choice by those who abort women pregnant for more than twelve weeks. Dilation and curettage is not used after about twelve weeks' gestation because it become prohibitively dangerous due to the larger size of the fetus and uterus, each now with larger blood vessels. The uterine wall is becoming progressively softer and thinner, the more likely to be perforated by a hard instrument. The fetal skeleton is becoming harder and the fetus more difficult to remove.

"Stimulation of effective uterine contractions, essentially the stimulation of premature labor, may be accomplished by injecting a variety of substances into the uterine cavity, either inside of or outside of the fetal membranes themselves. Most commonly used are concentrated salt (abandoned by the Japanese as unsafe after 1950), sugar, and formaldehyde solutions, irritant soaps, pastes, and rivanol (a mild antiseptic widely used in Japan).

"Schiffer has reported on the technic used in 28 abortions ranging from 14 to 24 weeks' gestation. The woman's abdomen was washed and prepared with antiseptic. Then, under local anesthesia a long needle was inserted through the abdominal wall, through the uterine wall and into the amniotic sac surrounding the fetus. As much of the fluid in this sac as possible was withdrawn through the needle, and, when possible, an equal amount of sterile salt solution was then injected and the needle withdrawn. Labor pains

began, on the average, 27.5 hours after injection and the fetus was delivered an average of 11 hours later. Some of Schiffer's patients received intravenous oxytocin, a drug used to strengthen uterine contractions, during the abortion. It is noteworthy that the reason that these substances stimulate labor is not yet known.

"During the period from twelve to twenty-four weeks' gestation the fetus grows to be about 13 inches long, weighing 1-1/4 pounds, with hair on its head, wrinkles on its skin and obvious sex organs. Survival of this 24-week size baby, though rare, has been reported.

"The Japanese often use a mechanical means to stimulate the pregnant uterus to start labor in performing mid-trimester abortions. Manabe reported on the use of the metreurynter–a balloon on the end of a flexible tube which is placed through the cervix between the uterine wall and the fetal membranes. The balloon is then filled with 3 to 10 ounces of sterile saline, causing it to become lodged in the uterus. The flexible tube is then hooked up to a pulley system between the woman's legs and a weight of 1 to 2 pounds is attached, exerting downward traction on the cervix. The Japanese feel that this force both dilates the cervix and stimulates the uterus to contract in an effort to expel the balloon and with it the unborn child. The average time from metreurynter inflation to delivery of the fetus–usually alive–varies widely but one report gives this figure to be about 26 hours.

"Manabe states that 'the ultimate aim in abortion is always the most physiologic delivery of the fetus, to ensure the safety of the mother.' He has found that the metreurynter method or the intrauterine instillation of 0.1% rivanol offer many advantages over other methods for mid-trimester abor-

tions because 'they result in a far more physiologic labor, evidenced by the fact that the fetus is normally delivered alive.' He points out that 'most fetuses, however, die shortly after delivery if fetal age is less than the middle of the seventh month. Survival of the fetus even several hours after delivery would pose serious moral and ethical dilemmas.'

"The least frequently used means of producing an abortion is the hysterotomy, which entails incision into the uterus and removal of the fetus. This method is used in pregnancies generally over 14 weeks. It is a major surgical procedure usually done through an abdominal incision. Up to about 16 weeks of pregnancy, it may be done through the vagina. After 16 weeks it is thought to be unsafe vaginally."

Even during early abortions, pieces come out which are obviously parts of what had been a small baby. This fact, and the fact that the purpose of abortion is to kill a human being, have led Dr. Andrew Ivy (Chicago Tribune, May 2, 1970) to point out that he was the expert medical witness at the Nurnberg War Crime Trials; that we are, in many ways, near the stage of respect for human life that Germany was in the mid 1930's; and that abortion may lead us to repeat the German crimes. Dr. Leo Alexander, in the July 14, 1969 New England Journal of Medicine, also pointed out the importance in Nazi Germany of the first small wedged-in lever through the right to life and how this made the following steps logical.

Permissive Abortion Laws Do Not Decrease The Criminal Abortion Rate.

As Table VI, Hilgers has set forth the following information:[22]

COUNTRY/STATE	EFFECT OF CRIMINAL ABORTION RATE
German Democratic Republic	Increased with liberal abortion law
	Decreased with strict abortion law
Japan	No effect
Great Britain	No effect
Yugoslavia	Increased
Hungary	No effect
Czechoslovakia	No effect
Switzerland	No effect
Bulgaria	No effect
Poland	No effect
Colorado	No effect
USSR	No effect

(Note: Similar results have been found for Sweden[23], Denmark[24], and California at least in the initial years[25].)

---

[22] *Ibid.* pp. 32, 33.

[23] Rice, "The Vanishing Right To Live," p. 39.

[24] Shaw, "Abortion On Trial," p. 144.

[25] Dr. Lewis Saylor, State Director of Public Health.

Hilgers continues: "Not one country has seen a decrease in the criminal abortion rate as the result of adopting weak legislation. On the other hand, some countries have actually seen an increase. The German Democratic Republic is a good example. They saw an increase in the criminal abortion rate during the years 1947-1950, a time when they had a relaxed abortion law. In 1950, they adopted a law allowing abortion only for strict medical indications. This was followed by a precipitous fall in the number of criminal abortions.

"There are a number of reasons given for this paradox. It seems that the law plays an inherent educative role in forming the social ethic of any given society. When this social ethic is changed by eliminating all the legal safeguards to abortion, a whole new class of women, dependent upon that social ethic, find themselves asking for abortion. It also seems clear that women desire privacy when they are aborted and the legal framework, no matter how loose, does not allow for this."

Willke states:[26] "The prestigious British Medical Journal Lancet, in 1968 in a report entitled 'On the Outcome of Pregnancy When Legal Abortion is Readily Available' stated: '*Sweden's law, in its present form, has not sufficed to subdue criminal abortion.*'

"Dr. Christopher Tietze, certainly one of the world's outstanding biostaticians, and a man who incidentally favors legalization of abortion, has written in his report, 'Abortion In Europe:' '*One of the major*

---

[26] "Handbook On Abortion," Dr. & Mrs. J. C. Willke, Hiltz Publishing Co., 1971, pp. 75-78.

goals of the liberalization laws in Scandinavia was to reduce illegal abortion. This was not realized. Rather, as we know from a variety of sources, both criminal and total abortions increased. It survives because of the relative lack of privacy of the official procedures. (U.S. Journal of Public Health, Nov. 1967.)

"Was this also true of Japan? Even more so in Japan. Of the 50,000,000 unborn children that have been killed by abortions in the last 22 years in Japan, and where abortions are very inexpensive, a full one-third of the procedures continue to be done illegally.

"What of the United States? What has been our experience to date? There hasn't been too much published because legalized abortion laws are new in our country. Dr. W. Droegemuller in the American Journal of Obstetrics and Gynecology, March 1969, reporting on 'One Year Experience With a Liberalized Abortion Law,' says that, '*This has not reduced the admissions for septic abortions.*' Sepsis (infection) is one of the most common complications of criminal abortion, and the number of septic cases admitted post-abortive to a hospital is a fairly good indication in a community of the number of criminal abortions being done.

"But perhaps their laws are too restrictive. What if abortion is completely available at the request of the mother? Wouldn't that eliminate illegal abortion? It didn't in Japan. It hasn't in England nor in any other major country to date.

"What is the reason why illegal abortions are not reduced? Here are some examples:

1) Suppose you are the wife of a man who wants another child. You do not. You become preg-

nant. If you go through official procedures in a hospital, your husband may find out. You don't want him to know, but you want to get rid of this baby, so you have an illegal abortion.

2) Suppose you are a married woman, and you become pregnant by another man. Your husband has been away, and he knows this would not be his child. Again, he must never know that you've become pregnant, so you have it done illegally.

3) Suppose you are a prominent citizen, and your teenage daughter becomes pregnant. You wish to avoid scandal. Hospital procedures are available to her. You cannot, however, take the risk of disclosure. You have it done in the privacy of an illegal situation.

4) Suppose you are poor. Perhaps your man has left you. There is a long waiting list at the public hospital, and much red tape you don't understand. You are frantic to 'get rid of it.' A friend tells you of someone who will. You go there.

"What of England? Hasn't the number of illegal abortions dropped there? The most authoritative report on this was published in the British Medical Journal, May 1970, by the Royal College of Obstetrics and Gynecology, and constituted a summary of the opinions of the consultant obstetricians of England. It said:

'The original protagonists for abortion law reform often argued that a large proportion of

*cases of spontaneous abortions hitherto treated in hospitals and nearly all the associated deaths were the result of criminal interference. Legalization of abortion would, they postulated, eliminate these. They brushed aside contrary arguments and evidence. Our figures show * * * that despite a sharp rise in the number of therapeutic ("legal") abortions from 1968 to 1969, there was not, unfortunately, a significant change in the number of cases of spontaneous abortion requiring admission to hospital.*

'The fact that legalization of abortion has not so far materially reduced the numbers of spontaneous abortions or of deaths from abortions of all kinds is not surprising. It confirms the experience of most countries and was forecast by the College's 1966 statement.' "

Incest And Rape Cause Few Pregnancies.

Willke states:[27] "If a girl is raped or subjected to incestuous intercourse and reports the fact promptly, she is usually taken immediately for medical attention. This consists of a douche, commonly a scraping of the uterus, and at times doses of medication, one or all of which, while done partially to prevent venereal disease, will also almost invariably prevent her from getting pregnant. If the rape victim would report her assault promptly, there would be, for all practical purposes, no pregnancies from rape. . . .

---

[27] *Ibid.* pp. 32-36.

"Are there any statistics to support the fact that pregnancy is rare? There have been few good statistical studies in this country. In Czechoslovakia, however, out of 86,000 consecutive induced abortions, only twenty-two were done for rape. This figures out to one in 4,000. At a recent obstetric meeting at a major midwest hospital, a poll taken of those physicians present (who had delivered over 19,000 babies) revealed that not one had delivered a bona fide rape pregnancy. . . .

"Unquestionably, many would want her to destroy the growing baby within her. But before making this decision, remember that most of the trauma has already occurred. She has been raped. That trauma will live with her all of her life. Furthermore, this girl did not report for help but kept this to herself. For several weeks she thought of little else as the panic built up. Now she has finally asked for help, has shared her upset, and should be in a supportive situation.

"The utilitarian question from the mother's standpoint is whether or not it would now be better to kill the developing baby within her. But will abortion now be best for her, or will it bring her more harm yet? What has happened and its damage has already occurred. She's old enough to know and have an opinion as to whether she carries a 'baby' or a 'blob of protoplasm.'

"Will she be able to live comfortably with the memory that she killed her developing baby? Or would she ultimately be more mature and more at peace with herself if she could remember that, even though she was unwillingly pregnant, she nevertheless gave her child life and a good home (perhaps through adoption).

"Even from only the mother's standpoint, the choice is one which deserves the most serious deliberation, and no answer is easy or automatically right."

And, finally, isn't it a twisted logic that would kill an innocent unborn baby for the crime of his father!

Abortion On Demand Does Not Fulfill The Requirements For A Good Law Dealing With A Complex Social, Biological, Economic, And Moral Issue.

Congressman Lawrence Hogan has defined requirements of a good abortion law.[29]

"*First, it should reflect the best medical and scientific judgment available.* We deal with human life at its beginning. If the physicians and scientists tell us–as they do–that the fetus, at say, 15 weeks, is definitely a *human person*, how can we kill that human person without guilt? . . .

"*Second, a good law does not help solve one social problem by creating others.* Besides the problem of the unborn, unwanted child, we have the problem of 'back-alley' abortions and the problem of death or injury to the aborting mother through improper surgical techniques. The New York experience since last July indicates that a so-called 'liberalized' abortion bill does not solve these: it creates an 'abortion mentality' which fosters thousands of unnecessary abortions and it appears there have been *more* deaths than before, rather than fewer. We should not go down New York's road until we have time to study

---

[29]Congressional Record, January 29, 1971.

and see where that road leads. . . .

"*Third, a good law should harmonize the rights of all interested parties.* Here the proposed bill completely overlooks the uncontroverted fact that the child in the womb is not just a growth in someone's body, like tonsils or an appendix, but is a real human being who, in my opinion, has the right to life. . . . .

"*Fourth, a good law should not foster crimes or put honest people into impossible crises of conscience.* Under similar laws in other states and in England, frequently an intended abortion results in the birth of a living child. Nurses are told to put him into a bucket and toss him into the incinerator. Thus the public policy of the given jurisdiction actually promotes what its laws define as *manslaughter*—and requires conscientious hospital personnel to witness or even help in the killing of a living human being, contrary to all their training, instincts, and moral convictions.

"*Fifth, a good law respects the common morality of a pluralistic community.* We are not talking about contraception here; we are talking about *killing* . . . ."

Even the pro-abortion California Medical Association (*supra*) admits that the idea of killing is presently socially abhorrent and that "semantic gymnastics are required to rationalize abortion."[30]

---

[30]California Medicine, September 1970, pp. 67, 68.

A High Abortion Rate Correlates With A High Suicide Rate.

Both in European and non-European nations, those countries having the largest numbers of abortions have the highest numbers of suicides. Among the non-European nations, Japan appears to have the largest number and rate of abortions. Ceylon appears to have the highest average death rate from abortions of those countries publishing rates.[31] Among the approximately 40 non-European nations publishing suicide rates, Japan and Ceylon have the highest two suicide rates.[31] Statistics are not complete enough to draw further conclusions for non-European nations.

Among those European nations listing their suicide rates,[31] eight–Bulgaria, Czechoslovakia, Denmark, Finland, Hungary, Norway, Poland and Sweden–have relatively permissive abortion laws.[32]

The eight permissive abortion European nations have suicide rates about 80% higher than the other European nations. While suicide correlates very closely with abortions in European nations, it correlates slightly or not at all with climate, longitude, latitude, economic development, mountains or Communism. (While the four Communist nations have high suicide rates, all four are permissive abortion nations and their suicide rates are comparable to those of non-Communist permissive abortion nations.)

---

[31]United Nations Demographic Yearbooks 1965-1969.

[32]Population Council, 245 Park Ave., New York, N.Y. 10017.

Here in the United States there is some basis for the belief that a low value on life—caused in part by young people believing that they themselves are unwanted, because of an abortion mentality creeping into society—is increasing our suicide rate and our drug-use rate.[33]

Permissive Abortion Laws Might Increase Venereal Disease Damage.

1967 United States Vital Statistics[34] indicate that syphilis and related diseases kill far more Americans annually than pregnancy and abortion combined. If a permissive abortion law causes even a slight percentage increase in venereal disease annually, it may cause far more physical harm and misery than that presently caused by the non-termination of unwanted pregnancies.

Dr. Geoffrey Simmons, an originator of the campaign sponsored by the Los Angeles County Health Department, Citizens for Eradication of Syphilis and Council of Free Clinics, has said[35] that even with the most effective preventive means, the condom, there is a ten per cent chance of infection from relations with partners having syphilis, but that most people use birth prevention means such as the pill which are not effective in preventing VD. "About half a million men and women have syphilis in the United States and don't know it . . . . The tragedy is that VD already is out of control and indica-

---

[33]Los Angeles Times, Part 4, p. 4, May 25, 1971.

[34]"Vital Statistics of the United States, 1967, Vol. II, Mortality Part A," pp. 1-7.

[35]Los Angeles Times, Part 4, p. 4, April 1, 1971.

tions are that the current epidemic will get worse. . . . [D]rugs now being used are beginning to fail." He predicts that by 1975 instead of 2 million venereal disease cases in the country there will be 5 million, "barring some scientific discovery or strong preventive measures assumed on an individual basis by the population at large. . . . More than 100,000 persons who have syphilis will either have severe heart disease, be insane, paralyzed or dead from this disease."

The Abortionists Have Interpreted *United States v. Vuitch*, 91 S.Ct. 1294, 28 L.Ed.2d 601 (1971), As Permitting Abortion On Demand.[36]

A close reading of the Washington, D. C. newspapers or contact with the abortion referral agencies and abortionists in Washington, D. C., since the *Vuitch* decision was made public in April 1971, should be sufficient to convince the Court that the practical effect of the Court's *Vuitch* decision has been abortion on demand, which has stripped the unborn of all protection in Washington, D. C.

The Abortionists Interpret "Abortion For Mental Health Reasons" To Mean Abortion On Demand.

In California, for example, the ratio of abortions performed to applications in 1970 was 99%[37]–not a bad percentage considering that 1% of the women might change their minds. Ninety-eight per cent of the 1970 abortions

---

[36] Life In America, May 1971, p. 2.

[37] "American Medical News," March 29, 1971, p. 6.

were based on preserving the mental health of the woman. In California, "mental health" should mean "mental illness to the extent that the woman is dangerous to herself or to the person or property of others or is in need of supervision or restraint."[38]

The number of abortions in California in 1970 was nearly 70,000. It is unreasonable to assume that all of these women in California think they have mental health problems sufficient to fall within the definition of California Health & Safety Code section 25954, and that 99% of these women are accurate in their analysis. If that were true, a significant number of women would be receiving mental health care after their abortion. In fact, there are no records indicating post-abortion mental-health care for any significant number of women receiving abortions in California or elsewhere. The mental health provision is an example of form over substance. The women say the magic words, "mental health," and pay their money and the doctor performs the abortion. KABC-TV[39] indicated the lack of respect the abortionists have for the limitations in the California abortion law as follows, "Yet doctors will tell you that any woman who wants an abortion can now secure one legally and safely in this state." Since doctors can earn hundreds of dollars each few minutes by performing abortions if they have a sufficient number of applicants for abortion, and a relatively small number of doctors can do a large number of abortions, it is not surprising that doctors in California have

---

[38]California Health & Safety Code section 25954.

[39]In an ad in the weekly TV magazine of the Los Angeles Times, November 8, 1970, p. 17.

approved 99% of abortion applications for mental health reasons.

Amicus submits that if the Court wishes to give the unborn any significant protection, the Court must close the loophole the abortionists have read in to *Vuitch*. Amicus further submits that it is poor public policy to permit lawbreakers to force a change in the law by continually breaking the law.

CONCLUSION

In other nations and in other areas of United States law, the Right to Life is not extinguished by someone else's Right to Privacy. There are strong forces working to further diminish the Right to Life, so that if the Court takes this first step, nobody may be able to stop additional steps which may destroy the Right to Live of everyone. A 10-ounce child has survived premature birth, while 60-ounce children are being deliberately killed. Abortion causes far more harm to the mothers than continuation of the pregnancy would have caused, on the average. Abortion has not been made desirable by a change in people's beliefs. Abortion is unlikely to reduce the number of battered children. Rejection of the child is common early in pregnancy, when the woman must decide whether to abort, but nearly always disappears before birth of the formerly unwanted child. The first step of abortion has in the recent past logically led to catastrophic erosion of the Right to Life. Permissive abortion laws do not decrease the criminal abortion rate. Rape and incest cause few pregnancies, and pregnancy from rape and incest can

easily be prevented without abortion. Abortion on demand does not fulfill the general requirements for good law. European nations having permissive abortion laws have nearly twice the suicide rate of nations having strict abortion laws. Permissive abortion laws may cause far more damage from venereal disease than is caused by unwanted pregnancies. Abortionists have interpreted *Vuitch* so as to destroy all protection for the unborn. Abortionists interpret "abortion for mental health reasons" as abortion on demand.

Respectfully submitted,

ROBERT E. DUNNE

Attorney for Amicus Curiae

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 322 Main Street, Huntington Beach, California 92648, that on JULY 30, 1971, I served the within MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE and BRIEF OF AMICUS CURIAE ROBERT L. SASSONE IN SUPPORT OF RESPONDENT (No. 70-18) on the following named parties by depositing copies as designated, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

SOLICITOR GENERAL OF THE UNITED STATES
WASHINGTON, D. C. 20543 (3 copies)

ROY LUCAS
JAMES MADISON CONSTITUTIONAL LAW INSTITUTE
4 PATCHIN PLACE
New York,, NEW YORK 10011 (10 copies)
For Petitioners.

ATTORNEY GENERAL CRAWFORD C. MARTIN
CAPITOL STATION
P. O. BOX 12548
AUSTIN, TEXAS 78711
For Respondent. (2 copies)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JULY 30, 1971, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer Co., 322 Main St., Huntington Beach, Calif.
(714) 536-7161

TOPICAL INDEX

	Page
Motion For Leave To File A Brief As Amicus Curiae	1
Brief Of Amicus Curiae Robert L. Sassone In Support Of Respondent	3
The powers of a sovereign state include the power to limit the reasons for abortion	4
In areas other than abortion the right to privacy is a relative right, not an absolute right	4
The right to life is the most nearly absolute right	5
In areas other than abortion the right to privacy is insufficient reason to take the life of another human being	6
Burden and degree of proof	7
The scope of the right to privacy in the area of abortion should be determined in part by comparing the conflicting rights and by determining the results likely to follow if various alternatives are adopted	7
Loosening abortion laws may have significant unforeseen future effects	8
Abortion is only the opening wedge of a broad based attack on the right to live	9
The protection of the right to life should be based on current medical knowledge (which indicates that a 10-ounce child	

TOPICAL INDEX

Brief of Amicus Curiae (cont'd)	Page
can survive), not medical knowledge hundreds of years old	11
Abortion has caused emotional disturbances in non-Christian Japan among about 80% of abortion patients	14
In Japan, the physical abnormality rate following abortion has been about 29%	15
Abortion on demand has not been made socially desirable by a change in what people believe is right	16
Permissive abortion laws are unlikely to reduce the numbers of battered children	17
Deaths from pregnancy are not sufficient reason to forbid abortion limitation laws	18
The woman's health is not a justification for abortion	20
A negative feeling in early pregnancy is common but temporary	23
Medical complications of induced abortion	25
Tables:	
Legal Abortion Mortality Rates	27
Incidence Of Pelvic Infection Following Legal Abortion	28
Incidence Of Major Hemorrhage Following Legal Abortion	30
Incidence Of Uterine Perforation As A Result Of Legal Abortion	31
Incidence of Menstrual Disturbance Following Legal Abortion	32

TOPICAL INDEX

Brief of Amicus Curiae (cont'd)	Page
Techniques of induced abortion	36
Permissive abortion laws do not decrease the criminal abortion rate	42
Table: Effect of criminal abortion rate	42
Incest and rape cause few pregnancies	46
Abortion on demand does not fulfill the requirements for a good law dealing with a complex social, biological, economic, and moral issue	48
A high abortion rate correlates with a high suicide rate	50
Permissive abortion laws might increase venereal disease damage	51
The abortionists have interpreted *United States v. Vuitch*, 91 S.Ct. 1294, 28 L.Ed.2d 601 (1971), as permitting abortion on demand	52
The abortionists interpret "abortion for mental health reasons" to mean abortion on demand	52
Conclusion	54

TABLE OF AUTHORITIES CITED

Cases	Page
Ballard v. Anderson, 4 Cal.3d 873, 484 P.2d 1345, 95 Cal.Rptr. 1 (1971)	8
United States v. Vuitch, 91 S.Ct. 1294, 28 L.Ed.2d 601 (1971)	52, 53
Statutes and Related Material	
Declaration of Independence	5
United States Constitution	
Amend. IX	4
Amend. X	4
Amend. XIV	5
Congressional Record, Jan. 29, 1971	48, 49
California Health & Safety Code § 25954	53
HB 3184, Florida (Oct. 1969)	9
SB 1421-70, Hawaii (Feb. 4, 1970)	9
Declaration of the Rights Of A Child, General Assembly of the United Nations, Nov. 20, 1959	5, 6
Legal Textbooks	
Perkins, Criminal Law, 2d Ed., 1969, p. 31	11
Prosser on Torts, 3rd Ed., 1964, Chapter 22	4, 6

TABLE OF AUTHORITIES CITED

Medical Reports, Bulletins, Magazines, etc.	Page
"American Medical News," March 29, 1971, p. 6 ..	52
California Medicine, Sept. 1970, pp.67, 68	9, 10, 49
KOYA, MURAMATSU, Bulletin of the Institute of Public Health (Japan) IV, No. 1-2, Sept. 1954	19
New England Journal of Medicine, July 14, 1969	41
"Our Role In The Generation, Modification And Termination Of Life," Archives of Internal Medicine, 1969	11
"Japan's 22 Year Experience With A Liberal Abortion Law," Dr. Yokichi Hayasaka, et al., pp. 4, 5, 6	14, 15, 16
"Induced Abortion: A Documented Report," by T. W. Hilgers, M.D., P. N. Shearin, M.D. (Presented to Minnesota State Legislature) Jan. 1971 .... 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, ... 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43	

Statistical Reference Books

"Vital Statistics of the U.S., 1967, Vol. II, Mortality, Part A," pp. 1-7	51
United Nations Demographic Yearbooks 1965-1969	50
Guinness Book of Records	12

TABLE OF AUTHORITIES CITED

Reference Books **Page**

"Love and Curing The Neurotic," Arlington House, 1971 20

Rice, "The Vanishing Right To Live," p. 39 42

Shaw, "Abortion on Trial," p. 144 42

Gordon Rattray Taylor, "The Biological Timebomb," pp. 37, 38, 207 12

"Handbook on Abortion," Dr. & Mrs. J. C. Willke, Hiltz Publishing Co., 1971 .....
.....13, 17, 20, 27, 43, 44, 45, 46, 47, 48

Magazines

"Alive In An Artificial Womb," Life, August 28, 1964 12

"Control of Population," Life, Feb. 20, 1970 11

"Abortion and The Law," Newsweek, April 13, 1970 11

Robert A. Harper, OB-GYN News, Nov. 1, 1969 .. 11

"The Tragedy of The Commons," Science, December 13, 1969 11

Newspaper Articles

Chicago Tribune, May 2, 1970 41

Life In America, May 1971 52

TABLE OF AUTHORITIES CITED

Newspaper Articles (cont'd)	Page
Los Angeles Times, TV magazine, Nov. 18, 1970, p. 17	53
Los Angeles Times, April 1, 1971, Part 4, p. 4	51
Los Angeles Times, Sunday, June 20, 1971, p. A3	13
Los Angeles Times, May 13, 1971, Part IV, p. 23	16, 17
Los Angeles Times, May 25, 1971, Part 4, p. 4	51
New York Times, May 19, 1971, p. 1	8

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 70-40

MARY DOE, *et al.*,

Petitioners,

vs.

ARTHUR K. BOLTON,

Respondent.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Robert L. Sassone hereby respectfully moves for leave to file a brief amicus curiae in this case. The consent of the attorneys for the parties has not been obtained. This brief is identical to that filed by Robert L. Sassone in *Roe v. Wade*, No. 70-18.

The interest of Robert L. Sassone in this case arises from the fact that he is the President of LIFE (League for Infants, Fetuses, and the Elderly, an organization of over a thousand individuals, including many clergymen, doctors and attorneys). The members of LIFE fear that declaring abortion control laws unconstitutional may lead to lessened respect for the value of human life.

Certain of the individual members of LIFE have examined

certain of the recent lower court decisions and briefs relating to the constitutionality of abortion control laws. These examinations have indicated that certain statistical, medical and sociological arguments by defendants have not been answered, or that the answers have omitted important data. In addition, arguments in favor of the right to live of the unborn have omitted important data. The rights of the unborn are relevant in determining the constitutionality of the abortion control law in question, because abortion involves a balancing of rights, not a mere consideration of only the rights of the mother.

The present brief sets forth data in short sections which may be read separately if the Court feels that the data in any of the individual sections is relevant and not adequately set forth elsewhere.

Respectfully submitted,

ROBERT E. DUNNE,

Attorney for Amicus Curiae.

Dated: July 28, 1971.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 70-40

MARY DOE, *et al.*,

Petitioners,

vs.

ARTHUR K. BOLTON,

Respondent.

BRIEF OF AMICUS CURIAE ROBERT L. SASSONE IN SUPPORT OF RESPONDENT

The Powers Of A Sovereign State Include The Power To Limit The Reasons For Abortion.

Nearly every nation at some time or other has forbidden or strictly limited the power of a woman to obtain an abortion. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Accordingly, unless it is shown that the Constitution prohibits states from limiting the reasons for abortion, the states have that power. Those nations, such as England, which respect rights not enumerated in a formal constitution afford a precedent for the scope of protection which should be afforded women seeking an abortion because of a right to privacy guaranteed by the Ninth Amendment, since the Ninth Amendment reserves to the people those rights of the people not enumerated in the Constitution. A search of the laws of other nations has not indicated any other nation which has defined the inherent rights of the people to include a right to privacy in women sufficiently broad to prevent the state from regulating the reasons for obtaining an abortion.

In Areas Other Than Abortion The Right To Privacy Is A Relative Right, Not An Absolute Right.

Numerous examples in Tort and Criminal Law indicate that the right to privacy is a relative right.[1] A woman cannot in privacy, even though she harm no other person, legally

[1]Tort Law limitations on the Right of Privacy are outlined in Prosser on Torts, 3rd Edition, 1964, Chapter 22.

utilize or even possess certain forbidden drugs such as LSD or heroin. The right to privacy was considered a mere relative right by the framers of the Constitution. Had they not considered the right to privacy a mere relative right, they would not have carefully defined additional protection for the small portion of the right to privacy protected by the guarantee against unreasonable search and seizure.

The Right To Life Is The Most Nearly Absolute Right.

The right to life forms the foundation for nearly all other rights. Remove the right to life and the other rights become valueless. The preciousness of this right to the unborn may be surmised from the following:

"We hold these truths to be self-evident; that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these rights are life . . . that to secure these rights, governments are instituted among men . . . . " Declaration of Independence.

"Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction that equal protection of the laws." Fourteenth Amendment, Constitution of the United States.

"The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." Declaration of the Rights of a Child, General Assembly of

the United Nations, November 20, 1959.

In Areas Other Than Abortion The Right To Privacy Is Insufficient Reason To Take The Life Of Another Human Being.

In areas other than abortion the right to privacy does not give the right to take the life of another human, even an invading inferior human being. There is a dispute as to the seriousness of the imposition on the woman *by her unborn baby*. The extent of the woman's right to privacy should be determined in part by the seriousness of the invasion of that right to privacy. Analogous in some ways to the invasion of a mother's body by an unwanted unborn baby is the invasion of a building by a trespasser or a petty thief, where the thief's right to live is protected. "But spring guns and other man-killing devices are not justifiable against a trespasser or even a petty thief."[2]

When we apply the well-tested common law policy relating to traps to abortion, we find that the case for the preservation of life is stronger in many ways in the case of abortion, where the baby is invited in by actions by the woman.

In the case of the traps, the person whose right to privacy is being invaded is entirely powerless to prevent the invasion in many cases, since the measures necessary to make property thief-proof cost more than most persons can afford. In the case of abortion, the mother not only has the power to prevent the pregnancy, she had to actively participate in a sexual act before the conception could

---

[2] *Ibid.* p. 118.

occur. In addition, after participating, she had to refrain from taking steps, such as a morning-after pill or D & C, to prevent implantation. In the case of traps, the protected invader of privacy may well be guilty of a criminal act, yet he still is protected. In the case of abortion, the victim is personally entirely innocent, regardless of the acts of his parents.

Burden And Degree Of Proof.

Whenever a human being is faced with the legal loss of his life, the burden of proof that that person should lose his life lies with those who are attempting to take his life, and the burden of proof is not a mere preponderance of the evidence. The Court should not do less in the case of innocent unborn humans than it does for more mature humans who are accused of serious crimes. Before defining the law to permit the killing of millions of unborn children, the Court should require the pro-abortionists to prove their case beyond a reasonable doubt.

The Scope Of The Right To Privacy In The Area Of Abortion Should Be Determined In Part By Comparing The Conflicting Rights And By Determing The Results Likely To Follow If Various Alternatives Are Adopted.

The issue of abortion is more than a question of the freedom of a woman to control the reproduction functions of her body. It is also a question of those circumstances under which a human being may be permitted to take the

life of another. Granting an absolute right to aborton because of the right to privacy will cause abortion on demand to exist, the advantages and disadvantages of abortion on demand may be analyzed in part by analyzing the experience of the large nations which have had sufficiently large volume of abortions over a sufficiently long period of time under carefully monitored conditions.

Loosening Abortion Laws May Have Significant Unforeseen Future Effects.

In *Ballard v. Anderson*, 4 Cal.3d 873, 484 P.2d 1345, 95 Cal.Rptr. 1 (1971), the California Supreme Court ruled that the 1967 California Abortion Law permits a minor of any age to get an abortion without parental knowledge or consent, a result not mentioned during debate in 1967. A New York court has held that New York cannot limit medicaid for abortions to abortions for medical reasons.[3] Neither of these events were foreseen or discussed at the time the respective abortion laws were being discussed. Declaring abortion laws unconstitutional may cause unforeseen, possibly unwanted, future events. Will a 12 or 13 year old girl then have the right to become pregnant and to get an abortion without parental knowledge and consent, such as happened in California? If the minor is permitted to get an abortion, does not her right to privacy give her a right to be sterilized without parental knowledge or consent? Will not more unborn Americans be executed in a relatively few years than the number of Jews by the Nazis? Will not a woman,

---

[3]New York Times, May 19, 1971, page 1.

have a right to deliberately conceive a child, then kill that child by means of abortion, for purposes such as toxicity tests? It is probable that the unforeseen results from giving a woman an absolute right to privacy in the area of abortion will be far more imaginative than the few possibilities suggested herein. If the Court permits abortion for no reason, where will it logically be able to draw a line when the same anti-life arguments are extended?

Abortion Is Only The Opening Wedge Of A Broad Based Attack On The Right To Live.

The scope and severity of the attacks on the right to live are such that if the right to live is destroyed in a particular small area, it may be impossible to prevent the right to live from being destroyed in other areas. HB 3184, prefiled October, 1969, by Representative Sackett in Florida, and introduced annually since, would permit three doctors and one judge to order the execution of persons they felt deserving of execution. SB 1421-70, introduced by Nadao Yoshinaga, February 4, 1970, in Hawaii, the week after Hawaii passed its aborton-on-demand law, provides that every woman giving birth to her second child must be sterilized regardless of her opinions or belief or those of her doctor. These two bills, if passed, would make legal in America a large percentage of the actions of the Nazis which were labeled atrocities in the 1940's. There is sufficient pressure, however, to go far beyond these two bills in America today. The California Medical Association has stated in an an editorial: "The traditional western ethic has always placed great emphasis on the intrinsic worth and equal value of every human life

regardless of its stage or condition . . . . This traditional ethic is still clearly dominant, but there is much to suggest that it is being eroded at its core and may eventually even be abandoned . . . . It will become necessary and acceptable to place relative rather than absolute values on such things as human lives . . . . The process of eroding the old ethic and substituting the new has already begun. It may be seen most clearly in changing attitudes toward human abortion. In defiance of the long held Western ethic of intrinsic and equal value for every human life regardless of its stage, condition or status, abortion is becoming accepted by society as moral, right and even necessary . . . . Since the old ethic has not yet been fully displaced it has been necessary to separate the idea of abortion from the idea of killing, which continues to be socially abhorrent. The result has been a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous whether intra- or extra-uterine until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they were not often put forth under socially impeccable auspices. It is suggested that this schizophrenic sort of subterfuge is necessary because while a new ethic is being accepted the old one has not yet been rejected. . . . Medicine's role with respect to changing attitudes toward abortion may well be a prototype of what is to occur . . . . One may anticipate further development of these roles as the problems of birth control and birth selection are extended inevitably to death selection and death control whether by the individual or by society."[4]

[4]California Medicine, September 1970, pp. 67, 68.

Whether it be best sellers such as "Population Bomb," which likens human beings to a cancer which must be removed–even though the operation will require many cruel and apparent heartless decisions, TV talk shows, magazine articles[5], or talks at schools, etc., general principles are being proposed for America today which are broad enough to encompass most of the worst acts of the Nazis. It is very possible that today in America the right to live may be whittled away by a series of small steps, each justified for varying reasons, so that the sum result of all those steps will be undesirable. The first and most difficult step is to establish in the law, as the Court is being asked to do in this case, that a certain class of human beings are subhumans whose lives may be taken with no more justification than needed to step on an ant. Once that first large step is taken, and the right to privacy becomes a license to kill, the subsequent small steps may come easily, rapidly and inevitably.

The Protection Of The Right To Life Should Be Based On Current Medical Knowledge (Which Indicates That A 10-Ounce Child Can Survive), Not Medical Knowledge Hundreds Of Years Old.

All would agree that "shooting or otherwise damaging a corpse is not homicide."[6] An apparently drowned child would have been pronounced dead in years past, and a court

---

[5]"Control Of Population," *Life*, Feb. 20, 1970; "The Tragedy Of The Commons," *Science*, Dec. 13, 1968; "Our Role In The Generation, Modification And Termination Of Life," *Archives of Internal Medicine*, 1969; "Abortion And The Law," *Newsweek*, Apr. 13, 1970; Robert A. Harper in *OB-GYN News*, Nov. 1, 1969, and many others.

[6]Perkins, Criminal Law, 2d Ed. 1969, p. 31.

in those days would exonerate from homicide one who cut off the child's head a moment after the heart stopped. Would this be just today, when we have modified the definition of a corpse because of advances in techniques for life revival, restoration and resuscitation, such as artificial respiration, open heart massage, transfusions, transplants, and a variety of life-restoring stimulants, drugs and new surgical methods.

The "quickening" barrier for fetus survival was long ago broken. In the 1930's, a ten-ounce premature infant survived its early birth to grow to become a normal size adult.[7] This Court should not disregard the medicine of the 1930's and hold that a woman's right to privacy gives her a license to kill her unquickened unborn child because that child would have been too small to have survived in 1600. Nor should this Court rule that a nine-ounce child can be killed by its mother, because the "nine-ounce barrier" for premature infants is no more sacred than the "four-minute mile barrier" was for runners.

Experiments going back into the early 1960's[8] have indicated that artificial wombs for unborn humans are only a matter of time. It is expected that before the present decade ends,[9] that is, sometime before 1980, any unborn human being, perhaps even those weighing less than one ounce, old enough to have developed a placenta, may be removed from its mother, placed in an artificial liquid environment, fed food and oxygen from a heart-lung

---

[7]Guinness Book of Records.

[8]"Alive In An Artificial Womb," an article in *Life Magazine*, August 28, 1964.

[9]Gordon Rattray Taylor, "The Biological Timebomb," pp. 37, 38, 207.

machine through its placenta, and enabled to develop until it can breathe and eat like a normal newborn child. This year, in Sydney, Australia, Richard Brodrick, a child only six inches long, nearly survived.[10] In a matter of a few short years, any woman wishing to terminate an early pregnancy will be able to terminate the pregnancy without the death of the child. The doctor will be able to carefully remove the placenta and child and give the child a chance to live, if the law protects the child.

" 'Responsible' physicians would hope not to abort a mother whose baby would be over one pound. But - - one of our colleagues recently witnessed a four pound baby killed by the salt method and delivered stillborn. Another practice is that of some so-called physicians in New York City and elsewhere of injecting salt solution and immediately sending the mother home. Within two weeks in Cincinnati two babies weighing three-and-a-fourth and three-and-three-fourths pounds were delivered dead from mothers who had had this procedure."[11]

Unless it sustains strong abortion laws, the Court will, in effect, make a new legal definition–the subhuman who can be killed with impunity. It will then be much easier to increase the scope and variety of those innocents falling within the "subhuman class" than it was to establish the first class of innocent, legal subhumans.

---

[10] Los Angeles Times, Sunday, June 20, 1971, p. A3.

[11] "Handbook On Abortion," Dr. & Mrs. J. C. Willke, Hiltz Publishing Co., 1971, p. 29.

Abortion Has Caused Emotional Disturbance In Non-Christian Japan Among About 80% Of Aborton Patients.[12]

"The average of six surveys in Japan indicates that most women with abortion experience do not approve of it without reserve. The 1963 survey by the Aichi Committee on the Eugenic Protection Law indicates that 73.1% of the women who experienced abortion felt 'anguish' about what they did. In the 1964 survey of Dr. Kaseki, 59% responded that they felt abortion was something 'very evil' and only 8% said they don't think it should be called something bad. In the Gamagori City survey, 65% had some reason to be sorry. In the 1968 survey of the Nagoya City area, 67% of the women responded that they felt the fetus is an individual human being from the beginning, not a part of the mother. 42% of the women in the survey responded that abortion is not good. In addition another 57% that it is not good but it couldn't be helped; and only 1% didn't know whether to call it bad or good. In the 1969 survey by the Prime Minister's Office, 88% answered that abortion is bad, or it is not good but cannot be helped.

"In the 1965 Mainichi survey, only 18% responded that they 'did not feel anything in particular' when they experienced abortion for the first time; 35.3% felt 'sorry about the fetus'; 28.1% felt they did something wrong; 4.3% worried about fecundity impairments; 6.5% had other answers, and 7.9% did not answer." *Ibid.*

---

12. "Japan's 22 Year Experience With A Liberal Abortion Law," Dr. Yokichi Hayasaka, *et al.*, p. 4.

In Japan, The Physical Abnormality Rate Following Abortion Has Been About 29%.

"All public opinion surveys taken indicate that several million women in Japan believe that their health has been harmed by abortion; that is, legal abortion. The surveys cover a total of 16-17 million married women, not counting the unmarried, among whom many have also experienced abortion. If roughly half of them have experienced at least one abortion (which is a conservative estimate); and if 30% of them have adverse health effects as a result, the number of women affected is already above 2.5 million; there are more if we also count the unmarried, and those who have moved into the higher age categories.

"This appears to be the picture which emerges from the public opinion surveys. In the 1959 Mainichi survey, 28.4% of those who had abortion reported 'some kind of bad effect'; in the 1963 Aichi survey, 13% indicated damage from the operation; in the 1964 Welfare Ministry survey, 24.1% indicated that they were physically unwell since the operation; in the 1965 Mainichi survey, 18.5% indicated (after only one abortion) that they were physically unwell after the operation; in the 1968 Nagoya survey by Women's Associations, 59% indicated that they were severely troubled with adverse after-effects, or in less good health; and in the 1969 survey of the Office of the Prime Minister, 31% indicated that some kind of physical abnormality came about as a result of abortion; this averages to 29% in the six surveys; not counting those who did not reply to this question.

"In the 1965 Mainichi survey, the percentage of complaints is seen to rise with the number of abortions experienc-

ed: 18.5% indicate that they were physically unwell after one operation; 22.7% after two; 40.4% after three; 51.7% after four operations. . . .

"The 1969 survey of the Office of the Prime Minister indicates the following list of complaints: 9.17% sterility (after 3 years); 14.8% habitual spontaneous abortion; 3.9% extra-uterine pregnancies; 17.4% menstrual irregularities; 20% abdominal pains; 19.7% dizziness; 27.2% headache; 3.5% frigidity; 13.5% exhaustion; 3.6% neurosis.

"Even though the operating physician performs everything normally the woman experiences a sudden change from the pregnant state to the non-pregnant state. Her body has been functioning at high capacity to provide nourishment for the developing fetus and to dispose of wastes. When the fetus is wrenched out of her body, the reason for this prodigious physical activity is suddenly removed. Dr. Y. Moriguchi compares it to slamming emergency brakes on a train which is going at full speed (Katorikku Shingaku, Jochi University, II, II, 4, pp. 353-362). As a result the syndrome of the unbalanced sympathetic nervous system may appear (see Dr. Nakatsu "Mistakes in Abortion and Prognosis" in OBSTETRICS AND GYNECOLOGY, Sept. 1960, pp. 53-59)."[13]

Abortion On Demand Has Not Been Made Socially Desirable By A Change In What People Believe Is Right.

An article on a Lou Harris poll of 4,000 Americans[14]

---

[13] *Ibid.* pp. 5, 6.

[14] Los Angeles Times, May 13, 1971, Part IV, p. 23.

states: "And from what they answered, it appears the 1970's woman is as straitlaced as ladies of Victoria's day . . . . 65% of the women interviewed think premarital sex is immoral. More astounding, 54% of the men think so, too.

"Also shot down as socially unacceptable: trial marriages (77% of the women oppose and 69% of the men) and bearing children out of wedlock (85% of the women, 82% of the men oppose). In fact, 89% of the women and 87% of the men think society would fall apart without the institution of marriage."

Permissive Abortion Laws Are Unlikely To Reduce The Numbers Of Battered Children.

". . . Dr. Edward Lenoski, Professor of Pediatrics at the University of Southern California, did a four-and-a half year study of 400 battered children. He determined that 90% of the battered children in his study were planned pregnancies. Ninety per cent is far above average for planned pregnancies. Most of our readers undoubtably deeply cherish and love the children that they have been given. How many of you, however, actually planned the conception of 90% of them? We could apparently kill all 'unwanted' babies in the early stages of pregnancy, but still not significantly reduce the numbers of battered children.

"Dr. Lenoski has also determined that since the advent of the contraceptive pill (which has certainly reduced unwanted pregnancies), child beating is up threefold."[15]

---

15. "Handbook On Abortion," Dr. & Mrs. J. C. Willke, Hiltz Publishing Co., 1971, Cincinnati, p. 49.

Deaths From Pregnancy Are Not Sufficient Reason To Forbid Abortion Limitation Laws.

United States Vital Statistics indicate a death rate per pregnancy caused by deliveries and complications of pregnancy, childbirth and the pur perium of 28 per hundred thousand in 1967. Some mothers, however, have less than adequate medical care during pregnancy. The true risk of pregnancy, given mediocre medical care, is probably closer to 10 deaths per hundred thousand births. United States Vital Statistics indicate that the death rate per hundred thousand live births among white New England women during 1965-67 was 10.8 per hundred thousand live births. The death rate among women receiving inadequate medical care is probably 5 to 10 times as high or perhaps even higher, as can be seen by the nationwide non-white death rate of 69.5 per hundred thousand live births in 1967. Those white women in New England who did not receive adequate medical care probably had a death rate far higher than 10 per hundred thousand live births, although no such statistics are available in the United States Vital Statistics. Accordingly, the death rate per hundred thousand live births for women receiving adequate medical care was probably less than 10 per hundred thousand live births in the period 1965-67. In addition, the long term trend in death rates from pregnancy since the 1920's has been a reduction by more than 50% in the death rate from pregnancy each 10 years. There is some evidence that the long term trend is slowing down, but if it holds, the death rate for women receiving adequate medical care in the years 1973-75 will be about 5 per 100,000 live births.

In comparing the death rates caused by abortion and pregnancy, it should be noted that in the case of legal abortions, the woman is generally given what is considered to be adequate medical care. Accordingly, no improvement in medical care based on today's knowledge is likely to significantly reduce the death rate from abortion.

While United States Vital Statistics list nearly 1,000 deaths from pregnancy and related causes in 1967 and 1968, with only 130 deaths from abortion in 1968 and 160 in 1967, abortion is not thereby shown to be safer. The pregnancy death quantities are deceivingly high because all abortion deaths are *included* in maternal mortality figures, as well as a number of women who die during or after pregnancy of kidney disease, high blood pressure, and stroke conditions that might have claimed them whether they were pregnant or not. In addition, the risk from one pregnancy is spread over about 12 months. If aborted, the woman may become pregnant again soon, as indicated by the following table by KOYA, MURAMATSU, Bulletin of the Institute of Public Health, (Japan) IV, No. 1-2, Sept. 1954, for women not using contraceptives.

Months	Percentage Pregnant	
	After abortion	After childbirth
3	19.2% (448)	0.0% (354)
6	32.8%	2.5%
9	43.5%	8.5%
12	50.0%	16.9%
15	60.0%	26.3%

The Woman's Health Is Not A Justification For Abortion.

The experience of nearly every area where comprehensive statistics have been kept indicates that abortion is far more likely to cause death, emotional harm, mental harm, and physical harm to the woman than continuation of the pregnancy.[16] Willke lists Sweden's abortion death rate at 40 per hundred thousand, England's at 75 per hundred thousand, and points out that Maryland's initial rate the first year was 77 per hundred thousand and New York's is low because of the women who go home to die. They also point out why the low abortion death rates from Communist nations are "worse than useless"(p. 64).

The reasons why abortion causes mental harm to the mother have been stated by Conrad W. Baars, M.D.[17], who stated that a woman who is pregnant and has an abortion is going to be deprived of the most important psychological help, namely, the love of her child; they frequently think it will help, but it is actually pushing them back into loneliness; the essence of love is the affirmation of another, nothing is less affirming than the denial of the child by abortion which kills another human; the strong disaffirming of another, who is closer to her at that time than anyone else, can have strong adverse effects.

Hilgers has stated:[18] "In Colorado, 71.5% of all abortions are being done for psychiatric reasons. The

---

[16] *Ibid.* pp. 37-51, 62-73.

[17] "Love and Curing The Neurotic," Arlington House, 1971.

[18] "Induced Abortion: A Documented Report," T. W. Hilgers, M.D., P. N. Shearin, M.D. Presented to Minnesota State Legislature, January 1971, pp. 16, 17.

similar figures for California (1969) and Oregon are 90% and 97% respectively." (Note: In 1970 in California the rate went to 98%. See *infra.*) Hilgers continues:

"One would get the impression that mental illness in the pregnant woman is extremely common and very serious when present. However, in fact, in all of these states, the 'mental helath' clause has distinctly been abused. This abuse, Doctor Cavanaugh says, has led to a decline in the quality of patient care and a gross dishonesty in medical practice–particularly psychiatry. We must, therefore, look carefully at the psychiatric problems associated with pregnancy.

"Noyes and Kolbe's textbook of psychiatry states that 'experience does *not* show that pregnancy and the birth of the child influence adversely the course of schizophrenia, manic depressive illness or the majority of psychoneuroses.' On the other hand, those psychoses which are initiated by pregnancy rarely persist. Patients tend to recover after a comparatively short period of time and in some cases may recover spontaneously before full term is reached. Women who show permanent impairment of mentality following childbirth belong to the class of potentially psychotic for whom pregnancy is merely an ancillary factor in the pathogenesis of the psychosis. In such women, an induced abortion cannot be curative and it may have unresolved conflicts with guilt and added depression which is more harmful than the continuation of the pregnancy–(see section on complications–psychiatric sequelae).

"There is evidence to suggest that serious mental disorders arise following abortion more often in women with real psychiatric problems and that paradoxically, the very

women for whom legal abortion may seem justifiable are also the ones for whom the risk is highest for post-abortion psychic insufficiency.

"It should be pointed out that suicide in the pregnant woman is *extremely* rare. In fact, it is about 1/6th the rate seen in nonpregnant women of the same age. Furthermore, as Asche pointed out, it is virtually impossible to ascertain accurately whether a woman is suicidal. In the State of Minnesota, the Minnesota Maternal Mortality Committee, reported only 14 suicides associated with pregnancy in well over 1.5 million live births between 1950-1966. (The Minnesota Maternal Mortality Committee studies *in detail* all deaths in women which occur during pregnancy or within a period 90 days *following* delivery). Ten of these 14 *had delivered* before the suicide, and all 14 were married. In retrospect, these deaths probably could have been prevented if adequate psychiatric care had been obtained and utilized. The explanation of why so few pregnant women commit suicide appears to be that women–including the unwed–receive a good deal more attention from society when pregnant than when not pregnant. Also, there may be certain physiologic and instinctive factors which manifest themselves in greater maternal protectiveness.

"Eminent psychiatrists from throughout the world agree that, if *all* the evidence is taken into *careful* consideration, few neurotic or psychotic women are *ever* benefited by termination of pregnancy and that the few that would be are extremely difficult to select.

"When abortion is substituted for adequate psychiatric care (and there is much evidence to suggest that this is happening), then there is a distinct danger of minimizing established

psychotherapeutic principles. Unfortunately, it is the distressed woman who ultimately faces the full impact of this minimization. She is the one who cries out for help and she is also the one who is turned away."

Even assuming *arguendo* that abortion helped some types of illness, and abortions for mental health reasons were limited to the mentally ill instead of being used as a vehicle for abortion on demand, difficulties might arise from establishing the principle that the life of one person should depend on the judgment of another person who is mentally ill, because that person is mentally ill.

A Negative Feeling In Early Pregnancy Is Common But Temporary.

Hilgers states:[19] "Based on the knowledge that the majority of women who have a negative or ambivalent reaction to their pregnancy during its early stages do, in fact, as the pregnancy advances, develop a more positive acceptance of the pregnancy, supportive care of the pregnant woman becomes all the more reasonable. Much has been said of the unwanted child, yet the majority of women who expressed ambivalent or rejecting attitudes toward the pregnancy in the early months, now, in the third trimester, express positive, or at least more accepting, attitudes toward the baby.

"Indeed this phenomenon of early rejection and later acceptance has been spelled out by Gardiner in *Williams Obstetrics*, 13th edition, 1966:

[19] *Ibid.* pp. 36, 37.

" 'The initial acceptance and adaptation to the pregnancy by the particular patient will depend upon the implications regarding future responsibilities and future personal and intrapersonal relationships engendered by the pregnancy. At that stage (the first three months), the pregnancy exists only as an abstraction and can be accepted or rejected depending upon the character and personal significance of future implications . . . .

" 'So real and life-threatening are these emotional reactions to these women that they not only reject the existence of the pregnancy before they, themselves, are engulfed and destroyed. Under the spell of this distorted thinking and reasoning, the medical hazards of instrumental abortion fade into insignificance.

" 'It is *not unusual* (however) for women who will become good mothers, or those who have already demonstrated their excellent maternal qualities with their older children, to react initially to the diagnosis of pregnancy with resentment, frustration and depression, only to express *strong, genuine, positive feelings* of acceptance as the pregnancy advances and fetal movements appear.'

"Considering this, it seems fair to ask what happens if their fearful request for abortion is denied. Hook reported that of 249 women refused an abortion in Sweden, 86% gave birth, 11% had induced abortions (22% had threatened to do so), and 3% had spontaneous abortion. Of this group

12% had threatened suicide but no suicides or suicide attempts occurred. Kolstad reported that of 113 women refused abortion in Norway and who carried the pregnancy to term 84% were glad that the pregnancy was not terminated, 9% were uncertain as to their feelings, and only 7% were discontented. Furthermore, Murdock showed that by supporting pregnant women throughout their pregnancy, the pressures for abortion were significantly decreased. He suggested that the pregnancy carried to term may have been a positive factor in the mother's return to normalcy."

Medical Complications Of Induced Abortion.

Hilgers states:[20] "The American College of Obstetricians - - Gynecologists has stated: 'The inherent risk of a therapeutic abortion are serious and may be life-threatening, this fact should be fully appreciated by both the medical profession and the public. In nations where abortion may be obtained on demand, a considerable morbidity and mortality has been reported.'

"This is suppored by a statement issued by the Royal College of Obstetrician-Gynecologists (Great Britain): 'Those without specialists' knowledge, and these include members of the medical profession, are influenced in adopting what they regard as a humanitarian attitude to the induction of abortion by a failure to appreciate what is involved. They tend to regard induction of abortion as a trivial operation, free from risk. In fact, even to the expert working in the best conditions, the removal of an early pregnancy after

---

[20] *Ibid.* pp. 23-31.

dilating the cervic can be difficult, and is not infrequently accompanied by serious complications. This is particularly true in the case of the woman pregnant for the first time. For women who have a serious medical indication for termination of pregnancy, induction of abortion is extremely hazardous and its risks need to be weighed carefully against those involved in leaving the pregnancy undisturbed. Even for the relatively healthy woman, however, the dangers are considerable."

Under the heading "Mortality Rates" Hilgers states:

"Obviously, the worst complication resulting from a legal abortion is death itself. In Table I you will see listed the *legal abortion* mortality rates for several countries which have eliminated the legal safeguards to abortion. Included also are the 10 maternal deaths which New York City had during the *first 3 months* following enactment of their law.

"In the majority of countries, including New York State, a woman is more likely to die from legal abortion than she is if she were to carry the pregnancy to term (this is in contradiction to what proponents of abortion would have us believe). It must be emphasized that these figures are for *legal* abortion, done by licensed physicians in fully accredited medical facilities. The tragedy is that these deaths are preventable simply by having a strong abortion law. In Minnesota, this tragedy is compounded by the fact that there is probably no safer place in the world for a woman to have her baby."

Table I, referred to above, is as follows:

Legal Abortion Mortality Rates

Country/State	Deaths/100,000 legal abortions
Finland	66
Denmark	41.4
New York City	greater than 40
Sweden	39.2
Great Britain	30
Yugoslavia	10
Japan	7
Hungary	7
Czechoslovakia	2.5

"(Those countries with extremely low death rates have laws which generally do not allow abortion after 3 months and, as such, are not comparable to present changes in United States abortion laws.)

"Addendum: Minnesota Maternal Mortality Rate = 14/100,000 live births."

(Note: Willke criticizes the accuracy of the low rates in Communist nations and points out maternal mortality rate includes abortion deaths as well as others which may have happened if the woman were not pregnant, while abortion excludes those who die elsewhere and some of those whose death is caused only indirectly by abortion, such as by hepatitis.)

Hilgers continues: "There are a whole host of major complications resulting from legal abortion which at their

worst cause death, but much more frequently result in either temporary or permanent damage to the woman or her offspring. Again, using the world's medical literature as documentation, these complications will be presented in some detail. They will, however, be limited to the 4 main methods through which abortion is procured in the United States: dilation and curettage, suction curettage, saline instillation and hysterotomy.

"Infection–Pelvic infection is a common sequel to legal abortion. While the incidence varies slightly from country to country, consensus reveals an astonishing high rate. (See Table II)."

Table II, referred to above, is as follows:

The Incidence Of Pelvic Infection Following Legal Abortion

% EARLY INFECTION	% LATE INFECTION	METHOD	COUNTRY
5.0	-	D & C	Germany
5.0	15.0	D & C	Czechoslovakia
4.9	-	D & C	Czechoslovakia
4.0-5.0	12-15	D & C	Czechoslovakia
5.0	-	D & C	Rumania
7.0	-	D & C	USSR
2.6	9.7	D & C	Poland
	28.2	D & C	USSR
	12.0	D & C	USSR
2.0	-	D & C	Bulgaria
1.6-2.3	-	Saline	Sweden
15.4	-	Saline	Great Britain
10.4	-	Saline	Japan
1.0	-	Saline	Denmark
2.0	-	Suction	Great Britain
3.9	-	Suction	Czechoslovakia
5.0	-	Suction	Germany
10.0	-	All methods	Great Britain

Hilgers further states: "The incidence appears to be highest 2 - 3 weeks after the abortion at a time when the patient has been lost to follow-up. There is also good evidence to suggest that the *young* woman pregnant for the *first* time stands a much greater risk of infection (15.8%).

"These infections are the direct result of the instrumentation involved in the abortive technique and are manifest as salpingitis (infection in the fallopian tubes) or endometritis (infection in the lining of the womb). When out of control, these infections can cause septic shock with rapid death or pelvic thrombophlebitis (inflammation and blood clot formation in the pelvic veins) with sudden death by pulmonary embolus (blood clot from the pelvic veins which dislodges and is carried to the lungs). These infections can also result in sterility because they scar the tubes to a point where they no longer function properly.

"**Hemorrhage**–Major hemorrhage is another complication and can result in death by exsanguination. Again, the incidence is much too high to be acceptable from a medical standpoint. (See Table III)."

Table III, referred to above, is as follows:

Incidence Of Major Hemorrhage Following Legal Abortion

% MAJOR HEMORRHAGE	METHOD	COUNTRY/STATE
2.3	D & C	Germany
5.0	D & C	Czechoslovakia
8.6	D & C	Rumania
2.6	D & C	Poland
14.2	D & C	USSR
5.9	D & C	Bulgaria
21.0	All methods	Great Britain
8.0	All methods	Colorado
3-7.8	Saline	Sweden
15.4	Saline	Great Britain
3.6	Saline	Japan
2.0	Saline	Denmark
3.8	Suction	Great Britain

Hilgers continues: "To think that this won't happen in Amer'-a is naive. During the first year of Colorado's new abortion law, 8% of patients needed one or more blood transfusions (most of these abortions were done by dilation and curettage, or suction curettage). It should be mentioned that every time a blood transfusion is given, there are certain inherent risks, e.g., allergic reactions and serum hepatitis.

"Uterine Perforation--Perforation of the uterus can occur as a sequel to dilation and curettage. This occurs primarily because the surgeon operates by 'touch' alone and not under direct vision. Secondarily, the pregnant uterus is much softer than the non-pregnant uterus, lending itself to easier perforation. The incidence of perforation throughout the world is presented in Table IV."

Table IV, referred to above, is as follows:

The Incidence Of Uterine Perforation As A Result Of Legal Abortion

% PERFORATION	COUNTRY/STATE
0.11-0.28	Germany
0.14-0.80	Poland
0.10-0.18	Rumania
0.45	Czechoslovakia
0.20	Poland
1.2	USSR
0.4	Bulgaria
1.2	Great Britain
1.2	New York City
1.2	Colorado

Hilgers then states: "It is sad to note that New York City and Colorado are both experiencing relatively high rates of uterine perforation (1.2%). If in the process of perforation, the bowel or a blood vessel is torn, overwhelming infection and/or hemorrhage may occur which require an exploratory abdominal operation (30-65% with a perforation will need this operation). Subsequent pregnancy following a perforation is put in jeopardy because the perforation scar may rupture as the uterus expands.

"**Menstrual Disturbances**–Menstrual disturbances following abortion are not infrequent. (See Table V). This usually means gross irregularity in the appearance of the menstrual period, heavy bleeding with the menses or complete absence of menstruation. These disturbances may persist for many years. They are mostly the result of endouterine adherences or infection. This may lead to a number of more technical problems which need not be detailed here."

Table V, referred to above, is as follows:

The Incidence Of Menstrual Disturbance Following Legal Abortion

% MENSTRUAL DISTURBANCES	COUNTRY/STATE
3.1	Hungary
2.0	Czechoslovakia
1.0	Czechoslovakia
11-12 (5 year follow-up)	USSR
2.2	USSR
6.0	USSR
5.2	Poland

Under the heading "Subsequent Pathologic Pregnancies" Hilgers states: "Subsequent pregnancies are more often pathologic following abortion and this without question represents one of the most serious complications of induced abortion. The prematurity rate in Czechoslovakia prior to abortion on demand was 5% (not much different from the United States). Several years later, this had increased to 14%. Hungary and Japan have reported similar trends. The incidence in any one individual seems to be well correlated with the number of abortions a woman has; Hungarian studies reveal that the likelihood of premature delivery after one abortion increased to 12%; after two abortions–15%; and after three abortions –24%. It should be pointed out that prematurity is the leading cause of infant death in the United States, and one of the *major contributors* to *mental and motor retardation.* The authors are not aware of any studies which have been done regarding psychiatric sequelae following premature

birth as the result of a previous abortion, but would suspect a high correlation.

"A number of countries have reported a significant increase in incidence of ectopic pregnancies (pregnancies which occur someplace other than in the womb). In fact, Japan sees ectopic pregnancies in 3.9% of women, which is 4 to 8 times more frequent than in the United States. Ectopic pregnancies are not infrequently life threatening because of rupture and hemorrhage. Again, tubal malfunction secondary to infection seems to be the prime cause.

"Spontaneous abortions and fetal death before the onset of labor are reported to be significantly more common following legal abortion in those countries with weak abortion laws. Complicated labors (prolonged labor, placenta previa, adherent placenta) and excessive bleeding at the time of delivery are also more common when compared to women who have not had legal abortions. These all result in increased obstetrical intervention.

"**Transplacental Hemorrhage**–It has long been known that a woman who is Rh-negative is very susceptible to a special kind of problem if her consort is Rh-postive. Any given pregnancy may be a stimulus for the mother to develop antibodies against the baby's red blood cells (i.e., she becomes sensitized) so that in a subsequent pregnancy, these antibodies may destroy the baby's red blood cells resulting in an anemia in the unborn child which may be life-threatening. This sensitization occurs through the leakage of the baby's red blood cells into the mother's circulation (transplacental hemorrhage) usually at the time of delivery. Therefore, first born children are rarely affected. In spontaneous abortion, this sensitization *rarely* occurs.

However, with *all* methods of induced abortion sensitization has been reported to occur in 3 - 10% of Rh-negative women. Recent advances have allowed us to prevent this complication in 100% of women treated. However, because tests on the fetus cannot be performed to rule out sensitization of the mother, a number of women, who have not become sensitized, will be needlessly subjected to this expensive treatment.

"**Sterility**–There are a number of complications which do not appear immediately following the abortion. Poland has reported that 6.9% of women were sterile 4 to 5 years after abortion. Japan has reported 9.7% with subsequent sterility on 3 year follow-up and other countries have had similar experience. This appears to be the result of inadequate regeneration of the lining of the womb following dilation and curettage and/or infection as previously mentioned. There is evidence also to suggest that the sterility may have an adverse psychological effect on the woman. As Jeffcoat stated, 'If this happens when a first pregnancy is interrupted for non-recurrent indication, such as rubella or fleeting psychological upset, the situation is tragic.'

"**Miscellaneous**–A number of miscellaneous complications occur which deserve mention. (1) The Czech's have reported that 33% of patients had decreased sexual libido 9 months after the abortion. Similarly, a study from Poland showed 14% to have decreased libido 4 to 5 years after the abortion. This is theoretically related to the psychotraumatic experience of the interruption and emotional weakness that follows. (2) Changes in the coagulability of the blood following legal abortion, although rare, have been reported. (3) Most pregnancies following hyster-

otomy will need delivery by Caesarean section to eliminate the possibility of rupture of the hysterotomy scar. (4) Endometreosis is a common sequel to hysterotomy. (5) A particular problem associated with suction curettage appears to be perforation of the bladder.

"**Psychiatric Sequelae**—The psychiatric sequelae of induced abortion are most difficult to elucidate. Reports on the incidence of emotional difficulties following abortion vary from 0 - 85%. The true figure lies someplace in between. The difficulties appear to be more common in mature and motherly women than in the more immature, psychopathic and unmotherly. This may be because the husband is most often the prime mover to an abortion in the married woman and in the unmarried, parents and friends are prime movers. As previously mentioned, the woman with real psychiatric illness prior to an abortion is at greater risk to develop significant problems post-abortion than is the psychiatrically 'stable' woman.

"Martin Ekblad interviewed 479 women prior to abortion and again 2-1/2 to 3 years later. At follow-up, he found *10%* felt the operation unpleasant; *14%* had mild self reproach; and *11%* had serious self reproach and self regret. This is perhaps the best single study which has been conducted in this area.

"Seigfried, in 1951, studied 61 women, 2 years after abortion, and found *13%* to have serious self reproach. Beck, in 1964, studied 50 women 4 months after legal abortion and 9 had suppressed remorse which was expressed as various psychosomatic symptoms such as abdominal discomfort, vomiting, pruritis vulvae, dysmenorrhea, frigidity, headache, insomnia, fatigue, etc. Niswander and Patter-

so in 1967 studied 17 women, 8 months post-abortion for rubella. Eleven of the 17 reacted unfavorably and 8 had long term negative experience.

"It would appear that 15 - 25% of all women undergoing legal abortion will have some long term psychologic reaction. According to Helene Deutsch, the pregnant woman can initially deny the unborn child, but once she admits she is pregnant, she feels an unconscious attachment to him. The longer she stays pregnant, the more the child becomes a part of her. As a result, after abortion, many women feel that part of them is gone."

Techniques Of Induced Abortion.

Abortion can best be appreciated by seeing one from over the doctor's shoulder; nevertheless, some of the potential for damage can be understood by reading the following by Hilgers.[21]

"Potts has reported on the many ways of producing an abortion in a pregnant woman, many of them of only theoretical utility. He has described certain medical methods, including agents that destroy the fetus or placenta such as X rays, antimitotics and antimetabolites, together with agents that interfere with the maternal reaction to pregnancy such as monoamine oxidase inhibitors, non-steroidal estrogens, and immunological methods. Recent reports by Karim and Roth-Brandel and others reveal their use of a new abortifacient agent, prostaglandin, which when administered by continuous intravenous drip usually induces premature labor

---

[21] *Ibid.* pp. 18-22.

and results in abortion. Its side effects are presently being studied.

"Surgical techniques of abortion are of three general types: (1) scraping out or sucking out the fetus and its membranes from the uterus through the cervix and vagina after the cervix has been dilated with an instrument; (2) stimulation of premature labor and delivery, with or without ensuring the death of the fetus before delivery; and (3) hysterotomy, or direct surgical incision into the uterus with removal of the fetus, membranes and placenta.

"Presently available tests for pregnancy are usually unreliable until at least two weeks after a missed menstrual period, meaning that the human embryo is at least four weeks old when its existence is first discernible. One factor which frequently tends to delay the diagnosis of pregnancy is the slight vaginal bleeding often seen in early pregnancy and which the pregnant woman may mistake for a menstrual period. Another such delaying factor is the more or less constitutional menstrual irregularity which may lead a woman to accept the absence of menstrual period for a month or more.

"During the first twelve weeks of pregnancy, corresponding in practice, therefore, to an embryonic-fetal age of four to twelve weeks, abortionists rely upon dilation of the cervix and sharp curettage alone or suction curettage, which is usually followed by sharp curettage to ensure that no remnants of the fetus are left behind. In this procedure the woman is placed on her back on the operating table, her knees apart and hips and knees bent. She may be given general anesthesia, local anesthesia—by injections alongside the cervix (usually the only pain-sensitive structure involved)

or no anesthesia, depending on the size of the uterus and cervix, the ease with which it dilates, the age of the fetus (and therefore its size), and the preference of the operating doctor.

"The vagina is then cleansed with an antiseptic solution. A toothed instrument is clamped onto the cervix which is pulled toward the operator. The canal through the cervix is found with a long thin instrument called a sound, and then widened, usually by passing a series of progressively larger probes or dilators through it until it can admit the sharp curved curette or the tubular suction curette. Curettes for abortion range in size from 3.5 mm to 15 mm or about 1/8 inch to 5/8 inch, the larger sizes being necessary to tear through and scrape or suck out the tissues of the fetus, placenta, and membranes in the later stages of this first twelve week period of gestation. During the period from the fourth through the twelfth week of pregnancy the fetus has grown from 1/5 inch to 3-1/2 inches, has differentiated its organ systems, has arms and legs, has fingers and toes each provided with nails. Centers for bony development have appeared and begun to deposit bone in the skeleton which has been cartilage up to now. It may be of interest to the reader to read from the respected *Williams Obstetrics*, thirteenth edition, 1966, page 192: 'A fetus born at this time may make spontaneous movements if still within the amniotic sac or if immersed in warm saline.'

"If sharp curettage has been done, the pieces of the fetus with its membranes are placed on a sponge or in a pan and sent to the pathologist for identification. In suction curette equipment there is usually a glass jar

placed in line with the suction apparatus so that fetal parts will be trapped and not interfere with the machinery. In this case the glass bottle is simply unscrewed and sent to the pathologist.

"Stimulation of premature delivery, by a variety of means, is the method of choice by those who abort women pregnant for more than twelve weeks. Dilation and curettage is not used after about twelve weeks' gestation because it become prohibitively dangerous due to the larger size of the fetus and uterus, each now with larger blood vessels. The uterine wall is becoming progressively softer and thinner, the more likely to be perforated by a hard instrument. The fetal skeleton is becoming harder and the fetus more difficult to remove.

"Stimulation of effective uterine contractions, essentially the stimulation of premature labor, may be accomplished by injecting a variety of substances into the uterine cavity, either inside of or outside of the fetal membranes themselves. Most commonly used are concentrated salt (abandoned by the Japanese as unsafe after 1950), sugar, and formaldehyde solutions, irritant soaps, pastes, and rivanol (a mild antiseptic widely used in Japan).

"Schiffer has reported on the technic used in 28 abortions ranging from 14 to 24 weeks' gestation. The woman's abdomen was washed and prepared with antiseptic. Then, under local anesthesia a long needle was inserted through the abdominal wall, through the uterine wall and into the amniotic sac surrounding the fetus. As much of the fluid in this sac as possible was withdrawn through the needle, and, when possible, an equal amount of sterile salt solution was then injected and the needle withdrawn. Labor pains

began, on the average, 27.5 hours after injection and the fetus was delivered an average of 11 hours later. Some of Schiffer's patients received intravenous oxytocin, a drug used to strengthen uterine contractions, during the abortion. It is noteworthy that the reason that these substances stimulate labor is not yet known.

"During the period from twelve to twenty-four weeks' gestation the fetus grows to be about 13 inches long, weighing 1-1/4 pounds, with hair on its head, wrinkles on its skin and obvious sex organs. Survival of this 24-week size baby, though rare, has been reported.

"The Japanese often use a mechanical means to stimulate the pregnant uterus to start labor in performing mid-trimester abortions. Manabe reported on the use of the metreurynter–a balloon on the end of a flexible tube which is placed through the cervix between the uterine wall and the fetal membranes. The balloon is then filled with 3 to 10 ounces of sterile saline, causing it to become lodged in the uterus. The flexible tube is then hooked up to a pulley system between the woman's legs and a weight of 1 to 2 pounds is attached, exerting downward traction on the cervix. The Japanese feel that this force both dilates the cervix and stimulates the uterus to contract in an effort to expel the balloon and with it the unborn child. The average time from metreurynter inflation to delivery of the fetus–usually alive–varies widely but one report gives this figure to be about 26 hours.

"Manabe states that 'the ultimate aim in abortion is always the most physiologic delivery of the fetus, to ensure the safety of the mother.' He has found that the metreurynter method or the intrauterine instillation of 0.1% rivanol offer many advantages over other methods for mid-trimester abor-

tions because 'they result in a far more physiologic labor, evidenced by the fact that the fetus is normally delivered alive.' He points out that 'most fetuses, however, die shortly after delivery if fetal age is less than the middle of the seventh month. Survival of the fetus even several hours after delivery would pose serious moral and ethical dilemmas.'

"The least frequently used means of producing an abortion is the hysterotomy, which entails incision into the uterus and removal of the fetus. This method is used in pregnancies generally over 14 weeks. It is a major surgical procedure usually done through an abdominal incision. Up to about 16 weeks of pregnancy, it may be done through the vagina. After 16 weeks it is thought to be unsafe vaginally."

Even during early abortions, pieces come out which are obviously parts of what had been a small baby. This fact, and the fact that the purpose of abortion is to kill a human being, have led Dr. Andrew Ivy (Chicago Tribune, May 2, 1970) to point out that he was the expert medical witness at the Nurnberg War Crime Trials; that we are, in many ways, near the stage of respect for human life that Germany was in the mid 1930's; and that abortion may lead us to repeat the German crimes. Dr. Leo Alexander, in the July 14, 1969 New England Journal of Medicine, also pointed out the importance in Nazi Germany of the first small wedged-in lever through the right to life and how this made the following steps logical.

Permissive Abortion Laws Do Not Decrease The Criminal Abortion Rate.

As Table VI, Hilgers has set forth the following information:[22]

COUNTRY/STATE	EFFECT OF CRIMINAL ABORTION RATE
German Democratic Republic	Increased with liberal abortion law
	Decreased with strict abortion law
Japan	No effect
Great Britain	No effect
Yugoslavia	Increased
Hungary	No effect
Czechoslovakia	No effect
Switzerland	No effect
Bulgaria	No effect
Poland	No effect
Colorado	No effect
USSR	No effect

(Note: Similar results have been found for Sweden[23], Denmark[24], and California at least in the initial years[25].)

---

[22] *Ibid.* pp. 32, 33.

[23] Rice, "The Vanishing Right To Live," p. 39.

[24] Shaw, "Abortion On Trial," p. 144.

[25] Dr. Lewis Saylor, State Director of Public Health.

Hilgers continues: "Not one country has seen a decrease in the criminal abortion rate as the result of adopting weak legislation. On the other hand, some countries have actually seen an increase. The German Democratic Republic is a good example. They saw an increase in the criminal abortion rate during the years 1947-1950, a time when they had a relaxed abortion law. In 1950, they adopted a law allowing abortion only for strict medical indications. This was followed by a precipitous fall in the number of criminal abortions.

"There are a number of reasons given for this paradox. It seems that the law plays an inherent educative role in forming the social ethic of any given society. When this social ethic is changed by eliminating all the legal safeguards to abortion, a whole new class of women, dependent upon that social ethic, find themselves asking for abortion. It also seems clear that women desire privacy when they are aborted and the legal framework, no matter how loose, does not allow for this."

Willke states:[26] "The prestigious British Medical Journal Lancet, in 1968 in a report entitled 'On the Outcome of Pregnancy When Legal Abortion is Readily Available' stated: '*Sweden's law, in its present form, has not sufficed to subdue criminal abortion.*'

"Dr. Christopher Tietze, certainly one of the world's outstanding biostaticians, and a man who incidentally favors legalization of abortion, has written in his report, 'Abortion In Europe:' '*One of the major*

---

26. "Handbook On Abortion," Dr. & Mrs. J. C. Willke, Hiltz Publishing Co., 1971, pp. 75-78.

goals of the liberalization laws in Scandinavia was to reduce illegal abortion. This was not realized. Rather, as we know from a variety of sources, both criminal and total abortions increased. It survives because of the relative lack of privacy of the official procedures. (U.S. Journal of Public Health, Nov. 1967.)

"Was this also true of Japan? Even more so in Japan. Of the 50,000,000 unborn children that have been killed by abortions in the last 22 years in Japan, and where abortions are very inexpensive, a full one-third of the procedures continue to be done illegally.

"What of the United States? What has been our experience to date? There hasn't been too much published because legalized abortion laws are new in our country. Dr. W. Droegemuller in the American Journal of Obstetrics and Gynecology, March 1969, reporting on 'One Year Experience With a Liberalized Abortion Law,' says that, '*This has not reduced the admissions for septic abortions.*' Sepsis (infection) is one of the most common complications of criminal abortion, and the number of septic cases admitted post-abortive to a hospital is a fairly good indication in a community of the number of criminal abortions being done.

"But perhaps their laws are too restrictive. What if abortion is completely available at the request of the mother? Wouldn't that eliminate illegal abortion? It didn't in Japan. It hasn't in England nor in any other major country to date.

"What is the reason why illegal abortions are not reduced? Here are some examples:

1) Suppose you are the wife of a man who wants another child. You do not. You become preg-

nant. If you go through official procedures in a hospital, your husband may find out. You don't want him to know, but you want to get rid of this baby, so you have an illegal abortion.

2) Suppose you are a married woman, and you become pregnant by another man. Your husband has been away, and he knows this would not be his child. Again, he must never know that you've become pregnant, so you have it done illegally.

3) Suppose you are a prominent citizen, and your teenage daughter becomes pregnant. You wish to avoid scandal. Hospital procedures are available to her. You cannot, however, take the risk of disclosure. You have it done in the privacy of an illegal situation.

4) Suppose you are poor. Perhaps your man has left you. There is a long waiting list at the public hospital, and much red tape you don't understand. You are frantic to 'get rid of it.' A friend tells you of someone who will. You go there.

"What of England? Hasn't the number of illegal abortions dropped there? The most authoritative report on this was published in the British Medical Journal, May 1970, by the Royal College of Obstetrics and Gynecology, and constituted a summary of the opinions of the consultant obstetricians of England. It said:

'The original protagonists for abortion law reform often argued that a large proportion of

*cases of spontaneous abortions hitherto treated in hospitals and nearly all the associated deaths were the result of criminal interference. Legalization of abortion would, they postulated, eliminate these. They brushed aside contrary arguments and evidence. Our figures show * * * that despite a sharp rise in the number of therapeutic ("legal") abortions from 1968 to 1969, there was not, unfortunately, a significant change in the number of cases of spontaneous abortion requiring admission to hospital.*

'The fact that legalization of abortion has not so far materially reduced the numbers of spontaneous abortions or of deaths from abortions of all kinds is not surprising. It confirms the experience of most countries and was forecast by the College's 1966 statement.'"

Incest And Rape Cause Few Pregnancies.

Willke states:[27] "If a girl is raped or subjected to incestuous intercourse and reports the fact promptly, she is usually taken immediately for medical attention. This consists of a douche, commonly a scraping of the uterus, and at times doses of medication, one or all of which, while done partially to prevent venereal disease, will also almost invariably prevent her from getting pregnant. If the rape victim would report her assault promptly, there would be, for all practical purposes, no pregnancies from rape. . . .

---

[27] *Ibid.* pp. 32-36.

"Are there any statistics to support the fact that pregnancy is rare? There have been few good statistical studies in this country. In Czechoslovakia, however, out of 86,000 consecutive induced abortions, only twenty-two were done for rape. This figures out to one in 4,000. At a recent obstetric meeting at a major midwest hospital, a poll taken of those physicians present (who had delivered over 19,000 babies) revealed that not one had delivered a bona fide rape pregnancy. . . .

"Unquestionably, many would want her to destroy the growing baby within her. But before making this decision, remember that most of the trauma has already occurred. She has been raped. That trauma will live with her all of her life. Furthermore, this girl did not report for help but kept this to herself. For several weeks she thought of little else as the panic built up. Now she has finally asked for help, has shared her upset, and should be in a supportive situation.

"The utilitarian question from the mother's standpoint is whether or not it would now be better to kill the developing baby within her. But will abortion now be best for her, or will it bring her more harm yet? What has happened and its damage has already occurred. She's old enough to know and have an opinion as to whether she carries a 'baby' or a 'blob of protoplasm.'

"Will she be able to live comfortably with the memory that she killed her developing baby? Or would she ultimately be more mature and more at peace with herself if she could remember that, even though she was unwillingly pregnant, she nevertheless gave her child life and a good home (perhaps through adoption).

"Even from only the mother's standpoint, the choice is one which deserves the most serious deliberation, and no answer is easy or automatically right."

And, finally, isn't it a twisted logic that would kill an innocent unborn baby for the crime of his father!

Abortion On Demand Does Not Fulfill The Requirements For A Good Law Dealing With A Complex Social, Biological, Economic, And Moral Issue.

Congressman Lawrence Hogan has defined requirements of a good abortion law.[29]

"*First, it should reflect the best medical and scientific judgment available.* We deal with human life at its beginning. If the physicians and scientists tell us—as they do—that the fetus, at say, 15 weeks, is definitely a *human person,* how can we kill that human person without guilt? . . .

"*Second, a good law does not help solve one social problem by creating others.* Besides the problem of the unborn, unwanted child, we have the problem of 'back-alley' abortions and the problem of death or injury to the aborting mother through improper surgical techniques. The New York experience since last July indicates that a so-called 'liberalized' abortion bill does not solve these: it creates an 'abortion mentality' which fosters thousands of unnecessary abortions and it appears there have been *more* deaths than before, rather than fewer. We should not go down New York's road until we have time to study

---

[29]Congressional Record, January 29, 1971.

and see where that road leads. . . .

"*Third, a good law should harmonize the rights of all interested parties.* Here the proposed bill completely overlooks the uncontroverted fact that the child in the womb is not just a growth in someone's body, like tonsils or an appendix, but is a real human being who, in my opinion, has the right to life. . . . .

"*Fourth, a good law should not foster crimes or put honest people into impossible crises of conscience.* Under similar laws in other states and in England, frequently an intended abortion results in the birth of a living child. Nurses are told to put him into a bucket and toss him into the incinerator. Thus the public policy of the given jurisdiction actually promotes what its laws define as *manslaughter*–and requires conscientious hospital personnel to witness or even help in the killing of a living human being, contrary to all their training, instincts, and moral convictions.

"*Fifth, a good law respects the common morality of a pluralistic community.* We are not talking about contraception here; we are talking about *killing* . . . ."

Even the pro-abortion California Medical Association (*supra*) admits that the idea of killing is presently socially abhorrent and that "semantic gymnastics are required to rationalize abortion."[30]

---

[30]California Medicine, September 1970, pp. 67, 68.

A High Abortion Rate Correlates With A High Suicide Rate.

Both in European and non-European nations, those countries having the largest numbers of abortions have the highest numbers of suicides. Among the non-European nations, Japan appears to have the largest number and rate of abortions. Ceylon appears to have the highest average death rate from abortions of those countries publishing rates.[31] Among the approximately 40 non-European nations publishing suicide rates, Japan and Ceylon have the highest two suicide rates.[31] Statistics are not complete enough to draw further conclusions for non-European nations.

Among those European nations listing their suicide rates,[31] eight—Bulgaria, Czechoslovakia, Denmark, Finland, Hungary, Norway, Poland and Sweden—have relatively permissive abortion laws.[32]

The eight permissive abortion European nations have suicide rates about 80% higher than the other European nations. While suicide correlates very closely with abortions in European nations, it correlates slightly or not at all with climate, longitude, latitude, economic development, mountains or Communism. (While the four Communist nations have high suicide rates, all four are permissive abortion nations and their suicide rates are comparable to those of non-Communist permissive abortion nations.)

---

[31] United Nations Demographic Yearbooks 1965-1969.

[32] Population Council, 245 Park Ave., New York, N.Y. 10017.

Here in the United States there is some basis for the belief that a low value on life--caused in part by young people believing that they themselves are unwanted, because of an abortion mentality creeping into society--is increasing our suicide rate and our drug-use rate.[33]

Permissive Abortion Laws Might Increase Venereal Disease Damage.

1967 United States Vital Statistics[34] indicate that syphilis and related diseases kill far more Americans annually than pregnancy and abortion combined. If a permissive abortion law causes even a slight percentage increase in venereal disease annually, it may cause far more physical harm and misery than that presently caused by the non-termination of unwanted pregnancies.

Dr. Geoffrey Simmons, an originator of the campaign sponsored by the Los Angeles County Health Department, Citizens for Eradication of Syphilis and Council of Free Clinics, has said[35] that even with the most effective preventive means, the condom, there is a ten per cent chance of infection from relations with partners having syphilis, but that most people use birth prevention means such as the pill which are not effective in preventing VD. "About half a million men and women have syphilis in the United States and don't know it . . . . The tragedy is that VD already is out of control and indica-

---

[33]Los Angeles Times, Part 4, p. 4, May 25, 1971.

[34]"Vital Statistics of the United States, 1967, Vol. II, Mortality Part A," pp. 1-7.

[35]Los Angeles Times, Part 4, p. 4, April 1, 1971.

tions are that the current epidemic will get worse. . . . [D]rugs now being used are beginning to fail." He predicts that by 1975 instead of 2 million venereal disease cases in the country there will be 5 million, "barring some scientific discovery or strong preventive measures assumed on an individual basis by the population at large. . . . More than 100,000 persons who have syphilis will either have severe heart disease, be insane, paralyzed or dead from this disease."

The Abortionists Have Interpreted *United States v. Vuitch*, 91 S.Ct. 1294, 28 L.Ed.2d 601 (1971), As Permitting Abortion On Demand.[36]

A close reading of the Washington, D. C. newspapers or contact with the abortion referral agencies and abortionists in Washington, D. C., since the *Vuitch* decision was made public in April 1971, should be sufficient to convince the Court that the practical effect of the Court's *Vuitch* decision has been abortion on demand, which has stripped the unborn of all protection in Washington, D. C.

The Abortionists Interpret "Abortion For Mental Health Reasons" To Mean Abortion On Demand.

In California, for example, the ratio of abortions performed to applications in 1970 was 99%[37]–not a bad percentage considering that 1% of the women might change their minds. Ninety-eight per cent of the 1970 abortions

---

[36]Life In America, May 1971, p. 2.

[37]"American Medical News," March 29, 1971, p. 6.

were based on preserving the mental health of the woman. In California, "mental health" should mean "mental illness to the extent that the woman is dangerous to herself or to the person or property of others or is in need of supervision or restraint."[38]

The number of abortions in California in 1970 was nearly 70,000. It is unreasonable to assume that all of these women in California think they have mental health problems sufficient to fall within the definition of California Health & Safety Code section 25954, and that [redacted]% of these women are accurate in their analysis. If that were true, a significant number of women would be receiving mental health care after their abortion. In fact, there are no records indicating post-abortion mental-health care for any significant number of women receiving abortions in California or elsewhere. The mental health provision is an example of form over substance. The women say the magic words, "mental health," and pay their money and the doctor performs the abortion. KABC-TV[39] indicated the lack of respect the abortionists have for the limitations in the California abortion law as follows, "Yet doctors will tell you that any woman who wants an abortion can now secure one legally and safely in this state." Since doctors can earn hundreds of dollars each few minutes by performing abortions if they have a sufficient number of applicants for abortion, and a relatively small number of doctors can do a large number of abortions, it is not surprising that doctors in California have

---

[38]California Health & Safety Code section 25954.

[39]In an ad in the weekly TV magazine of the Los Angeles Times, November 8, 1970, p. 17.

approved 99% of abortion applications for mental health reasons.

Amicus submits that if the Court wishes to give the unborn any significant protection, the Court must close the loophole the abortionists have read in to *Vuitch*. Amicus further submits that it is poor public policy to permit lawbreakers to force a change in the law by continually breaking the law.

CONCLUSION

In other nations and in other areas of United States law, the Right to Life is not extinguished by someone else's Right to Privacy. There are strong forces working to further diminish the Right to Life, so that if the Court takes this first step, nobody may be able to stop additional steps which may destroy the Right to Live of everyone. A 10-ounce child has survived premature birth, while 60-ounce children are being deliberately killed. Abortion causes far more harm to the mothers than continuation of the pregnancy would have caused, on the average. Abortion has not been made desirable by a change in people's beliefs. Abortion is unlikely to reduce the number of battered children. Rejection of the child is common early in pregnancy, when the woman must decide whether to abort, but nearly always disappears before birth of the formerly unwanted child. The first step of abortion has in the recent past logically led to catastrophic erosion of the Right to Life. Permissive abortion laws do not decrease the criminal abortion rate. Rape and incest cause few pregnancies, and pregnancy from rape and incest can

easily be prevented without abortion. Abortion on demand does not fulfill the general requirements for good law. European nations having permissive abortion laws have nearly twice the suicide rate of nations having strict abortion laws. Permissive abortion laws may cause far more damage from venereal disease than is caused by unwanted pregnancies. Abortionists have interpreted *Vuitch* so as to destroy all protection for the unborn. Abortionists interpret "abortion for mental health reasons" as abortion on demand.

Respectfully submitted,

ROBERT E. DUNNE

Attorney for Amicus Curiae

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 322 Main Street, Huntington Beach, California 92648, that on JULY 30 1971, I served the within MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE and BRIEF OF AMICUS CURIAE ROBERT L. SASSONE IN SUPPORT OF RESPONDENT (No. 70-40) on the following named parties by depositing copies as designated, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

SOLICITOR GENERAL OF THE UNITED STATES
WASHINGTON, D. C. 20543 (3 copies)

MR. ROBERT F. BOULT, JR.
5 FORSYTH STREET, N.W.
ATLANTA, GEORGIA 30303 (3 copies)
For Petitioners.

ATTORNEY GENERAL
STATE OF GEORGIA
BY: JOEL M. FELDMAN
THIRD FLOOR, FULTON COUNTY COURTHOUSE
ATLANTA, GEORGIA 30303 (2 copies)
For Respondent.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JULY 30 1971, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer Co., 322 Main St., Huntington Beach, Calif.
(714) 536-7161

VERA GLASER,
Correspondent and Syndicated Columnist,
Knight Newspapers, Inc.,
Washington, D. C. 20004,

PAULA A. GORELICK,
Law Clerk,
Berkeley Neighborhood Legal Services,
Richmond, California,

RUTH CHURCH GUPTA,
Attorney at Law,
San Francisco, California,

AILEEN C. HERNANDEZ,
National President,
National Organization for Women,

MRS. LOUIS HONIG,
San Francisco, California,

THERESSA HOOVER,
Associate General Secretary,
Women's Division—Board of Missions,
United Methodist Church,
New York, New York,

JANE T. HOWARD,
Staff Writer, Life Magazine,
New York, New York,

ELIZABETH JANEWAY,
Writer,
New York, New York,

MARION B. JAVITS,
New York, New York,

HERMA HILL KAY,
Professor of Law,
University of California at Berkeley,

BARBARA KERR,
Contributing Editor,
Harper's Magazine,

JIMMYE KIMMEY,
Executive Director,
Association for the Study of Abortions,

BERNICE E. LAPOW,
Law Clerk,
Berkeley Neighborhood Legal Services,
Berkeley, California,

ELEANOR HOLMES NORTON,
Chairman,
New York City Commission on Human Rights,

KATHERINE B. OETTINGER,
Consultant, Population and Family Planning,
International Association of Schools for Social Work,

MARGUERITE RAWALT,
Past National President,
National Federation of Business and Professional Women's Club,

DR. EDRIS RICE-WRAY,
Director General,
Asociacion Pro-Salud Maternal, A.C.,
Mexico City, Mexico,

ALICE S. ROSSI,
Professor of Sociology,
Goucher College,

MARLENE SANDERS,
Correspondent,
ABC News,
New York, New York,

DORIS L. SASSOWER,
Former President, New York Women's Bar Association,
New Rochelle, New York,

ANNE FIROR SCOTT,
Professor,
Duke University,

ELIZABETH L. SCOTT,
Professor and Chairman,
Dept. of Statistics,
University of California,

CAROL RUTH SILVER,
Director,
Berkeley Neighborhood Services,
Berkeley, California,

HARRIET WHITMAN THAYER,
Attorney,
Berkeley, California,

HARRIET VAN HORNE,
Columnist,
New York Post,
New York, New York,

BEVERLY VAVOULIS (Mrs. G. J.),
St. Paul, Minnesota,

SUBJECT INDEX

Page

Motion for Leave to File Brief Amici Curiae on Behalf of Women's Organizations and Named Women in Support of Appellants in Each Case 1

Amici Curiae Brief on Behalf of Women's Organizations and Named Women in Support of Appellants in Each Case 5

Opinions Below 5

Jurisdiction 6

Interest of Amici Curiae 6

Summary of Argument 6

Argument 8

A. The Nature of the Woman's Right 8

B. State Anti-Abortion Statutes, Despite Their Long-Standing Duration, Are Subject to Examination for Constitutional Validity in the Light of Contemporary Community Standards 16

C. The Effects of Abortion Laws Upon a Women's Life, Dignity and Personal Freedom Are so Serious as to Require the State to Show an Urgent and Compelling Interest to Support Any Restrictions 24

Conclusion 37

Exhibit A. Ratios of Reported Legal Abortions to Live Births, by State of Residence in Rank Order, July-December 1970.

TABLE OF AUTHORITIES CITED

Cases — Page

Abortion Information Agency, Inc., In re, reported in New York Times 5/14/71 15

Aptheker v. Secretary of State, 378 U.S. 500 (1964) 25

Babbitz v. McCann, 310 F.Supp. 293 (E.D. Wis.) (per curiam) appeal dismissed, 400 U.S. 1 (per curiam) (1970) 14

Bates v. Little Rock, 361 U.S. 516 (1960) 24

Boddie v. Connecticut, 401 U.S. 371 (1971) 12

Brown v. Board of Education of Topeka, 347 U.S. 483 (1953) 17

City of New York v. Commissioner of Social Services, State of New York Supreme Court, New York County, Special Term, Part I, Index #40588 (1971) 15

Commonwealth v. Page, Centre County Leg. J. at 285 (Pa. C.P., Centre County, July 23, 1970) 14

Dandridge v. Williams, 397 U.S. 471 (1970) 25

Doe v. Bolton, 319 F.Supp. 1385 (N.D. Ga.) 6

Doe v. Scott, 321 F.Supp. 1385 (N.D. Ill.) (1971) 14

Griswold v. Connecticut, 381 U.S. 479 (1965) ..11, 13

Hanrahan v. Doe, 321 F.Supp. 1385 (N.D. Ill.), appeal docketed, 39 U.S.L.W. 3438 (1971) 14

Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966) 17

Levy v. Louisana, 391 U.S. 69 (1968) 17

Loving v. Virginia, 388 U.S. 1 (1967) 11, 12

Page

McCann v. Babbitz, 320 F.Supp. 219 (E.D. Wis. 1970) (per curiam) judgment vacated, 39 U.S.L.W. 3449 (per curiam) (1971) 14

McLaughlin v. Florida, 379 U.S. 184 (1965) 25

Meyer v. Nebraska, 262 U.S. 390 (1923) 8, 10

NAACP v. Alabama, 377 U.S. 288 (1964) 25

NACCP v. Button, 371 U.S. 415 (1963) 25

People v. Anast, No. 69-3429 (Ill. Cir. Ct., Cook County, 1970) (Dolezal, J.) 14

People v. Barksdale, Crim. No. 9526 14

People v. Belous, 71 Cal.2d 954, 458 P. 2d 194 (1969), cert. denied 397 U.S. 915 (1970) 12, 14, 16, 17, 25

Pierce v. Society of Sisters of Holy Names of Jesus and Mary, 268 U.S. 510 (1925) 9, 10

Plessy v. Ferguson, 163 U.S. 537 (1896) 17

Roe v. Wade, 314 F.Supp. 1217 .....5, 16

Rosen v. La. Bd. Med. Examiners, 318 F.Supp. 1217 (E.D. La.), appeal docketed, 39 U.S.L.W. 3247 (1970) 14

Sherbert v. Verner, 374 U.S. 398 (1963) 24, 25

Skinner v. State of Oklahoma, 316 U.S. 535 (1942) 10

Stanley v. Georgia, 394 U.S. 557 (1969) 13

State v. Ketchum (Mich. Dist. Ct., Mar. 30, 1970) (Reid, J.) 14

State v. Munson (S.D. 7th Jud. Cir., Pennington County, Apr. 6, 1970) (Clarence P. Cooper, J.) 14

Page

Statutes

California's 1967 Therapeutic Abortion Act 26
United States Code, Title 28, Sec. 1253 6
United States Code, Title 42, Sec. 2000(e) 24
United States Constitution, Fourteenth Amendment 24

Books

Abortion and The Unwanted Child (1970), pp. 73-75 31
Abortion and The Unwanted Child (1971), p. 108 19
Flexner, Eleanor, Century of Struggle: The Women's Rights Movement in the United States (1959) .. 23
Freidan, Betty, The Feminine Mystique (1963) 23
Guttmacher, The Case For Legalized Abortion Now (1967), p. 27 26
Kanowitz, Leo, Women and The Law (1969) 24
Kraditor, Alieen S., Up from the Pedestal: Selected Writings in the History of American Feminism (1968), p. 167 20
Lader, Abortion, pp. 2-3 .....26, 28
Lifton, Women In America (1965) 23
Mill, John S., On Liberty, Representative Government: The Subjection of Women (1869) 23
Riegel, Robert E., American Women, A Story of Social Change (1970) 23
Smith, Page, Daughters of the Promised Land: Women In American History (1970) 24
Statistical Abstract of the United States (1970) ..29, 35

Page

The Negro Family—The Case For National Action (1965), pp. 20, 23, 32 30

Periodicals

83 American Journal of Obstetrics & Gynecology (1962), p. 1229 28

American Journal of Public Health, January 1969, p. 153 20

59 American Journal of Public Health, p. 2131 28

7 Demography, No. 1 (1970), p. 19 26

1 Family Law Quarterly No. 4, pp. 103, 105 22

30 Journal of Marriage and The Family, No. 2 (1968), p. 249 29

2 Loyola University Law Review (1969), pp. 1-8 13

45 Studies in Family Planning (1969), pp. 6-8 28

Newspapers

American Medical Association News, Sept. 28, 1970 20

Los Angeles Times, April 6, 1971 19

Los Angeles Times, June 3, 1971 19

Miscellaneous

Group For Advancement of Psychiatry, Report No. 75 21

Hardin, Garrett, Abortion and Human Dignity (public lecture presented by Society for Humane Abortion, Inc.), p. 71 28

Report to the 1970 Legislature, Third Annual Report on the Implementation of the California Therapeutic Abortion Act 26

Page

Task Force Report on Administration of Justice, The President's Commission on Law Enforcement and Administration of Justice (1967), p. 105 26

Task Force Report, Recommendations of the Citizens' Advisory Council on the Status of Women (1968), p. 31 18

U.S. Department of Health, Education and Welfare, Public Health Service: Reporting and Surveillance of Legal Abortions in the United States—1970 (presented at Conference on Abortion Techniques & Services, New York, N.Y., June 3-5, 1971) 36

Draft No. 9, Model Penal Code 22

Second Tentative Draft of a Uniform Abortion Act, p. 15 23

IN THE

Supreme Court of the United States

October Term, 1971
No. 70-18

JANE ROE, JOHN DOE, and MARY DOE,
Appellants,

JAMES HUBERT HALLFORD, M.D.,
Appellant-Intervenor,

vs.

HENRY WADE,
Appellee.

On Appeal From the United States District Court for the Northern District of Texas.

No. 70-40

MARY DOE, *et al.*, etc.,
Appellants,

vs.

ARTHUR K. BOLTON, Attorney General of the State of Georgia, *et al.*, etc.,
Appellees.

On Appeal From the United States District Court for the Northern District of Georgia.

Motion for Leave to File Brief Amici Curiae on Behalf of Women's Organizations and Named Women in Support of Appellants in Each Case.

The individuals and organizations whose names are appended hereto respectfully move for leave to file a brief *amici curiae* in these cases. Appellants' attorneys in these cases have consented to the filing of this brief. The respective attorneys for each of the appellees and for appellant-intervenor have not so consented.

All the associations listed represent women's groups, which, although they have otherwise diverse activities and aims, share a continuing interest in social problems as they affect women.

The American Association of University Women is an organization of more than 170,000 members, all graduates of accredited colleges and universities. The Association has a long-standing concern with the rights and the advancement of women.

The National Board of the Young Women's Christian Association of the United States of America is entrusted with the continuing work of the National Association, which has been organized "to advance the physical, social, intellectual, moral and spiritual interests of young women." The Association itself is a membership organization wth more than 2½ million members and participants.

The National Organization for Women is a civil rights organization founded in 1966 and with approximately 15,000 members throughout the United States. It is working actively to bring women into the mainstream of American society and in line with that policy, has affirmed its belief that there is a basic human right to limit one's own reproduction.

The National Women's Conference of the American Ethical Union is composed of member delegates (as well as members at large) of the various local Women's Conference organizations, representing approximately 500 women.

The Professional Women's Caucus is an organization of professional women bound together to use their professional skills to advance the status and welfare of all women.

The Unitarian Universalist Women's Federation is an organization of 17,000 church women in the United States and Canada. Its program is broadly concerned with denominational concerns, the rights of women, service projects for children, concern for the aging, peace, and other issues. It has been carrying on an educational program for the abolition of abortion laws for several years.

The Women's Alliance of the First Unitarian Church of Dallas is an organization affiliated with the First Unitarian Church of Dallas which has a general interest in social matters and has been active in conducting studies in the field of abortion.

The individuals whose names are appended hereto are citizens of the United States, and all are women who have achieved recogntion in their respective fields of endeavor, including such diverse areas as literature, anthropology, the creative arts, social research, law, and civic activities.

Each of the individuals and organizations urges upon the Court the position contended for in this brief because of a firm conviction that it is a woman's right, as part of the most elementary concepts of human freedom, dignity and equality, to determine the time when and the circumstances under which she will bear a child. Each of the *Amici* believes that the full development of an individual woman's potential as a complete human has been and can be thwarted by an inability to make this most fundamental decision for herself, without the imposition of unnecessary state controls—controls which are based on outmoded medical and social theories and which were formulated in periods when women were regarded legally, economically and socially as having a subordinate role in society.

Amici's concern arises from the fact that the assertion by a woman of her fundamental rights conflicts with the laws of nearly all the states which, almost totally in most instances, and in varying degrees of latitude in the others, restrict the grounds upon which a woman can determine the number and spacing of her children, by limiting the circumstances in which a lawful abortion can be performed.

Amici believe that this Court should have before it all expressions concerning the overwhelming importance of the question. *Amici* urge that this personal right be recognized as constitutionally protected. Having widely observed the effects of existing restrictive laws upon women who have submitted themselves to illegal and unsafe abortions simply because there existed no lawful way in which they can make the choice of when to bear a child, and having widely observed the effects on the persons directly involved, their families and society as a whole where unwanted children are born, *Amici* are impelled to urge their position on the Court. *Amici* would not be understood as advocating abortions as being a necessarily desirable solution to particular personal or social problems. We do contend, however, that each woman has the right to make the decision for herself, unimpeded by restrictive laws, except as they demonstrably seek to regulate a matter of legitimate state concern such as the practice of medicine.

We believe that this brief, which reviews the constitutional basis for the conclusion that each woman possesses such a fundamental right in the light of current community standards, will be of assistance to the Court.

For these reasons we respectfully request leave to file the within brief *Amici Curiae*.

Respectfully submitted,

NORMA G. ZARKY,
Attorney for Movants.

IN THE

Supreme Court of the United States

October Term, 1971
No. 70-18

JANE ROE, JOHN DOE, and MARY DOE,
Appellants,

JAMES HUBERT HALLFORD, M.D.,
Appellant-Intervenor,

vs.

HENRY WADE,
Appellee.

On Appeal From the United States District Court for the Northern District of Texas.

No. 70-40

MARY DOE, *et al.*, etc.,
Appellants,

vs.

ARTHUR K. BOLTON, Attorney General of the State of Georgia, *et al.*, etc.,
Appellees.

On Appeal From the United States District Court for the Northern District of Georgia.

Amici Curiae Brief on Behalf of Women's Organizations and Named Women in Support of Appellants in Each Case.

Opinions Below.

The opinion of the United States District Court for the Northern District of Texas (*Roe v. Wade*) is reported at 314 Fed. Sup. 1217.

The United States District Court for the Northern District of Texas ruled that the Texas anti-abortion

statutes were unconstitutional on their face, being excessively vague and overbroad, but denied any injunctive relief.

The opinion of the United States District Court for the Northern District of Georgia (*Doe v. Bolton*) is reported at 319 Fed. Sup. 1048.

The United States District Court for the Northern District of Georgia held that the portions of the Georgia abortion laws, which imposed substantive qualifying requirements, were unconstitutional, but the court refused to enjoin future enforcement of those code sections. The remainder of the Georgia abortion statute was held to be valid exercise of state authority and both declaratory and injunctive relief were denied.

Jurisdiction.

By separate orders, both dated April 26, 1971, the question of jurisdiction in each case was postponed to the hearing of the cases on their merits. Jurisdiction of this Court in both cases is founded on 28 USC §1253.

Interest of Amici Curiae.

The interest of *Amici Curiae* has been set forth in the accompanying motion to file this brief and need not be reiterated here.

Summary of Argument.

Despite the numerous issues (including the question of the jurisdiction of this Court, postponed to the hearing on the merits) involved in these cases, this brief will address itself only to one, so as to avoid repetition of the arguments presented by appellants and by other briefs of *amicus curiae*. We believe that the time is ripe

for this Court to announce that the right of a woman to determine the number and spacing of her children is a fundamental constitutional right of a personal nature deserving of special protection, which can be impinged upon by a state only where (which is not the situation here) a most urgent and compelling contrary interest exists. Recognition of this right now exists within the community and in judicial decisions; full recognition is essential to the emergence of women as equal members of society.

The attempted denial of this right by the anti-abortion laws of most of the states, including those of Georgia and Texas, involved in the cases here, is a direct deprivation of the rights of women, imposing, as it does, restrictions on personal freedom; a necessary concomitant of that deprivation is to burden women, their families and society in general with vast numbers of unwanted children.

Although the Texas abortion laws permit abortion only in the single instance where the mother's life would be saved and the Georgia laws permit abortion in certain additional categories, both, in the view of *Amici* involve such impingement upon what may be called the right of reproductive autonomy that it is appropriate to treat the particular issue, to which this brief addresses itself, as being the same in both cases.

ARGUMENT.

A. The Nature of the Woman's Right.

The personal, constitutional right of a woman to determine the number and spacing of her children, and thus to determine whether to bear a particular child (which many refer to as a right of "reproductive autonomy") evolves inevitably from the recognition afforded by this Court to the deep and inviolate nature of those human interests which relate to marriage, sex, the family and the raising of children. They are some of the most fundamental aspects of living, which every member of society must possess, free of all restraint, except where society as a whole has a clear and demonstrably compelling interest to protect. In a series of decisions, spread over half a century, this Court has had several occasions to enunciate the constitutionally protected interests that exist in each of these areas.

Meyer v. Nebraska, 262 U.S. 390 (1923), chronologically the first of the decisions, upheld the right of parents to be free of unreasonable restraints in the education of their children. In so holding, the Court emphasized the broad, not narrow, concept of those human liberties which are protected by the Constitution. It stated at page 399:

> "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to

worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

Carrying the concept forward, *Pierce v. Society of Sisters of Holy Names of Jesus and Mary*, 268 U.S. 510 (1925) struck down, as an unreasonable interference with a fundamental liberty, an attempt to require attendance only at public schools. Again the Court stressed the broad base on which these personal constitutional liberties rests, saying (pp. 534-535):

> "Under the doctrine of Meyer v. Nebraska, 262 U. S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all goverments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

Important as is the right of parents to have the utmost possible freedom in the rearing and education of their children, we believe that it is even more fundamental that an individual have free choice in the

matter of becoming a parent. If bearing an additional child or children in an already large family will deprive the parents of the economic means of properly educating their existing children, the freedoms safeguarded by *Meyer* and *Pierce* become nugatory.

Subsequently, the statute of Oklahoma permitting involuntary sterilization was held invalid. In language which now has particular pertinence relative to laws which require an unwilling woman to carry an unwanted pregnancy to term, the Court said in *Skinner v. State of Oklahoma,* 316 U.S. 535 (1942) at p. 541:

> *"There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury.* He is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential. lest unwittingly or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of fair and equal laws. (Emphasis supplied)."

There is likewise "no redemption" for the woman who has been compelled by the state, against her will, to give birth to a child. Because the point deserves separate emphasis, the lifelong onerous effects, equal in seriousness to those described in *Skinner,* of the present restrictive abortion laws are discussed in Part C, *infra,* of this brief.

Skinner was the first case to deal with the inviolate personal freedoms of an individual relating to matters

of sex and procreation. *Griswold v. Connecticut,* 381 U.S. 479 (1965), invalidating the Connecticut statute prohibiting the use of contraceptives, was next. In a series of opinions by members of the Court, varying views were expressed of the precise constitutional source from which arises this area of deepest personal freedom. Speaking for the Court, Justice Douglas, noting that (p. 484) "Various guaranties create zones of privacy" and reviewing the relevant constitutional provisions and authorities, concluded that (p. 485) "These cases bear witness that the right of privacy which presses for recognition here is a legitimate one." and (p. 486) "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system."

The decision in *Griswold* furnishes a solid foundation for the express recognition of a woman's right to reproductive autonomy. While *Griswold* was concerned with the right to control child bearing through the use of contraceptives, it is hard to believe that that right could have a constitutional basis without there existing a cognate right of a woman who has become involuntarily pregnant, either through the unavailability or failure of contraceptives or for other reasons, to procure a legal abortion in safe and antiseptic surroundings. A woman's choice in bearing children is only freely made if her decision can be made "after" as well as "before" the beginning of pregnancy.

In the next case involving family relationships, the Court held that there is also a basic personal right to choose one's marriage partner and that it was infringed by the long-existing miscegenation statute of Virginia. *Loving v. Virginia,* 388 U.S. 1, 12 (1967).

These decisions, and others, led the Supreme Court of California to conclude in *People v. Belous*, 71 Cal. 2d 954, 458 P. 2d 194 (1969) *cert. denied*, 397 U.S. 915 (1970) that (p. 963):

> "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex."

Belous was the first of the modern day cases dealing with the validity of state anti-abortion statutes and expressly declaring the right of reproductive autonomy. It has sparked widespread litigation in other jurisdictions.

Subsequent to *Belous* and *Loving*, this Court has had another occasion to afford protection to still another facet of the civil rights arising out of the intimate relationships of man and woman. Because of "the basic position of the marriage relationship in this society's hierarchy of values," the state's requirement that fees be paid as a condition to bringing a divorce action was held invalid when applied to indigent parties wishing to dissolve that relationship. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

Again, it can be observed that, serious as may be the effects on adults who are required to continue the legal (not the physical) relationship of marriage against their will, it is as nothing compared to the effects on a woman who is compelled to continue a physical state of pregnancy against her will and to undertake the care of a child for a minimum period of its immature years.

Griswold and the right of privacy there upheld, was heavily relied on in *Stanley v. Georgia*, 394 U.S. 557 (1969), holding that the state could not punish "private" possession of obscene materials. In response to an argument that the state had the right to protect the individual's mind from the effects of obscenity (similar to the agument often heard in connection with abortion laws that they are required to prevent promiscuity), the opinion declared (p. 566) that the state cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts. On balance, we believe that the right of a woman to the integrity of her own body, free of interference by the state, must surely be more precious than the right to the private possession of sexually stimulating material.

The right of reproductive autonomy—the right to decide when and where to have children—is at least equal to, and in most instances, even more deserving of recognition than those "fundamental" and "basic" civil rights discussed above, to which the Court has already given protection. Without derogating from the importance of those areas of human relationships already protected, it cannot be over-emphasized that the woman's right asserted here is of such basic importance to her and to her family, and to society as a whole, as to overshadow in any scale of values most of the rights already specifically embraced in the protected constitutional areas.[1]

The concept of a woman's constitutionally protected right to reproductive autonomy, which has only during the past decade become the subject of open and public discussion, has been adopted by a majority of

---

[1]See Mr. Justice Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 Loyola University L. Rev. 1, 8 (1969).

the lower courts which have decided that issue. In the short period between the decision in *Belous* in September 1969 and the present time, both state courts and federal district courts have held that a woman does have a constitutionally protected right to determine when and where to bear children.[2] Just prior to the filing of this brief, the Court of Appeal, First Appellate District (Division 1) of the State of California, in *People v. Barksdale*, Crim. No. 9526 reiterated the right recognized in *Belous* and held that the 1967 Therapeutic Abortion Act of California (similar in essentials to the Georgia statutes challenged here) was invalid in part in imposing qualifying restrictions upon a woman's ability to procure an abortion. And, of course, in both the present cases, the courts below determined that such a right existed.

In this same period since the *Belous* decision, the fundamental right to decide whether to have a child has been recognized by courts in considering legal issues other than the validity of state abortion laws.

---

[2]*Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis.) (per curiam), appeal dismissed sub nomine *McCann v. Babbitz*, 400 U.S. 1 (1970) (per curiam); *Babbitz v. McCann*, 320 F. Supp. 219 (E.D. Wis. 1970) (per curiam), judgment vacated sub nomine *McCann v. Babbitz*, 39 U.S.L.W. 3449 (per curiam) (1971); *Doe v. Scott*, 321 F. Supp. 1385 (N.D. Ill.) (1971) docketed sub nomine *Hanrahan v. Doe* and *Heffernan v. Doe*, 39 U.S.L.W. 3438 (1971); *People v. Anast*, No. 69-3429 (Ill. Cir. Ct., Cook County, 1970) (Dolezal, J.); *Commonwealth v. Page*, Centre County Leg. J. (Pa. Ct. Comm. Pl., Centre County, July 23, 1970); *State v. Munson* (S.D. 7th Jud. Cir. Pennington County, Apr. 6, 1970) (Clarence P. Cooper, J.); *State v. Ketchum* (Mich. Dist. Ct. Mar. 30, 1970) (Reid, J.), *Contra: Rosen v. La. Bd. Med. Examiners*, 318 F. Supp. 1217 (E.D. La) (1970), appeal docketed, 39 U.S.L.W. 3427; *People v. Pettigrew*, 2d Appellate Dist., Division 2, Court of Appeals of the State of California. Counsel is aware that the foregoing list may not be exhaustive because of the extensive litigation challenging abortion laws in all states and in courts whose opinions are not necessarily reported.

BLEED

Thus, in determining whether New York State had the right to limit reimbursment for abortions under the Medicaid program to those abortions which were described as "medically indicated," the Supreme Court of New York County,[3] holding that the state did not have that right, based its decision on the effect such a limitation would have on the fundamental right to determine either to have the child or terminate the pregnancy.

> "In view of the fundamental nature of the right to terminate a pregnancy, and the fact that the State has determined that an abortion may be performed only by a duly licensed physician (Penal Law Section 125.05), the Constitution similarly prohibits the State from denying to indigent women access to physicians in order to exercise this right.
>
> Accordingly, if Section 365-a does not permit Medicaid-reimbursement for *all* lawful abortions, it denies indigent women the fundamental right to decide whether to have a child, and violates the Ninth and Fourteenth Amendments to the United States Constitution."

And in a decision holding that the State of New York could enjoin the activities of an abortion referral agency,[4] the court described abortion laws as those which force women into "servitude as unwilling breeders."

---

[3] *City of New York v. Commissioner of Social Services*, State of New York Supreme Court, New York County, Special Term, Part 1, Index #40588/1971.

[4] *In re Abortion Information Agency, Inc.*, reported in the New York Times, May 14, 1971.

We respectfully submit, as *Belous* concluded, that the prior decisions of this Court inescapably require a holding that one of the individual rights protected by the United States Constitution is the woman's right to determine the spacing of her children and to decide whether to carry a particular pregnancy to term.

B. State Anti-Abortion Statutes, Despite Their Long-Standing Duration, Are Subject to Examination for Constitutional Validity in the Light of Contemporary Community Standards.

The Texas statute challenged in *Roe v. Wade* has been in effect without substantial changes insofar as concerns the issue here since 1907; abortion laws of other states using substantially the same standards as that of Texas were for the most part adopted during the latter half of the nineteenth century. The Georgia statute in its present form is a modification of a more ancient statute. No significance can be given to the fact that, for these many years, the constitutionality of these laws went unchallenged. As we have said, it has been only during the past decade that the general public has articulated its present thinking on the need for women to make this decision for themselves. It is undoubtedly for that reason that, both on the judicial and legislative front, reexamination of abortion laws is taking place, a reexamination which is based on an evident growing desire to cast off the shackles of the past.

Neither the failure of society nor of the law to recognize the existence of these non-enumerated rights until recent years impairs their constitutionally protected

status nor precludes this Court from recognizing them. As this Court said in *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) at 669, *et seq.*:

> "We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment 'does not enact Mr. Herbert Spencer's Social Statics'. . . . Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process *to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.* See Malloy v. Hogan, 378 US 1, 5-6. . . ." (Emphasis supplied.)

To the same effect see also *People v. Belous, supra*, at page 967. This Court has not hesitated to strike down an invidious classification "even though it had history and tradition on its side." *Levy v. Louisiana*, 391 U.S. 69, 71 (1968).

On the contrary, the evidence of present community opinion discussed here and the effect of restrictive abortion laws on all concerned, discussed in Part C, are relevant considerations. In the segregation case, *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), this Court, in overturning the long standing constitutional doctrine enunciated in *Plessy v. Ferguson*, 163 U.S. 537 (1896), was at pains to make this clear, stating, at p. 492 "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson*

was written. We must consider public education in the light of its full development and *its present place* in American life throughout the Nation." (Emphasis supplied.)

With this principle in mind, this Court will properly weigh the woman's right to determine whether and when to bear a child in the context of contemporary considerations.

1. Both prior to and concurrent with developing judicial protection of rights connected with procreation, marriage and the family, nearly every important and representative segment of society has indicated its recognition of a personal right on the part of women to make decisions regarding the bearing of children. In the forefront, a Task Force of the Citizens Advisory Council on the Status of Women, appointed by the President of the United States, whose Chairman was Senator Maureen Neuberger, stated that it was "convinced that the right of a woman to determine her own reproductive life is a basic human right."[8] Many important wom-

[8]Task Force Report on Family Law and Policy, Recommendations of the Citizens Advisory Council on the Status of Women, p. 31 (1968). Subsequently, Senator Neuberger commented on the emergence of the community view as follows—"A few years earlier, I had served on the Status of Women Commission, which was appointed by President Kennedy. Its Chairman was Eleanor Roosevelt, and the Assistant Chairman was Esther Peterson. Mrs. Roosevelt died before we finished our report, and Esther Peterson took over. Our studies of the laws that affect women led us to believe that it was time to talk about abortion laws, but we couldn't get our own Commission to consider such a discussion. It was said that the word "abortion" was verboten; that we couldn't get anything printed about it in government publications. Believing all this, when the task force report came to my desk, I anticipated all sorts of trouble. I expected delays and hours of debate. But not so. What had happened in that interval of a few years? Well,

en's groups have also expressed concurrence in that view.[6] These organizations represent all shades and diversity of opinion. For example, the American Association of University Women has officially declared its belief that abortion should be legal for all those who wish it after medical consultation. Similarly, the National Conference of the Young Women's Christian Associations of the United States, another of the *Amici* herein, included in its action program emphasis on repeal of all laws restricting or prohibiting abortions performed by a duly licensed physician. The list of goals adopted by the National Organization of Women at the First National Conference in Washington, D.C. included implementation of "The right of women to control their own reproductive lives by removing from the penal code laws eliminating access to contraceptive information and devices and by repealing penal laws governing abortion."[7]

Many years ago a famous representative of her sex expressed the position that has now become current.

---

an educational process had been going on, organizations had been at work, and there had been a complete change in the emotional climate. The greatest dissension came, as we studied the task force report, over the proposal to amend the maximum hours law to permit women to work overtime. Very little—there was one minority report—on the abortion report." Neuberger, *Abortion, A Political View*, in ABORTION AND THE UNWANTED CHILD (1971) at p. 108.

[6]In addition to the women's groups listed as Amici Curiae, see list of organizations, Note 12, *infra*.

[7]The need for recognition of this fundamental human right in the eyes of the law has been dramatically expressed by groups of prominent French and German women who have sacrificed their personal privacy by signing statements admitting to illegal abortions, thus emphasizing the prison-like effect of the current laws in those countries. Articles in Los Angeles Times, *343 French Women Talk of Abortions*, April 6, 1971; *24 Celebrities Admit to Abortions*, June 3, 1971.

Harriot Stanton Blatch, in Voluntary Motherhood, pungently summarized the difference between wanted and unwanted reproduction.[8]

> "Poets sing and philosophers reason about the holiness of the mother's sphere, but men in laws and customs have degraded the woman in her maternity. *Motherhood is sacred,—that is, voluntary motherhood;* but the woman who bears unwelcome children is outraging every duty she owes the race. (Emphasis supplied.)"

From other groups in the community has come support for the woman's view.

The American Public Health Association, concerned with the invidious effects upon public health of large numbers of illegal abortions and unwanted pregnancies, formally expressed the view that there was an "accepted" personal right to determine the number of and spacing of children; to implement that right, it advocated that safe, legal abortion should be available to all women. It specifically noted that the "provision of abortion within the usual channels of medical care will reduce the well known adverse health effects of illegal abortion."[9]

Both medical and psychiatric groups have publicly taken the same position. It is noteworthy that the American College of Obstetricians and Gynecologists has recently liberalized its position so as to approve abortion on the joint decision of the patient and her physician, without additional medical consultation.[10]

---

[8]Reprinted in UP FROM THE PEDESTAL, Ed. by Aileen S. Kraditor (1968) at p. 167 *et seq.*

[9]*AJPA*, January 1969, p. 153.

[10]AMA News, Sept. 28, 1970. See note 12 *infra*, for a list of other medical organizations.

An eminent group of psychiatrists, joining in the recognition of a "woman's right to control her own reproductive life," observed the destructive effects of an unwanted pregnancy upon both mother and the child,[11] destructive effects which are discussed in detail below in Part C of this brief.

Almost all of the important religious groups (except the Roman Catholic Church) have recognized this right of free choice on the part of women by calling for abortion law reform. Among others, the American Friends' Service Committee and the Unitarian Universalist Association have each expressly announced the belief that the right of a woman to decide whether she will bear a child should not be interfered with by government. In its resolution adopted in 1968, the Unitarian Universalist Association stated "A child has a right to a mother who cherishes him . . .".

The roll call increases with almost every meeting of any national group having an interest in religion, health, the family, medicine or effective law enforcement.[12] From the legal profession, the section of Family

---

[11]Report No. 75, Group for Advancement of Psychiatry (1970).

[12]The following have endorsed the concept of woman's fundamental freedom in this area.

American Association of Planned Parenthood Physicians, American Baptist Convention, American Civil Liberties Union, American College of Obstetricians & Gynecologists, Americans for Democratic Action, American Ethical Union, American Friends Service Committee, American Humanist Association, American Jewish Congress, American Medical Women's Association, American Protestant Hospital Association, American Psychiatric Association, American Psychoanalytic Association, American Psychological Association, American Public Health Association, Association for Voluntary Sterilization, Church Women United, Board of Managers, Citizen's Advisory Council

(This footnote is continued on next page)

Law of the American Bar Association has stated its conclusion that:

> "The changes in our decisional and statuory law expresses a general recognition that the right to limit family size is a basic human right—that the individual has a right to free choice and self-determination in regard to procreation."[13]

When the American Law Institute first adopted what was then considered a liberal and realistic standard for abortions in its 1959 draft of the Model Penal Code,[14] the Institute proposed that abortions be available to women only when the pregnancy would gravely impair her physical or mental health, when the pregnancy resulted from rape or incest, or where there was danger of a child being born with grave mental or physical defects. In contrast, on August 4, 1970, the Com-

---

on the Status of Women, Clergy Consultation Service on Abortion, Episcopal Churchwomen of the U.S.A., Federation of American Scientists, Group for the Advancement of Psychiatry, Izaak Walton League, Medical Committee for Human Rights, Moravian Church, Northern Province Synod, National Association for Repeal of Abortion Laws, National Committee for Children & Youth, National Council of Jewish Women, National Council of Obstetrics-Gynecology, National Council of Women of the United States, National Emergency Civil Liberties Committee, National Medical Associaton, National Organization for Women, Physicians Forum, Planned Parenthood-World Population, President's Task Force on the Mentally Handicapped, Student American Medical Association, Unitarian Universalist Association, Unitarian Universalist Women's Federation, United Automobile Workers Union, United Church of Christ, United Church Board for Homeland Ministries, United Methodist Church, United Presbyterian Church in the U.S.A., Board of Christian Education, Women's Division of the United Methodist Church, Women's Liberation, Young Women's Christian Association of the U.S., Zero Population Growth, Inc.

This list compiled from public statements may represent only part of the many organizations who have taken the same position.

[13]Dembitz, Nanette, *Law and Family Planning*, Vol. 1, FAMILY LAW QUARTERLY No. 4, p. 103, at p. 105.

[14]Draft No. 9, Model Penal Code (1959).

missioners on Uniform State Laws issued a Second Tentative Draft of a Uniform Abortion Act which would authorize abortion within twenty weeks after commencement of the pregnancy, without any further qualification. The proposed Uniform Act, by imposing no substantive restrictions, thus recognized the essentially personal nature of the determination to terminate a pregnancy. The difference in approach between the 1959 Penal Code draft and the 1970 Uniform Act parallels the developing community thinking that took place in the same period of time.

In light of the hundreds of years of silence in which abortion was discussed only in hushed tones, in which the word was never used by any of the mass media and was referred to by newspapers under the euphemism of "illegal operation," the rapidity with which, in recent years, the community has expressed its adherence to the proposition that free choice in areas of procreation is fundamental to the dignity of women and to the best interests of society is virtually astounding.

2. We turn now to a brief mention of the present place of women in the American scene. There has been a basic change in the legal status of women in our society[15] from the period when they were, under the law, unable to control their property, their children or their family life in any fashion, to the present day when

---

[15]For a comprehensive review of this evolution in the areas of law, political and civil rights and economic opportunities see Mill, John S., ON LIBERTY, REPRESENTATIVE GOVERNMENT: THE SUBJECTION OF WOMEN (1869); Lifton, WOMEN IN AMERICA (1965); Riegel, Robert E., AMERICAN WOMEN, A STORY OF SOCIAL CHANGE (1970); Flexner, Eleanor, CENTURY OF STRUGGLE: THE WOMEN'S RIGHTS MOVEMENT IN THE UNITED STATES (1959); Friedan, Betty, THE FEMININE MYSTIQUE (1963);

(This footnote is continued on next page)

disabilities with respect to property, divorce, child custody, voting, jury service and others have been largely removed.[15] The woman suffrage amendment (U.S. Const.; Amendment XIX), the provisions prohibiting discrimination under the Equal Employment Opportunities Law (1964) (Civil Rights Act, Title 7, 42 U.S.C. 2000e *et seq.*), and the various Married Women's Property Acts, are all manifestations of a judgment by society that women are no longer to be in a subordinate status.

However, the value of the present right to vote, to equal pay, to equal job opportunities, to choose one's marriage partner, to joint custody of children—which did not, in a legal sense, exist for most women at the time of the passage of state anti-abortion laws—can be sharply decreased by an unwanted pregnancy. To fully implement those rights, this Court should recognize the paramount right of reproductive autonomy which is sought here.

C. The Effects of Abortion Laws Upon a Woman's Life, Dignity and Personal Freedom Are So Serious as to Require the State to Show an Urgent and Compelling Interest to Support Any Restrictions.

Interference with fundamental constitutional rights of the individual must be minimal and must be supported by a compelling state interest. *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); *Sherbert v. Verner*, 374

Kanowitz, Leo, WOMEN AND THE LAW (1969); Kraditor, Aileen S., ed. UP FROM THE PEDESTAL: SELECTED WRITINGS IN THE HISTORY OF AMERICAN FEMINISM (1968); Smith, Page, DAUGHTERS OF THE PROMISED LAND: WOMEN IN AMERICAN HISTORY (1970).

[15]Kanowitz, Leo, WOMEN AND THE LAW, summarizes these changes.

U.S. 398, 406 (1963); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1965); *NAACP v. Button*, 371 U.S. 415, 438 (1963). Even when there is a compelling state interest,[17] the fundamental rights of the individual can, consistent with their constitutionally protected status, be restricted only to the limited extent required by that state interest, and not to any greater extent. *NAACP v. Alabama*, 377 U.S. 288 (1964) and cases cited therein at pages 307-308.[18]

Because the right to choose not to bear a child is a "personal" rather than a purely economic right, there should be a strict scrutiny of the anti-abortion laws which impinge upon the free exercise of that right. See *e.g. Aptheker v. Secretary of State*, 378 U.S. 500, 516 (1964). For a recent reiteration of this distinction see *Dandridge v. Williams*, 397 U.S. 471 at 484 (1970).

A woman whom the law would force to carry an unwanted pregnancy to term is, quite plainly, restricted and imposed upon to a greater degree than by any other action which the state could take, save execution of a sentence of death or possibly long term imprisonment. Such a woman is harmed, not only directly in her person, but in her capacity as the protector of her other children and in her interest in assuring the health

[17]Abortion laws had their genesis in the nineteenth century and represented an application of then prevalent concepts of population growth and sexual morality and some concern for the health of the woman, based on the then current surgical and antiseptic standards. *People v. Belous, supra*, at 964-965.

[18]The state, in its traditional concern for public health and safety in regulating aspects of medical practice may well be able to specify the qualifications of persons authorized to perform abortions or prescribe the period of pregnancy beyond which an abortion cannot be performed. But, in prohibiting abortions altogether except for a limited number of reasons, the state goes beyond the scope of its power.

and well being of the child she is compelled to bring forth. Not only is the woman injured, so too is the unwanted child, her family and society as a whole.

1. The harm to the woman falls into many categories. Consider, first, the horrendous number of women who, rather than face the fact of bringing an unwanted pregnancy to term, are forced into seeking illegal abortions. They are willing to risk violations of the criminal laws or, worse, they risk their very health and lives.

While the realities of law enforcement, social, and public health problems posed by abortion laws have been openly discussed in books, conferences and the press only within a period of not more than the last ten years, one fact appears undeniable, although unverifiable statistically. There are at least one million illegal abortions in the United States each year.[19] Indeed, studies indicate that, if the local law still has qualifying requirements, the relaxation in the law has not diminished to any substantial extent the numbers in which women procure illegal abortions.[20]

The overall effect of illegal abortions has been summarized by the President's Commission on Law Enforcement and Administration of Justice, through the Report of its Task Force on Administration of Justice, (1967) at page 105, *et seq.* as follows:

---

[19]The President's Commission on Law Enforcement and Administration of Justice, Report of Task Force on Administration of Justice (1967), p. 105; Rossi, Alice, *Public Views on Abortion,* in Guttmacher, THE CASE FOR LEGALIZED ABORTION NOW, p. 27 (1967); LADER, ABORTION, pp. 2-3 (1966).

[20]Abernathy and Horvitz, *Estimates of Induced Abortion in Urban North Carolina,* DEMOGRAPHY, Vol. 7, Number 1 (1970), p. 19 *et seq.;* Report to the 1970 Legislature, Third Annual Report on the Implementation of the California Therapeutic Abortion Act.

"Abortion laws are another instance in which the criminal law, by its failure to define prohibited conduct carefully, has created high costs for society and has placed obstacles in the path of effective enforcement. The demand for abortions, both by married and unmarried women, is widespread. It is often produced by motives and inclinations that manifest no serious dangerousness or deviation from the normal on the part of the people who seek it. These factors produce the spectacle of pervasive violations but few prosecutions."

"It has been estimated that as many as a million abortions are performed each year in this country, while the arrest rate is not more than one per thousand abortions performed. Two-thirds of all abortions are reportedly performed on married women. Available indications are that only 8,000 to 10,000 of these are legal abortions conducted in a hospital setting."

"The reasons for seeking abortions vary; they include direct danger to the physical health of the mother; the likelihood that the fetus, if born, will be deformed or non-viable; the circumstances of conception, particularly rape, incest, extreme immaturity of the mother, or her unmarried state; the mother's mental health; the low income of the family and its inability to support more children; or simply that the family does not want any more children . . ."

"The present state of the law presents particularly acute problems for conscientious parents and physicians faced with weighty reasons for termi-

nating pregnancy in a jurisdiction where the law is restrictive or its standards are vague and uncertain. Since some highly reputable physicians regard the law as an injustice and want to protect their patients against incompetent abortions available on the black market, large numbers of reputable citizens find themselves in the position of law violators. This tends to contribute to antagonism and resentment toward those who enforce the law."

Since illegal abortions are not likely to be performed in safe facilities or by the most modern antiseptic techniques, they have created a severe public health problem. Investigators have estimated that in the United States five thousand women die each year from criminal abortions and that illegal abortions induced out of hospitals by persons without medical training are at the rate of 100 deaths per 1000 abortions.[21] By contrast, where legal abortions are performed in hospitals by medical practitioners, there are only 3 deaths per 100,000 abortions.[22] The incidence of severe infection from criminal abortion is, as would be expected, very much greater than the incidence of death.[23]

Second, for the woman who is too fearful of breaking the criminal laws or of risking the unsafe procedures of the illegal abortionists, there is no alternative, except

---

[21]LADER, *supra*, note 19 at 48-59 (1966); Hardin, Garrett, *Abortion and Human Dignity*, public lecture, presented by Society for Humane Abortion, Inc., Guttmacher, *supra*, note 19, p. 71 (1966); Beck, Newman and Lewitt, *Abortion & National Public and Mental Health Problems*, 59 AJPH 2131, *et seq.*

[22]Tietze, *Mortality with Contraception and Induced Abortion*, 45 STUDIES IN FAMILY PLANNING, 6-8 (1969).

[23]Stevenson & Yang, *Septic Abortion with Shock*, 83 AM. J. OBST. & GYNEC. 1229 (1962).

bringing forth the unwanted child—a development in her life which can never be reversed.

Third, for the unmarried woman, this forced bearing of a child can have additional obvious and undesirable effects on the remainder of her entire life, including the rearing of a future, legitimate family. And, it is no answer to think that adoption of the child will solve her problems, for there may be serious psychological reprecussions for the woman in parting with a child already born, even when the birth was not planned or desired.

For the woman, whether married or unmarried, what has been called compulsory pregnancy[24] may force the abandonment of educational plans, unwilling renunciation of a career, a further demand upon physical energies, which may already be fully drained by repeated child bearing and child care. Her mental health may suffer or be seriously impaired. Direct economic deprivation for both the female concerned and the remainder of her family can be an immediate result. At the present time 41.6% of all women are in the labor force, and 63.9% of the total female labor force is married.[25] Of this total female labor force approximately 60% is within child bearing age.[26] Thus, in our society, curtailment of the woman's wage-earning capaci-

---

[24]Professor Hardin has suggested that the appropriate term for the condition of life to which the abortion laws give rise is "compulsory pregnancy." Hardin, Garrett, *Abortion—or Compulsory Pregnancy?*, JOURNAL OF MARRIAGE AND THE FAMILY, Vol. XXX, No. 2, (1968) at p. 249.

[25]Table #330, *Marital Status of Women in the Civilian Labor Force, 1940-1969*, STATISTICAL ABSTRACT OF THE UNITED STATES (1970).

[26]Table #332, *Civilian Female Population Total and Labor Force by Age and Marital Status, 1969*, STATISTICAL ABSTRACT OF THE UNITED STATES (1970).

ties by enforced child bearing can substantially cut the family income. Particularly in the disadvantaged minority groups, the woman may be the main wage earner of the family and her plight and that of the remainder of her family becomes crucial.[37] From the viewpoint of society, the additional pregnancy may force the economically marginal family over the line, so that it thereafter requires public assistance.

2. The woman can be adversely affected in her relationship with her family—her husband and her other children.

The insistence upon compulsory pregnancy too often thwarts the right of both a woman and her husband to a meaningful and happy spousal relationship. A pregnancy unwanted by the woman is normally equally unwanted by the husband. The consequent family tension and bickering, with increased calls upon the husband's economic responsibilities, affect the marriage. Indeed, an unwanted pregnancy has been known to precipitate separation or desertion by the husband.

The mother's unwanted pregnancy may severely handicap her in discharging her duties to her existing children. She who has the primary sociological as well as biological responsibility for rearing children in our society, may be forced to divide her energy in so many directions that even those children she has born willingly, subsequently become, in a sense, unwanted children. No one can deny that the harassed mother can scarcely give her time, attention, and manifestations of affection, to the full extent necessary for the develop-

[37]The Negro Family—the Case for National Action (1965) pp. 20, 23, 32.

ment of her children into sound and whole human beings.

3. It is not unimportant to the consideration of these cases that a child born as the result of an unwanted pregnancy can suffer serious adverse effects, frequently of lifetime duration. The physical, psychological and emotional damage to those having the unhappy status of being an unwanted child is most movingly documented in four case studies of unwanted children reported by a Professor of Pediatrics at the Yale University Child Study Center, New Haven, Connecticut.[28]

Two summaries serve as examples of what, unfortunately, are not rare and isolated instances, but typical of the histories of thousands of children.[29]

> "Tommy, age seven, is in a residential treatment center for emotionally disturbed children after passing through five foster homes. I first saw him when he was three. He had been admitted to our hospital because of malnutrition and delayed physical and mental development. The story we have heard is not uncommon. He was the fourth child born within five years to an immature woman of twenty-two. At the time of his hospitalization, she told us how unhappy she had felt about this, her fourth pregnancy; that having one more child was just too much for her. Childlike, and in precarious physical health, she was unable to cope with the many responsibilities of caring for, four young

---

[28]*Provence*, Sally, *Unwanted Children: Four Case Studies*, a chapter in ABORTION AND THE UNWANTED CHILD, *supra* note 5 at pp. 73-75.

[29]For a general discussion of this problem see *Beck*, Mildred B., *The Destiny of the Unwanted Child: The Issue of Compulsory Pregnancy*, in ABORTION AND THE UNWANTED CHILD, *supra*, note 5, at p. 59.

children, and her burden was increased by an alcoholic husband who worked only intermittently. Although he was interested in her and the children at times, he was frequently neglectful or abusive.

Tommy improved during hospitalization and his parents asked for foster care for him, Tragically, no placement could be sustained for very long—twice because of illness of the foster mother; twice because foster parents, at first motivated to help him, became exhausted with his difficult behavior and his limited responsiveness to their efforts. The residential treatment staff will work with Tommy, trying to rehabilitate him so that he can adjust to family life—an objective of great importance in giving him some hope for the future. Physically, he is now in good condition. Intellectually, he functions at a dull normal level. In his ability to learn, to establish controls over his behavior, and to love others, he is crippled. Experience with similar cases has shown that the chances that he will become an adult who can maintain himself and assume appropriate adult responsibilities are not favorable.

Laurie, four years old, was brought to our clinic at sixteen months by her well-to-do parents who feared she was mentally defective. Two older siblings were doing well. In her first year, Laurie had had two caretakers besides the mother, each of whom was devoted to her for a short time. Laurie's mother was a competent, articulate, conscientious person, who devoted much time and effort to community activities and to her two older children. The father was a responsible man, a hardworking

partner in a successful business, and devoted to his wife and the two older children.

Laurie, we found, was an unwanted child of an unwanted pregnancy—a pregnancy during which her mother felt unloved and unlovely. She endured the pregnancy as a sentence to be served before she could again return to the world. In Laurie's infancy her mother was unable to feel close to her, to nurture her in the ways that are crucial to an infant's development. She dressed her in beautiful clothing, but gave little of herself. While she was concerned and guilty, she put other things first. The child had no biological defect; her intellectual, emotional, and motor development were delayed and distorted by the deficits in her care. With casework assistance, the parents have been able to modify some of their behavior so that Laurie is more a part of the family and more time is devoted to her. The parents have provided her with a good nursery school and other social and educational experiences. They have made a conscientious effort to understand her needs. Laurie no longer looks like a mentally retarded child, but her learning is erratic and her interactions with others lack richness and depth. She is attached to her parents and siblings, but not closely. Emotionally starved and isolated by intelligent parents in the midst of economic affluence, she is, sadly, a four-year-old shadow of a person. I fear she can be expected to be an inadequate mother to her own children twenty years from now."

The long term consequences for the community were demonstrated by a innovative study of one hundred and twenty children born in Sweden after their mothers'

request for a therapeutic abortion was refused. The findings of that review have been summarized as follows:

> "A study made of Swedish children born when their mothers were refused the abortions they had requested showed that unwanted children, as compared with their controls, as they grew up were more often picked up for drunkenness, or anti-social or criminal behavior; they received less education; they received more psychiatric care; and they were more often exempted from military service by reason of defect. Moreover the females in the group married earlier and had children earlier, thus no doubt tending to create a vicious circle of poorly tended children who in their turn would produce more poorly tended children."[30]

As noted in the foregoing comment, in addition to the effect of the unwanted pregnancy upon the mother and upon the unwanted children, those unwanted children who are economically or emotionally harmed, transmit their psychosocial pathology to succeeding generations. Women forced to bear unwanted children have often themselves been raised in households in which they were unwanted, and they in turn may be forced by restrictive abortion laws to raise their children in the same circumstances.[31] The long term effects upon society are quite literally incalculable but our society also suffers most directly. Observation in

---

[30]Hardin, Garrett, *Abortion—or Compulsory Pregnancy? supra*, note 24, at 249. The full study is set out as Appendix A in ABORTION AND THE UNWANTED CHILD, *supra*, note 5.

[31]Beck, *supra*, note 29, at p. 62.

the United States demonstrates, and the Swedish study of the parallel problems in Sweden gives concrete evidence of, the direct cost in alcoholism, drunkenness, crime and welfare costs with which society is faced.

Particularly acute is the problem of the unwanted child who is also illegitimate; and illegitimate births are frequent. The proportion of live births which occur to unmarried women has risen startlingly; since 1940 the percentage of live births which are illegitimate has increased from 3.5% to 9.7% of all births.[32] The number of illegitimate births to mothers of minorities is far out of proportion to the ratio of such minorities in the whole population.[33]

The foregoing effects of bringing to term an unwanted pregnancy have undoubtedly contributed to the deep felt need of women to determine for themselves, without outside restrictions, whether to bear a child. That need shows quite plainly in the increase in legal abortions. Since there has been a lessening of the restrictions on legal abortions it has been possible to compile reliable statistics, and to see that there is a direct relationship between the availability of legal abortions in any jurisdiction and the proportion of women who have elected to procure such legal abortions.

---

[32]Table #58, *Illegitimate Live Births By Age and Race of Mother: 1940-1968*, STATISTICAL ABSTRACT OF THE UNITED STATES (1970).

[33]For example, in 1968 (the last year for which reports have been published), 54.2% or 183,900 illegitimate births occurred to "negro and other mothers" while 155,200 illegitimate births occurred to "white" mothers. Table #58, *supra*.

This sharp (but not unexpected) rise in the number of legal abortions in jurisdictions where laws have been reformed or medical practice basically modified has an obvious implication: when women have received complete or partial recognition of their right of reproductive autonomy, they have exercised the right to an extent directly correlated with the degree of permissiveness of the law and medical practice.[34]

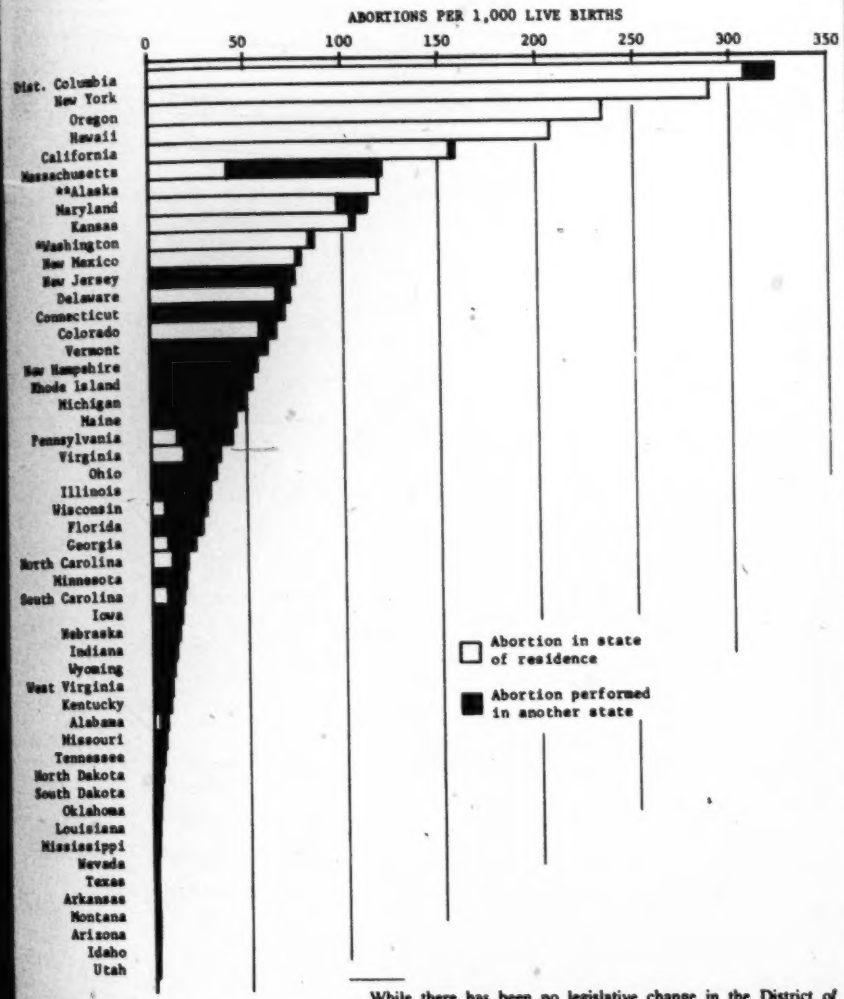
[34]Table 2, statistics titled REPORTING AND SURVEILLANCE OF LEGAL ABORTIONS IN THE UNITED STATES, 1970, compiled by Carl W. Tyler, Jr., M.D. Chief, Family Planning Evaluation Activity, Epidemiology Program, Center for Disease Control; Judith E. Bourne, R.N., M.S., Nurse Epidemiologist, Family Planning Evaluation Activity, Epidemiology Program, Center for Disease Control; S. Beach Conger, M.D., Special Studies Officer, Family Planning Evaluation Activity, Epidemic Intelligence Service, Center for Disease Control; James B. Kahn, M.D., Abortion Surveillance Officer, Family Planning Evaluation Activity, Epidemic Intelligence Service, Center for Disease Control; presented at CONFERENCE ON ABORTION TECHNIQUES AND SERVICES, Barbizon-Plaza Hotel, New York, New York, June 3-5, 1971; U. S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, PUBLIC HEALTH SERVICE, Health Services and Mental Health Administration Center for Disease Control, attached as Exhibit A. In California more than 62,000 legal abortions were performed in 1970, rising from 5,030 abortions in 1968 and 15,339 in 1969.

Conclusion.

This Court, we respectfully submit, should recognize the existence of a fundamental, constitutional right on the part of a woman, to determine, along with her personal physician, the number and spacing of her children. This right is of a personal nature, and attempts to restrict its exercise are, therefore, subject to strict scrutiny and can be justified only by reason of a most compelling state interest.

NORMA G. ZARKY,
1800 Century Park East,
Los Angeles, Calif. 90067,
Attorney for Amici Curiae.

Figure 2 RATIOS OF REPORTED LEGAL ABORTIONS TO LIVE BIRTHS, BY STATE OF RESIDENCE, IN RANK ORDER, JULY – DECEMBER 1970



Y 21 - DECEMBER 31, 1970

ER 3 - DECEMBER 31, 1970

While there has been no legislative change in the District of Columbia, hospitals and doctors accepted the lower court ruling in *United States v. Vuitch*, 305 F. Supp. 1132 (D.D.C. 1969) reversed United States v. Vuitch, ... U.S. ....., 39 L.W. 4464 (1971) and legal abortions were widely performed. In Georgia, listed as 27 in order of ratio of legal abortions to live births, the number of legal abortions was apparently severely limited by the procedural requirements of the statute, upheld by the District Court.

NOS 70 - 18 and 70 - 40

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

JANE ROE, et al.,

Appellants

vs.

HENRY WADE,

Appellee.

and

MARY DOE, et al.,

Appellants

vs.

ARTHUR K. BOLTON,

Appellee

MOTION FOR PERMISSION TO FILE BRIEF AMICUS CURIAE AND TO PARTICIPATE IN ORAL ARGUMENT ON BEHALF OF NEW WOMEN LAWYERS, WOMEN'S HEALTH AND ABORTION PROJECT, INC., and WOMEN'S NATIONAL ABORTION ACTION COALITION

MOTION FOR PERMISSION TO FILE BRIEF AMICUS CURIAE AND TO PARTICIPATE IN ORAL ARGUMENT.

Amici, the New Women Lawyers, the Women's Health and Abortion Project, Inc. and the Women's National Abortion Action Coalition, by their undersigned counsel hereby move this Court for permission to file the annexed Brief Amicus Curiae in the above-captioned cases and to participate in oral argument.

Amici have requested permission of the attorneys for the parties to file the annexed brief but have not yet received responses from all of them.

Amici have set forth the reasons why they seek to file a brief amicus curiae and why they feel their brief would be of special assistance to the Court in the statement of interest, accompanying their motion. Amici believe they have raised aspects of the constitutional issues before this court hitherto unexplored by the parties.

Any decision by this Court in the two cases before it will deeply affect the lives of more than half the citizens of this country. Amici are aware that this Court has treated limited aspects of the question of abortion before and recognize the competence of the counsel in the above-captioned cases. Nonetheless, given the gravity of the question of a woman's right to abortion, aspects of which are being raised de novo before this Court, and given the fact that some decisions of this Court have turned on arguments raised by an amicus curiae, amici believe their participation in oral argument would be of assistance to this Court in determining the sensitive and complex issues before it.

Therefore amici respectfully urge this Court to grant their motion and permit them to file the requested brief amicus and participate in the oral argument of the cases of Roe v. Wade and Doe v. Bolton.

Respectfully submitted,

Nancy Stearns
c/o Center for Constitutional Rights
588 Ninth Avenue
New York, New York
10036

NOS. 70-18 and 70-40

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

JANE ROE, et al.,

Appellants

vs.

HENRY WADE,

Appellee.

and

MARY DOE, et at.,

Appellants

vs.

ARTHUR K. BOLTON,

Appellee.

BRIEF AMICUS CURIAE ON BEHALF OF NEW WOMEN LAWYERS, WOMEN'S HEALTH AND ABORTION PROJECT, INC., NATIONAL ABORTION ACTION COALITION

NANCY STEARNS
c/o Center for Constitutional Rights
588 Ninth Avenue
New York, New York 10036

INDEX

	Page
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	6
I. THE GEORGIA AND TEXAS STATUTES RESTRICTING THE AVAILABILITY OF ABORTION VIOLATE THE MOST BASIC RIGHTS OF WOMEN TO LIFE, LIBERTY AND PROPERTY GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION	8
A. The Right to Life	10
B. The Right to Liberty	14
II. THE GEORGIA AND TEXAS STATUTES RESTRICTING THE AVAILABILITY OF ABORTIONS DENY WOMEN THE EQUAL PROTECTION OF THE LAWS GUARANTEED TO THEM BY THE FOURTEENTH AMENDMENT	25
III. ABORTION LAWS VIOLATE THE CONSTITUTIONAL GUARANTEE AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT	34
IV. THERE IS NO COMPELLING STATE INTEREST JUSTIFYING THE VIOLATION OF FUNDAMENTAL CONSTITUTIONAL RIGHTS EFFECTED BY THE CHALLENGED ABORTION LAWS	44
V. YOUNGER v. HARRIS DOES NOT IMPAIR OR LESSEN THE JURISDICTION, POWER OR RESPONSIBILITY OF THIS COURT TO GRANT THE RELIEF REQUESTED	57
CONCLUSION	60

CASES CITED

	Page
Aberle v. Markel, Civ. Action #14291 (D.Conn., May 14, 1971) ----	1
Abramowicz v. Lefkowitz, 67 Civ. 4469 (S.D.N.Y.) ----------	1
Abromowitz v. Kugler, 431-1970 (D.N.J.) ----------	1
Adams v. American Fastener Co., 7 Conn. Supp. 379 (1939) ----------	20
Allgeyer v. State of Louisiana, 165 U.S. 578 (1897) ----------	14, 1[illegible] 20
Babbitz v. McCann, 310 F.Supp. 293 (E.D.Wisc., 1970), remanded 400 U.S. 1 (1971) ----------	2, 5-[illegible] 8
Baker v. Carr, 369 U.S. 186 (1962) ----------	31, [illegible]
Bates v. City of Little Rock, 361 U.S. 516 (1960) ----------	55
Beaver v. State, 256 S.W. 929 (Cr.App.Tex., 1923) ----------	29
Bolling v. Sharpe, 347 U.S. 497 (1954) ----------	31
Boyle v. Landry, 91 S.Ct. 958 (1971) ----------	58
Breen v. Kahl, 296 F.Supp. 702 (W.D.Wisc., 1969), aff'd 419 F.2d 1034 (7th Cir., 1969) --------	16
Brown v. Board of Education, 347 U.S. 483 (1954) ----------	21, [illegible]

Cases Cited (Cont'd)

	Page
lifornia v. Belous, 80 Cal. ptr. 354 (1969), cert denied, 97 U.S. 915 (1970)	1,8,10,44, 45, et passim
lifornia v. Robb, #14,005 un.Ct. Orange Co., Cal., anuary 9, 1970)	8
rani v. Danaher, 13 Conn.Sup. 09 (Conn., 1943)	19
rroll v.Skloff, 415 Pa. 47, 02 A.2d 9 (1964)	48
ty of New York v. Wyman, ew York Law Journal (May 19, 971)	9
hen v. Chesterfield County chool Board, Civ. Action o. 678-70-R (E.D.Va., May 17, 971)	18,26,27-8
lgrove v. Green, 328 U.S. 549 1946)	45
e v. Dunbar, Civ. Action C-2402 (D.Colo.)	2
e v. Scott, Civ. Action 70 C 395 (E.D.Ill., January 29, 971)	2, 8
uglas v. California, 372 U.S. 53 (1963)	25
rham v. Pulsiter, 312 F.Supp. 11 (D.Vt., 1970)	16

Cases Cited (Cont'd)

Dyson v. Stein, 91 S.Ct. 769 (1971) ----

Endresz v. Friedberg, 24 N.Y.2d 478, 301 N.Y.S.2d 65 (1969) ----------

Everson v. Board of Education, 330 U.S. 1 (1947) ----------

Ex Parte Young, 209 U.S. 123 ------

Fletcher v. State, 362 S.W.2d 845 (Cr.App.Tex., 1962) ----------

Gomillion v. Lightfoot, 364 U.S. 339 (1960) ----------

Graf v. Taggart, 43 N.J. 303, 204 A.2d 140 (1964) ----------

Grape v. Brown, 231 So.2d 663 (Ct.App.La., 1970) ----------

Gray v. Sanders, 372 U.S. 368 (1963) ----------

Griffin v. Illinois, 351 U.S. 12 (1956) ----------

Griffin v. Tatum, 300 F.Supp. 60 (M.D.Ala., 1969) ----------

Griswold v. Connecticut, 381 U.S. 479 (1965) ----------

Gruenwald v. Gardner, 390 F.2d 591 (2d Cir., 1968) ----------

Hargrove v. Lloyds Casualty Company of New York, 66 S.W.2d 446 (1953) -----

Cases Cited (Cont'd)

	Page
Hemans v. United States, 163 F.2d 228 (6th Cir., 1947)	38
Hernandez v. Texas, 347 U.S. 475 (1954)	25
Hodgson v. Randall, 7 Cr.L. 2186 aff'd 91 S.Ct. 1656 (1971)	2
Home of Holy Infancy v. Kaska, 397 S.W.2d 208 (Tex., 1965)	29
In re Carl, 174 Misc. 955, 22 N.Y.S.2d 782 (Dom.Rel., 1940)	39
In re Roe, 92 N.Y.S.2d 882, 883, 196 Misc. 830 (Dom.Rel.Ct., 1949)	39
Janello v. Administrator Unemployment Compensation Act, 178 A.2d 282, 23 Conn.Sup. 155 (Conn., 1961)	18
Kennan v. Nichol, 71-C-118 (W.D.Wisc.)	2
Keyes v. Construction Service, 340 Mass. 633, 165 N.E.2d 912 (1960)	48
Kirstein v. Rector and Visitors of the University of Virginia, 309 F.Supp. 184 (E.D.Va., 1970)	25
Labine v. Vincent, 91 S.Ct. 1017 (1971)	49-50
LaFleur v. Cleveland School Board of Education, Civ. Action No. C-71-292 (N.D.Ohio, May 27, 1971)	27

Lane v. Phillips, 6 S.W.2d 208 (Tex., 1965) ----------

Lenz v. Admistrator Unemployment Compensation Act, 16 Conn. Supp. 482 (Super. Ct., 1951) ----------

Levy v. Louisiana, 391 U.S. 68 (1968) ----------

Loving v. Virginia, 388 U.S. 1 (1967) ----------

Lukienchuk v. Administrator Unemployment Compensation Act, 176 A.2d 892, 23 Conn.Supp.85 (Supp. Ct., 1961) ----------

Madera v. Board of Education of the City of New York, 386 F.2d 778 (2d Cir., 1967) ----------

Mengelkoch v. Industrial Welfare Commission, 437 F.2d 563 (9th Cir., 1971) ----------

Meyer v. Nebraska, 262 U.S. 390 (1823) ----------

Mississippi Employment Security Commission v. Corley, 148 So. 2d 715 (Miss., 1963) ----------

Muller v. Oregon, 208 U.S. 412 (1908) ----------

Norman v. Murphy, 124 Cal.App.2d 95, 268 P.2d 178 (Dis.Ct.App., 1954) ----------

Cases Cited (Cont'd)

	Page
lko v. Connecticut, 302 U.S. 19 (1937) ----------	20
tterson v. Liberty Mutual nsurance Co., 147 S.E.2d 4 (1966) ----------	50
ople v. Edwards, 42 Misc.2d 30, 249 N.Y.S.2d 325 (1964) ----	29
ople v. Robb, #149005 and 59061, Munic.Ct. Orange Co., al. (January 9, 1970) ----------	2,56
rlman v. United States, 247 .S. 7 (1918) ----------	58
rry v. Grenada Municipal eparate School District, 300 .Supp. 748 (N.D.Miss., 1969) ---	21
llips v. Martin Marietta, l F.2d 1 (5th Cir., 1969), emanded, 91 S.Ct. 496 (1971) ---	20,28,30
ssy v. Ferguson, 163 U.S. 537 1896) ----------	45
v. Ullman, 367 U.S. 497 (1961)-	15
ers v. City of Troy, 4 Mich. p. 572, 145 N.W.2d 418 (1966) --	48
chenberg v. Nelson, 310 F. pp. 248 (D.Nebr., 1970) --------	16
nolds v. Sims, 377 U.S. 533 964) ----------	31
nolds v. United States, 98 S. 145 (1878) ----------	54

Cases Cited (Cont'd)

	Page
Robinson v. California, 370 U.S. 660 (1962)	36
Roe v. Wade, 314 F.Supp. 1217 (N.D.Tex., 1970) jurisdiction noted, 91 S.Ct. 1610 (1971)	8
Rogers v. Danforth, Civ Action No. 18360-2 (W.D.Miss.)	2
Rosen v. Louisiana State Board of Medical Examiners, 318 F.Supp. 1217 (1970)	2
Ryan v. Spector, 70-2527 (E.D.Pa.)-	1
Sail'er Inn v. Kirby, #29811 Sup.Ct.Calif. (May 27, 1971)	25
Schattman v. Texas Employment Commission, Civ. Action No. A-70-Ca-75 (W.D.Tex., February 25, 1971 and April 16, 1971)	17
School District of Abington Township v. Schempp, 374 U.S. 203 (1965)	53
Seidenberg v. McSorely's Old Ale House, Inc., 317 F.Supp. 593 (S.D.N.Y., 1970)	25
Shapiro v. Thompson, 394 U.S. 618 (1969)	25
Skinner v. Oklahoma, 316 U.S. 535 (1942)	31
Smith v. Hill, 285 F.Supp. 556 (D.N.C., 1968)	21

Cases Cited (Cont'd)

	Page
ith v. Texas, 233 U.S. 630 (1914) --	14
uth v. Peters, 339 U.S. 276 (1950)--	45
uth Dakota v. Munson, Circuit t., Pennington Cty. (S.D. pril 20, 1070) ----------	2,18,55
ate v. Hunter, 300 P.2d 445, 08 Ore. 282 (Ore., 1956) ----------	31
einberg v. Rhodes, C-70-289 N.D.Ohio) ----------	2,
kahashi v. Fish and Game ommission, 334 U.S. 410 (1945) -----	25
orpe v. Housing Authority, 393 .S. 268 (1969) ----------	23
op v. Dulles, 356 U.S. 86 (1958)----	36,42,43
lman v. Ullman, 151 A.D. 419, 35 N.Y.S. 80 (1912) ----------	39
ited States ex rel. Robinson v. ork, 281 F.Supp. 8 (D.Conn., 968) ----------	25
ited States v. Vuitch, 05 F.Supp. 1032 (D.D.C., 1969) eversed on other grounds 91 S.Ct. 294 (1971)----------	8
isingham v. Florida, Case No. 40,210 .Ct.Fla., July 12, 1971) ----------	2,8-9,24 35, 46, et passim
ms v. United States, 217 U.S. 49 (1910) ----------	35,36,40, 42

Page

Westley v. Rossi, 305 F.Supp. 706 (D.Minn., 1969) ---------- 16

White v. Crook, 251 F.Supp. 401 (M.D.Ala., 1966) ---------- 25

Women of Rhode Island v. Israel, Civ. Action #4605 (D.R.I.)------ 1

Yick Wo v. Hopkins, 118 U.S. 356 (1886) ---------- 25

Younger v. Harris, 91 S.Ct. 746 (1971) ---------- 57

Zwickler v. Koota, 381 U.S. 241 (1967) ---------- 59

AUTHORITIES CITED

American Women: Report of the President's Commission on the Status of Women, 1963 ---------- 22

Cisler "Unfinished Business: Birth Control and Women's Liberation," Sisterhood is Powerful, ed. Robin Morgan, Random House, 1970 ---------- 55

"Competitive Problems in the Drug Industry", Subcommittee on Monopoly of Senate Select Committee on Small Business, 91st Cong. 2nd Sess. ---------- 12

COPY BOUND TOO CLOSE IN CENTER

Authorities Cited (Cont'd)

	Page
nan, Robert F., S.J., "The orality of Abortion Laws," Cath. Lawyer 190 (Summer, 968) ----------	51
dman, Rabbi David M., Birth ontrol in Jewish Law, New ork University Press, 1967)-----	52,53
RYOU, 1964, Youth in the Ghetto .Y. Orans Press ----------	21
vamann, Ernest, A Special Report: irth Control, Time-Life Inc., ew York (1967) ----------	11
lfer, The Battered Child, niversity of Chicago Press 968 ----------	39
der, Lawrence, Abortion, Beacon ress, 1966 ----------	44, 52
cas, Roy, "Federal Constitu- ional Limitations of the En- orcement and Administration f State Abortion Statutes, 6 N.C.L. Rev. 732 (June 968) ----------	44
ans, Cyril C., Jr., "The Law f New York Concerning Abortion nd the Status of the Fetus 664-68: A Case of Cessation of onstitutionality," N.Y.L.F. 11 F. '68 ----------	44,49,52
ore, Emily, Induced Abortion nd Contraception, Workshop of ational Institute of Child Health Human Development and National nstitute of Mental Health, ber 15-16, 1969, p. 12 -------	13

BLEED THROUGH

Authorities Cited (Cont'd)

	Page
New York Times, "Compromise Warning on Birth Pill Announced," April 8, 1970	12
New York Times, "Warning on Pill Drafted by F.D.A." March 5, 1970	12
Pratt, Rappaport & Barlow, Arch. Gen. Psychiat. 20:408-414 (1969)	41
Rosen, Harold, M.D. "Psychiatric Implications of Abortion," A Case Study of Social Hypocrisy, 17 Wes. R.L. Rev. 454	22
Schulder & Kennedy, Abortion Rap, McGraw Hill, 1971	34, 41
Sinclair, Andrew, The Emancipation of the American Woman, Harper Colophon Books, New York (1966)	24
Studies in Family Planning, 34:6-8 September 1969, Population Council, New York	10
Study of Employment of Women in Federal Government, 1968; U.S. Civil Service Commission, Manpower Statistic Division, Washington, D.C.	30
Tietze, Dr. Christopher, Legal Abortion in Eastern Europe, J.A.M.A., 175:1149 (1961) April	10
Victory How Women Won It, National American Women Suffrage Association, A Centennial Symposium, 1840-1940, H.W. Wilson Co., 1940	24

STATUTES CITED

	Page
Georgia Code Annotated § 26-1201 et seq. ----------	3
Tex.Penal Code Articles 1191, 1192, 1193, 1194 & 1196 ---	3

STATEMENT OF INTEREST

During the past two years the question of the onstitutionality of abortion laws - of the right of woman to control her own body and life - has become ne of the most burning issues for women throughout he country. As women have become aware of the myriad evels of unconstitutional discrimination they face aily, they have become most acutely aware of the pri- ary role which restrictions on abortions plays in hat discrimination. As a result, women throughout he country have become determined to free themselves f the crippling and unconstitutional restrictions on heir lives. As a major part of their efforts, thou- ands of women have sought and continue to seek the id of federal and state courts in their challenges o abortion statutes. In New York State, more than hree hundred persons, primarily women sued to have heir state laws declared unconstituional. Abramo- icz v. Lefkowitz, 69 Civ. 4469 (S.D.N.Y.), dismissed s moot on July 1, 1970 when the New York State Sta- ute went into effect permitting the performance of bortions up to twenty-four weeks of pregnancy. In ew Jersey more than one thousand women sought the aid f the federal courts. Abromowitz v. Kugler, 431-1970 .N.J, argued in December, 1970, and awaiting de- ision. In Pennsylvania again well over one thousand ersons, most of whom were women, similarly sought the id of the court in Ryan v. Spector, 70-2527, E.D.Pa. ee also Connecticut, where 858 women sued in Aberle . Markel, Civ. Action #14291 D.Conn. (May 14, 1971), ismissed, presently on appeal; and Rhode Island, here over one hundred took similar action in Women of hode Island v. Israel, Civ. Action #4605 (D.R.I.) in hich a three judge court has been convened.*

These actions by women are only a portion of the weeping challenges on the abortion laws of this coun- ry which have taken place in the last two years. The ollowing is a partial list of such challenges. Cali- ornia v. Belous, 80 Cal. Rptr. 354 (1969), cert.

(footnote continued following page)

Similar efforts to challenge the abortion laws of their states are being developed by women in other states throughout the country. These women have sought the assistance of the federal courts because of the degree to which restrictions on the availability of abortion have crippled and even destroyed their own lives and lives of many other women.

The organizations listed below share the concern of these thousands of women who have sought the assistance of the courts. Each of the groups has a particular concern to see that these unconstitutional burdens and restrictions on a woman's life be removed.

The issues raised by the Texas and Georgia cases presently before this Court are not local

---

(fn. continued from preceding page)
denied, 397 U.S. 915 (1970); People v. Robb, #149005 and 159061, Munic.Ct., Orange Co.Cal. (Jan. 9, 1970); Babbitz v. McCann, 310 F.Supp. 293 (E.D.Wisc., 1970), remanded 91 S.Ct. 1375 (1971); Kennan v. Nichol, 71-C-118 (W.D.Wisc.); Hodgson v. Randall, 7 Cr. L.2186, affirmed, 91 S.Ct. 1656 (1971); Hodgson v. Minnesota, cert. denied, 41 S.Ct. 1655 (1971); Doe v. Scott, Civ. Action #70 C 395 (E.D.Ill.); Rosen v. Louisiana State Board of Medical Examiners, 318 F.Supp. 1217 (1970), upholding the constitutionality of the Louisiana statute, Cassibry, J., dissenting. Rogers v. Danforth, Civ. Action No. 18360-2 W.D.Miss. dismissed September 10, 1970; Steinberg v. Rhodes, C-70-289, W.D.Ohio; Doe v. Dunbar, Civ. Action #C-2402, D.Colo.; South Dakota v. Munson, Circuit Ct., Pennington Cty. S.D., April 20, 1970; Walsingham v. Florida, No. 40,210 (Sup.Ct.Fla., July 12, 1971).

but national issues. The problems raised by restrictive abortion laws are problems of millions of pregnant women.*

Therefore, Amici have drawn on cases and statutes throughout the country in order to aid this Court in deeply and fully understanding the problem before it.

The New Women Lawyers is an unincorporated membership association of women lawyers and law students in the New York City area.

Amongst its purposes is to work through the courts to redress the discrimination and oppression which women face under the law.

As women lawyers and law students amici are both members of the class whose interests are before this Court and advocates for that class. Therefore, amici have special insight into the problems and issues presented in the two abortion cases which may be of assistance to the Court.

The Women's Health and Abortion Project, Inc., is a non-profit corporation in the State of New York which grew out of the challenge to the constitutionality of the former New York abortion statute. Amongst the purposes of the Project is to counsel, and provide information to women concerning family planning and abortion without fee. Since the liberalized New York abortion law went into effect on July 1,

---

* There are three basic types of laws used throughout the United States to prevent the performance of abortion, laws permitting the performance of abortion, a) only when necessary to save the life of the woman, b) when necessary to preserve her life and health and c) the "reform type law which permits abortion for reasons of life and health, as well as when the fetus resulted from rape, incest or when

(fn. continues on next page)

1970, the Project has counselled thousands of desperate women from across the country who came to New York seeking abortions. The women's Health and Abortion Project therefore has particular concern for and understanding of the problems of women in need of abortion and is particularly concerned with the infringement of women's rights by laws such as those of Georgia and Texas restricting the availability of abortion to women.

The Women's National Abortion Action Coalition is a coalition of women's groups and individual women throughout the country who have united in efforts to eliminate all abortion laws. Many of the individual women within the Coalition are plaintiffs in class action litigation challenging the constitutionality of the abortion laws of their own states. Many others work with pregnancy counseling groups and are members of women's groups whose prime concern is the elimination of discriminatory laws such as abortion laws.

Therefore, the Coalition is particularly concerned about the issues presented in the two cases before this Court and well suited to understand and present to this Court, to the fullest extent, the tolls which these laws take on the lives of women.

Amici believe that their special perspective on the constitutional issues before this Court will be of assistance to this Court in its deliberations on one of today's most sensitive issues -- an issue of overwhelming importance to

---

(fn. continued from preceding page)
there is a likelihood of fetal deformity, etc. In discussing the constitutional infirmities of abortion laws, amici have not distinguished among the different types of laws because regardless of their wording their effect has all been the same -- to deny an abortion to nearly every woman who wishes one.

more than 50% of the nation's population. Amici have sought to present aspects of the issue involving the constitutional rights of women which they believe have not been treated by the parties to this litigation or by other amici such as the manner in which the challenged Texas and Georgia statutes deprive women of their rights to life, liberty and the equal protection of the laws guaranteed by the Fourteenth Amendment and the degree to which they constitute cruel and usual punishment in violation of the Eighth Amendment to the Constitution.

Amici therefore, urge this Court to accept their Brief Amicus in the hope that it will be of assistance in unravelling the crucial constitutional issues before this Court.

SUMMARY OF ARGUMENT

This is a brief Amicus in support of actions challenging the constitutionality of the abortion statutes of Georgia, Georgia Code Annotated § 26-1201 et seq. (1969); and Texas, Texas Penal Code Articles 1191, 1192, 1193, 1194 and 1196. The Texas statute permits abortion only when necessary to preserve the life of the pregnant woman. Under the Georgia statute a woman may obtain an abortion only with the approval of a committee of doctors where the abortion is necessary to preserve her life or health, or when the pregnancy resulted from rape, or would result in a deformed child.

Amici have argued that both statutes are void in that they violate the most basic constitutional rights of women.

First, the Texas and Georgia statutes and other statutes which restrict the availability of abortion, deny to women their right to control and direct their lives and bodies as protected by the Fourteenth Amendment's guarantees of life and liberty. Amici have attempted to set forth for this Court the manner in which the status of pregnancy and motherhood severely restricts the life of a woman the way in which an unwanted pregnancy can unalterably change and even destroy her life.

Amici have next shown that despite the fact that both man and woman are responsible for any pregnancy, it is the woman who bears the disproportionate share of the de jure and de facto burdens and penalties of pregnancy, child birth and child rearing. Thus, any statute which denies a woman the right to determine whether she will bear those burdens denies her the equal protection of the law.

Carrying, giving birth to, and raising an unwanted child can be one of the most painful and longlasting punishments that a person can endure. Amici have argued that statutes which condemn women to share their bodies with another organism against their will, to be child breeders and rearers against their will, violate the Eighth Amendment's proscription against cruel and unusual punishment.

Finally, amici contend there is no compelling state interest in forcing a woman to these deprivations of her constitutional rights. For, it is no longer possible to justify a ban on abortions to protect a woman's health and such a ban is a consitutionally unacceptable method to use to establish a particular moral standard. Furthermore, the argument that the state must protect the life of the fetus when examined closely is in reality a codification of a particular religious doctrine and therefore constitutionally insufficient.

In closing, amici have urged that the doctrine of Younger v. Harris does not bar the Court from deciding this matter before it for in fact Mary Doe in Doe v. Bolton and Jane Roe in Roe v. Wade may not challenge the abortion statutes of Georgia and Texas in state criminal proceedings as envisioned in Younger and must turn to the Federal Courts to safeguard their constitutional rights.

I. THE GEORGIA AND TEXAS STATUTES RESTRICTING THE AVAILABILITY OF ABORTION VIOLATE THE MOST BASIC RIGHTS OF WOMEN TO LIFE, LIBERTY AND PROPERTY GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION.

Under the Fourteenth Amendment to the Constitution, no state shall "...deprive any person of life liberty, or property without due process of law." The courts have not yet, however, begun to come to grips with the fact that approximately one half of our citizenry is systematically being denied those guarantees of the Fourteenth Amendment. That is exactly the effect of the abortion laws of Texas and Georgia, and nearly every other state in the United States. Amici urge this Court not to shrink from redressing the constitutional wrongs perpetrated on women.

For the first time, this Court has the opportunity to give serious and full consideration to the degree to which laws such as those challenged herein, in denying women the control of their reproductive lif violate their most basic constitutional rights.

In the past two years, the Supreme Court of the State of California, the United States District Court for the District of Columbia below, and the Municipal Court of Central Orange County, California, recognized that it is "the fundamental right of the woman to choose whether to bear children...." California v. Belous, 80 Cal. Rptr. 354, 359 (1969), Cert. Denied 397 U.S. 915 (1970). See also, United States v. Vuit 305 F.Supp. 1032 (D.D.C., 1969) reversed on other grounds, 91 S.Ct. 1294(1971); Roe v. Wade, 314 F.Supp. 1217 (N.D. Tex.,1970) jurisdiction noted, 91 S.Ct.161 (1971); Babbitz v. McCann, 310 F.Supp. 293 (E.D.Wisc. 1970) remanded 400 U.S. 1 (1971); South Dakota v. Munson, 7th Jud'l District, Pennington Co., S.Dak. (1970); Doe v. Scott, #70 C 395 (N.D.Ill.) Jan 29, 1971; California v. Robb, #140,005 Mun. Ct., Orange Co., Cal., Jan 9, 1970, and most recently, Walsingha

Florida, #40,210, Sup.Ct. Fla.,(July 12, 1971) which
rturned convictions of three men convicted of con-
ring to commit abortion and cast severe doubt on the
stitutionality of the Florida statute, and City of
York v. Wyman, reported in full, New York Law Jour-
May 19, 1971, invalidating state restrictions on
icade reimbursement for abortions. In Wyman, Justice
egel spoke of "... the fundamental nature of the
ht to terminate pregnancy" and stated that "a woman
a Constitutional right pursuant to the United States
stitution Amendments IX and XIV to terminate an un-
ed pregnancy."

The decision by a woman of whether and when
will bear children may be the most fundamental de-
ion of her life because of its far-reaching signi-
nce, affecting almost every aspect of her life from
earliest days of her pregnancy.

A. The Right to Life.

Persons seeking to uphold restrictive abo laws argue that the State has a compelling interes protecting human life. Amici could not agree more. But, we argue that the responsibility of the State to persons who are living and that the State may n maintain laws which effect the most serious invasi of the constitutional rights of its citizens.

From the very fact, as noted by the Calif Supreme Court in Belous, that "childbirth involves risk of death", California v. Belous, supra at 359, should be most obvious that laws which force wome bear every child she happens to conceive raises th severe constitutional questions under the Fourteen Amendment.

Nearly ten years ago a medical expert rep that "the risk to life from an abortion, performed an experienced physician in a hospital on a health woman in the first trimester of pregnancy is far smaller than the risk ordinarily associated with p nancy and childbirth. (Dr. Christopher Tietze, Leg Abortion in Eastern Europe J.A.M.A. 175:1149 (1961 April). A recent study of the death rate from chi birth in the United States revealed that there are still 20 deaths per 100,000 pregnancies among Amer women. Studies in Family Planning, 34:6-8 Septem 1969, Population Council, New York. The same study ported that the death rate due to legalized aborti performed in hospitals in Eastern Europe is 3 per 000 pregnancies. And so, in the United States tod giving birth is nearly 7 times more dangerous than therapeutic abortion.

Furthermore, if a woman truly believes sh should not continue an unwanted pregnancy and give birth to and raise an unwanted child, she will not be deterred by the fact that an abortion in her ci curmstances would be illegal. She will do this de spite the great hazards to her physical and mental health -- and the great financial expense involved

will do this even though she knows that under lo- law she is performing a criminal act.

The very fact that legal abortion is unavail- e for most women forces them into an additional ha- d to their health and life. Aware of the failure e of most contraceptives* and afraid of an acciden- pregnancy which they will be unable to terminate, llions of women daily expose themselves to the known as yet unknown dangers of the pill** even though y would prefer not to.

---

*There is no such thing as a contraceptive device ch is both 100% safe and 100% effective. Oral traceptives, which have the highest degree of ef- tiveness are the least safe. However, for a va- ty of reasons, 15-28% of the women who use the pill p taking it after two years. The interuterine de- e (I.U.D.) is not 100% effective though its fail- rate has not yet been fully determined. However, date, 50% of the women who use the I.U.D. have it oved within two years. Sheldon J. Segal, PhD, ulation Council, and Christopher Tietze, M.D. Pop- tion Council, "Contraceptive Technology, Current Perfected Methods, Reports of Population Family nning," issued by the Population Council and the ernational Institute for the Study of Human Re- duction, Columbia University, October 1969, pp. 9 7.

The failure rate for the diaphragm is 12% (that is, 100 women using the diaphragm in a year, twelve en will become pregnant). The failure rate for the dom is 14%. Ernest Havamann, Ed., Time-Life, Inc. pecial Report: Birth Control, New York, 1967, p. 159.

** Although there are not yet definitive conclusions cerning the dangers of oral contraceptives, their ety and general effects on women are sufficiently question to have warranted full-blown Senate hear- by the Subcommittee on Monopoly of the Senate ect Committee on Small Business which began in

(fn. continues on next page)

BLEED THROUGH

The fear of accidental pregnancy is so great that even women who have medical histories that indicate that they should not take oral contraceptives

---

(fn. continued from preceding page)
January 1970, and continued in February and March. See "Competitive Problems in the Drug Industry," Subcommittee on Monopoly of Senate Select Committee on Small Business, 91st Cong. 2nd Sess. Although there has been a conflict of medical and scientific opinion expressed at the hearings, the response of the government to the question seems to be markedly casual in contrast with its swift action on a somewhat related matter -- cyclamates. It certainly leads women to believe that their government is less concerned with their health and safety than with curbing population or with health matters which also affect men. This concern on the part of women was not eased when they observed the action of the Food and Drug Administration with respect to warnings about possible dangers of birth control pills. Following the first part of the Senate hearings the F.D.A. ordered that a leaflet listing in detail the dangers of oral contraceptives be enclosed in each package of pills. New York Times, "Warning on Pill Drafted by F.D.A.", March 1970. Only one month later the Department of Health Education and Welfare announced that a "compromise" warning would be used. A warning "far shorter and less emphatic about dangers than [the] earlier version." The compromise version not only eliminated nearly the entire list of potential hazards, merely noting there might be side effects and further stated, without any basis in fact, "'These points were discussed with you when you chose this method of contraception.'" New York Times, "Compromise Warning on Birth Pill Announced" April 8, 1970.

el compelled to do so.*

Thus while governments profess their overelming concern for human life, they force their male citizens into the intolerable dilemma of oosing between what in many instances would be a tally irresponsible act of bearing and casting f, or even "raising" an unwanted child or jeoardizing their life and health, both physical d mental, by obtaining an illegal abortion or ttempting to self-abort. What is more, this prossed concern for life in fact results in hazards women's lives, often forcing them into the hands unskilled and unscrupulous persons directly in e face of the guarantees of the Fourteenth endment.

---

* It may be reassuring to note that a high use of bortion is generally coupled with a high use of ontraception. That is, women who use contraceptives have "a higher motivation toward fertility ontrol. They are likely to resort to abortion when ontraceptive efforts fail. The greater the expectation of avoiding pregnancy through contraception he greater the likelihood of an induced abortion nce pregnancy occurs..." "What is more, liberalization of abortion laws tends to accompany an increase in the use of contraceptives." Induced Abortion and Contraception, paper delivered by Emily oore at Workshop of National Institute of Child ealth and Human Development and National Institute f Mental Health, December 15-16, 1969, p. 12.

B. The Right to Liberty

If the Fourteenth Amendment and its guarante
are to have any real meaning for women, they must no
be read to protect only women's physical survival.
Fourteenth Amendment speaks not merely of life, but
life and liberty. For the framers of our constituti
recognized well that it is not life alone which must
protected, but also personal liberty and freedom. B
cause of that fact, the Constitution has established
quirements that neither life nor liberty may be denie
a person without the guarantees of due process.
As the Court of Appeals for the Second Circuit state
in Madera v. Board of Education of the City of New Y
386 F.2d 778, 783-4(2nd Cir., 1967), invoking a long
standing constitutional principle:

> '...The 'liberty' mentioned in [the Fourteenth]
> Amendment means, not only the right of the
> citizen to be free from the mere physical re-
> straint of his person by incarceration, but
> the term is deemed to embrace the right of th
> citizen to be free in the enjoyment of all hi
> faculties; to live and work where he will; to
> earn his livelihood by any lawful calling; to
> pursue any livelihood or avocation....' Allgey
> v. State of Louisiana, 165 U.S. 578, 589, 17
> S.Ct. 427, 37 L.Ed. 832 (1897).

The right of liberty is one which is complex
closely related to other rights protected by the Con
tution. As stated by this Court in Smith v. Texas,
U.S. 630, 636 (1914),

> Liberty means more than freedom from servitu
> and the constitutional guaranty is an assura
> that the citizen shall be protected in the
> to use [her] powers of mind or body in any l
> ful calling.

The right of liberty has long been seen by thi
Court as one which is basic to matters of family and

ildren. In Meyer v. Nebraska, 262 U.S. 390, 399 (1823) is Court stated

> Without doubt 'liberty' denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, and acquire undue knowledge, to marry, establish and home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

should go without saying that the liberty to establish home and bring up children is nearly meaningless if it es not include the liberty to decide when and whether have those children. Of course, this right to control e timing of one's family is now express in Griswold v. nnecticut, 381 U.S. 479 (1965).

Even this does not circumscribe the limits of berty, however. As Justice Douglas expressed in his ssent in Poe v. Ulman, 367 U.S. 497, 516 (1961):

> Though I believe that 'due process' as used in the Fourteenth Amendment includes all of the first eight Amendments, I do not think it is restricted and confined to them.... The right 'to marry, establish a home and bring up children' was said in Meyer v. Nebraska ... to come within the 'liberty' of the person protected by the Due Process Clause of the Fourteenth Amendment.... 'Liberty' is a conception that sometimes gains content from the examinations of other specific guarantees... or from experience with the requirements of a free society.

st recently the understanding of personal liberty has me to include such matters as physical appearance -- e way in which a person presents himself or herself

to the world. In Breen v. Kahl, 296 F.Supp. 702, [illegible] (W.D.Wisc., 1969), aff'd 419 F.2d 1034 (7th Cir., 1969) the court ordered the reinstatement of high school students whose hair length did not conform to the school board standard stating:

> The freedom of an adult male or female to present himself or herself physically to the world in the manner of his or her own choice is a highly protected freedom....
>
> For the state to impair this freedom, in the absence of a compelling subordinating interest in doing so, would offend a widely shared concept of human dignity, would assault personality and individuality, would undermine identity, and would invade human 'being'. It would violate a basic value 'implicit in the concept of ordered liberty'. Palko v. Connecticut, 302 U.S. 219, 325....
>
> It would deprive a man or woman of liberty without due process of law in violation of the Fourteenth Amendment. See Griswold, 381 U.S. at 499-500 (Harlan, J., concurring).

Accord, Griffin v. Tatum, 300 F.Supp. 60 (M.D. Ala., 1969); Westley v. Rossi, 305 F.Supp. 706 (D. Minn., 1969); Durham v. Pulsiter, 312 F.Supp. 411 (D. Ut., 1970); Reitenberg v. Nelson, 310 F.Supp. 248 (D. Nebr., 1970).

The concept of the right to liberty is one which has developed from the right to contract in Allgeyer, to the right to raise a family in Meyer, to the right to control one's own appearance in Breen. Surely none of these rights can be seen as more basic, fundamental or worthy of protection than a woman's right to control her body and the nature, direction and quality of her life.

In light of this understanding of the meaning of the guarantees of the Fourteenth Amendment, it is even

COPY BOUND TOO CLOSE IN CENTER

re critical that this Court carefully examine the ways which women are systematically deprived of their rights the abortion laws of Texas and Georgia as well as those nearly every state in the nation.

It should be obvious that from the moment a wo- n becomes pregnant her status in society changes as a sult of both direct and indirect actions of the govern- nt and because of social mores. Except in very rare ses (primarily among the wealthy) she is certainly no nger "free in the enjoyment of all [her] faculties; ... ee to use them in all lawful ways; to live and work ere [she] will; to earn [her] livelihood by any lawful lling; to pursue any livelihood or avocation...". Ma- ra v. Board of Education of the City of New York, su- a at 783-4.

Pregnancy, from the moment of conception, severe- limits a woman's liberty. In many cases of both pub- ic and private employment women are forced to temporar- ly or permanently leave their employment when they become regnant. The employer has no duty to transfer a preg- ant woman to a less arduous job during any stage of preg- ancy (should the woman or her doctor consider this advi- able); nor is there any statutory duty to rehire the wo- an after she gives birth. For example, under the New ork State Civil Service Law, Rule 3, a female employee ust report her pregnancy to the appointing authority ot later than the fourth month. The appointing au- hority then may in his discretion "...place the em- loyee on leave at any time when in its judgment the he interest of either the department or the employee ould be best served." [emphsis supplied] There is o indication that the employee's medical condition s the critical factor and there are no standards on hich the decision in made. What is plain is that re- ardless of whether the woman wishes and/or needs to ontinue working, regardless of whether she is physi- ally capable of working, she may nonetheless be re- uired to stop working solely because of her pregnancy. n many if not most states women who are public em- loyees are compelled to terminate their employment t some arbitrary date during pregnancy regardless of

BLEED THROUGH

whether they are capable of continuing work. See for example Cohen v. Chesterfield County School Board, Civil Action No. 678-70-R (E.D.Va.) May 17, 1971; Schattman v. Texas Employment Commission, Civil Action No. A-70-CA-75 (W.D.Tex.) February 25, 1971; and LaFleur v. v. Cleveland School Board of Education, Civil Action No. C-71-292 N.D. Ohio, May 27, 1971.

In Connecticut a directive from the Attorney General in 1938 stated that a pregnant woman could not be employed "during the four weeks previous to and following her confinement." This rule still exists. In fact, such employment is a criminal offense (directed against the employer). This denial of liberty in one's work is accompanied by an unconstitutional taking of property, for Connecticut provides no maternity benefits. A woman is also denied unemployment compensation during her last two months of pregnancy, even when her unemployment is due to some reason other than pregnancy. CGST 31-236(5). Janello v. Administrator, Unemployment Compensation Act, 178 A.2d 282, 23 Conn. Supp. 155 (1961). If "total or partial unemployment is due to pregnancy," the woman is completely ineligible for benefits. Janello, supra at 156. Even worse, the employer has the absolute, arbitrary right to fire a pregnant woman when, in his estimation, her pregnancy would interfere with her work. Janello, supra at 157.

In Louisiana a recent amendment in 1968 of L. S.A.- R.S. 23:1601(6)(b) enables a woman who is forced to leave her employment either by contract or otherwise on account of pregnancy, to qualify for unemployment compensation. But, as illustrated in the case of Grape v. Brown, 231 So. 2d 663 (Ct. App. La., 1970) the unemployment compensation in no way adequately compensates either for the actual wages lost, or for the denial of liberty which forces a woman to receive unemployment compensation. Mary Grape was employed as a key punch operator by Southwestern Electric Power Co. When she became pregnant she was advised that the company policy required that expectant mothers terminate employment no later than the end of the 150th

COPY BOUND TOO CLOSE IN CENTER

ay of pregnancy and that no leaves of absence would e granted. Thus she was forced onto unemployment ompensation and had lost her job.

Mississippi laws curtail even more severely he liberty of a woman and her property. Sec. 7379(a), iss. Code 1942 Rec. states that a married woman who as left work because of pregnancy is considered to ave voluntarily severed her employment without good ause and therefore is not even entitled to unemployent compensation. See Mississippi Employment Security Commission v. Corley, 148 So.2d 715 (Miss., 1963). hus, the pregnant woman loses her job, her source of ncome, and is forced to become economically dependent n others. The law is most harsh on pregnant women ho are heads of households, and depended upon as readwinners. Statistics show that a very high perent of all working women are in this position, i.e. hey must work to support themselves and/or their hildren.

But restrictions on a woman's liberty and proerty only begin with pregnancy. A woman worker with hildren is considered "unavailable for work" (which eans that she cannot qualify for unemployment compensation), if she restricts her hours of availability to late afternoon and night shifts so that she ay care for her children during the day. Connecticut courts have often held that "domestic responsibilities" are "personal reasons unrelated to employment," Lukenchuk v. Administrator, Unemp. Comp. Act, 176 A.2d 892, 23 Conn. Sup. 85 (Super. Ct., 1961) or "entirely disconnectied from any attribute of employment" Lenz v. Administrator, Unemp. Comp. Act, 17 Conn. Sup. 315 (Super. Ct.,1951). In one decision the court said that a woman had just five weeks to try to rearrange her life and her domestic responsibilities to try to make herself "available for work" according to Connecticut standards (i.e. ready to work at all hours of the day.) There is only one case that held that a woman who restricted her availability for personal reasons was entitled to unemployment compensation. The woman had seven children. Carani v. Danaher, 13 Conn. Supp.109(Super. Ct.,1943).

BLEED THROUGH

But the dominant belief is that a woman's "personal reasons" (in most cases, "domestic responsibilities") for seeking work during specific hours are not relevant to employment. Thus, women with home responsibilities (children or husband) -- who need or want to work -- are considered "unavailable for work." They are denied the freedom "to live and work where they will, to earn their livelihood by any lawful calling" Allgeyer v. Louisiana, supra and "to engage in any of the common occupations of life" Meyer v. Nebraska, supra -- freedoms that are implicit in the Fourteenth Amendment's "concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319(1937). It becomes clear from Connecticut decisions on pregnant working women that the State of Connecticut considers pregnancy a "malady." Adams v. American Fastener Co., 7 Conn. Supp. 379(1939). Under these circumstances, a case can well be made that the anti-abortion law, in compelling a pregnant woman to continue this condition against her wishes, is not merely a denial of liberty, but also an imposition of cruel and unusual punishment on the woman. See Section III infra. "Confinement" well describes the situation of the pregnant woman, or mother, who is denied work, or restricted in her work because of an employer's decision on her ability to work.

Here we see how inextricably the rights to life and liberty are mixed and even more how laws restricting abortion deny women both.

Once a woman has given birth, according to the Court of Appeals for the Fifth Circuit, she may still be barred from employment as long as she has pre-school children. Phillips v. Martin Marietta Corp., 411 F.2d 1 (5th Cir., 1969). See Section II, infra, for a discussion of the treatment of Phillips by this Court. Furthermore, if she needs or merely wishes to work while she has pre-school children she cannot unless she is fortunate enough to have family who will care for the children or is wealthy enough to hire help. And, though a housekeeper, nurse, or baby sitter is a necessary expense enabling her to work, she may not deduct the salary of that person from her income tax 26 U.S.C.

COPY BOUND TOO CLOSE IN CENTER

214 and thus is normally left with little if any of her pay after those expenses are covered.

Thus as long as a woman has young children she is denied the right to obtain employment though her "...power to earn a living for [herself] and those dependant upon [her] is in the nature of personal liberty." Smith v. Hill, 285 F.Supp. 556, 560 (D.N.C., 1968).

A further denial of liberty results from the fact that women are generally forced to arbitrarily end their education because of pregnancy. Until recently, girls who became pregnant were forced to drop out of public school in New York. In New York City, Central Harlem, more than forty percent of the girls who leave school before graduation do so because of pregnancy. Haryou, 1964, Youth in the Ghetto, N.Y. Orans Press, p. 185. This still happens in countless other cities throughout the country as well. See, for example, Perry v. Grenada Municipal Separate School District, 300 F.Supp. 748 (N.D.Miss., 1969). Many women are also deprived of higher education because of college rules requiring that pregnant women leave school.

The importance of education in modern society has been stressed and restressed in recent years, since Chief Justice Warren stated in Brown v. Board of Education, 347 U.S. 483, 493 (1954):

> Today, education is perhaps the most important function of state and local governments.... It is required in the performance of our most basic public responsibilities.... It is the very foundation of good citizenship. Today it is a principal instrument in awakening..cultural values, in preparing...for later professional training and in helping...to adjust normally to his environment.

It has been recognized more recently that there are special problems for women in obtaining education for

BLEED THROUGH

though "men and women are equally in need of continuing education...at present women's opportunities are more limited than men's." American Women: Report of the President's Commission on the Status of Women, 1963, p. 11. Nonetheless, women are robbed of their education and opportunity for any development and self-fulfillment; robbed of their rights to be "free in the enjoyment of all (their) faculties," Madera, supra, at 783-4, by chance an unwanted pregnancy.

The incursions on the liberty of an unmarried woman who becomes pregnant are even more severe. She too may be fired from her job and is even more likely to be compelled to discontinue her education. Unable to terminate her pregnancy, she is often forced into marriage against her will and better judgment in an attempt to cope with the new economic and social realities of her life. Such marriages are forced on women despite the fact that the right to marry or not to marry may not be invaded by the state. Loving v. Virginia, 388 U.S. 1 (1967).*

Of course, frequently, the man who is responsible for the pregnancy refuses to marry her. Then unable to support herself she may be forced to become a welfare recipient, become part of that cycle of poverty, and expose herself to the personal humiliation, loss of personal liberty and inadequate income that entails.

To further add to her difficulties, the mere

---

* The reaction of forcing a pregnant girl or woman into marriage as a "solution" to an unwanted out-of-wedlock pregnancy is exemplified by the ruling of a Maryland court in 1955, waiving the marriage age requirments to permit a thirteen year old pregnant girl to marry. Harold Rosen, M.D., Psychiatric Implications of Abortion, A Case Study of Social Hypocrisy, 17 Wes.R.L.Rev. 454, at 454.

act of her out-of-wedlock pregnancy or child resulting from that pregnancy may be used as "some evidential or presumptive effect" to a decision to exclude or remove her from public housing. Thorpe v. Housing Authority, 393 U.S. 268, 271 (1969). Thus, having been forced to bear a child she did not want, she may be deprived of her right and ability to provide for herself and her child either because of employer policies or because of her inability to leave the child. Surviving on at least marginal income, she who is most obviously in need of public housing is then deprived of decent shelter because of the existence of that very same child.

For a woman perhaps the most critical aspect of liberty is the right to decide when and whether she will have a child -- with all the burdens and limitations on her freedom which that entails. But that has been robbed from her by men who make the laws which govern her.

As early as 1848 women spoke out against the way in which men controlled their lives -- denied them of any meaningful liberty. At the Women's Rights Convention held in Seneca Falls, New York, on July 14, 1848, the women spoke of men as follows:

> He has compelled her (woman) to submit to laws in the formation of which she has no voice.... He has taken all her rights to property, even to the wages she earns.... In the covenant of marriage...the law (gives) him power to deprive her of her liberty and to administer chastisement.... He closes against her all the avenues of wealth and distinction which he considers most honorable to himself.... He has denied her the facilities for obtaining a thorough education.... He has endeavored in every way that he could to destroy her confidence in her own powers, to lessen her self-respect, and to make her willing

to lead an abject life. Victory, How Women Won It, National American Woman Suffrage Association, A Centennial Symposium, 1840-1940, H.W. Wilson Co., 1940, pp. 15-25.

Restrictive laws governing abortion such as th of Texas and Georgia are a manifestation of the fact t men are unable to see women in any role other than tha of mother and wife. Furthermore,

> So long as he continues to think and write, to speak and act, as if maternity was the one and sole object of a woman's existence -- so long as children are conceived in weariness and disgust -- you must not look for high-toned men and women capable of accomplishing any great and noble achievement.*

As recently as July 12, 1971 the Supreme Court of the State of Florida reversed three convictions for conspiracy to commit abortion. In the concluding sentence of its opinion the Court stated: "In sum the [abortion] statute intrudes into the area of personal liberty of women and does it crudely in vague, uncertain, archaic language." Walsingham v. Florida, supra slip opinion, p. 15, Ervin, J., Concurring.

The Florida statute does not alone abridge a woman's fundamental right to liberty. The statutes of Georgia, Texas and nearly every other state in the nation similarly deny to women throughout the country their most precious right to control their lives and bodies.

---

* Elizabeth Stanton to Gerrit Smith, December 21, 1857, Stanton Papers, LC, quoted in Andrew Sinclair, The Emancipation of the American Woman, Harper Colophon Books, New York, 1966, p. 259.

COPY BOUND TOO CLOSE IN CENTER

II. THE GEORGIA AND TEXAS STATUTES RESTRICTING THE AVAILABILITY OF ABORTIONS DENY WOMEN THE EQUAL PROTECTION OF THE LAWS GUARANTEED TO THEM BY THE FOURTEENTH AMENDMENT.

The express guarantee of equal protection was originally designed to protect black people. Since that time, its protection has been greatly extended. First the courts extended equal protection to protect Chinese, Yick Wo v. Hopkins, 118 U.S. 356 (1886). More recently it has been extended to protect aliens, Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948); Mexican American, Hernandez v. Texas, 347 U.S. 475 (1954), and poor persons, Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963), and Shapiro v. Thompson, 394 U.S. 618 (1969).

Most recently federal estate courts have begun to apply the guarantees of the equal protection of the laws to prohibit discrimination against women.

In White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966) exclusion of women and Negroes from Alabama juries was held unconstitutional. In United States ex rel Robinson v. York, 281 F. Supp. 8, (D. Conn. 1968) differential sentences for men and women were struck down as "invidious discrimination against [women] which is repugnant to the equal protection of the laws guaranteed in the Fourteenth Amendment. In Kirstein v. Rector and Visitors of the University of Virginia, 309 F. Supp. 184 (E.D. Va. 1970) a three judge court held that the exclusion of women from the University of Virginia violated their rights to the equal protection of the laws. In 1970 a federal District Court in New York held that a public tavern could not deny service to a woman. Seidenberg v. McSorely's Ale House, Inc., 317 F.Supp. 583 (S.D.N.Y., 1970).

More recently the Supreme Court of the state of California rejected the ruling of this Court in Muller v. Oregon, 208 U.S. 412 (1908) to find that laws restricting women from being bartenders except in the most limited circumstances stand in violation of the guarantees of the Fourteenth Amendment. Sail'er Inn v. Kirby, # 29811 Sup. Ct. Calif. May 27, 1971.

BLEED THROUGH

Federal district courts have also looked to the guarantees of equal protection to invalidate regulations compelling female employees to take a leave of absence from work because of pregnancy. Cohen v. Chesterfield County School Board, # 678-70-R (E.D.Va.) (May 17, 1971) Schattman v. Texas Employment Commission, # A-70-Ca-75 (W.D. Tex.) (April 16, 1971) Order Denying Motion for Relief from Judgment. See also Mengelkoch v. Industrial Welfare Commission, 437 F. 2d 563 (9th Cir. 1971) holding that plaintiffs' challenge to California protective labor laws raised substantial constitutional questions.

Despite the fact that women are entitled to the equal protection of the laws, one major area in which they are daily denied that protection is in the area of abortion.

Man and woman have equal responsibility for the act of sexual intercourse. Should the woman accidentally become pregnant, against her will, however, she endures in many instances the entire burden or "punishment."

In obtaining an abortion, the threats and punishments fall on the woman. This happens even where the decision to have an abortion has been a mutual one. Only the woman is subjected to the variety of threats which often accompany the painful search for abortion - the threats of frightened or hostile doctors of giving her name to the police - the threat of subpoena and/or prosecution if the doctor who would help her is arrested.

It is often said that if men could become pregnant or if women sat in the legislatures there would no longer be laws prohibiting abortion. This is not said in jest. It reaches to the heart of the unequal position of women with respect to the burdens of bearing and raising children and the fact that they are robbed of the ability to choose whether they wish to bear those burdens.

And the woman carries an unequal and greater share of the burden, not merely for nine months, but

for many years, all in violation of the equal protection of the laws, as we shall discuss below. The abortion laws therefore present a rather unusual constitutional situation. At first glance, it would appear that the concept of equal protection of the laws might not even apply to abortion since the laws relate only to women. However, when we look beyond the face of the laws to their effect, we see that the constitutional test of equal protection must be applied.* For the effect of the laws is to force women, against their will, into a position in which they will be subjected to a whole range of de facto forms of discrimination based on the status of pregnancy and motherhood.

As we have discussed at length above, a woman who has a child is subject to a whole range of de jure and de facto punishments, disabilities and limitations to her freedom from the earliest stages of pregnancy. In the most obvious sense she alone must bear the pains and hazards of pregnancy and childbirth. She may be suspended or expelled from school and thus robbed of her opportunity for education and self-development. She may be fired or suspended from her employment and thereby denied the right to earn a living and, if single and without independent income, forced into the degrading position of living on welfare.

For example, many if not most employers including public employers have policies requiring pregnant women to take a leave of absense or otherwise terminate their employment at a given stage of pregnancy. Recently the case of LaFleur v. Cleveland Board of Education, # C-71-292 N.D. Ohio, May 12, 1971 upheld one such regulation. Contra, Cohen

---

* Here , of course, we are discussing not the secondary effect of the laws on persons who perform abortions and who might be men or women, but on the persons who feel the greatest impact of the laws, women.

BLEED THROUGH

v. Chesterfield County School Board, supra, and Schattman v. Texas State Employment Commission, supra. If she has pre-school age children, employers may refuse to hire her despite the provisions of the Civil Rights Act of 1964 which states that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual ... because of such individual's sex...." 42 U.S.C. 200 e-2(a)(4)(emphasis added), for, according to the Fifth Circuit, it is inconceivable that Congress intended to:

> exclude absolutely any consideration of the normal relationship of working father to their pre-school age children and to require that an employer treat the two exactly alike in the administration of its general hiring policies. Phillips v. Martin Marietta, supra, 411 F. 2d at 4.

Only this winter this Court effectively affirmed that court's ruling with Justice Marshall dissenting by holding that

> The existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under §703(e) of the [civil rights] Act. Phillips v. Martin Marietta Corp. 91 S. Ct. 496, 498 (1971).

In other words this court said if men refuse to share equally in the care of their children then women may be doubly burdened - they may be burdened with the responsibilities of child care and they may be deprived of employment opportunities as well.

If a woman is unmarried, unless she succeeds in obtaining an abortion, she has no choice but to bear the child, while the man who shares responsibility for her pregnancy can, and often does, just walk away.

As a practical matter, the woman is then alone with the problem of seeking and financing an abortion

and if that fails, she is alone paying the expenses of pre-natal care and childbirth and raising and supporting the child. She could seek to establish paternity of the father and therefore some measure of financial responsibility, However, to do this she must expose herself to accusations by the father concerning her sexual behavior as part of his attempt to avoid legal responsibility for the child. In some states she would further be forced to admit the commission of a crime, e.g. D.C. Code § 22-1002 (Crime of Fornication). Furthermore, although in most areas a parent has the legal responsibility to support his or her child whether married or single, e.g. D.C. Code §22-903, in some of those same places a parent will only be punished for neglect where married -- thus the irresponsibility of the man who walks away from the child he has helped to create is reinforced by the rule of law. For example, under New York law the mother is expressly liable for child support if the father is unable to support the child or cannot be found within the state. New York Family Court Act § 414.

In Texas, a father of an out-of-wedlock child has neither the common law nor the statutory duty to support his child. Home of Holy Infancy v. Kaska, 397 S.W. 2d 208 (Tex. 1965). See also Lane v. Phillips, 6 S.W. 610 (Tex. 1887), Beaver v. State, 256 S.W. 929 (Cr. App. Tex., 1923).

Having been forced to give birth to a child she did not want, a woman may be subject to criminal sanctions for child neglect, e.g., D.C. Code §22-902, if she does not care for the child to the satisfaction of the state. In some states even here the disabilities for the woman are greater than for the man. The New York courts seem to have found as a matter of law that the mother has a greater responsibility for the child than the father. In the case of People v. Edwards, 42 Misc. 2d 930, 249 N.Y.S. 2d 325 (1964), though the father and mother were jointly indicted for failure to provide shelter and medical attention for their baby, the court held that only the mother could be punished for failing to bring the baby to a doctor when a condition which began with a diaper rash resulted in the child's death. Of course, again, if the woman is

unmarried and paternity was never legally established, the woman bears these legal burdens alone.

The unwed mother may suffer additional disabilities by being denied employment because of her status. Courts are gradually recognizing the inequities of so penalizing unwed mothers. Nonetheless, not every woman is in a position to go to court to contest such discriminatory actions and many such policies and practices still exist throughout the country unchallenged.

Even where the father is present, the mother rather than father will be primarily responsible for raising the children. As long as "women, as a class earn less than men." Gruenwald v. Gardner, 390 F.2d 591 (2d Cir., 1968), and women have less opportunity for advancement**, they, rather than the father, will remain at home to raise the family.

The rulings of the Fifth Circuit and this Court in Phillips v. Martin Marietta, supra, further reinforce this arbitrary role differentiation, forcing the greater burden on child care on the mother. For in saying that a mother of pre-school age children may constitutionally be denied employment though a father may not, the power and authority of the courts is reinforcing the actions of private employers and society to force a woman to 'stay at home and take care of the children' even if she has otherwise provided for their care.

If such a broad range of disabilities are permitted to attach to the status of pregnancy and

---

* "In 1959, 1960 and 1961, median earnings for male workers with taxable incomes was...approximately twice the median earnings of females." Gruenwald v. Gardner, supra, p. 592 n. 2.

** See, for example, Study of Employment of Women in the Federal Government, 1968; U.S. Civil Service Commission, Manpower Statistics Division, Washington, D.C.

COPY BOUND TOO CLOSE IN CENTER

motherhood, that status must be one of choice. And it is not sufficient to say that the women "chose" to have sexual intercourse, for she did not choose to become pregnant. As long as she is forced to bear such an extraordinarily disproportionate share of the pains and burdens of childrearing (including, of course, pregnancy and childbirth), then, to deprive her of the ultimate choice as to whether she will in fact bear those burdens violates the most basic aspects of "our American ideal of fairness" guaranteed and enshrined in the Fourteenth Amendment. Bolling v. Sharpe, 347 U.S. 497 (1954).

There is yet another way in which women are denied the equal protection of the laws. This Court has shown great concern with the "conception of political equality" Reynolds v. Sims, 377 U.S. 533, 558 (1964) and particualrly with "questions of alleged 'invidious discriminations * * * against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.'" Reynolds v. Sims, supra, 377 U.S. at 561 citing Skinner v. Oklahoma, 316 U.S. 535, 536 (1942). Because of this concern, in a line of cases the court has sought to guarantee that each citizen is fairly and equally represented in the legislature which make laws governing his or her life. See Baker v. Carr, 369 U.S. 186 (1962), Reynolds v. Sims, supra, and their progeny. Nevertheless, in the instance of abortion laws one finds the grossest form of lack of representation.

This court can surely take judicial notice of the fact that the state legislatures in Texas and Georgia, like state legislatures throughout the country are composed almost exclusively of men. As the supreme court of the state of Oregon stated in State v. Hunter, 300 P. 2d 455,457-7,208 Ore. 282 (Ore., 1956).

> ...We believe that we are justified in taking judicial notice of the fact that the membership of the legislative assembly which enacted this statute was predominately masculine. That fact is important

in determining what the legislature might have had in mind with respect to this particular statute...

Therefore we have a situation in which persons are making laws which could never possibly effect them.*

These laws which are passed largely by men and only affect women were first instituted many years prior to the time that women even had the vote. The Georgia statute was enacted in 1876, the Texas in 1907. This relationship between the legislators and the laws they are making is even more complex than it may appear on the surface. For laws such as the abortion laws presently before this court in fact insure that women never will be able to function fully in the society in a manner that will enable them to participate as equals with men in making the laws which control and govern their lives. For as long as women are unable to control their reproductive lives they will be forced to disrupt their education, forego their career, and will never be a totally functioning part of the government which determines her rights. Forced to remain at home with her children a woman has neither the time, the money, nor the mobility to either organize an effective lobby on her own behalf or to assert her own rights as a direct participant in the legislative workings of government. The underrepresented city dweller could not realistically look to the rural dominated legislature to rectify the inequality of representation, nor could black people look to a white controlled legislature to eliminate the gerrymandering which cheapened their votes. Gomillion v. Lightfoot, 364 U.S. 339 (1960). Neither can women realistically look to male controlled legislatures to change laws which will return to them the control of their lives and bodies and that may incidentally

---

* It may be worth noting that the only other major areas of law in which this occurs is with laws governing children and incompetents; that alone may give interesting insights into the views of legislators towards women.

COPY BOUND TOO CLOSE IN CENTER

ree them to actively participate in those same legis-
atures. Therefore, if women are to have their rights
edressed they can look only to the courts.*

---

* Amici have not addressed themselves to the economic discrimination resulting from the application of the abortion laws of Texas and Georgia on the understanding that the issue is being treated fully by other amici and by parties to the litigation. Amici are deeply concerned, however about the economic hardship and blatant economic discrimination effected by such laws restricting the availability of legal abortion.

III. ABORTION LAWS VIOLATE THE CONSTITUTIONAL GUARANTEE AGAINST THE IMPOSITION OF CRUEL AND UNUSUAL PUNISHMENT.

To understand what having an unwanted pregnancy and child means to a woman, it may be best to consider the following analogy: a group of people are walking along the street. Half the group crosses; the remainder are stopped by a red light. Those stopped by the light are told the following:

> "From now on, for about nine months, you are going to have to carry a twenty-five pound pack on your back. Now, you will have to endure it, whether you develop ulcers under the load whether your spine becomes deformed, no matter how exhausted you get, you and this are inseparable.
>
> Then, after nine months you may drop this load, but from then on you are going to have it tied to your wrist. So that, wherever you go this is going to be with you the rest of your life and if, by some accident, the rope is cut or the chain is cut, that piece of rope is always going to be tied to you to remind you of it."*

Of course, this analogy is not complete. It does not include the extreme, sometimes excruciating pain and risk of death involved with the process of transferring the pack from your back to your wrist, nor does it fully describe the limitations placed on your liberty by having that load chained to your wrist for a substantial portion, if not all of your life. It does, however, begin to give some picture of the pain and burden of pregnancy and motherhood when both are involuntary. Forcing a woman to bear a child against her will is indeed a form of punishment, a result of society's ambivalent attitude towards female sexuality. The existe

---

* Testimony of psychiatrist Natalie Shainess, in Schulder & Kennedy, Abortion Rap, McGraw-Hill, 1971, p. 125

COPY BOUND TOO CLOSE IN CENTER

the sexual "double standard" has created the social sponse that when a woman becomes pregnant accident- ly, she must be "punished" for her transgression, rticularly if she is single. This punishment falls lely on the woman: she must face the physical burdens d emotional strains of an unwanted pregnancy, the grading experience of having an illegal abortion ften in filthy motel rooms at the mercy of quacks who e charging exhorbitant fees." Ervin, J. concurring, lsingham v. Florida, Case No. 40,210 (S.Ct. Fla., ly 12, 1971), and if unable to get such an abortion, e responsibilities and trauma involved in raising an wanted child. The man equally responsible for the egnancy faces no such punishment.

Those who seek to impose the punishment of forc- g a woman to bear a child against her will could not considering its scope and dimensions. Such a punish- nt condemns a woman to severe physical burden, pain and bor not only during pregnancy, but also through the rth process and after the child is born, imposing on r years of toil and loss of freedom. To deny an un- rried woman an abortion is even more obviously a nishment and an act of greater cruelty as she is tally alone, with all of the physical, financial and cial burdens of raising a child.

The Eighth Amendment to the United States Consti- tion protects all persons against the infliction of ruel and unusual punishment." Amici contend that the panding constitutional concern, as expressed by this urt, with practices which "offend the dignity of man", e contrary to "the evolving standards of decency that rk the progress of a maturing society" and punishment isproportionate to the offense committed" as violative the Eighth Amendment necessitates a finding that laws stricting abortion are unconstitutional

In 1910, the Supreme Court in Weems v. United tates, 217 U.S. 349 (1910), repudiated the nineteenth ntury assumption that the punishments proscribed by the ighth Amendment were limited to the barbarous practices

BLEED THROUGH

of seventeenth century England. "The Cruel and Unusual Punishment Clause and The Substantive Criminal Law" 79 Harv.L.Rev. 635, 636-7 (1966). The Court in Weems, invalidating a section of the Phillipine Penal Code authorizing a sentence of 15 years hard labor and concomitant forfeiture of citizenship rights noted that a "principle to be vital must be capable of wider application than the mischief which gave it birth," 217 U.S. at 373. Further the Court held that the Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." 217 U.S. at 367. Underlying the Court's holding was the concept of "proportional punishment" as a "precept of the fundamental law." Significantly, the Court considered the moral stigma and mental anguish suffered as a result of such punishment to be of equal relevance as the purely physical burden imposed.

In Trop v. Dulles, 356 U.S. 86 (1958), invalidating a punishment of denaturalization for desertion as unconstitutional in violation of the Eighth Amendment, the Court again emphasized the standard of proportion, and the flexible, expansive nature of the Eighth Amendment's ban, while declaring their willingness to apply the Eighth Amendment affirmatively to protect individual liberty. Noting that the "traditional" punishment for desertion was death, the court rejected the notion that "excessiveness" alone was determinative of constitutional validity. Instead, the Court asserted that "the question is whether the punishment subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment." 356 U.S. at 99. "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." 356 U.S. at 100. The Amendment, the Court noted, was not a static one; it "must draw its meaning from evolving standards of decency that mark the progress of a maturing society." 356 U.S. at 101. In setting a standard for the application of the Amendment, the Court rejected, as well, an exclusive concern with the physical aspect of punishment, forbidding what it characterized as "the total destruction of the individual's status in organized society." 356 U.S. at 101.

This Court's most recent analysis of the flexibility of the Eighth Amendment is found in Robinson v

lifornia, 370 U.S. 660 (1962). In that case, the urt held that a state law which made the "status" of rcotics addiction a criminal offense constituted ruel and unusual punishment" in violation of the arantees of the Eighth Amendment. For Justice Doug- s stated in his analysis of the constitutional de- lopment of the Eighth Amendment; Douglas, J. concur- ng at 675:

> The historic punishments that were cruel and unusual included "burning at the stake, crucifixion, breaking on the wheel" (In re Kemmler, 136 U.S. 436, 446, 10 S.Ct. 930,933 34 L.Ed. 519) quartering, the rack and the thumbscrew (see Chambers v. Florida, 309 U.S. 227, 237, 60 S.Ct. 472, 477, 84 L.Ed. 716) and in some circumstances even solitary confinement (See In re Medley, 134 U.S. 160, 167-8, 10 S.Ct. 384, 386, 33 L.Ed. 835). The question presented in the earlier cases concerned the degree of severity with which a particular offense was punished or the element of cruelty present. A punishment out of all proportion to the offense may bring it within the ban against "cruel and unusual punishment." See O'Neil v. Vermont, 144 U.S. 323, 331, 12 S.Ct. 693, 696, 36 L.Ed.450. So may the cruelty of the method of punishment as, for example, disemboweling a person alive. See Wilkerson v. Utah, 99 U.S. 130, 135, 25 L.Ed. 345. But the principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick.

The essence of the Eighth Amendment, as evolved n the cases discussed above, lies in its concern with he "disproportionate" nature of the punishment im- osed, the moral anguish as well as physical burdens f punishment, the extent to which punishment is a re- sponse to an individual's 'status' and is measured by volving standards of decency", and offensiveness to the "dignity of

man." Laws which force women to endure unwanted pregnancy and motherhood against their will or to become criminals and take the risks to physical and mental health resulting from an illegal abortion are disproportionate to the act for which they are being punished --an act which, in many instances, is not even illegal. Further, amici contend that abortions, in fact if not in theory, punish women for private, sexual activity for which only women bear the repercussions of pregnancy, therefore punishing them for their status as women and potential child-bearers.

The pain and suffering associated with an unwanted pregnancy or child, is not solely physical pain. The emotional pain and scarring which accompanies an unwanted pregnancy is an equally important and far more lasting form of pain which must be considered in the context of guarantees of the Eighth Amendment, and the emphasis given to mental anguish as a crucial component of "cruel and unusual punishment." According to Dr. Natalie Shainess, who has devoted the majority of her 25-year practice as a psychoanalyst and psychiatrist to the area of feminine psychology and particularly with experience of being a mother, a woman who does not want her pregnancy suffers depression through nearly the entire pregnancy and often that depression is extremely severe. Furthermore, according to Dr. Shainess that depression continues even after birth may even go into psychotic states, and may result in permanent emotional damage to the woman.

Such potential permanent emotional damage, the risks to physical health and safety which may also result in permanent physical harm, see Fletcher v. State, 362 S.W.2d 845 (Cr.App.Tex., 1962), and the burdens of taking care of an unwanted child, constitute a form of long-term imprisonment. Such long term imprisonment, "could be so disproportionate to the offense as to fall within the inhibition" of the Eighth Amendment. Hancock v. United States, 163 F.2d 228 (6th Cir., 1947). For most women, bearing and raising an unwanted child is

---

* Schulder and Kennedy, supra, p. 122.

COPY BOUND TOO CLOSE IN CENTER

rse, it is life-term imprisonment. For the woman, the anted pregnancy may also carry with it the trauma of ing rejected or mistreated by the man when he learns the pregnancy. Under such conditions, the child re-lting from the relationship would constitute a lasting d omnipresent reminder of the suffering the woman ex-rienced from the man. Such a life-long reminder is form of constant punishment that the woman should not forced to face. When she is forced into that situa-on, however, not only does she suffer emotionally, t her suffering is manifested in her relations with r child. She may vent her anger by physically injur-g the child,* neglecting the child, or being extreme-over protective, virtually "smothering" the child otionally.

According to New York law as interpreted by its urts, a "child at tender age is entitled to have such re, love and discipline as only a good and devoted ther can usually give," Ullman v. Ullman, 151 A.D. 9, 135 N.Y.S. 80 (1912) (emphasis added); it is en-tled to care which includes its "spiritual and moral fe" In re Roe, 92 N.Y.S.2d 882, 883, 196 Misc. 830 om.Rel.Ct., 1949). Nonetheless, the State, by its in-stence on the right to life for the fetus, practically sures that once born, the child will receive neither e care, love, nor spiritual and moral life to which it entitled. If indeed, the unwanted child is a hated ild, in denying women the right to abortion Texas, orgia, and all other states with laws which restrict ortion are punishing not only the mother, but also e very child they claim to protect. Furthermore, under w York law a mother is required to give "care, guid-ce, supervision, love and affection," In re Carl, 174 sc. 955, 22 N.Y.S.2d 782, 784 (Dom.Rel., 1940), to the

---

According to Ray E. Helfer, M.D., who has recently ited a book called The Battered Child, University of icago Press, 1968, and is an expert in the field, an wanted pregnancy may be a crisis situation in the three ctor pattern which leads to physical abuse of children.

BLEED THROUGH

child she never wanted in the first place and she is punished if she is unable to.

By denying women the right to abortion the state is punishing her for her sexual activity with the equivalent of long-term imprisonment and giving her an indeterminate sentence of life with an unwanted child. Sentencing a woman to a full term pregnancy and motherhood against her will is thus a clear violation of her right to be free from cruel and unusual punishment. The words of this Court in Weems, supra, are most appropriate in describing such a "sentence."

> [Her] prison bars and [some] chains are removed, it is true after [nine months], but [she] goes from them to a perpetual limitation of [her] liberty. [She] is forever kept under the shadow of [her] crime....
>
> ...[She] is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty. It may be that even the cruelty of pain is not omitted. [She] must bear a chain night and day. [She] is condemned to painful as well as hard labor. 30 S.Ct. at 549.

Even where the woman decides she cannot endure the pains and penalties of pregnancy and motherhood, which the law attempts to force on her, she is still exposed to what may be the great physical and emotional pain and the far greater danger of illegal abortion. It has long been thought that abortion in and of itself caused substantial destructive emotional effects on women. More recently, however, a number of studies have shown that when abortions are legally obtained women do not suffer psychological harm as a result of their experience, but rather in most cases their emotional status improves and many report that they experience emotional growth as a result of the abortion

experience. Pratt, Rappaport & Barlow, Arch. Gen. Psychiat., 20:408-414 (1969).

It is no answer to suggest that the woman may always choose to minimize her pain by placing the child for adoption following birth -- performing the function of "commodity" or a "baby breeder". For as one woman has movingly described:*

> The kind of trauma of giving a baby up for adoption leaves you with the feeling of -- at least I had my feeling about it as a mother -- I was a mother who had abandoned my child and I fought against this self-concept.
>
> I prepared to think of myself as a breeder, I was just breeding babies for someone else to take rather than think of myself as a mother who abandoned her baby.
>
> But the guilt -- for months after I left the home, I'd wake up in the night crying and sort of rocking my pillow and this feeling sometimes of deprivation but ... the guilt was stronger than the feeling that someone else had deprived, someone had ripped the baby from my arms.
>
> I would have been more comfortable that way than what I did, because I actually signed the papers and gave the baby up.

For this woman, and for many others, this experience carries with it a further overwhelming sense of guilt at having done something shameful -- a sense of guilt which may haunt her for years after and which, in the same person, will not develop in connection with an abortion -- even an illegal abortion. Such mental anguish, and the emotional harm which ultimately

---

* Schulder and Kennedy, Ibid., p. 23.

BLEED THROUGH

results is certainly disproportionate to the act for which a woman is being punished, and constitutes cruel and unusual punishment for her.

Finally, some might feel that whereas it may be constitutionally impermissible to deny a married woman an abortion, it is permissible to force an unmarried woman to see her pregnancy and its consequences through as a "deterrent to her immorality." However, not only is such a position unconstitutional, it is irrational. Compared with a married woman, an unmarried woman is likely to experience even greater unconstitutional deprivations of her liberty, as a result of the greater pain and suffering from being forced to bear and raise an unwanted child with no help from the man who is equally responsible for the conception of that child. Furthermore, both she and the child will become a financial "burden" on the society if she is forced to go on welfare.

Millions of women are now becoming truly conscious of the manifold forms of oppresion and discrimination of their sex in our society. They are beginning to publicly express their outrage at what they have always known - that bearing and raising a child that they do not want is indeed cruel and unusual punishment. Such punishment involves not only an indeterminate sentence and a loss of citizenship rights as an independent person as held unconstitutional in Weems, supra, great physical hardship and emotional damage 'disproportionate' to the "crime" of participating equally in sexual activity with a man, as held unconstitutional in Trop, supra, but is punishment for her 'status' as a woman and a potential child-bearer as held unconstitutional in Robinson, supra. As this Court in Trop so firmly stated, the concept underlying the Eighth Amendment is "nothing less than the dignity of man" 356 U.S. at 100 and "must draw its meaning from evolving standards of decency" at 101. Abortion laws reinforce the legally legitimized indignities that women have already

suffered under for too long and bear witness to the inferior position to which women are relegated. The total destruction of a woman's status in society results from compelling her to take sole responsibility for having the illegal abortion or bear the unwanted child, and suffer the physical hardship and mental anguish whichever she chooses. Only the woman is punished by society for an act in which she has participated equally, only she is punished for her "status" as child-bearer. In light of "evolving standards of decency that mark the progress of a maturing society", the basis of the Eighth Amendment as set forth in Trop, supra, the struggle of women for full and meaningful equality in society over the last hundred years indicates that it would indeed be a sign of the immaturity of our social development if these laws were upheld. White persons have had to readjust their thinking and actions to question whether laws which discriminated against blacks were unconstitutional.

Men (of whom the legislatures and courts are almost exclusively composed) must now learn that they may not constitutionally impose the cruel penalties of unwanted pregnancy and motherhood on women, where the penalties fall solely on them.

IV. THERE IS NO COMPELLING STATE INTEREST JUSTIFYING THE VIOLATION OF FUNDAMENTAL CONSTITUTIONAL RIGHTS EFFECTED BY THE CHALLENGED ABORTION LAWS.

Historically under common law and in the early years of American law, abortion was legally permissible before the fetus was "quick" inside the mother. See generally, Cyril S. Means, Jr., "The Law of New York Concerning Abortion and the Status of the Fetus, 1664-68: A Case of Cessation of Constitutionality," 14 N.Y.L.F. 411, Feb. 1968; and Roy Lucas, "Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes," 46 N.C. L. Rev. 732, June 1968. The adoption of laws regulating (and almost effectively eliminating) legal abortion came about for a combination of three major reasons, none of which can any longer constitutionally justify the extreme incursion into and violation of protected rights effected by the challenged abortion laws. The three reasons were: (a) "compelling uniform adherence to specified moral norms ...[by] (l)egal bans on both contraception and all abortion...." Lucas, supra, p. 732, i.e., moral norms regarding sexual relations; (b) protecting the health of the mother from the dangers then inherent in any operation, Lucas, supra, p. 732; Means, supra; and (c) enforcing the newly established religious concept that the soul was present in the body from the time of conception. Lawrence Lader, Abortion, Beacon Press, Boston, 1966.

The operation and effect of the challenged Georgia and Texas abortion laws directly violate plaintiffs' constitutionally protected rights of life, liberty, equal protection, personal privacy of associations and others as well. As the Supreme Court of California stated in California v. Belous, supra, 80 Cal.Rptr. at 360:

> The critical issue is not whether such rights exist, but whether the state has

a compelling interest in the regulation of a subject which is within the police powers of the state (Shapiro v. Thompson (1969), 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600; Sherbert v. Verner, (1963), 374 U.S. 398, 403, 83 S.Ct. 1790, 10 L.Ed.2d 965), whether the regulation is "necessary *** to the accomplishment of a permissible state policy" (McLaughlin v. Florida (1964), 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 L.Ed.2d 222; see also, NAACP v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 105; Bates v. City of Little Rock (1960) 361 U.S. 516, 527, 80 S.Ct. 412, 4 L.Ed.2d 480; Huntley v. Public Util. Comm. 69 A.C. 62, 69 Cal. Rptr. 605, 442 P.2d 685; Vogel v. County of Los Angeles, 68 Cal.2d 18, 21, 64 Cal. Rptr. 409, 434 P.2d 961; People v. Woody, 61 Cal.2d 716, 718, 40 Cal.Rptr. 69, 394 P.2d 813.

The fact that the abortion laws may have been valid when first enacted does not resolve the questions concerning the present constitutionality of the law. California v. Belous, supra, at 362. Compare Gray v. Sanders, 372 U.S. 368, 381 (1963) with South v. Peters, 339 U.S. 276, 277 (1950); Baker v. Carr, 369 U.S. 186, 237 (1962); with Colgrove v. Green, 328 U.S. 549, 556 (1946); Brown v. Board of Education, supra, with Plessy v. Ferguson, 163 U.S. 537 (1896).

Most persons who seek to justify the constitutionality of abortion laws would now concede that the first two of the three justifications mentioned above are no longer able to sustain abortion laws which take such great tolls on the lives of women.

It is common knowledge that an abortion no longer entails the danger it did in the mid 1800's and early 1900's when the Texas and Georgia abortion

laws as well as the laws of nearly all the other states were first enacted. In fact, as pointed out above, there is considerable evidence that abortion now carries about the same, if not lesser risks then childbirth. See p. 10, supra. Therefore the medical rationalization to sustain abortion restrictions can be easily dispensed with.

As for the use of abortion laws to ensure the community standard of morality, it should be clear from this Court's decision in Griswold v. Connecticut, supra, 381 U.S. at 498, Justice Goldberg, Warren and Brennan, concurring that such an argument is not constitutionally sufficient. See also Walsingham v. Florida, supra, slip opinion, p. 12, which notes that the abortion statutes themselves "...[do] not show a compelling state interest in prohibiting premarital sexual intercourse (the prelude to unwed mothers) since [they draw] no distinction between married and unmarried women." In any case it is quite evident that the "community" standard is at present a changing one. Furthermore, we must consider just who is the community. For on this particular issue there are at minimum two communities -- the community of men and the community of women. Normally, we cannot and should not consider legislation from such a perspective but in this case we can and must. For, here we have legislation which is made by men [see Page 32-33, supra] who are never directly affected by it (except to the extent that they fear that they themselves might never have been born were there no abortion law). It is women, who at best have an indirect voice in the determination of these laws, who must suffer from them. And it should be plain that the community of women does not support these laws. For centuries they have been seeking and obtaining abortions even at substantial risk to themselves despite the voice of the legislature.

It may well be said that the abortion laws which the states seek to maintain in fact undermine

the moral fabric of the community. For, it is those laws which not only force countless women to flagrantly violate the law each year, but forces them into the sordid underworld of criminal abortions.*

However, even assuming the maintenance of a particular standard of morality for men and women were sufficient to sustain some legislation in the area, that legislation could not be drawn in such a way as to consistently place all of its weight and burden on only one sex. For this is just the sort of invidious discrimination prohibited by the Fourteenth Amendment.

Thus we must look to the third rationale for abortion laws. Although it is generally discussed in terms of the "right to life," if we analyze it more closely, the third rationale is actually a means of enforcing the religious concept that the soul is present in the body from the time of conception and therefore must be saved. The use of criminal statutes to enforce the views of one or more particular religious groups is of course proscribed by the First Amendment's Establishment Clause.

Looking closer at the argument that the state must guarantee to every fetus its right to life, we must immediately be struck by tremendous inconsistencies in the state's alleged concern for life.

---

* Amici do not take either the position that women who have abortions are "criminals" or that all persons who are willing to aid women in terminating unwanted pregnancies are criminals. However, there are many persons who unscrupulously profit from women's predicament and misery with little concern for their health and safety.

In fact, claims of great concern for the life of the fetus are at best questionable in practice and turn sour when examined in light of their consequences on the lives of women.

It is clear both from the application of the abortion laws as well as from other areas of law that the concern of the state in the life of the fetus is at best a qualified concern. Firstly, under the laws of many states the fetus has "no legal personality or identity until it sees the light of day." Endresz v. Friedberg, 24 N.Y.2d 478, 301 N.Y.S.2d 65, 70 (1969), and, therefore, an action for wrongful death of a fetus cannot be sustained. See also, Graf v. Taggart , 43 N.J. 303, 204 A.2d 140 (1964); Norman v. Murphy, 124 Cal.App.2d 95, 268 P.2d 178 (Dis.Ct.App., 1954); Keyes v. Construction Service, 340 Mass. 633, 165 N.E.2d 912 (1960); Powers v. City of Troy, 4 Mich. App. 572, 145 N.W.2d 418 (1966); Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964), for similar rules in New Jersey, California, Massachusetts, Michigan and Pennsylvania.

What is more laws governing abortion in Georgia as in several other states with supposed "reform laws" show at best a qualified concern for the life of a fetus. Those statutes permit the abortion of a fetus resulting from rape or incest, and in some states a fetus growing within the body of an unmarried woman under the age of fourteen, fifteen or sixteen, or a woman with German Measles, e.g., Colo. Rev. Stat. Ann. § 40-2-50 et seq. (Supp. 1967).

In other states, a pregnant woman may not be

executed if she is "quick with child". New York Code of Criminal Procedure, §§ 501 et seq. Presumably, as was true historically, a woman who is pregnant with an unquick fetus may be executed.* Of course, in that case the fetus will die with her.

Furthermore, in no other way do the states act to protect the fetus from dangers to its existence. There exist no intensive prenatal care programs for those expectant mothers who do not receive this necessary care. There exist no massive education programs concerning diet, exercise, etc., for expectant mothers. There is no mandatory innoculation against rubella, a crippling disease for a fetus to be affected by. Drugs harmful to the fetus are allowed on the market even though alternative treatment could be utilized. In New York, for example, the State Department of Social Services does not provide additional money for the fetus until the fourth month of pregnancy. Title 18, Codes, Rules and Regulations of the State of New York, § 353.2. Clearly, the states take no affirmative action to care for the fetus in which they claim such a compelling interest. Nor do the governments consistently protect the interest of the children who are subsequently born.**

---

* For further historical discussion of this distinction between the quick and unquick fetus in New York law, see Means, supra, 14 N.Y.L.F. at pp. 441-3.

** If governments insist that there is a compelling state interest in protecting human life and therefore in outlawing abortions, why is it that these same governments fail to protect the rights of illegitimate children who are subsequently born. Although Levy v. Louisiana, 391 U.S. 68 (1968), stated that a state cannot treat an illegitimate child differently from legitimate offspring, in Labine v. Vincent, 91

(fn. continues on next page)

In light of these facts we must look again at the argument that the state must protect each and every fetus which has been conceived. In order to assert this view one must assume that every fetus is a human being equal in all respects to every living citizen from the moment of conception. Stripped of any religious definitions of when meaningful human life begins, that is when the soul enters the human organism, the various medical procedures for terminating pregnancy that are currently illegal under the challenged laws are not significantly different from some current methods of birth control.*

(fn. continued from preceding page)
S.Ct. 1017 (1971), this Court upheld a Louisiana statute which prohibited illegitimate children, though duly acknowledged, from claiming and taking property by interstate succession for their father's estate. There are cases in both the states of Georgia and Texas which reveal the same form of discrimination. In Patterson v. Liberty Mutual Insurance Co., 147 S.E.2d 64 (1966), the Georgia Court of Appeals refused to allow a posthumous illegitimate child who brought a proceeding to recover compensation for death of the deceased employee, the child's father, to recover. In Hargrove v. Lloyds Casualty Company of New York, 66 S.W.2d 466 (1933), the Texas Court held that an illegitimate child could not recover compensation for her father's death under Workingman's Compensation Act. Thus there would seem to be a fundamental inconsistency in vigorously protecting the right of the child to be born and then denying that same child equal protection. Such protection of the property of the father from the claims of his out-of-wedlock children may well be yet another factor to encourage men to desert the children they have fathered and the mothers of those children.

* E.G., it is commonly accepted that the intrauterine device (IUD) acts as an abortive agent rather than as a contraceptive which prevent conception.

There is a great variation in positions as to when the essential "humanness" which causes society to protect the life of its citizens actually develops. In fact, the final determination is a philosophical or religious one.

For example, one might consider that the moment of fertilization is the moment of creation of a human being. Under that approach the development of that "life" could not be interfered with from that moment of fertilization. In that case no I.U.D.'s could be legally used by women though they are widely used throughout the country. According to Father Robert F. Drinan, former Dean of the Boston College Law School, and now United States Congressman,

> There is no doubt whatever that countless individuals and several opinion molding groups in America are convinced that the Catholic Church is using its persuasion, its prestige and its political power to fight any change in the abortion laws. These individuals and associations are sometimes afraid to speak openly about the role of the Church lest they deepen the Church's antagonism to the causes they espouse. Drinan, Robert F., S.J., "The Morality of Abortion Laws," 14 Cath. Lawyer 190, 195 Summer (1968).

For that reason the political activities of the Catholic Church and its proponents in opposing even liberalization of abortion laws remains an open secret which is difficult if not impossible to "prove" in a traditional legal sense. However, in reporting the passage by the Hawaii legislature of a bill repealing that state's abortion law, the New York Times stated that "The Roman Catholic Church waged a long battle to try to keep the abortion bill from passing." New York Times, 2/25/70, 1:5. The Hawaiian experience is

plainly not an isolated experience.

Significantly, under the common law there appears to have been no legal proscription against abortion before the fetus was quick within the mother -- and it was at that time that the soul was thought to enter the organism. Means, supra, at 426-8. At approximately the time that the view of the Catholic Church shifted concerning the entry of the soul, laws concerning abortion did too -- both moving back to the time of conception.**

What is more, according to Rabbi David M. Feldman, Author of Birth Control in Jewish Law, the position of the Catholic Church on the question of abortion is doctrinal rather than a general moral position. The position stems in part from an ancient interpretation of the Hebrew Septuagint, with respect to "ensoulment" leading to the proscription of abortion of a "formed" fetus. Feldman, Birth Control in Jewish Law, New York University Press 1968, pp. 257-8 and 269. It further stems from the position of the Church on original sin and baptism, which leads to the conclusion that if a fetus is not permitted to develop to term so that it can be baptized at birth, it is "worse than murder" for then the fetus is doomed to limbo. Feldman, Ibid., pp. 268 and 270.

In contrast with the Catholic approach to abortion, under Jewish law, the welfare of the woman -- her pain and suffering -- is paramount. Feldman, Ibid., pp. 291-2. In Jewish law, the fetus does not become a person until the moment of birth. Feldman, Ibid., pp. 255 and 273. The fetus, at least in the early stages is considered part of its

---

** This was coupled with crusades in Calvinist theology and New England Puritanism against sex and immorality. Lader, Lawrence, Abortion, Beacon Press (1966).

other's body, Feldman, Ibid., p. 265, and only when its head emerges is it inviolate. Feldman, Ibid., p. 275. Therefore, in any number of situations in which abortion would be permissible under Jewish law it would be forbidden under the laws of Texas and Georgia and nearly every other state in the country as would be more consonant with Catholic doctrine.

Abortion laws throughout the country are thus based on a religious definition of when "human" life begins. As a result, no woman may legally terminate an unwanted pregnancy except under the most limited circumstances, because to do so would offend the religious precepts of others. She then, though forced to adopt certain beliefs, has her personal constitutional freedoms eroded by laws which not only favor one religious doctrine but actually enforce it. Thus, the Texas and Georgia as well as most other abortion laws are in direct conflict with constitutional rule that "[t]he government is neutral, and while protecting all, it prefers none, and it disparages none." School District of Abington Township v. Schempp, 374 U.S. 203, 215 (1965). As this Court stated in that case:

> The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or all orthodoxies. 374 U.S. at 222.

Just such fusion deprives countless of women each year of the most basic control over their bodies and their lives in a way which will affect them for the rest of their days, and all in violation of the constitutional proscription against the establishment

of religion.

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state or Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state." Everson v. Board of Education, 330 U.S. 1, 15-16 (1947), citing Reynolds v. United States, 98 U.S. 145, 164 (1878).

The Texas and Georgia laws governing abortion constitute the most glaring example of the demolition of th wall. Furthermore, insisting that a woman carry to term each and every pregnancy which may occur the state is not only enforcing a particular religious belief but developing a form of right unique in America law. For, in no other instance does the right to live include the right to use another person's body - his or her kidney, heart and lungs. Yet the denial t

women the right to an abortion gives a fetus the right to occupy an unwilling woman's body and use not only her uterus but every other organ of her body without her consent.

Thus stripped of the remaining religions justification for the prohibition of abortion, there is no argument sufficient to sustain the abridgment of a women's rights effected by the denial of abortion.

"Where there is a significant encroachment upon personal liberty, the State may prevail only by showing a subordinating interest which is compelling." Griswold v. Connecticut, supra, 381 U.S. at 497, citing Bates v. City of Little Rock, 361 U.S. 516, 524 (1960).

Amici urge this Court to consider the following questions:

> Are the interests of society being served by a law which exposed over a million women last year to such risks [as described above]? Are the interests of society being served by women bearing unwanted children, subjected to the pressures of an emotionally and financially deprived existence? Are the interests of society being served by the population explosion we are now witnessing? South Dakota v. Munson, supra, slip opinion, p. 9.

> Thus the real question is not "How can we justify abortion"? but "How can we justify compulsory childbearing?" Cisler, "Unfinished Business: Birth Control and Women's Liberation," Sisterhood is Powerful, ed., Robin Morgan, Random House, 1970, p. 278.

This Court must then conclude, as other courts have across the nation, that,

> Upon a balancing of relevant interest, we hold that a woman's right to refuse to carry an embryo during the early months of pregnancy may not be invaded by the state without a more compelling public necessity than is reflected in the statute in question. Walsingham v. Florida, supra, slip opinion, p. 12, citing Babbitz v. McCann, supra.

And further, that,

> The Court can find no compelling interest of the state and concludes that the right to choose to bear or not to bear children is a fundamental right of the individual woman to be exercised in any manner she chooses and which may not in any way be abridged by law. People v. Robb, supra, slip opinion, p. 9.

V. YOUNGER v. HARRIS DOES NOT IMPAIR OR LESSEN THE JURISDICTION, POWER OR RESPONSIBILITY OF THIS COURT TO GRANT THE RELIEF REQUESTED.

In Younger v. Harris, 91 S.Ct. 746 (1971), and its companion cases this Court refused to rule on the constitutionality of several state statutes challenged on First Amendment grounds. The Court held that the constitutional objections could and should be raised by the litigants in defense to a criminal prosecution, and the litigants would not be irreparably harmed by raising their constitutional rights in that forum. That is not the case here however.

In the two cases before this Court the primary plaintiffs are women in need of abortions. Neither they, nor other women throughout the country, who daily have their rights denied by the Georgia, Texas and other abortion statutes, can turn to the state criminal process for a determination of their rights. For, the violation of their rights does not stem primarily from the fact that they may be prosecuted for having an abortion (though in rare cases they are), but from the fact that a very real threat of criminal prosecution of third parties prevents them from obtaining the medical care they require. As long as abortion laws such as those of Georgia and Texas are in effect they will not be able to obtain abortions. As the Supreme Court of the State of California recognized in California v. Belous, supra, 80 Cal.Rptr. at 366, since the doctor is risking his own freedom and professional career in performing an abortion, "Rather than being impartial, the physician has a 'direct, personal, substantial, pecuniary interest in reaching a conclusion' that the woman should not have an abortion." The situation of women barred from obtaining

abortions by unconstitutional laws is therefore distinguishable from that of appellees in Boyle v. Landry, 91 S.Ct. 758 (1971). This Court found that they were deterred from exercising their constitutional rights only by their own "imaginary or speculative fears of prosecution." 91 S.Ct. at 758. Furthermore, women are not required to entrust the protection of their constitutional rights to a third party which has litte interest in protecting those rights. Perlman v. United States, 247 U.S. 7, 12-13 (1918).

Amici have attempted to show that to require a woman to carry, give birth to and raise a child against her will is indeed irreparable harm sufficient to satisfy the standard of Dyson v. Stein, 91 S.Ct. 769 (1971), decided with Younger v. Harris, supra, in which the Court stated that,

> ...federal intervention affecting pending state criminal prosecutions, either by injunction or by declaratory judgment is proper only where irreparable injury is threatened. The existence of such injury is a matter to be determined carefully under the facts of each case.

The rights of women such as Mary Doe and Jane Roe who are denied the abortions they seek must not turn on whether some few medical personnel are courageous enough to open themselves to prosecution by performing the needed abortions, and then challenge the restrictive law in a criminal proceeding. This is too tenuous a thread for millions of women throughout the country to rest their constitutional rights on. In Younger v. Harris, supra, 91 S.Ct. at 751, this Court noted that it has long been considered appropriate for the federal courts to rule on the constitutionality of state criminal

statutes where,

> ... The threat to the plaintiff's federally protected rights [is] one that cannot be eliminated by his defense against a single criminal prosecution. See, e.g., Ex Parte Young, 209 U.S. 123, 145-7.

That is exactly the situation before the Court. Women are having their lives and bodies mangled and destroyed daily by abortion laws such as those of Georgia and Texas and cannot look to the state criminal process to rid themselves of the bonds of these laws. This Court must, therefore, exercise the "duty" of the federal courts to hear and decide federal constitutional claims, for the federal courts are the "...primary and powerful reliances for vindicating every right given by the Constitution...." Zwickler v. Koota, 381 U.S. 241, 247 (1967).

CONCLUSION

For the foregoing reasons Amici urge this Court to find Georgia Code Annotated § 26-1201 and Texas Penal Code Articles 1191, 1192, 1193, 1194 and 1196 violate the most fundamental rights of women guaranteed by the United States Constitution.

Respectfully submitted,

NANCY STEARNS
c/o Center for Constitutional Rights
588 Ninth Avenue
New York, New York 10036

The attorney for amici wishes to note with appreciation the invaluable assistance of Elizabeth Schneider of New York University School and Chris Stern of Brooklyn Law School in the preparation of this Brief.

IN THE

Supreme Court of the United States

October Term, 1971

Supreme Court, U.S.
FILED
OCT 12 1971
E. ROBERT SEAVER, CLERK

MOTION FILED
AUG 11 1971

No. 70-18

JANE ROE, JOHN DOE, and MARY DOE,
Appellants,

JAMES HUBERT HALLFORD, M. D.
Appellant-Intervenor,

v.

HENRY WADE,
Appellee.

On Appeal from the United States District Court for the Northern District of Texas

No. 70-40

MARY DOE, *et al.*,
Appellants,

v.

ARTHUR K. BOLTON, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

MOTION FOR LEAVE TO FILE A BRIEF WITH BRIEF AS *AMICI CURIAE* FOR PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. and AMERICAN ASSOCIATION OF PLANNED PARENTHOOD PHYSICIANS

HARRIET F. PILPEL
NANCY F. WECHSLER
Attorneys for Amici Curiae
437 Madison Avenue
New York, New York 10022

Of Counsel:
GREENBAUM, WOLFF & ERNST
RUTH JANE ZUCKERMAN
MICHAEL KENNETH BROWN

IN THE

Supreme Court of the United States

October Term, 1971

No. 70-18

JANE ROE, JOHN DOE, and MARY DOE,
Appellants,

JAMES HUBERT HALLFORD, M. D.
Appellant-Intervenor,

v.

HENRY WADE,
Appellee.

On Appeal from the United States District Court for the Northern District of Texas

---

No. 70-40

MARY DOE, *et al.*,
Appellants,

v.

ARTHUR K. BOLTON, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

---

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

Planned Parenthood Federation of America, Inc., hereinafter called "Planned Parenthood," and the American

THROUGH

Association of Planned Parenthood Physicians, hereinafter called "AAPPP," hereby respectfully move for leave to file a brief annexed hereto as *amici curiae* in these cases.

The appellants consented in writing to the filing of this *amici* brief. The states of Georgia and Texas have declined to consent thereto.

Planned Parenthood Federation of America, Inc., is a not-for-profit corporation originally organized in 1922 and existing under the laws of the State of New York. Its headquarters are in New York City. It is the leading national voluntary public health organization in the field of family planning and birth control and a leading national organization in the field of educating the public concerning the danger to the United States and the world inherent in continuing population growth.

As of May, 1971, Planned Parenthood had 190 affiliates in 42 states and the District of Columbia, operating approximately 700 family planning clinics offering services to the public. Planned Parenthood provides its affiliates guidance in the areas of birth control, voluntary sterilization, treatment of infertility problems, abortion and education for marriage and parenthood. Each of the affiliates functions under strict medical standards promulgated by the National Medical Advisory Committee in conjunction with local medical advisory committees, all such committees consisting exclusively of physicians.

Planned Parenthood also functions as a clearing house for information and services relating to these same areas. It formulates nationwide medical and clinical standards and is active in developing guidelines and materials relating to public and professional education in this field. Its Medical Director and other consultants confer with medical school faculties and local agencies in relation to teaching techniques, formation of clinics and the like.

Many of Planned Parenthood's affiliates operate in cooperation with local public health facilities. The affiliates are also teaching and training centers for physicians, nurses, teachers and social workers and provide for referral services to qualified medical specialists.

Planned Parenthood's concern with family planning and family health necessarily includes concern with the availability of abortion and with the compelling problems which result from restrictive abortion laws which make medically safe, legal abortions unavailable to many women. Planned Parenthood has adopted a policy on abortion which states in part:

> "The optimum method of birth control is the consistent employment of effective contraception but in practice this goal is sometimes not achieved. It is, therefore, desirable that provisions respecting abortion not be contained in State Criminal Codes. Planned Parenthood believes that since abortion is a medical procedure, it should be governed by the same rules as apply to other medical procedures in general when performed by properly qualified physicians with reasonable medical safeguards."

This commitment to the principle that safe abortions should be available to all who seek them is a necessary corollary of Planned Parenthood's activities in the area of birth control. While Planned Parenthood does not view abortion as an alternative to contraception, it recognizes that abortion services are essential to protect women where contraception is unavailable, where it has not been used or where it has failed. Planned Parenthood believes that abortions must also be available to women who have been raped and in cases where the fetus may be deformed as a result of the mother's exposure to rubella, her use of drugs which affect fetal development or as a result of other factors.

Each year a number of the patients served by Planned Parenthood affiliates (in Georgia and Texas as well as in other states) experience unwanted pregnancies, often due to contraceptive failure. Contraceptive technology has not developed to a point where there is any perfect contraceptive and many of the techniques available to particular women do on occasion fail. Also, many women do not have

effective access to contraception. There are, therefore, vast numbers of unwanted pregnancies each year which do not involve failure of use or motivation on the part of the patient.

Throughout the United States many patients who experience unwanted pregnancies seek abortion services from the Planned Parenthood clinics, especially those women who have looked to those clinics for contraceptive services. Because of the Georgia and Texas abortion laws challenged herein, and similarly restrictive laws on the books in other states, the activities of Planned Parenthood affiliates are severely circumscribed and they are unable to provide patients with the medical services they urgently need.

The American Association of Planned Parenthood Physicians (AAPPP) was organized in 1963. As of May, 1971, its membership consisted of 650 physicians specializing in obstetrics and gynecology and having a special interest in the various aspects of human reproduction. Many such physicians are connected with Planned Parenthood affiliates, health departments, hospitals and other agencies; others are primarily private practitioners.

Papers presented at AAPPP conventions are published in *Advances in Planned Parenthood*. The 1970 volume reached 5,000 doctors, thus sharing the experience, studies and ideas of AAPPP physicians with other non-member doctors engaged in providing family planning services.

AAPPP adopted a resolution on abortion at its 1970 annual meeting which states in part:

> "The American Association of Planned Parenthood Physicians supports the principle that the decision whether or not to bear children is a right which belongs solely to each individual woman, to be exercised by her in any manner she may desire.
>
> Consequently the decision to undergo legal abortion, as one method of exercising this right, must rest with the individual woman and her physician.

Therefore, the American Association of Planned Parenthood Physicians strongly urges the abolition of all statutes and criminal laws which in any way restrict the performance of abortion by qualified medical personnel."

AAPPP believes that restrictive abortion statutes not only impair rights of women to receive medical treatment for abortion and to determine whether to bear children, but also interfere with the practice of good medicine by preventing physicians from providing their patients with a safe medical procedure which is often necessary for the health and well-being of the patient.

Both Planned Parenthood and the AAPPP by reason of their long experience in and knowledge of the field of family planning services believe that they are in a unique position to aid the Court in its resolution of the issues raised in these cases. Both organizations have a profound interest in vindicating the constitutional right of all women to have access to qualified medical services for abortion, insuring that no woman is denied her freedom to choose whether or not to bear a child, and establishing the right of physicians to provide the best available medical service to their patients.

Therefore, Planned Parenthood and AAPPP respectfully request that the Court grant this motion for leave to file the annexed brief *amici curiae*.

Respectfully submitted,

HARRIET F. PILPEL

NANCY F. WECHSLER
Attorneys for Amici Curiae
437 Madison Avenue
New York, New York 10022

Of Counsel:
GREENBAUM, WOLFF & ERNST
RUTH JANE ZUCKERMAN
MICHAEL KENNETH BROWN

IN THE

Supreme Court of the United States

October Term, 1971

No. 70-18

JANE ROE, JOHN DOE, and MARY DOE,
Appellants,

JAMES HUBERT HALLFORD, M. D.,
Appellant-Intervenor,

v.

HENRY WADE,
Appellee.

On Appeal from the United States District Court for the Northern District of Texas

No. 70-40

MARY DOE, *et al.*,
Appellants,

v.

ARTHUR K. BOLTON, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

BRIEF FOR PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. and AMERICAN ASSOCIATION OF PLANNED PARENTHOOD PHYSICIANS AS *AMICI CURIAE*

HARRIET F. PILPEL
NANCY F. WECHSLER
Attorneys for Amici Curiae
437 Madison Avenue
New York, New York 10022

Of Counsel:
GREENBAUM, WOLFF & ERNST
RUTH JANE ZUCKERMAN
MICHAEL KENNETH BROWN

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Statement of the Cases	7
Questions Presented	7
Interest of Planned Parenthood Federation of America, Inc. and American Association of Planned Parenthood Physicians as *Amici Curiae*	8
Summary of Argument	9
Argument	
Point I—The facts relating to unwanted births, contraception and abortion show the compelling need for a determination by this Court of the issues raised in these cases	11
A. The Facts About Contraception	12
1. Availability of Contraception	12
2. Contraceptive Failure	13
B. The Facts About Abortion	21
1. Abortion Is an Accepted Medical Procedure	21
2. The Dangerous Effects on Life and Health of Restrictive Abortion Laws	22
C. The Facts About Unwanted Births	24

PAGE

Point II—The Georgia and Texas statutes, by restricting the grounds for the performance of abortions, violate fundamental rights of women and their physicians under the Ninth and Fourteenth Amendments to the Constitution 30

A. Statutory Framework 30

1. Texas 30

2. Georgia 31

B. The Fundamental Right to Choose Whether or Not to Bear a Child 32

C. The Fundamental Right to Life and Health 36

D. The Physician's Right to Provide His Patients with the Best Medical Treatment 36

E. Since Neither the Texas nor the Georgia Statute Promotes any Compelling State Interest, Both Violate the Ninth and Fourteenth Amendments to the Constitution 39

1. Enforcing Morals 40

2. Increasing Population 41

3. The Statutes Do Not Serve the Health Interests of Pregnant Women 41

4. Protecting the Interest of the Fetus 43

Conclusion 45

TABLE OF AUTHORITIES

PAGE

Cases:

Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wisc. 1970) (*per curiam*), *appeal dismissed*, 400 U.S. 1 (1970) (*per curiam*) 35

Baird v. Eisenstadt, 429 F.2d 1398 (1st Cir. 1970), *prob. juris. noted*, 401 U.S. 934 (1971) (No. 804, 1970 Term; renumbered No. 70-17, 1971 Term) 12, 40

Bates v. Little Rock, 361 U.S. 516 (1960) 39

Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971), *appeal docketed*, 40 U.S.L.W. 3048 (U.S. July 17, 1971) (No. 71-92) 35

Dent v. West Virginia, 129 U.S. 114 (1889) 37

Doe v. Bolton, 319 F. Supp., 1048 (N.D. Ga. 1970) (*per curiam*), *ques. of juris. postponed to merits*, 91 S. Ct. 1614 (1971) (No. 971, 1970 Term; renumbered No. 70-40, 1971 Term) 2, 3, 9, 35

Doe v. Scott, 321 F. Supp. 1384 (N.D. Ill. 1971), *appeals docketed, sub noms.* Hanrahan v. Doe and Heffernan v. Doe, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (Nos. 1522, 1523, 1970 Term; renumbered Nos. 70-105, 70-106, 1971 Term) 35

Everard's Breweries v. Day, 265 U.S. 545 (1924) 37, 38

Greene v. McElroy, 360 U.S. 474 (1959) 37

Griswold v. Connecticut, 381 U.S. 479 (1965) 11, 33, 34, 35

Jacobson v. Massachusetts, 197 U.S. 11 (1905) 36

Katz v. United States, 389 U.S. 347 (1967) 32

Lambert v. Yellowley, 272 U.S. 581 (1926) 37

Loving v. Commonwealth, 388 U.S. 1 (1967) 33, 35

Meyer v. Nebraska, 262 U.S. 390 (1923) 33, 35

PAGE

Olmstead v. United States, 277 U.S. 438 (1928) 32

People v. Barksdale, Docket No. 1 Crim. 9526 (Calif. Ct. of Appeal, First App. Dist., Division 1, July 22, 1971) 35

People v. Belous, 71 Cal.2d 954, 80 Cal. Rptr. 354, 458 P.2d 194 (1969), *cert. denied* 397 U.S. 915 (1970) 35, 43

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 33, 35

Roe v. Wade, 314 F. Supp. 1048 (N.D. Tex. 1970) (*per curiam*) *ques. of juris. postponed to merits*, 91 S. Ct. 1610 (1971) (No. 808, 1970 Term; renumbered No. 70-40, 1971 Term) 2, 35

Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970), *appeal docketed*, 39 U.S.L.W. 3247 (U.S. Nov. 27, 1970) (No. 1010, 1970 Term; renumbered No. 70-42, 1971 Term) 35

Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) 37

Skinner v. Oklahoma, 316 U.S. 535 (1942) 33, 35

Stanley v. Georgia, 394 U.S. 557 (1969) 32, 33, 35

State v. Baird, 50 N.J. 376, 235 A.2d 673 (1967) 40

Steinberg v. Brown, 321 F. Supp. 741 (W.D. Ohio 1970) 35

United States v. Freund, 290 Fed. 411 (D. Mont. 1923) 37, 38

United States v. One Package, 86 F.2d 737 (2d Cir. 1936) 37

United States v. Vuitch, 91 S. Ct. 1294 (1971) 36

Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) 37

COPY BOUND TOO CLOSE IN CENTER

BL

PAGE

Constitution and Statutes:

United States Constitution:

Ninth Amendment 7, 30, 36, 39
Fourteenth Amendment 7, 30, 36, 39

United States Statutes:

28 U.S.C. §1253 (1964 ed.) 2

State Statutes:

Ga. Code Ann. §26-1201 ..... 3, 7
Ga. Code Ann. §26-1202 ..... 4-7, 31, 32
Ga. Code Ann. §26-1203 7
Ga. Code Ann. §26-2018 32
Mass. Gen. Laws, ch. 272, §21 12
Mass. Gen. Laws, ch. 272 §21A 12
Texas Penal Code Ann. art. 1191 ..... 2, 7, 30
Texas Penal Code Ann. art. 1192 ..... 3, 7
Texas Penal Code Ann. art. 1193 ..... 3, 7
Texas Penal Code Ann. art. 1194 ..... 3, 7
Texas Penal Code Ann. art. 1196 ..... 3, 7, 30
Wis. Stat. Ann. §151.15 12

Articles, Publications and Other Authorities:

Anderson, Jenss, Mosher & Richter, The Medical, Social and Educational Implications of the Increase in Out of Wedlock Births, 56 Am. J. Pub. Health 1868 (1966) 27

Bates & Zawadski, Criminal Abortion (1964) 22, 23

Bengston & Mouvad, The Effect of the Lippes Loop on Human Myometrial Activity, 98 Am. J. Obst. & Gynec. 957 (1967) 44

Bernstein and Herzog, Health Services for the Unmarried Mother, United States Department of Health, Education and Welfare, Welfare Administration (Children's Bureau 1964) 27, 28

ED THROUGH

PAGE

Tietze, Mortality with Contraception and Induced Abortion, 45 Studies in Family Planning 6 (1969) 21, 42

Tietze, Somatic Consequences of Abortion, Obtained & Denied: Research Approaches (Paper Presented at National Institute of Health Workshop on Abortion, December 15-16, 1969) (unpublished paper on file with the Population Council, New York City, N.Y.) 23

Tietze & Lewit, The IUD and the Pill: Extended Use-Effectiveness, Family Planning Perspectives, April, 1971 20

Tyler & Schneider, The Logistics of Abortion Services in the Absence of Restrictive Criminal Legislation in the United States, 61 Am. J. Pub. Health 489 (1971) 22

United States Department of Health, Education and Welfare, Division of Vital Statistics, Public Health Service, Monthly Vital Statistics Report —Table 10: Estimated number of illegitimate live births and ratios by age of mother and color —United States [Based on a 50 percent sample of births] (1968) 25

United States Department of Health, Education and Welfare, Public Health Service, National Center for Health Services, National Natality Survey, Monthly Vital Statistics Report Volume 18, No. 12 (Supplement) 26

Yurdin, Recent Trends in Illegitimacy—Implications for Practice, 49 Child Welfare 373-375 (1970) 25

PAGE

Miscellaneous:

213 J.A.M.A. 359 (1970) 21

Jurisdictional Statement, Bolton v. Doe, *appeal dismissed*, 91 S. Ct. 1614 (1971) 41

Policy on abortion approved by the Executive Board of the American College of Obstetricians and Gynecologists, August, 1970 22

Presidential Message on Population, 115 Cong. Rec. 20025 (1969) 41

Psychiatric News, January 1970, p. 5 22

IN THE

Supreme Court of the United States

October Term, 1971

No. 70-18

JANE ROE, JOHN DOE, and MARY DOE,
Appellants,

JAMES HUBERT HALLFORD, M. D.,
Appellant-Intervenor,

v.

HENRY WADE,
Appellee.

On Appeal from the United States District Court for the Northern District of Texas

---

No. 70-40

MARY DOE, *et al.*,
Appellants,

v.

ARTHUR K. BOLTON, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

---

BRIEF FOR PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. and AMERICAN ASSOCIATION OF PLANNED PARENTHOOD PHYSICIANS AS *AMICI CURIAE*

Opinions Below

The opinion of the United States District Court for the Northern District of Georgia in *Doe* v. *Bolton* is reported at 319 F. Supp 1048 (1970). The opinion of the United States District Court for the Northern District of Texas in *Roe* v. *Wade* is reported at 314 F. Supp 1217 (1970).

Jurisdiction

The jurisdiction of this Court in both *Doe* v. *Bolton* and *Roe* v. *Wade* is invoked under 28 U.S.C. §1253 (1964 ed.). For full statements, as to jurisdiction, *amici* respectfully refer the Court to the statements incorporated in the briefs for the appellants in the two cases.

Statutes Involved

1. *Roe* v. *Wade*

TEXAS PENAL CODE ANN. art. 1191, at 429 (1961):

> "If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused."

TEXAS PENAL CODE ANN. art. 1192, at 433 (1961):

"Whoever furnishes the means for procuring an abortion knowing the purpose intended is an accomplice."

TEXAS PENAL CODE ANN. art. 1193, at 434 (1961):

"If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars."

TEXAS PENAL CODE ANN. art. 1194, at 435 (1961):

"If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder."

TEXAS PENAL CODE ANN. art. 1196, at 436 (1961):

"Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

2. *Doe* v. *Bolton*

(Those sections of the statute declared unconstitutional by the court below are italicized.)

GA. CODE ANN. §26-1201 at 85 (1970 revision): **Criminal Abortion**

Except as otherwise provided in section 26-1202, a person commits criminal abortion when he administers any medicine, drug or other substance whatever to any woman or when he uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion. (Acts 1968, pp. 1249, 1277.)

GA. CODE ANN. §26-1202 at 85-87 (1970 revision): **Exception**

(a) Section 26-1201 shall not apply to an abortion performed by a physician duly licensed to practice medicine and surgery pursuant to Chapter 84-9 or 84-12 of the Code of Georgia of 1933, as amended, based upon his best clinical judgment that an abortion is necessary *because*:

(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or

(2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or

(3) The pregnancy resulted from forcible or statutory rape.

(b) No abortion is authorized or shall be performed under this section unless each of the following conditions is met:

(1) The pregnant woman requesting the abortion certifies in writing under oath and subject to the penalties of false swearing to the physician who proposes to perform the abortion that she is a bona fide legal resident of the State of Georgia.

(2) The physician certifies that he believes the woman is a bona fide resident of this State and that he has no information which should lead him to believe otherwise.

(3) Such physician's judgment is reduced to writing and concurred in by at least two other physicians duly licensed to practice medicine and surgery pursuant to Chapter 84-9 of the Code of Georgia of 1933, as amended, who certify in writing that based upon their separate personal medical examinations of the

pregnant woman, the abortion is, in their judgment, necessary *because of one or more of the reasons enumerated above.*

(4) Such abortion is performed in a hospital licensed by the State Board of Health and accredited by the Joint Commission on Accreditation of Hospitals.

(5) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose.

(6) If the proposed abortion is considered necessary because the woman has been raped, the woman makes a written statement under oath, and subject to the penalties of false swearing, of the date, time and place of the rape and the name of the rapist, if known. There must be attached to this statement a certified copy of any report of the rape made to any law enforcement officer or agency and a statement by the solicitor general of the judicial circuit where the rape occurred or allegedly occurred that, according to his best information, there is probable cause to believe that the rape did occur.

(7) Such written opinions, statements, certificates, and concurrences are maintained in the permanent files of such hospital and are available at all reasonable times to the solicitor general of the judicial circuit in which the hospital is located.

(8) A copy of such written opinions, statements, certificates, and concurrences is filed with the Director

of the State Department of Public Health within ten (10) days after such operation is performed.

(9) All written opinions, statements, certificates, and concurrences filed and maintained pursuant to Paragraphs (7) and (8) of this subsection shall be confidential records and shall not be made available for public inspection at any time.

(c) *Any solicitor general of the judicial circuit in which an abortion is to be performed under this section, or any person who would be a relative of the child within the second degree of consanguinity, may petition the superior court of the county in which the abortion is to be performed for a declaratory judgment whether the performance of such abortion would violate any constitutional or other legal rights of the fetus. Such solicitor general may also petition such court for the purpose of taking issue with compliance with the requirements of this section. The physician who proposes to perform the abortion and the pregnant woman shall be respondents. The petition shall be heard expeditiously and if the court adjudges that such abortion would violate the constitutional or other legal rights of the fetus, the court shall so declare and shall restrain the physician from performing the abortion.*

(d) If an abortion is performed in compliance with this section, the death of the fetus shall not give rise to any claim for wrongful death.

(e) Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b) (5). A physician, or any other person

who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person.

GA. CODE ANN. §26-1203 at 87 (1970 revision): **Punishment**

A person convicted of criminal abortion shall be punished by imprisonment for not less than one nor more than 10 years. (Acts 1968, pp. 1249-1280.)

Statement of the Cases

Amici respectfully refer the Court to the statements of the cases incorporated in the briefs for appellants.

Questions Presented

1. Whether Articles 1191, 1192, 1193, 1194 and 1196 of the Texas Penal Code by limiting the grounds for the performance of abortions deprive women and physicians of their fundamental rights of privacy and liberty in violation of the Ninth and Fourteenth Amendments to the Constitution.

2. Whether §26-1201 to §26-1203 of the Georgia Code by limiting the grounds for the performance of abortions deprive women and physicians of their fundamental rights of privacy and liberty in violation of the Ninth and Fourteenth Amendments to the Constitution.

Interest of Planned Parenthood Federation of America, Inc. and American Association of Planned Parenthood Physicians as *Amici Curiae*

We have in the accompanying notice of motion set forth the pertinent facts concerning Planned Parenthood Federation of America, Inc. and the American Association of Planned Parenthood Physicians and the reasons why we believe acceptance by this Court of this brief on their behalf as *amici curiae* is appropriate to consideration of the questions raised in these cases.

Planned Parenthood Federation of America, Inc. and the American Association of Planned Parenthood Physicians believe that they can provide the Court facts about contraceptive failure, unwanted births, and abortion which will not otherwise be presented. Moreover, the ability of Planned Parenthood and its affiliates to function effectively in the area of family planning and the ability of the member doctors of American Association of Planned Parenthood Physicians to practice medicine are drastically curtailed by the statutes such as those of Texas and Georgia which are at issue in these cases. *Amici* believe that the parties will not cover material presented herein.

Amici have not briefed separately either the question of whether the courts below improperly denied injunctive relief or the issues of jurisdiction as to which this Court has postponed determination. *Amici* support the arguments made by appellants in their briefs as to jurisdiction and injunctive relief.

With respect to arguments on the merits, *amici* will discuss only the question of whether the Georgia and Texas statutes, insofar as they restrict the grounds for the performance of abortion, are unconstitutional, since these are the questions as to which *amici* believe they are in a special position to be of aid to the Court and to present new material. *Amici* do, however, support the arguments developed in the appellants' brief in *Doe* v. *Bolton,* that the requirements in the Georgia statute as to residency, physician consultation, hospital committee approval and accreditation of hospitals by the Joint Commission are unconstitutional for the reasons stated by appellants in that case. *Amici* also concur with the appellants' contentions that both the Texas statute and the Georgia statute are unconstitutionally vague.

Summary of Argument

In this brief *amici* have presented factual material, as well as legal arguments, to demonstrate that the Texas and Georgia abortion statutes, by prohibiting all abortions other than those performed for the specific reasons set forth in the statutes, violate fundamental constitutional rights of women and their physicians.

The facts on contraception, abortion and unwanted births which *amici* discuss in Point I demonstrate the compelling need for a decision on the merits of these cases. Contraception, which provides the first line of defense against compulsory pregnancy and childbearing, is neither available to all nor fully effective when used. Literally millions of individuals have no access to the most effective, or indeed, any contraceptives because of their economic

situation or because of inadequate medical or pharmaceutical services. In addition, many women, for medical or other reasons, cannot avail themselves of the most effective techniques of contraception.

Childbirth may be dangerous or unsuitable for a girl or woman for a variety of reasons. Her physical or mental health may be adversely affected by pregnancy; there may be a risk of serious fetal defect; the pregnancy may occur in a teenager out of wedlock, or may have been the result of an act of rape or incest; she may be unable to support another—or any—child. There are in short, a whole host of reasons—medical, social, economic and psychological—why a pregnant girl or woman may wish to have an abortion.

Abortion is an accepted and safe medical procedure and various respected medical organizations have stated their views to the effect that there should be no statutorily imposed restrictions on the grounds for which an abortion is performed. Restrictive laws such as those in Texas and Georgia, however, deprive women of their right of choice and force most women, unless they are able to obtain a safe, legal abortion out of state, to choose between bearing a child against their wishes or seeking illegal and unsafe abortions. These alternatives involve risks to the pregnant woman and to society and, when the woman carries the pregnancy to full term, to the unwanted child as well, especially if the child is born out of wedlock.

Prior cases decided by this Court have established the fundamental nature of the rights of the individual in areas relating to marriage, the family and sex. Moreover, the

right to abortion must be viewed as a corollary of the right to control fertility which was recognized in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). Also at issue are the woman's right to life and to needed health services and her physician's right to practice medicine in accordance with the highest standards of the profession.

Since it cannot be demonstrated that the Texas and Georgia abortion statutes are both narrowly drawn and necessary to promote a compelling state interest, the statutes must, under established principles of law, be declared unconstitutional.

ARGUMENT

POINT I

The facts relating to unwanted births, contraception and abortion show the compelling need for a determination by this Court of the issues raised in these cases.

Amici present the following material to bring to the Court's attention the serious health problems facing women and society where abortion is not available to terminate pregnancies which for a variety of reasons should not result in compelling the birth of a child. Such pregnancies include those resulting from contraceptive failure and from rape, as well as those which will probably result in the birth of a deformed or defective child. They also include pregnancies which if carried to full term will create severe hardship or utterly disrupt the life of the mother, particularly where she is an unmarried teenager.

A. The Facts About Contraception

1. Availability of Contraception

Although contraceptive services are legally available in all states to married persons and in almost all states without regard to marital status,[1] in fact contraceptives are not readily available to a substantial portion of the population. This is particularly true of urban and rural poor in many areas of the country. In some of these areas even non-prescription and relatively ineffective contraceptives cannot be obtained. Even if some form of contraception is available there is likelihood of unwanted pregnancy since the most effective and practical contraceptives, such as the birth control pill, the intrauterine device, and the diaphragm[2] can be obtained only on the prescription of a doctor whose services are denied to hundreds of thousands of poor. The extent to which the poor are unable to obtain effective or even any contraceptives is shown by a recent report of the Senate Committee for Labor and Public Welfare which states:

> "Problems of unwanted children do not occur only in low income and less educated families in this country, but the consequences are greater in this group because of the accumulation of difficulties this condition imposes upon the poor. • • •

1. In only two states—Wisconsin (WIS. STAT. ANN. §151.15), and Massachusetts (MASS. GEN. LAWS ch. 272 §§21, 21A)—is prescription and/or distribution of contraceptives to unmarried persons prohibited. The Massachusetts law was declared unconstitutional by the Court of Appeals for the First Circuit in Baird v. Eisenstadt, 429 F.2d 1398 (1st Cir. 1970), *prob. juris. noted*, 401 U.S. 934 (1971) (No. 804, 1970 Term; renumbered No. 70-17, 1971 Term).

2. *See* pp. 13-20, *infra*.

> • • • Medically indigent families (defined according to poverty levels established by the Social Security Administration) have an average annual fertility rate 53 per cent higher than the nonpoor. The couple with funds to purchase health care has relatively easy access to family planning services. The medically indigent couple—usually dependent on public and voluntary agencies for health care—is forced to do without, or to rely heavily on the least effective nonmedical techniques for fertility control unless they happen to reside in an area where family planning services are made readily available by public health services or voluntary agencies.
>
> *A number of studies have established the existence of a group totaling about 5 million medically indigent women in the United States of child bearing age having a need for subsidized family planning services.*" SEN. REP. No. 91-1004, 91st Cong., 2d Sess. 9 (1970) (footnote omitted) (emphasis added).

Because of the unavailability of contraceptives to so many women, and the unavailability in most states of legal abortions, many medically indigent women, who should not be forced to bear a child for medical or other reasons, have no alternative unless willing and able to obtain illegal abortions.

2. *Contraceptive Failure*

There is a wide variation among contraceptives respecting efficacy, safety and side effects. A recent study by Dr. Christopher Tietze, the Associate Director of the Bio-Medical Division of The Population Council and one of the leading experts in the field, examines the level of effective-

ness of the various contraceptive methods.[3] Tietze distinguishes between use-effectiveness or clinical effectiveness—"the protection from unwanted pregnancy achieved by users under real life conditions, including the effects of carelessness, ambivalence, and other manifestations of human frailty"[4]—and theoretical or biological or physiological effectiveness—"the antifertility action of a method under laboratory conditions."[5]

In his study, Tietze ranks currently utilized contraceptive methods according to estimated theoretical effectiveness[6] into four categories. The categories are "most effective," "highly effective," "less effective" and "least effective."[7]

Included in the "most effective" category are surgical sterilization, oral contraceptives, injectable progestational

3. Tietze, *Effectiveness of Contraceptive Methods* in CONTROL OF HUMAN FERTILITY: PROCEEDINGS OF THE FIFTEENTH NOBEL SYMPOSIUM, 303 (E. Diczfalusy & U. Borell eds. 1971) (hereinafter cited as Tietze). This section of *amici's* brief will also draw upon Segal & Tietze, *Contraceptive Technology: Current and Prospective Methods* in REPORTS ON POPULATION/FAMILY PLANNING, REPORT No. 1 (July 1971 Edition) (in press) (hereinafter cited as Segal & Tietze).

4. Tietze, *supra* note 3, at 304.

5. *Id.* at 303.

6. With respect to measurements of theoretical effectiveness he states: "Since these [laboratory] conditions are rarely achieved by human populations and can never be ascertained for most methods, theoretical effectiveness is not usually accessible to direct measurement. However, it can be inferred from the performance of the most successful group of users, supplemented by *a priori* anatomical and physiological considerations and by observations in the laboratory either *in vitro* or *in vivo*, or perhaps more accurately, *in viva*." *Id.* at 303-304.

7. *Id.* at 304.

agents and temperature rhythm.[8] However, even as to techniques that are theoretically most effective, method failures occur. Also, each of these techniques has disadvantages and some are unavailable for medical reasons for many people.

Voluntary female or tubal sterilization is the most effective contraceptive method there is and a "method for which theoretical effectiveness and use-effectiveness coincide," although there are occasional failures of this technique.[9]

There is some data indicating "a somewhat lower level of effectiveness" achieved by male sterilization or vasectomy as opposed to tubal sterilization; however, such data is fragmentary.[10]

Despite its effectiveness, sterilization is not appropriate for many. A disadvantage of surgical sterilization as a method is that only in some cases is restoration of fertility in males and females possible after sterilization.[11] Thus, unless an individual is certain that he or she never wants any, or any more children, sterilization is inappropriate.

Oral contraceptives (OCs) of the combined type are "almost 100 percent effective" when "taken according to the prescribed regimen."[12] But the oral contraceptives

8. *Ibid.*

9. *Ibid.*

10. *Id.* at 305.

11. Segal & Tietze, *supra* note 3, at 10.

12. Tietze, *supra* note 3 at 305. Sequential medication according to Tietze is "somewhat less effective than combined medication." *Id.* at 306. Failures occur with both types of oral contraceptives, the only important reason for which is the patient's omission of one or more tablets in the course of the prescribed medication cycle. Segal & Tietze, *supra* note 3, at 5.

have disadvantages such as side effects during their early use.[13] Moreover, their use is medically contraindicated for certain patients, particularly those with a history of thromboembolic disease.[14]

Temperature rhythm is defined as "the determination of ovulation by means of basal body temperature and restriction of coitus to the post-ovulatory phase of the cycle"[15] and is placed by Tietze in the theoretically "most effective" category[16] whereas calendar rhythm, is in the "less effective"[17] or third category. Neither technique is suitable for many women particularly those with grossly irregular menstrual cycles.[18] The chief disadvantage of both of the rhythm methods is that "opportunity for coitus is greatly reduced, especially with temperature rhythm"[19] which is the more reliable method. Both techniques, if the sole methods relied upon, obviously require that the couple be highly motivated and disciplined,[20] since careful records must be kept and periods of abstinence observed.

---

13. Thus, "the early use of OCs is frequently associated with symptoms similar to those occurring during early pregnancy, such as nausea, vomiting, or breast engorgement * * *. Other common complaints are breakthrough bleeding during medication, weight gain, headache, dizziness, and brownish discoloration of the facial epidermis known as chloasma. Whereas most of these symptoms last only a few months, some users become discouraged and turn to other methods or even abandon their efforts at family planning." Segal & Tietze, *supra* note 3, at 6.

14. *Id.* at 6-7.

15. Tietze, *supra* note 3, at 307. Also included in the most effective category is the injectable progestational agent which is still in the testing stage. *Id.* at 306-307.

16. *Id.* at 307.

17. *Id.* at 310.

18. Segal & Tietze, *supra* note 3, at 5.

19. *Ibid.*

20. *Ibid.*

Tietze's second category—the theoretically "highly effective methods"—includes the intrauterine devices (IUDs), the diaphragm with cream or jelly, and the condom.[21] Tietze found that the most complete information on theoretical effectiveness is available for the intrauterine devices "since theoretical effectiveness and use-effectiveness are almost identical with this method."[22]

The clinical data available on IUD effectiveness indicates that "failure rates based on all pregnancies with the most widely used IUDs * * * ranged from 1.5 to 3.0 per 100 women during the first year of use and declined during later years."[23] In some cases in which pregnancy occurred, the IUD had been expelled without the user noticing it. However, the majority of the pregnancies occurred in women with the IUD *in situ*.[24] Tietze points out that "since some conceptions after an IUD had been expelled could have been avoided by careful self-examination, the theoretical effectiveness of the loop may be placed somewhere between the rate based on all pregnancies and the rate based on pregnancies with IUD *in situ*."[25]

There are other disadvantages to the IUD aside from the failure rate attributable to method, as opposed to use. Side effects may occur, the most common of which are

21. Tietze, *supra* note 3, at 307.

22. *Ibid.*

23. *Ibid.*

24. *Ibid.* "Failure rates based on pregnancies with the IUD verified as *in situ* averaged about one-fourth less than corresponding rates based on all pregnancies." *Ibid.*

25. *Ibid.*

"bleeding or spotting and pain, including cramps, backache, and similar discomforts. These symptoms most often occur soon after insertion and tend to disappear within a few months. In some cases, however, the bleeding or pain is sufficiently severe to require removal of the device."[26]

Segal and Tietze report that the association of pelvic inflammatory disease [PID] with the use of intrauterine devices is "a more important adverse experience."[27] As of July 1971 it was not yet known "whether the insertion of an IUD in women with healthy pelvic organs [as opposed to insertion in women with pre-existing chronic or subchronic conditions] can produce PID * * *."[28]

Tietze also reports that levels of theoretical effectiveness for the diaphragm and the condom are about the same as that for the IUD.[29] Pregnancy may occur with the condom due to a break or tear in the product.[30] There may be failure with even a well-fitted diaphragm due to improper insertion or due to displacement of the diaphragm during coitus.[31] However, use-effectiveness "is

26. Segal & Tietze, *supra* note 3, at 9.

27. *Ibid.*

28. *Ibid.* Segal & Tietze state: "The majority of cases of PID among women using IUDs are relatively mild and can be treated successfully with antibiotics and without removing the device. However, some patients with PID, with or without an IUD, develop serious complications and a few still die, even with adequate medical care." *Ibid.*

29. Tietze, *supra* note 3, at 307.

30. Segal & Tietze, *supra* note 3, at 3.

31. *Id.* at 4.

frequently lower" with the diaphragm and condom,[32] and perfect use without omissions is rare.[33]

The "less effective methods" of contraception described by Tietze are chemical contraceptives such as vaginal foams, jellies, creams and the like, calendar rhythm and coitus interruptus.[34] Evidence indicates that *"vaginal foams* are more effective than *jellies* and *creams* which, in turn, are more effective than *foaming tablets* and *suppositories."*[35]

Coitus interruptus, while of high theoretical effectiveness if correctly practiced, is, according to Tietze, a "less effective" technique because many males are physiologically unable to practice it effectively.[36]

The "least effective" techniques of contraception include the post-coital douche and prolonged breast feeding.[37] The former has a very high failure rate; in addition, rapid sperm migration to an area beyond the effective reach of the douche has been observed.[38] Hence, the very low rating of the douche. Breast feeding has a tendency to postpone the return of ovulation and menstruation. The

32. Tietze, *supra* note 3, at 307-308. The rates of unwanted pregnancies reported with these methods in clinical settings "are usually between 10 and 20 pregnancies per 100 women during the first year and less in later years." *Id.* at 308.

33. Segal & Tietze, *supra* note 3, at 3, 4.

34. Tietze, *supra* note 3, at 309-310. Calendar rhythm has already been discussed. *See* p. 16, *supra.*

35. Tietze, *supra* note 3, at 310.

36. *Id.* at 310-311.

37. *Id.* at 311.

38. *Ibid.*

duration of the protection cannot be predicted, and since the first post-delivery ovulation may precede menstruation, the woman may conceive without realizing that she is no longer protected.[39]

It is clear from the foregoing that even the theoretically most effective or highly effective methods of contraception are not always actually effective for a number of reasons. Except for voluntary sterilization which many people will not use, even the most effective or highly effective methods have shortcomings either in terms of method failures or in terms of side effects or medical contraindications. In addition some of the methods are so difficult to practice regularly and correctly that they have little practical utility.

Although the method failures for some techniques are not high in terms of *percentages,* a failure rate of 1.5 to 3 per 100 women with, for example, the IUD, is indeed significant when one considers the vast numbers of women using this device, *e.g.,* in 100,000 women, 1,500 to 3,000 would experience contraceptive failure.

The failure rates are, of course, much higher when the *use*-effectiveness is considered, and this too varies with the techniques in question, as well as with the motivation and education of the people using them.[40]

---

39. *Ibid.*

40. Tietze & Lewit, *The IUD and the Pill: Extended Use-Effectiveness,* FAMILY PLANNING PERSPECTIVES, April, 1971, at 53-55.

B. The Facts About Abortion

1. Abortion Is an Accepted Medical Procedure

There is no medical dispute as to the efficacy and safety of abortion as a procedure for the termination of an unwanted pregnancy. Indeed it has been shown that abortion in the early stages of pregnancy is far safer than childbirth.[41]

Modern medical opinion regards abortion as a procedure which should be available without state imposed restrictions as to the permissible reasons. Thus, on June 25th, 1970, the House of Delegates of the American Medical Association recommended that licensed physicians be permitted to perform abortions in hospitals or approved clinics without restriction after consultation with two other physicians.[42]

In August, 1970, the Executive Board of the American College of Obstetricians and Gynecologists approved a policy permitting performance of an abortion at the patient's request, which specifically states:

> "It is recognized that abortion may be performed at a patient's request, or upon a physician's recommendation.
>
> • • • When abortion is requested by a patient, a consultation is not necessary. When abortion is recommended by a physician, the indication for the proce-

41. *See, e.g.*, Tietze, *Mortality with Contraception and Induced Abortion*, 45 STUDIES IN FAMILY PLANNING 6 (1969). *See also* Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N. Y. L. FORUM 411, 511-513 (1968).

42. 213 J.A.M.A. 359 (1970).

> dure should be approved by a consultant knowledgeable in regard to the condition thought to indicate abortion * * *".[43]

Under this policy there are no restrictions to the grounds for abortion, and consultation is required only in those cases in which it is not the woman who requests abortion but rather the physician who recommends it.

The Committee on Family Planning of the Maternal and Child Health Section of the American Public Health Association recently stated that legal abortion as a safe health measure must be accepted as an essential component of maternal and child health services.[44] In addition, the American Psychiatric Association and the Group for Advancement of Psychiatry have recently endorsed the repeal of state abortion laws as applied to competent licensed physicians.[45]

2. *The Dangerous Effects on Life and Health of Restrictive Abortion Laws*

It has been estimated that about one million illegal abortions are performed each year.[46] While some of these illegal abortions are performed by physicians, the often tragic consequences of clandestine abortions, many of them self-induced, or performed by non-physicians, have created a serious state and national health problem. The most serious consequence of bungled illegal abortion is, of course,

---

43. Policy on Abortion Approved by the Executive Board of the American College of Obstetricians and Gynecologists, August, 1970.

44. Tyler & Schneider, *The Logistics of Abortion Services in the Absence of Restrictive Criminal Legislation in the Untied States*, 61 AM. J. PUB. HEALTH 489 (1971).

45. PSYCHIATRIC NEWS, January 1970, at 5.

46. BATES & ZAWADZKI, CRIMINAL ABORTION 3 (1964).

the death of the pregnant woman. It is estimated that abortion-related mortality is under-reported by as much as fifty percent.[47] Earlier estimates were that between 5,000 and 10,000 women died each year because of bungled illegal abortions.[48] However, the number of deaths from criminal abortion has decreased in recent years as a result of several factors including the advent of antibiotics, so that a figure of 500 to 1,000 such deaths per year is probably a more reliable national estimate.[49] Despite the fact that the death rate from illegal abortion has decreased, the adverse side effects of such abortions, including severe infection,[50] permanent sterility[51] or other serious compli-

47. Tietze, *Somatic Consequences of Abortion* (paper presented at National Institute of Health Workshop on Abortion, Obtained & Denied: Research Approaches) (December 15-16, 1969) (unpublished paper on file with the Population Council, New York City, N. Y.).

48. BATES & ZAWADZKI, *supra* note 46, at 3-4.

49. Hall, *Commentary* in ABORTION AND THE LAW 228 (D. Smith ed. 1967).

50. See, e.g., Decker & Hall, *Treatment of Abortion Infected with Clostridium Welchii*, 95 AM. J. OBST. & GYNEC. 94 (1966); Douglas, *Toxic Effects of the Welch Bacillus in Post-. ortal Infections*, 56 N.Y. STATE J. MED. 3673 (1956); Knapp, Platt & Douglas, *Septic Abortion*, 15 OBST. & GYNEC. 344 (1960); Mortiz & Thompson, *Septic Abortion*, 95 AM. J. OBST. & GYNEC. 46 (1966); Reid, *Assessment and Management of the Seriously Ill Patient Following Abortion*, 199 J.A.M.A. 805 (1967); Shenoi, Smits & Davidson, *Massive Removal of Small Bowel During Criminal Abortion*, 2 BRIT. MED. J. 929 (1966); Studdiford & Douglas, *Placental Bacteremia: A Significant Finding in Septic Abortion Accompanied by Vascular Collapse*, 71 AM. J. OBST. & GYNEC. 842 (1956).

51. "Will an abortion now lead to sterility later? If a criminal abortion is contemplated, the conscientious doctor will have to say 'Yes; it may well lead to sterility.' The first effect is scar tissue formation in the endometrium, which prevents proper implantation and nidation of the ovum. Or, it may give rise to an ascending infection starting with an endometritis which develops into a parametritis, pelvic cellulitis or salpingitis." ROMMER, STERILITY: ITS CAUSE AND ITS TREATMENTS 59 (1952)

cations are still epidemic. Thus, it has been found that "induced illegal abortion * * * is one of the important causes of subsequent infertility and pelvic disease."[52]

C. The Facts About Unwanted Births

The magnitude of the problem of unwanted births is discussed in the 1971 interim report of the President's Commission on Population Growth and the American Future. This report states:

> "Estimates made in 1965, based on married women's own reports about their childbearing experience, indicated that one-third of the married couples who did not intend to have any more children already had at least one unwanted child. In the period 1960-65 nearly 20 percent of all live births were reported as unwanted by their parents. Only one-fourth of all parents claimed to have been completely successful in preventing both unwanted and unplanned pregnancies.
>
> The 20 percent of births reported as unwanted by their parents represents nearly five million children born between 1960 and 1965 who theoretically would never have been born if their parents' desires had prevailed. Fortunately, many of these unwanted pregnancies and birth become wanted children. But many do not."

Commission on Population Growth and the American Future, *An Interim Report to the President and the Congress* 26 (1971).

It is obvious that unwanted births occurring in marriage frequently result in physical and mental harm to the mother, economic and social hardships to the existing fam-

---

52. Kleegman & Kaufman, Infertility in Women 361 (1966).

ily and often lead to the abuse and neglect of the children.[53]

The most disastrous unwanted pregnancies are those occurring out of wedlock. Illegitimacy rates are high in the United States and are increasing.[54] In 1968, the estimated number of illegitimate live births in the United States was 339,200. More than half of these births were to females between the ages of 15 and 24.[55] These figures do not reflect the number of out-of-wedlock conceptions since they do not take into account such factors as: out-of-wedlock pregnancies that are successfully concealed; out-of-wedlock pregnancies that result in forced marriages and legitimate births; and out-of-wedlock pregnancies that result in the delivery of stillborn infants. Also to be con-

53. *See* GIL, VIOLENCE AGAINST CHILDREN—PHYSICAL CHILD ABUSE IN THE UNITED STATES (1970); COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE, AN INTERIM REPORT TO THE PRESIDENT AND THE CONGRESS 27 (1971).

54. Yurdin, *Recent Trends in Illegitimacy—Implications for Practice*, 49 CHILD WELFARE 373 (1970); Cutright, *Illegitimacy: Myths, Causes and Cures*, FAMILY PLANNING PERSPECTIVES (Special Feature) January, 1971 at 26-27.

55. The distribution by age of the illegitimate births in 1968 was as follows:

under 15 years	7,700
15 - 17 years	77,900
18 - 19 years	80,100
20 - 24 years	107,900
25 - 29 years	35,200
30 - 34 years	17,200
35 - 39 years	9,700
40 years and over	3,300

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DIVISION OF VITAL STATISTICS, PUBLIC HEALTH SERVICE, MONTHLY VITAL STATISTICS REPORT—TABLE 10: "Estimated Number of Illegitimate Live Births and Ratios by Age of Mother and Color—United States [Based on a 50 percent sample of births]" (1968). *See also* Yurdin, *supra* note 54, at 373-375.

sidered are the number of out-of-wedlock pregnancies terminated by spontaneous miscarriage or by abortion, legal or illegal. The extent to which premarital conception is not reflected in illegitimate births is partially revealed in a survey conducted by The National Center for Health Statistics which revealed that one-third of all first-born children in the United States in the years 1964 to 1966 were conceived out of wedlock. The study showed that "of the average 1,174,000 first births to women aged 15-44 which occurred in the United States each year during 1964-1966, 166,000 or 14 percent were illegitimate and 218,000, or 19 percent were premarital conceptions of legitimate babies."[56]

The unmarried girl or woman who becomes pregnant is faced with a number of alternatives, many of which depend on her economic status. In some instances a hastily arranged marriage will take place and an illegitimate birth will thus be prevented. Such forced marriages often between immature young people frequently lead to divorce or desertion. If the pregnant woman does not marry, she may seek an abortion. If she lives in a state in which the indications for abortion are circumscribed and/or in which the procedural hurdles for obtaining an abortion are great, she may, if she has sufficient funds, travel to another state or country to obtain a medically safe, legal abortion. If, however, she is young and/or ignorant and/or poor, she may try to abort herself or may turn to the unskilled quack abortionist and serious injury or even death may result from either course.

---

56. UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, PUBLIC HEALTH SERVICE, NATIONAL CENTER FOR HEALTH STATISTICS, "National Natality Survey," Monthly Vital Statistics Report Volume 18, No. 12 (Supplement 1970) at p. 1.

For the girl or woman who does not obtain an abortion, does not marry and bears the child, the costs to her, to the illegitimate child and to society are incalculable. She is likely to become a school dropout, economically dependent, poverty-stricken and trapped.[57] In addition, the occurrence of illegitimate births has adverse effects on the health of the unmarried mother and her child, many of which are related to her failure to obtain adequate prenatal care.[58] These effects include higher rates of prematurity and infant mortality than occur in legitimate births,[59] increased health hazards for the infant, including higher infant mortality rates during the first year,[60] and increase in child abuse and neglect.[61] Also important, because of the frequency with which illegitimate births occur to adolescents, is the direct relationship between

---

57. Campell, *The Role of Family Planning in the Reduction of Poverty*, 30 J. MARRIAGE AND THE FAMILY 236, 245 (1968).

58. *See generally* BERNSTEIN & HERZOG, HEALTH SERVICES FOR THE UNMARRIED MOTHER, United States Department of Health, Education and Welfare, Welfare Administration (Children's Bureau) (1964).

59. *Id.* at 2, 4.

60. Anderson, Jenss, Mosher & Richter, *The Medical, Social and Educational Implications of the Increase in Out of Wedlock Births*, 56 AM. J. PUB. HEALTH 1868, 1869 (1966).

61. *See generally* GIL, *supra* note 53. Gil reports that the victims of abuse are often unwanted children who live primarily in households headed by women, that is by women who are unmarried, widowed, divorced or separated. *Id.* at 146. Gil also found that 29 percent of the abused children revealed deviations in social interaction and general functioning, 14 percent suffered from deviations in physical functioning, 8 per cent revealed deviations in intellectual functioning, and that over 13 percent of the school age children in a sample of physically abused children attended special classes for retarded children or were in grades below their age level. *Id.* at 107.

early childbearing and the risks of particular diseases in offspring[62] and the risk of maternal death.[63]

At least one important study has analyzed the effects on children who are born after a request by their mother for a legal abortion on psychiatric grounds had been refused.[64] This study, which was conducted in Sweden following the first liberalization in 1939 of Sweden's abortion law, compared a series of 120 children born of unwanted pregnancies[65] as to which abortions on psychiatric grounds had been denied, with a control series of 120 children. The subjects of the study were followed from birth to the time of their 21st birthday.

The study found important differences between the unwanted and the control children. The authors summarized their findings as follows:

"A study of the social features revealed that many more of the unwanted than control children had not

62. One study found "significantly elevated risks of intracranial and spinal injury at birth, postnatal asphyxia, atelectasis and club foot among children from very young mothers." Newcombe & Tavendale, *Maternal Age and Birth Order Correlations*, I MUTATION RESEARCH 446, 452 (1964). There are also special risks to children born to women who are over 35, including mental deficiency disorders, mongolism, cerebral spastic infantile paralysis, congenital malformations of the circulatory system, intracranial and spinal injury at birth and postnatal asphyxia. *Ibid.*

63. BERNSTEIN & HERZOG, *supra* note 58, at 3. It was also reported that, "generally maternal risk increases with decreasing maternal age below 20, and increases with increasing maternal age above 30." Perkin, *Assessment of Reproductive Risk in Non-Pregnant Women*, 101 AM. J. OBST. & GYNEC. 709, 710 (1968).

64. Fossman & Thuwe, *One Hundred and Twenty Children Born After Application for Therapeutic Abortion Refused* in ABORTION AND THE UNWANTED CHILD 123-145 (Carl Reiterman ed. 1971).

65. Most of these children were not born out of wedlock. *Id.* at 133.

had the advantage of a secure family life during childhood. They were also registered more often in psychiatric services, and a few more of them than control subjects received psychiatric care. They were more often registered for antisocial and criminal behavior, and slightly more often for drunken misconduct, and they got public assistance more often than the control subjects. A few more of them were educationally subnormal and far fewer had pursued theoretical studies over and above what is obligatory. They were more often exempted from military service. More of the females married early and had children early than in the control series. The differences between the two series in these respects were often statistically significant, and when they were not significant they always pointed in the same direction—to the unwanted children being born into a worse situation than the control children."[66]

From the data gathered the authors concluded that "the very fact a woman applies for legal abortion means that the prospective child runs a risk of having to surmount greater social and mental handicaps than its peers, even when the grounds for the application are so slight that it is refused."[67]

Amici believe that the facts presented on unwanted births as well as on contraception and abortion demonstrate the importance of the cases at bar to individuals and to society.

---

66. *Id.* at 143.

67. *Ibid.*

POINT II

The Georgia and Texas statutes, by restricting the grounds for the performance of abortions, violate fundamental rights of women and their physicians under the Ninth and Fourteenth Amendments to the Constitution.

Amici contend that the legislative restrictions on the permissible grounds for abortion contained in the statutes here involved deprive women in Texas and Georgia of their fundamental constitutional right under the Ninth and Fourteenth Amendments to choose whether or not to bear a child. We contend further that these laws also infringe a woman's fundamental right to life and health, and a physician's right to practice medicine in accordance with the highest standards of his profession.

A. Statutory Framework

1. Texas

The Texas abortion statute proscribes all abortions except those which are "procured or attempted by medical advice for the purpose of saving the life of the mother." Texas Pen. Code Ann. arts. 1191, 1196 (1961)

Abortions are completely denied all women in Texas other than those who fall within this narrow and vaguely worded exception; indeed, in practice abortions are denied to women who cannot convince a physician that they come within this exception.

Women in Texas whose pregnancy results from rape or incest, or for whom pregnancy would be dangerous to

physical or mental health, or whose pregnancy is contraindicated, because of exposure to rubella or because of other intervening factors which result in there being a substantial risk of fetal defect or deformity—all are compelled to continue the pregnancy irrespective of their needs and the judgment of their physicians. Women unable for economic or other reasons to rear another or indeed any child are forced to become parents and have the quality not only of their lives but also that of their families adversely affected.[68] The Texas law also has the obvious effect of forcing most teenagers who become pregnant to bear children, many if not most of whom will be illegitimate.

2. *Georgia*

The Georgia statute prohibits abortions except where

> "(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or
>
> "(2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or
>
> "(3) The pregnancy resulted from forcible or statutory rape." GA. CODE ANN. §26-1202(a) (1970 revision).

In Georgia, accordingly there are many women who do not fall within these categories and who cannot obtain needed abortions. Thus, if the injury to health, although "serious," is not "permanent," abortion is prohibited. Moreover, since the criminal law of Georgia provides that statutory rape is committed only where the female is 14

68. The effects of such restrictions on pregnant women and girls has been discussed. *See* pp. 24-29, *supra*.

years of age or younger,[69] teenagers over that age are unable to obtain abortions unless they fall within the terms of one of the other exceptions, which is highly unlikely. Also disregarded by the Georgia statute are the economic and social hardships imposed by unwanted pregnancy. That the pregnancy may have resulted because of contraceptive failure or unavailability is immaterial. Even if the pregnancy resulted from forcible rape, abortion is not assured.[70]

B. The Fundamental Right to Choose Whether or Not to Bear a Child

The right of a woman to choose whether or not to bear a child is an aspect of her right of privacy and liberty and, we submit, a fundamental right. This Court has frequently protected the individual's right of privacy and has emphasized the right of the individual "as against the Government • • • to be let alone,"[71] and the "right to be free, except in very limited circumstances from unwarranted governmental intrusions into one's privacy."[72]

---

69. GA. CODE ANN. §26-2018 (1970 revision).

70. The abortion statute requires, where abortion is considered necessary because of rape, that "the woman makes a written statement under oath, and subject to the penalties of false swearing, of the date, time and place of the rape and the name of the rapist, if known." In addition, a statement by the solicitor general of the judicial circuit where the rape allegedly occurred is required "that according to his best information, there is probable cause to believe that the rape did occur." GA. CODE ANN. §26-1202(b)(6) (1970 revision).

71. Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion of Mr. Justice Brandeis). The majority decision in Olmstead was overruled in Katz v. United States, 389 U.S. 347 (1967).

72. Stanley v. Georgia, 394 U.S. 557, 564 (1969).

A wide range of private individual activity in the areas of marriage, the family and sex has thus been safeguarded against governmental interference. The right to procreate, described by this Court as "one of the basic civil rights of man,"[73] led the Court to invalidate as a violation of equal protection an Oklahoma statute which imposed sterilization upon persons convicted two or more times of larceny but not upon similarly situated persons convicted of embezzlement. *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942). Similarly, the right to marry,[74] the right to direct the education of one's children,[75] the right to have possession of pornography in the privacy of one's own home,[76] have all been held to be fundamental rights under the Constitution.

We believe that the right of privacy recognized by this Court in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), includes the right of women to decide not only when but also whether to bear a child. As former Justice Tom C. Clark has cogently stated:

> "[A]bortion falls within that sensitive area of privacy—the marital relation. One of the basic values of this privacy is birth control, as evidenced by the *Griswold* decision. Griswold's act was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent conception, why can he not nullify that conception when prevention has failed?" Clark, *Religion, Morality and Abortion: A Constitutional Appraisal*, 2 Loyola Univ. (L.A.) L. Rev. 1, 9 (1969).

73. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

74. Loving v. Commonwealth, 388 U.S. 1 (1967).

75. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

76. Stanley v. Georgia, 394 U.S. 557 (1969).

The force of Mr. Justice Clark's reasoning is apparent. *Griswold* recognized fundamental constitutional rights relating to the prevention of conception and established the substantive constitutional basis of the right to practice contraception and thus control fertility. As we have shown, recognition of the right to control conception by employing contraceptives by no means solves the problem of undesirable or unwanted pregnancies.[77] Even if the most reliable contraceptive techniques are employed, failures of use as well as failures of method occur. The most effective contraceptives are not 100 per cent effective and in many cases may be contraindicated for both medical and other reasons.[78] Moreover, there are literally millions of Americans for whom the most reliable, or indeed any reliable contraceptive is unavailable.[79]

The decision to bear or not to bear children is one of the most private and personal decisions that can be made. The responsibilities involved in raising a child are obviously serious ones and the implications of becoming a parent are far-reaching. Denial of an abortion to a woman who needs one thus infringes her freedom to regulate manifold aspects of her life, not only her reproductive potential.

The right to contraception implicitly includes the right to choose whether or not to become a parent. The right to control one's reproductive life even after fertilization has occurred is a corollary of the right this Court has recognized in *Griswold* and is at least equal in stature to similar private rights also previously acknowledged by

77. *See* pp. 12-29, *supra*.

78. *See* pp. 13-20, *supra*.

79. *See* pp. 12-13, *supra*.

this Court's decisions. *See, e.g., Stanley* v. *Georgia,* 394 U.S. 557 (1969); *Loving* v. *Commonwealth,* 388 U.S. 1 (1967); *Skinner* v. *Oklahoma, supra; Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923). Accordingly, we believe that in order to adequately implement the values protected by *Griswold* this Court should expressly recognize the right of abortion.

That there is a fundamental constitutional right to abortion was the conclusion of the courts below in the instant cases. *Doe* v. *Bolton,* 319 F. Supp. 1048 (N.D. Ga. 1970) (*per curiam*), *ques. of juris. postponed to merits,* 91 S. Ct. 1614 (1971) (No. 971, 1970 Term; renumbered No. 70-40, 1971 Term); *Roe* v. *Wade,* 314 F. Supp. 1217 (N.D. Tex. 1970) (*per curiam*), *ques. of juris. postponed to merits,* 91 S. Ct. 1610 (1971) (No. 808, 1970 Term; renumbered No. 70-18, 1971 Term). Their view has also been accepted by a number of other courts which have considered the question and have affirmed that this is a fundamental right. *E.g., Doe* v. *Scott,* 321 F. Supp. 1384 (N.D. Ill. 1971), *appeals docketed, sub noms. Hanrahan* v. *Doe* and *Hefferman* v. *Doe,* 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (Nos. 1522, 1523, 1970 Term; renumbered Nos. 70-105, 70-106, 1971 Term); *Babbitz* v. *McCann,* 310 F. Supp. 293 (E.D. Wis.) (*per curiam*), *appeal dismissed,* 400 U.S. 1 (1970) (*per curiam*); *People* v. *Belous,* 71 Cal. 2d 954, 80 Cal. Rptr. 354, 458 P2d 194 (1969), *cert. denied,* 397 U.S. 915 (1970); *People* v. *Barksdale,* Docket No. 1 Crim. 9526 (Calif. Ct. of Appeal, First App. Dist., Division 1, July 22, 1971).[80]

80. *Contra,* Corkey v. Edwards, 322 F. Supp. 1248 (W.D. N.C. 1971), *appeal docketed,* 40 U.S.L.W. 3048 (U.S. July 17, 1971) (No. 71-92); Steinberg v. Brown, 321 F. Supp 741 (W.D. Ohio 1970); Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970), *appeal docketed,* 39 U.S.L.W. 3247 (U.S. Nov. 27, 1970) (No. 1010, 1970 Term; renumbered No. 70-42, 1971 Term).

C. The Fundamental Right to Life and Health

The woman's right to have access to needed medical services and more broadly her right to life and health are also at stake here. The right to life is, of course, self-evident and the right to protect health seems equally fundamental. *See Jacobson* v. *Massachusetts,* 197 U.S. 11 (1905). As this Court acknowledged in *United States* v. *Vuitch,* 91 S.Ct. 1294 (1971), health includes all aspects of physical and mental well-being. While, in *Vuitch,* this Court was construing the District of Columbia statute, we believe that implicit in that construction was the recognition that people must be free to safeguard health as defined broadly in that case.

Freedom to obtain medical services for safeguarding health (regardless of whether the risk is "permanent," as it must be under Georgia law) must be deemed an aspect of life and liberty if the Ninth and Fourteenth Amendments are to have meaning. There can hardly be a more basic attribute of freedom than the right to be secure from physical or emotional harm and the question of whether and how health should be protected is one uniquely suited to solution by the patient and the physician.

D. The Physician's Right to Provide His Patients with the Best Medical Treatment

The right of physicians to provide medical services to their patients must also be deemed fundamental and, as we have shown in Point I, abortion is a recognized medical service. Yet these Texas and Georgia laws prevent doctors from providing abortions for reasons wholly unrelated to medical and health considerations.

Amici suggest that there is no dispute as to the fundamental freedom of professionally trained people to pursue their calling on the basis of their training and expertise. This was the doctrine of *Dent* v. *West Virginia*, 129 U.S. 114 (1889), and is implicit in many later decisions of this Court. *See, e.g., Willner* v. *Committee on Character and Fitness*, 373 U.S. 96 (1963); *Greene* v. *McElroy*, 360 U.S. 474 (1959); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957).

Physicians, like other members of learned professions, serve society by the exercise of expert judgment; they are responsible for the well-being of patients. Arbitrary government interposition of non-medical barriers between the patient and the exercise of the physician's professional judgment represents a serious infringement of the personal liberty of doctors. See *Dent* v. *West Virginia, supra. See also United States* v. *Freund*, 290 Fed. 411 (D. Mont. 1923); *United States* v. *One Package*, 86 F. 2d 737 (2d Cir. 1936). As this Court stated in *Dent*:

> "Few professions require more careful preparation by one who seeks to enter it than that of medicine. * * * The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal." 129 U.S. at 122.

And, as the district court concluded in *Freund*, a law which arbitrarily forbids a doctor from exercising his skill in a manner approved by medical consensus, is "an unreasonable mandate to malpractice * * * and is invalid." 290 Fed. at 413.[81]

81. *Amici* suggest that Lambert v. Yellowley, 272 U.S. 581 (1926), and Everard's Breweries v. Day, 265 U.S. 545 (1924), which overruled United States v. Freund, 290 Fed. 411 (D. Mont. 1923) by implication, are not relevant here because in *Lambert* and

In deciding the medical procedures to follow in all situations other than those involving abortion doctors are free to make objective decisions based on the medical situation and on medically relevant factors presented. It makes little sense to speak of the freedom to learn and to study if the state can interpose itself arbitrarily and direct a physician to disregard his skills and the well-being of his patients.

Moreover, the restrictive abortion laws often create for a doctor the dilemma of whether to follow the dictates of his conscience as a physician and use his medical skills to protect the patient or act in his own self-interest, regardless of the cost to the health and well-being of his patient and even when there are grounds to believe the patient is eligible for legal abortion. While the state may properly require doctors to act responsibly in the interest of the welfare of their patients, it may not, *amici* submit, require doctors to act irresponsibly to their patients because the state has put the doctor in the position of subordinating the patient's welfare to his own self-interest in avoiding risk of prosecution. Thus, the state has created a conflict of interest between the doctor and the patient and has restricted doctors in a manner wholly inconsistent with freedom to pursue their profession according to the best standards of medical practice.

Everard the Court found that there was "no consensus of opinion among physicians and medical authorities that they [the restricted liquors] have any substantial value as medicinal agents. * * *" Everard's Breweries v. Day, *supra* at 562. Indeed, the consensus of opinion appeared to be against the value of the prohibited liquors as medicinal agents. The holding in *Freund*, on the other hand, was based upon a finding of consensus in favor of the proscribed treatment. As pointed out in Point I, abortion is a fully accepted medical procedure.

E. Since Neither the Texas nor the Georgia Statute Promotes any Compelling State Interest, Both Violate the Ninth and Fourteenth Amendments to the Constitution.

Since the right to choose whether or not to bear a child and the right to give and receive medical treatment are fundamental rights of constitutional magnitude, the states of Georgia and Texas bear a heavy burden of justification for the severe restrictions on abortion contained in the laws at issue in these cases. As this Court stated in *Bates* v. *Little Rock*, 361 U.S. 516 (1960):

> "Where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling. *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449. See also *Jacobson* v. *Massachusetts*, 197 U.S. 11; *Schneider* v. *State*, 308 U.S. 147; *Cox* v. *New Hampshire*, 312 U.S. 569, 574; *Murdock* v. *Pennsylvania*, 319 U.S. 105; *Prince* v. *Massachusetts*, 321 U.S. 158; *Kovacs* v. *Cooper*, 336 U.S. 77." 361 U.S. at 524.

We believe that no more than four hypothetical state interests can be put forth by Texas and Georgia to support their statutory limitations on the permissible grounds for performance of abortions—(a) enforcing morals; (b) increasing population; (c) protecting the health of the pregnant woman; and (d) protecting the fetus. We shall discuss each of these interests separately but briefly in order to demonstrate that the statutes involved cannot stand on any of them.

1. Enforcing Morals

Any asserted state interest in enforcing morals by forbidding abortions, on the theory that this would prevent illicit sexual conduct, scarcely merits discussion. In the first place, if such an interest were asserted, the statutes would present clear instances of impermissible overbreath since neither Texas nor Georgia draws any distinction between pregnancies occurring within the marriage relationship and those outside it. Moreover, in Texas no distinction is drawn between consensual and non-consensual intercourse.

Narrowly drawn statutes exist or may be devised for the purpose of deterring sexual misconduct. Reliance upon anti-abortion statutes as a deterrent is not only overbroad but to "prescribe * * * [an unwanted pregnancy] * * * as a punishment for illicit intercourse would be a monstrous thing." *State* v. *Baird*, 50 N.J. 376, 383, 235 A. 2d 673, 677 (1967) (concurring opinion, Weintraub, C.J.). See also *Baird* v. *Eisenstadt*, 429 F. 2d 1398, 1402 (1st Cir. 1970), *prob. juris. noted*, 401 U.S. 934 (1970) (No. 804, 1970 Term; renumbered No. 70-17, 1971 Term). Moreover, there is no reasonable basis for believing that illegal sexual behavior has been or will be deterred by proscribing abortion.

Amici submit that any interest in deterring fornication or adultery cannot be deemed sufficiently compelling to justify the interference worked by these statutes on the rights of women (including married women pregnant by their husbands) and the rights of their physicians.

2. *Increasing Population*

With respect to any possible state interest in fostering population growth by unwanted pregnancies, *amici* need only point to the increasing concern of the United States Government and the governments of many of the states as well as of the United Nations and its constituent members with the threat posed by population increases.[82] In view of the widely acknowledged dangers of continued increase in population and of the myriad problems presented by unwanted pregnancies,[83] it is inconceivable that any serious attempt can be made to justify statutes restricting the grounds for abortion as a means of assuring continued population growth.

3. *The Statutes Do Not Serve the Health Interests of Pregnant Women.*

While the state admittedly has an interest in adopting appropriate narrowly drawn measures designed to protect the health and safety of all who seek medical care, no health interest can possibly be served by limiting the grounds for the performance of abortions.[84]

At one time, abortion, like other surgery, was dangerous. However, given the state of modern medical knowledge and present-day surgical techniques and procedures,

82. *See, e.g., Presidential Message on Population,* 115 CONG. REC. 20025-29 (1969); *Commission on Population Growth and the American Future, An Interim Report to the President and the Congress* (1971).

83. *See supra* at 24-29.

84. Georgia does not appear in the past to have argued that the purpose of its statutory limits on the grounds for abortion is to protect the health of women. See Jurisdictional Statement at 14-15, Bolton v. Doe, *appeal dismissed,* 91 S.Ct. 1614 (1971).

it can no longer be argued that these statutes are public health measures designed to protect the pregnant woman from hazards of abortion. For the fact is that today an abortion performed during the early stages of pregnancy in safe clinical surroundings by a physician involves less risk to the woman than does childbirth itself.[85]

The Texas and Georgia statutes and others like them, far from serving any health interest, have in fact created enormous public health problems by forcing women to bear unwanted children or resort to primitive methods of self-abortion or go to unqualified and/or discredited performers of abortions, which often result in serious injury or death.[86] If a woman is unable to justify her right to an abortion under the terms of the Texas or Georgia statutes, then unless she has the ability and the funds to seek a safe, legal abortion in another state or country, her only alternative is either to risk an unsafe, illegal abortion or to bear a child against her will, despite the fact that the pregnancy may be medically contraindicated.

The Texas law makes no pretext of considering the woman's health interests, except in the most extreme cases. The Georgia statute is somewhat less draconian, but in requiring "serious" and "permanent" injury to the woman's health before an abortion can be performed, it also demonstrates its lack of concern with real health needs. Moreover, the statute's onerous procedural requirements render abortion even in cases of threatened "serious" and "permanent" injury illusory for many women, and in ad-

85. Tietze, *supra* note 41. *See also* MEANS, *supra* note 41, at 511-513.

86. *See* pp. 22-24, *supra*.

dition contain no provision permitting abortion in emergencies. Thus, the threat to health is enhanced and the disregard of health made clear.

When the unwanted pregnancy occurs out of wedlock, particularly to a teenager, compulsory birth of an unwanted child is peculiarly detrimental to the child born and to the community as well as to the mother.[87] But whether the pregnancy occurs in or out of marriage, it is plain that the harmful effects of compulsory pregnancy and childbirth far outweigh any health danger to a woman for whom an abortion is performed by a licensed physician in proper clinical surroundings.

4. Protecting the Interest of the Fetus

The final interest that might be urged by Georgia and Texas is the states' alleged interest in the fetus after fertilization has occurred.

Amici contend that even assuming the states may be said to have interests in the potentiality for life that is represented by the fetus in the early stages of pregnancy, such interests cannot constitutionally be given precedence over the fundamental rights of women.

The California Supreme Court in *People* v. *Belous, supra,* correctly noted that "the law has always recognized that the pregnant woman's right to life takes precedence over any interest the state may have in the unborn,"[88] and both the Texas and Georgia statutes acknowledge this,

87. *See* pp. 24-29, *supra.*

88. People v. Belous, 71 Cal. 2d 954, 969, 80 Cal. Rptr. 354, 363, 458 P. 2d 194, 203 (1969) *cert. denied,* 397 U.S. 915 (1970).

D THROUGH

although the inhibitions imposed on doctors by the threat of criminal prosecution tends to jeopardize women's lives. Georgia's more permissive statute also negates any claim that the state considers the fetus to have rights equal to those of the pregnant woman. Moreover, the states, through their criminal laws have neither equated abortion with murder nor made any effort to outlaw the use of the intrauterine device which in fact may function to prevent implantation after fertilization has occurred.[89]

Any assertion that the fetus' interests take precedence over the constitutional rights of women derives from non-secular considerations such as a conclusion as to "when life begins." In a culturally and religiously pluralistic society, the beliefs of individuals on matters such as this vary widely on the basis of religion and moral value systems. For those who equate abortion with murder, any state law sanctioning abortion in *any* situation, even where necessary to save life, is an anathema. But the differences which exist on this question in our society are religious and philosophical; they cannot be resolved by legislative fiat, nor, we believe, is it constitutionally permissible for the state to adopt the metaphysical belief of some about the nature of the fetus, particularly when, in so doing, it infringes the fundamental rights of living persons.

---

89. *See* Bengston & Mouvad, *The Effect of the Lippes Loop on Human Myometrial Activity*, 98 Am. J. Obst. & Gynec. 957, 964 (1967); Tietze, *Contraception with Intrauterine Devices*, 96 Am. J. Obst. & Gynec. 1043 (1966); Panchalingham, *Is the Contraceptive Intrauterine Device an Abortifacient?*, 1 Lancet 1391 (1965); Meloy, *Pre-Implantation Fertility Control and the Abortion Laws*, 41 Chi.-Kent. L. Rev. 183 (1964).

Conclusion

For the reasons stated in this brief and in the briefs of the appellants, *amici* respectfully urge that this Court affirm the judgments of the three-judge courts below insofar as they held unconstitutional the limitations in the Georgia and Texas statutes on the grounds for the performance of abortions, reverse the judgment of the Texas three-judge court insofar as it denied injunctive relief, and reverse the judgment of the Georgia three-judge court insofar as it denied injunctive relief and upheld the constitutionality of the residency, consultation, committee approval and joint accreditation requirements of the Georgia law.

August, 1971

Respectfully submitted,

HARRIET F. PILPEL and
NANCY F. WECHSLER
Attorneys for Amici Curiae

Of Counsel:
GREENBAUM, WOLFF & ERNST
RUTH JANE ZUCKERMAN
MICHAEL KENNETH BROWN

ORMAN KRETCHMER, M.D., Ph.D.
rofessor of Pediatrics
tanford University School of Medicine
epartment of Pediatrics
tanford

EROME M. KUMMER, M.D.
linical Professor
epartment of Psychiatry
chool of Medicine
niversity of California
at Los Angeles

HARLES E. McLENNAN, M.D.
rofessor of Gynecology and Obstetrics
tanford University
tanford

. W. OVERSTREET, M.D.
rofessor
epartment of Obstetrics and Gynecology
niversity of California
an Francisco

DWARD B. SHAW, M.D.
rofessor of Pediatrics, Emeritus
niversity of California School of Medicine
an Francisco

EORGE S. HARRIS, M.D.
ssoc. Clinical Prof. of
Obstetrics & Gynecology
SC School of Medicine
os Angeles

LBERT E. LONG, M.D.
ssociate Clinical Professor of
Obstetrics and Gynecology
niversity of California, San Francisco
an Francisco

RANK BOWMAN, M.D.
ledical Director
outhern Calif. Edison Co.
os Angeles

COLORADO

. G. WHITTINGTON, M.D.
irector of Psychiatry
epartment of Health and Hospitals
tate Department of Health
enver

AVID W. TALMAGE, M.D.
ean, School of Medicine
and Professor of Microbiology
and Medicine
niversity of Colorado Medical Center
enver

C. HENRY KEMPE, M.D.
Professor and Chairman
Department of Pediatrics
University of Colorado Medical Center
Denver

E. STEWART TAYLOR, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
University of Colorado
Denver

CONRAD M. RILEY, M.D.
Professor
Departments of Pediatrics
and Preventive Medicine
University of Colorado Medical Center
Denver

CONNECTICUT

NATHAN KASE, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Yale University School of Medicine
New Haven

CLARENCE D. DAVIS, M.D.
Professor of Obstetrics and Gynecology
Yale University School of Medicine
New Haven

DISTRICT OF COLUMBIA

JOHN F. J. CLARK, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Howard University and
Freedmen's Hospital
Washington

ROBERT H. BARTER, M.D.
Professor, Obstetrics and Gynecology
George Washington University
2141 K Street, Northwest
Washington

FLORIDA

E. M. PAPPER, M.D.
Vice President and Dean
School of Medicine
University of Miami
Miami

WILLIAM A. LITTLE, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
University of Miami School of Medicine
Miami

HARRY PRYSTOWSKY, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
University of Florida College of Medicine
Gainesville

Hawaii

WINDSOR C. CUTTING, M.D.
Dean, School of Medicine
University of Hawaii
Honolulu

Illinois

WILLIAM J. GROVE, M.D.
Executive Dean
University of Illinois College of Medicine
Chicago

ROBERT B. LAWSON, M.D.
Vice President for Health Sciences
Northwestern University
Chicago

D. N. DANFORTH, Ph.D., M.D.
Professor and Chairman
Department of Obstetrics & Gynecology
Northwestern University Medical School
Chicago

ROBERT C. STEPTO, M.D.
Chairman, Department of Obstetrics
and Gynecology
Chicago Medical School
Chicago

RALPH M. WYNN
Professor and Head
Department of Obstetrics and Gynecology
The Abraham Lincoln School of Medicine
University of Illinois Medical Center
Chicago

FREDERICK ZUSPAN, M.D.
John Bolivar DeLee Professor and Chairman
Department of Obstetrics and Gynecology
The Chicago Lying-In Hospital
The University of Chicago
Chicago

CHARLES FIELDS, M.D.
Clinical Professor
Department of Obstetrics and Gynecology
Mount Sinai Hospital
Chicago

ALBERT DORFMAN, M.D.
Richard T. Crane Distinguished Service
Professor of Pediatrics
University of Chicago
Chicago

Indiana

CARL P. HUBER, M.D.
Coleman Professor
Obstetrics and Gynecology
Indiana University Medical Center
Indianapolis

Iowa

ROBERT C. HARDIN, M.D.
Vice Provost and Dean
Health Affairs
University of Iowa
Iowa City

Kansas

KERMIT E. KRANTZ, M.D., Litt.D.
Professor and Chairman
Department of Gynecology and Obstetrics
Professor of Anatomy
University of Kansas Medical Center
Kansas City

Kentucky

DOUGLAS M. HAYNES, M.D.
Dean and Professor of Obstetrics
and Gynecology
University of Louisville School of Medicine
Health Sciences Center
Louisville

W. S. JORDAN, JR., M.D.
Dean
University of Kentucky
College of Medicine
Lexington

TOM F. WHAYNE, M.D.
Associate Dean
University of Kentucky
College of Medicine
Lexington

JOHN W. GREENE, JR., M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
University of Kentucky Medical Center
Lexington

WARREN E. WHEELER, M.D.
Professor and Chairman
Department of Pediatrics
University of Kentucky
Medical Center
Lexington

Louisiana

RICHARD L. FOWLER, M.D.
Professor and Head
Department of Pediatrics
Louisiana State University
School of Medicine
New Orleans

Maryland

DAVID E. ROGERS, M.D.
Dean of the Medical Faculty
Johns Hopkins University School of Medicine
Baltimore

THEODORE M. KING, M.D., Ph.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Johns Hopkins University School of Medicine
Baltimore

A. L. HASKINS, M.D.
Professor of Obstetrics and Gynecology
University of Maryland Hospital
Baltimore

IRVIN M. CUSHNER, M.D.
Director, Center for Social Studies in Human Reproduction
Associate Professor of Obstetrics and Gynecology
Johns Hopkins University School of Medicine
Baltimore

ISADORE A. SIEGEL, M.D.
Emeritus Professor of Obstetrics and Gynecology
University of Maryland Medical School
Baltimore

HELEN B. TAUSSIG, M.D.
Professor Emeritus of Pediatrics
The Johns Hopkins School of Medicine
Baltimore

JOSEPH COUDON, M.D.
South Atlantic Association of Obstetrics and Gynecology
Diplomate, American Board of Obstetrics and Gynecology
Perryville

Massachusetts

ROBERT H. EBERT, M.D.
Dean of the Faculty of Medicine
Harvard Medical School
Boston

GEORGE V. SMITH, M.D.
Wm. H. Baker Professor of Gynecology, Emeritus
Harvard Medical School
Boston

SOMERS H. STURGIS
Professor of Gynecology
Harvard Medical School
Boston

ALLAN M. BUTLER, M.D.
Professor of Pediatrics, Emeritus
Harvard Medical School
Boston

DAVID CHARLES, M.D.
Director, Department of Obstetrics and Gynecology
Boston City Hospital
Boston

Michigan

T. N. EVANS, M.D.
Acting Dean and
Chairman, Department of Gynecology and Obstetrics
Wayne State University
Detroit

ANDREW D. HUNT, JR., M.D.
Dean
College of Human Medicine
Michigan State University
East Lansing

WILLIAM B. WEIL, JR., M.D.
Professor and Chairman
Department of Human Development
Michigan State University
East Lansing

Minnesota

DAVID G. DECKER, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Mayo Clinic
Rochester

JOSEPH H. PRATT, M.D.
Professor of Surgery
University of Minnesota School of Medicine
Head, Gynecological Surgery
Mayo Clinic
Rochester

MARY E. MUSSEY, M.D.
Consultant in Gynecology
Department of Obstetrics and Gynecology
Mayo Clinic
Rochester

H. MEAD CAVERT, M.D.
Associate Dean
University of Minnesota School of Medicine
Minneapolis

JOHN J. SCIARRA, M.D.
Professor and Head
Department of Obstetrics and Gynecology
University of Minnesota Hospitals
Minneapolis

HARRY FOREMAN, M.D.
Director, Center for Population Studies
University of Minnesota
Mayo Memorial Hospital
Minneapolis

FRANK W. QUATTLEBAUM, M.D.
Associate Professor of Surgery
School of Medicine
University of Minnesota
Minneapolis

JANE E. HODGSON, M.D.
Assistant Clinical Professor of
Obstetrics and Gynecology
School of Medicine
University of Minnesota
Minneapolis

HAROLD G. RAVITS, M.D.
President, Ramsey County Medical Society
Chairman, and Clinical Professor
Department of Dermatology
University of Minnesota School of Medicine
St. Paul

DWIGHT MARTIN, M.D.
President-elect, Ramsey County Medical
Society
Clinical Assistant Professor
Department of Medicine
University of Minnesota School of Medicine
St. Paul

DAVID M. CRAIG, M.D.
Past-president, Ramsey County Medical
Society
Clinical Associate Professor
Department of Medicine
University of Minnesota School of Medicine
St. Paul

CARL RICE, M.D.
Editor, *Minnesota Medicine*
Clinical Associate Professor
Department of Surgery
University of Minnesota School of Medicine
Minneapolis

ERICK Y. HAKANSON, M.D.
Chairman and Associate Professor
Department of Obstetrics and Gynecology
St. Paul Ramsey Hospital
St. Paul

JOHN W. FROST, M.D.
Chairman and Professor
Department of Medicine
St. Paul Ramsey Hospital
St. Paul

ROBERT G. B. BJORNSON, M.D.
Chairman and Associate Professor
Department of Radiology
St. Paul Ramsey Hospital
St. Paul

ROBERT J. GUMNIT, M.D.
Chairman and Professor
Department of Neurology
St. Paul Ramsey Hospital
St. Paul

THEODORE T. WATSON, M.D.
Clinical Assistant Professor
Department of Obstetrics and Gynecology
University of Minnesota School of Medicine
Minneapolis

FRED A. LYON, M.D.
Clinical Assistant Professor
Department of Obstetrics and Gynecology
University of Minnesota School of Medicine
Minneapolis

MELVIN T. BAKEN, JR., M.D.
Clinical Assistant Professor
Department of Obstetrics and Gynecology
University of Minnesota School of Medicine
Minneapolis

JOHN F. PERRY, M.D.
Professor of Surgery
University of Minnesota School of Medicine
Minneapolis

WILLIAM BERNSTEIN, M.D.
Clinical Professor of Surgery
University of Minnesota School of Medicine
Minneapolis

SAMUEL W. HUNTER, M.D.
Clinical Associate Professor of Surgery
University of Minnesota School of Medicine
Minneapolis

MILTON M. HURWITZ, M.D.
Clinical Professor of Medicine
University of Minnesota School of Medicine
Minneapolis

ROBERT B. BENJAMIN, M.D.
Clinical Associate Professor of Surgery
University of Minnesota School of Medicine
Minneapolis

Mississippi

ROBERT E. BLOUNT, M.D.
Director and Dean
University of Mississippi School of
Medicine
Jackson

Missouri

JAMES C. WARREN, M.D.
Professor and Head, Designate
Department of Obstetrics and Gynecology
Washington University Medical School
St. Louis

Nebraska

ROBERT B. KUGEL, M.D.
Dean, College of Medicine
The University of Nebraska
Omaha

WARREN H. PEARSE, M.D.
Foundation Professor and Chairman
Department of Obstetrics and Gynecology
University of Nebraska Medical Center
42nd and Dewey Streets
Omaha

New Hampshire

CARLETON B. CHAPMAN, Dean
Dartmouth Medical School
Hanover

New Mexico

ROBERT A. MUNSICK, M.D., Ph.D.
Professor and Chairman
Department of Obstetrics and Gynecology
University of New Mexico School of Medicine
Albuquerque

New York

ALAN F. GUTTMACHER, M.D.
President, Planned Parenthood/World Population
New York

LOUIS M. HELLMAN, M.D.
Professor Emeritus of Obstetrics and Gynecology
State University of New York
Downstate Medical Center
Brooklyn

GEORGE JAMES, M.D.
President
Mount Sinai Medical Center
New York

HAROLD C. WIGGERS, M.D.
Executive Vice President and Dean
Albany Medical College
Albany

FRITZ FUCHS, M.D.
Given Foundation Professor and Chairman
Department of Obstetrics and Gynecology
Cornell University Medical College
New York

S. B. GUSBERG, M.D., D.Sc.
Professor and Chairman of Obstetrics and Gynecology
Mt. Sinai School of Medicine
of the City University of New York
New York

ROBERT J. HAGGERTY, M.D.
Professor and Chairman
Department of Pediatrics
University of Rochester School of Medicine and Dentistry
Rochester

SAUL KRUGMAN, M.D.
Professor and Chairman
Department of Pediatrics
New York University Medical Center
New York

JONATHAN T. LANMAN
Professor and Chairman
Department of Pediatrics
Downstate Medical Center
Brooklyn

CURTIS J. LUND, M.D.
Professor and Chairman
Department of Obstetrics-Gynecology
University of Rochester School of Medicine and Dentistry
Rochester

JAMES H. NELSON, JR., M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
State University of New York
Downstate Medical Center
Brooklyn

ROBERT E. L. NESBITT, JR., M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
State University of New York
Upstate Medical Center
Syracuse

SEYMOUR L. ROMNEY, M.D.
Professor and Chairman
Albert Einstein College of Medicine
Bronx Municipal Hospital Center
Pelham Parkway and Eastchester Road
Department of Gynecology and Obstetrics
Bronx

DONALD P. SWARTZ, M.D.
Director, Department of Obstetrics and Gynecology
Harlem Hospital Center
New York

HAROLD M. M. TOVELL, M.D.
Professor of Obstetrics and Gynecology
College of Physicians and Surgeons
Columbia University
New York

RAYMOND L. VANDE WIELE, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Director of the Ob-Gyn Service
Columbia-Presbyterian Medical Center
New York

JEAN A. CORTNER, M.D.
Professor of Pediatrics
State University of New York
Buffalo

410 US 113, 179 U.S. SUP. CT. RECORDS, BRIEFS 1972 FO
ROE V. WADE, DOE V. BOLTON NOS. 70-18 AND 70-40

EDWARD C. CURNEN, JR., M.D.
Carpentier Professor of Pediatrics
College of Physicians and Surgeons
Columbia University
New York

GORDON W. DOUGLAS, M.D.
Professor of Obstetrics and Gynecology
New York University School of Medicine
New York

HARRY H. GORDON, M.D.
Professor of Pediatrics
Albert Einstein College of Medicine
Bronx

RICHARD L. DAY, M.D.,
Emeritus Professor of Pediatrics
Mount Sinai School of Medicine
New York

HERBERT G. WINSTON, M.D.
Clinical Professor of Obstetrics and Gynecology
Albert Einstein College of Medicine
Bronx

North Carolina

W. G. ANLYAN, M.D.
Professor of Surgery and
Vice President for Health Affairs
Duke University Medical Center
Durham

MANSON MEADS, M.D.
Vice President for Medical Affairs and Dean
The Bowman Gray School of Medicine
Winston-Salem

RICHARD L. BURT, M.D.
Professor and Chairman
Bowman Gray School of Medicine
Winston-Salem

ROY T. PARKER, M.D.
F. Bayard Carter Professor and Chairman, Department of Obstetrics and Gynecology
Duke Medical Center
Durham

North Dakota

WALLACE W. NELSON, M.D.
Assistant Dean, Student Affairs
School of Medicine
University of North Dakota
Grand Forks

Ohio

CLIFFORD G. GRULEE, JR., M.D.
Dean
University of Cincinnati
College of Medicine
Cincinnati

FREDERICK C. ROBBINS, M.D.
Dean, School of Medicine
Case Western Reserve University
Cleveland

M. A. AYERS, M.D.
Acting Chairman
Department of Obstetrics and Gynecology
Medical College of Ohio
Toledo

ROBERT G. PAGE, M.D.
Dean and Professor of Medicine and Pharmacology
Medical College of Ohio
Toledo

E. L. PRATT, M.D.
Director, Department of Pediatrics
University of Cincinnati,
College of Medicine
Children's Hospital
Cincinnati

RICHARD W. STANDER, M.D.
Professor and Chairman, Department of Obstetrics and Gynecology
University of Cincinnati Medical Center
Cincinnati

FRANK FALKNER, M.D., M.R.C.P.
Fels Professor of Pediatrics
University of Cincinnati College of Medicine
Cincinnati

Oklahoma

JAMES A. MERRILL, M.D.
Professor and Head
Dept. of Gynecology and Obstetrics
University of Oklahoma
School of Medicine
Oklahoma City

HARRIS D. RILEY, JR., M.D.
Professor of Pediatrics
Children's Hospital
University of Oklahoma
Oklahoma City

Oregon

RALPH C. BENSON, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
University of Oregon
Medical School, Hospitals and Clinics
Portland

Pennsylvania

ROBERT L. BRENT, M.D.
Professor and Chairman
Department of Pediatrics
Stein Research Center
Jefferson Medical College
Philadelphia

ELSIE R. CARRINGTON, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Medical College of Pennsylvania
Philadelphia

RUSSELL R. de ALVAREZ, M.D.
Chairman Emeritus and
Professor of Obstetrics and Gynecology
Temple University Hospital
Philadelphia

ROY G. HOLLY, M.D.
Chairman, Department of Obstetrics and Gynecology
Jefferson Medical College
Philadelphia

S. LEON ISRAEL, M.D.
Professor of Obstetrics and Gynecology
School of Medicine, University of Pennsylvania
Philadelphia

JOSEPH P. LONG, M.D.
Associate Professor of Obstetrics and Gynecology
Jefferson Medical College
Philadelphia

DONALD N. MEDEARIS, JR., M.D.
Professor of Pediatrics
Dean, School of Medicine
University of Pittsburgh
Pittsburgh

WILLIAM G. SLATE, M.B., Ch.B., M.S.
Professor of Obstetrics and Gynecology
Temple University School of Medicine
Chairman, Division of Gynecology and Obstetrics
Albert Einstein Medical Center
Philadelphia

VICTOR C. VAUGHAN III, M.D.
Professor and Chairman
Department of Pediatrics
Temple University School of Medicine
Philadelphia

South Carolina

LAWRENCE L. HESTER, JR., M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Medical University of South Carolina
Charleston

D. STROTHER POPE, M.D.
Secretary, S.C. Medical Society
Past-President (1966)
S.C. Obstetrical and Gynecological Society
Columbia

South Dakota

GEORGE W. KNABE, JR., M.D.
Dean
School of Medicine
University of South Dakota
Vermillion

Tennessee

STEWART A. FISH, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
University of Tennessee College of Medicine
Memphis

DONALD A. GOSS, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Vanderbilt University School of Medicine
Nashville

W. F. BERNELL JAMES, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Meharry Medical College
Nashville

Texas

CHARLES E. GIBBS, M.D.
President
Texas Association of Obstetricians and Gynecologists
Associate Professor, Department of Obstetrics and Gynecology
The University of Texas Medical School at San Antonio

HUGH SAVAGE, M.D.
Chairman, Texas Medical Association
Committee to Study Abortion Laws in Texas
Fort Worth

JOSEPH M. WHITE, M.D.
Vice-President for Academic Affairs and
Dean of Medicine
The University of Texas Medical Branch
Galveston

CHARLES WILLIAM DAESCHNER, JR., M.D.
Professor and Chairman
Department of Pediatrics
The University of Texas Medical Branch
Galveston

HEINZ F. EICHENWALD, M.D.
Professor and Chairman
Department of Pediatrics
The University of Texas Southwestern Medical School
Dallas

HAMILTON FORD, M.D.
Professor and Chairman
Department of Neurology and Psychiatry
The University of Texas Medical Branch
Galveston

RAYMOND H. KAUFMAN, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Baylor University College of Medicine
Houston

PAUL MacDONALD, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
The University of Texas Southwestern Medical School
Dallas

WILLIAM J. McGANITY, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
The University of Texas Medical Branch
Galveston

JACK PRITCHARD, M.D.
Professor and former Chairman
Department of Obstetrics and Gynecology
The University of Texas Southwestern Medical School
Dallas

JOSEPH SEITCHIK, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
The University of Texas Medical School at San Antonio

ROBERT H. BARNES, M.D.
Professor, Department of Psychiatry
The University of Texas Medical School at San Antonio

HERMAN L. GARDNER, M.D.
Clinical Professor
Department of Obstetrics and Gynecology
Baylor University College of Medicine
Houston

ROBERT S. GLEN, M.D.
Professor, Department of Psychiatry
The University of Texas Southwestern Medical School
Dallas

WILLIAM C. LEVIN, M.D.
Professor
Department of Internal Medicine
The University of Texas Medical Branch
Galveston

L. CHARLES POWELL, M.D.
Professor
Department of Obstetrics and Gynecology
The University of Texas Medical Branch
Galveston

ROBERT L. ROESSLER, M.D.
Professor
Department of Psychiatry
Baylor University College of Medicine
Houston

PEGGY JOYCE WHALLEY, M.D.
Professor
Department of Obstetrics and Gynecology
The University of Texas Southwestern Medical School
Dallas

ROBERT B. WHITE, M.D.
Professor
Department of Neurology and Psychiatry
The University of Texas Medical Branch
Galveston

UTAH

THOMAS C. KING, M.D.
Provost
University of Utah
School of Medicine
Salt Lake City

VERMONT

WILLIAM H. LUGINBUHL, M.D.
Dean
University of Vermont
College of Medicine
Burlington

JOHN VAN S. MAECK, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Chief of Service
University of Vermont College of Medicine
Burlington

Virginia

20 J. DUNN, M.D.
rofessor and Chairman
epartment of Obstetrics and Gynecology
edical College of Virginia
ealth Science Division
irginia Commonwealth University
chmond

. G. THURMAN, M.D.
rofessor of Pediatrics
epartment of Pediatrics
niversity of Virginia School of Medicine
harlottesville

. NORMAN THORNTON, JR., M.D.
hairman
epartment of Obstetrics and Gynecology
niversity of Virginia School of Medicine
harlottesville

Washington

ERNARD GOMBERG, M.D.
linical Assistant Professor of
Obstetrics and Gynecology
niversity of Washington School of
Medicine
eattle

RALPH J. WEDGWOOD, M.D.
Professor and Chairman Department of Pediatrics
University of Washington School of Medicine
Seattle

West Virginia

WALTER A. BONNEY, M.D.
Professor and Chairman Department of Obstetrics and Gynecology
West Virginia University School of Medicine
Morgantown

WILLIAM G. KLINGBERG, M.D.
Professor and Chairman Department of Pediatrics
West Virginia University School of Medicine
Morgantown

Wisconsin

BEN M. PECKHAM, M.D.
Chairman, Department of Gynecology and Obstetrics
Associate Dean, Clinical Affairs
University of Wisconsin Medical School
Madison

IN THE

Supreme Court of the United States

No. 70-40, 1971 Term

MARY DOE, *et al.*,

Appellants,

—v.—

ARTHUR K. BOLTON, Attorney General of the State of Georgia, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* FOR THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN MEDICAL WOMEN'S ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, NEW YORK ACADEMY OF MEDICINE, MEDICAL SCHOOL DEANS AND PROFESSORS, AND CERTAIN INDIVIDUAL PHYSICIANS

Pursuant to Rule 42(3) of this Court, the organizations and physicians named on the cover and initial pages of this Motion, respectfully ask leave to file the annexed brief as *Amici Curiae* in the above-styled case.

Counsel for appellant have not responded to the request for leave to file a brief. Counsel for appellee asked *Amici* to seek the leave of this Court.

Interest of *Amici Curiae*

Amici are organizations and individuals from the medical profession generally, as well as particular specialties.

Amicus American College of Obstetricians and Gynecologists was founded in 1951 and has 13,400 Fellows and Junior Fellows. ACOG was organized in part to "establish and maintain the highest possible standards for obstetric and gynecologic education in medical schools and hospitals,

obstetric and gynecologic practice and research" and to "maintain the dignity and efficiency of obstetric and gynecologic practice in its relationship to public welfare." The ACOG "Policy on Abortion" recognizes that "abortion may be performed at a patient's request, or upon a physician's recommendation." (For complete text of policy statement, *see* Appendix A.)

Amicus American Medical Women's Association, which was organized over 56 years ago, is composed of some 2,000 women physicians and women medical students throughout the United States and territories. AMWA has supported liberalization of abortion laws "for those who, for family planning or health reasons, wish it, and that this be done with the approval of their physicians."

Amicus American Psychiatric Association is a scientific and educational medical organization, composed of 18,783 qualified doctors of medicine who specialize as psychiatrists in the diagnosis, care and treatment of mental diseases and defects of the mind. It is the second largest medical specialty organization in the United States. Abortions are a prime interest to psychiatrists because pregnancy, child-bearing, birth and abortion can have material effects upon the mental processes of patients requiring psychiatric diagnosis, evaluation and care. The Board of Trustees of the APA on Dec. 12-13, 1969, upon the recommendation of the Committee on Psychiatry and Law, approved the following:

"Position Statement on Abortion"

"A decision to perform an abortion should be regarded as strictly a medical decision and a medical responsibility. It should be removed entirely from the jurisdiction of criminal law. Criminal penalties should be reserved for persons who perform abortions without medical license or qualifications to do so. A medical decision to perform an abortion is based on the careful and informed judgments of the physician and the patient. Among other factors to be considered in arriving at the decision is the motivation of the patient.

> Often psychiatric consultation can help clarify motivational problems and thereby contribute to the patient's welfare."

Composed of 3,118 Fellows, *Amicus* the New York Academy of Medicine was incorporated, by special act of the Legislature of the State of New York in 1851, for the advancement of science and medicine:

> "The New York Academy of Medicine recommends repeal of those sections of the criminal code referable to the performance of abortion by qualified physicians and further supports the legal changes that would place abortion under the general provisions of the medical practices act of all the various states."

The individual *Amici* also include over 170 medical school deans, departmental chairmen, and professors of both obstetrics and gynecology and other branches of medicine.

Amici have a vital interest in overturning the jurisdictional holding of the lower court. The panel found no "case or controversy" posed by the sub-class of physician plaintiffs. *Doe* v. *Bolton,* 319 F. Supp. 1048, 1052-54 (N.D. Ga. 1970) (per curiam); J.S., at 4-a to 9-a. Although the district court upheld the "standing" of the physician class, the judges denied that physicians who "are not free to perform or counsel the obtaining of abortions" may contest the law short of inviting criminal prosecution. *Id.*

This determination runs completely contrary to decisions by this Court, *e.g., Investment Co. Institute* v. *Camp,* 401 U.S. 617, 620 (1971); *LSCRRC* v. *Wadmond,* 401 U.S. 154, 158-59 (1971); *Epperson* v. *Arkansas,* 393 U.S. 97, 101-02 (1968); *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 151-53 (1967). It also asks the near impossible of physicians and their patients. Either a pregnant woman must file an action and await lengthy judicial deliberations which risk her very life and health (fifteen weeks intervened between the April 16, 1970, filing date and the July 31 decision in this case). Or, a physician must invite criminal prosecution, where none is necessary to reveal the continuing im-

pact of the statute's restrictions. Only two physicians in Anglo-American history have had sufficient courage to choose the latter route. *See Rex* v. *Bourne* [1939] 1 K.B. 687; *Hodgson* v. *Randall*, 314 F. Supp. 32 (D. Minn. 1970), *aff'd mem.*, 402 U.S. —— (May 17, 1971).

Amici have a second important interest in the merits. The Georgia law regulating the medical procedure of abortion is patterned after analogous Model Penal Code provisions.[1] Similar laws are currently in force in twelve states.[2] *Amici* include or represent physicians from each of these additional jurisdictions. A decision on this appeal will have the effect of settling, one way or another, objections to those other eleven statutes. For this reason, *Amici* have a legitimate claim to be heard.

Equally important to the *Amici* is the need to present medical data to the Court concerning the implementation of this type of legislation. On a cumulative as well as state-by-state basis, data have gradually become available from public health authorities. These reveal discriminatory variations in access to medical abortions, from county-to-county, hospital-to-hospital, and state to state. All purport to be operating under similar statutory language.

To the extent that these data have bearing upon the constitutional questions before this Court, *Amici* have prepared illustrative tables and charts. These appear in Appendix B to the brief annexed hereto.

Amici Curiae, as physicians, also have data and argument in support of the contention that state law cannot rationally differentiate the medical procedure of abortion from all other procedures, by limiting the former to general community hospitals accredited by the Joint Commission on Accreditation of Hospitals [JCAH]. The aforementioned tables and charts show the paucity of such fully

---

[1] *See* MODEL PENAL CODE §230.3, at 189 (Proposed Official Draft, 1962); *Id.*, §207.11, at 144 (Tent. Draft No. 9, 1959), both of which follow almost verbatim from the fifteen year old 1955 draft.

[2] The twelve states are: Arkansas, California, Colorado, Delaware, Kansas, Maryland, New Mexico, North Carolina, Oregon, South Carolina, Virginia, and Georgia.

accredited hospitals in the affected states, such as Georgia, Arkansas, and another eight states with substantially the same requirement. This lack of available facilities is accentuated by the tendency for many accredited hospital directorates to permit their physicians to perform few or no medical abortions.

In some states, however, the laws permit specialized abortion facilities. In others, data from abortion experience suggests that the limitation of this medical procedure to fully accredited general community hospitals goes far beyond legitimate public health demands. *Amici* have assembled the most relevant and recent scientific findings. These are discussed in the annexed brief.

In two respects the brief for *Amici Curiae* will supplement the brief for appellants in a manner useful to the Court. First, *Amici* will concentrate arguments primarily on the interference of the statute with physicians, patients, and the physician-patient relationship.

Second, *Amici* will present these arguments from a national perspective, by showing how the Georgia-type law compares with laws in other states, both in terminology and implementation at the statewide, county, and hospital levels.

For the most part, the data materials are no more technical than the far more extensive records filed in antitrust, patent, and food and drug litigation. *Amici* have prepared the annexed brief and appendix to ensure that the Court will not be without what Judge Learned Hand denominated as "the aid of unpartisan and authoritative scientific assistance in the administration of justice" in this case. *See Parke-Davis & Co.* v. *H. K. Mulford Co.*, 189 Fed. 95, 115 (C.C.S.D.N.Y. 1911) (L. Hand, J., referring to the need for technical assistance in interpreting the patent on "adrenalin.").

For the reasons set forth, the Court should grant the Motion of *Amici* and receive the annexed brief.

Respectfully submitted,

Roy Lucas,
Attorney for Movant Amici Curiae.

IN THE

Supreme Court of the United States

No. 70-40, 1971 Term

MARY DOE, *et al.*,

Appellants,

—v.—

ARTHUR K. BOLTON, Attorney General of the State of Georgia, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF AS *AMICI CURIAE* FOR THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN MEDICAL WOMEN'S ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, NEW YORK ACADEMY OF MEDICINE, MEDICAL SCHOOL DEANS AND PROFESSORS, AND CERTAIN INDIVIDUAL PHYSICIANS

ROY LUCAS
James Madison Constitutional Law Institute, Inc.
Four Patchin Place
New York, N.Y. 10011
Tel.: 212-691-2020
Attorney for Amici Curiae

INDEX

PAGE

Interest of *Amici Curiae* 1

Questions Presented 1

Statute Involved 3

Statement of the Case 7

I. Medical Aspects of Abortion 7

II. Incidence of Medically Induced Abortion 13

III. Incidence and Sequelae of Nonmedical Abortion 15

IV. Abortion and Contraception 16

A. Contraceptive Failure 16

B. Lack of Access to Contraception 18

ARGUMENT:

JURISDICTION:

I. The District Court had jurisdiction to grant declaratory and injunctive relief to the class of physicians 22

A. Physicians have standing to assert their own fundamental personal rights, and those of the class of their patients who seek medical advice and treatment, because enforce-

PAGE

ment of the statute in question is almost solely against physicians, the physicians' interests are inextricably related to those of their patients, and the rights of patients cannot be adequately protected unless considered along with those of physicians 22

1. Standing of Physicians 22

2. Physician's Standing to Assert Patient's Right to Seek Medical Care 23

B. The drastic regular and recurring impact of the statute upon physicians and their patients poses a continuing case or controversy, which is ripe for adjudication, because physicians are deterred and hampered by the statute in advising and treating their patients, and repeatedly compelled to refuse to provide medical care out of a reasonable fear of enforcement of the statute 25

C. Injunctive relief was necessary to prevent inevitable grave and immediate injury to physicians and their patients, because defense of criminal and/or administrative proceedings in a single case could not eliminate the recurring controversy, and the mere fact of such a state proceeding would drastically invade the physician-patient relationship, as well as exert an *in terrorem* effect upon the profession 34

PAGE

THE MERITS:

II. The provisions in Georgia Criminal Code §§26-1201, -1202(a)(1)-(3), -1202(b)(1)-(9), -1202(c), and -1202(e), which differentiate the medical procedures of therapeutic and elective induced abortion from all other forms of health care, deprive physicians of the fundamental personal right to administer to their patients, and patients of the right to seek medical care, in violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment .. 37

A. The rights of physicians to administer health care, and of patients to seek medical treatment, are fundamental personal interests recognized by national and international standards of medical practice, and protected by the First, Ninth, and Fourteenth Amendments 38

1. Physicians Have a Fundamental Right to Administer Health Care Without Arbitrary State Interference 38

2. Patients Have a Fundamental Right to Seek Health Care Which Includes the Treatment of Medical Abortion 41

B. The Equal Protection and Due Process clauses of the Fourteenth Amendment require that restrictive classifications in the challenged statute be narrowly drawn and supported by compelling state interests, in

PAGE

order not to abridge fundamental personal rights 45

C. The Georgia law on medical abortion, and similar laws in eleven other states, restrict access to this medical procedure in a manner which offends the Equal Protection clause of the Fourteenth Amendment 48

1. The "Health" Clause Is Interpreted Differently in Every State, Community, and Hospital, and Has Been Demonstrated to Be Without a Reasonably Specific Meaning 49

2. Widespread Discrimination on the Basis of a Patient's Place of Abode Has Resulted From the Statute and Its Uneven Administration 61

D. The provisions in Georgia Criminal Code §§26-1201, -1202(a)(1)-(3), -1202(b)(1)-(9), -1202(c), and -1202(e) are not narrowly drawn and do not advance a compelling state interest 68

1. The Limitation of Medical Justifications to Cases in Which: (1) Continuation of Pregnancy Would "Endanger the Life" of the Woman, or "Seriously and Permanently Injure Her Health," or (2) "[t]he Fetus Would Very Likely Be Born With a Grave, Permanent, and Irreme-

PAGE

dial Mental or Physical Defect," or (3) "[t]he Pregnancy Resulted From Forcible or Statutory Rape," Is Neither Narrowly Drawn Nor Supported by Any Compelling State Interests 69

a. The limiting provisions are not rationally related to a public health interest 70

b. The provisions advance no legitimate interest in protecting human life 72

c. The provisions do not advance any rational moral value 73

2. The Requirement That Patients Requesting a Therapeutic or Elective Abortion Be Examined and Certified by Three Physicians, and That Certifications Be Approved Further by a Hospital Committee of Three or More Physicians, Is Neither Narrowly Drawn Nor Supportive of a Compelling State Interest 74

a. The consulting requirement precludes a clinical relationship by creating an adversarial one, which serves no medical purpose 74

b. Multiple physician consultations have no rational justification where the patient has no specialized medical problem which could complicate the induced abortion procedure 76

PAGE

c. The committee process is devoid of procedures which remotely resemble those required by the due process clause 78

3. The requirement that the medical procedure of abortion be undertaken only in hospitals accredited by the Joint Commission on Accreditation of Hospitals unjustifiably discriminates against a single medical procedure, and seriously limits the availability of medical facilities for abortion, without advancing any compelling state interest 80

a. The JCAH itself does not advocate that medical procedures be confined to a given type of facility or limited to particular patient circumstances .. 82

b. No public health justification can be advanced for confining the medical procedure of abortion to those limited institutions which are JCAH-accredited 85

4. The prohibition further limiting access to the medical procedure of induced abortion to the single class of patients who are "bona fide legal resident[s] of the State of Georgia" violates the Privileges and Immunities clause of Article IV, §2, and the Equal Protection clause

PAGE

of the Fourteenth Amendment by excluding non-resident patients for reasons which are neither narrowly drawn nor supportive of any legitimate, compelling state interest 90

CONCLUSIONS 96

APPENDIX A A-1

APPENDIX B B-1

TABLE OF AUTHORITIES

Constitutional Provisions:

United States Constitution—
Amendment I 22, 38, 40
Amendment VIII 48
Amendment IX 38
Amendment XIV ..... *passim*
Article IV, §2 ..... 90, 92, 94, 95

Statutes:

Georgia Statutes—
Georgia Criminal Code §26-1201 (1969) 2, 3, 37, 68
Georgia Criminal Code §26-1202 (1969) ..*passim*
Georgia Criminal Code §26-1203 (1969) 3, 6

PAGE

Other Statutes and Rules:

Abortion Services, N.Y.C. HEALTH CODE tit. III, Art. 42, 98 CITY RECORD 6313-6315 (Oct. 23, 1970) 89

Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572 (Dec. 24, 1970) 18

40A MINN. STAT. ANN. §617.19, at 286 (1964) 49

Public Law, U.S. Congress 89-749 42

2A TEXAS PENAL CODE, Art. 1196, at 436 (1961) 49

Cases:

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) ..30, 36
Alabama State Teachers Ass'n v. Lowndes County Bd. of Education, 289 F. Supp. 300 (M.D. Ala. 1968) 66
American Commuters Ass'n v. Levitt, 279 F. Supp. 40 (S.D.N.Y. 1967) 95
Application of Georgetown College, Inc., 331 F.2d 1010 (D.C. Cir.) (en banc), *cert. denied*, 377 U.S. 978 (1964) 44
Avery v. Midland County, 390 U.S. 474 (1967) 65

Baggett v. Bullitt, 377 U.S. 360 (1964) 29
Baker v. Carr, 369 U.S. 186 (1962) 23
Baldwin v. Hale, 68 U.S. (1 Wall.) 223 (1864) 78
Barrows v. Jackson, 346 U.S. 249 (1953) 24
Baxtrom v. Herold, 383 U.S. 107 (1966) 80
Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966) 22
Blake v. McClung, 172 U.S. 239 (1898) 93
Boddie v. Connecticut, 401 U.S. 371 (1971) ..... *passim*
Brockington v. Rhodes, 396 U.S. 41 (1969) (per curiam) 30

PAGE

Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966) 62
Brotherhood of Railway Trainmen v. Virginia, 377 U.S. 1 (1964) 40

California v. Belous, 71 Cal.2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (Sept. 5, 1969), *cert. denied*, 397 U.S. 915 (1970) ..... *passim*
Canale v. Stevenson, —— Tenn. ——, 458 S.W.2d 797 (1970) 66
Clayton v. North Carolina State Bd. of Elections, 317 F. Supp. 915 (E.D.N.C. 1970) 65
Corfield v. Coryell, 6 Fed. Cas. 546 (C.C.E.D. Pa., 1832) (No. 3,230) 92
Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C.), *appeal docketed*, 40 U.S.L.W. 3048 (U.S. July 17, 1971) (No. 71-92, 1971 Term) 29, 90
Crossen v. Breckenridge, —— F.2d ——, No. 20852 (6th Cir. June 23, 1971) 24

Dent v. West Virginia, 129 U.S. 114 (1889) 27, 38, 39, 51
Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970) (per curiam), *juris. postponed*, 402 U.S. —— (May 3, 1971) (No. 70-40, 1971 Term) ..... *passim*
Doe v. Dunbar, 320 F. Supp. 1297 (D. Colo. 1970) 29
Doe v. Randall, 314 F. Supp. 32 (1970) 26
Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill.) *appeal docketed sub nom.* Hanrahan v. Doe, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (No. 70-105, 1971 Term) 29

Eisenstadt v. Baird, 429 F.2d 1398 (1st Cir. 1970), *prob. juris. noted*, 401 U.S. 934 (1971) (No. 70-17, 1971 Term) 73

PAGE

Elfbrandt v. Russell, 384 U.S. 11 (1966) 89
Epperson v. Arkansas, 393 U.S. 97 (1968) 29

Goldberg v. Kelly, 397 U.S. 254 (1970) 79
Golden v. Zwickler, 394 U.S. 103 (1969) 28
Graham v. Richardson, 402 U.S. —— (June 14, 1971) 45, 46, 95
Gray v. Sanders, 372 U.S. 363 (1963) 61
Greene v. McElroy, 360 U.S. 474 (1959) 22, 79-80
Griffin v. County School Board, 377 U.S. 218 (1964) 64, 65, 67
Griswold v. Connecticut, 381 U.S. 479 (1965) ..... *passim*

Hall v. Beals, 396 U.S. 45 (1969) 30
Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) 61
Hawkins v. Town of Shaw, Mississippi, 437 F.2d 1286 (5th Cir. 1971) 62, 65
Hodgson v. Randall, 314 F. Supp. 32 (D. Minn. 1970) *aff'd mem.*, 402 U.S. —— (May 17, 1971) 29-30

Iowa Nat'l Bank v. Stewart, 214 Iowa 1229, 232 N.W. 445 (1930) 34

Jacobson v. Massachusetts, 197 U.S. 11 (1904) 43, 48

Kennan v. Nichol, —— F. Supp. ——, 71-C-118 (W.D. Wis. Apr. 27, May 5, 6, 1971) 35
King v. Smith, 392 U.S. 309 (1968) 73

Lane v. Wilson, 307 U.S. 268 (1939) 66, 67
Long v. Robinson, 316 F. Supp. 22 (D.Md. 1970), *aff'd*, 436 F.2d 1116 (4th Cir. 1971) 65

PAGE

Loving v. Commonwealth, 388 U.S. 1 (1967) 43
LSCRRC v. Wadmond, 401 U.S. 154 (1971) 29

McCann v. Babbitz, 310 F. Supp. 293 (E.D. Wis. Mar. 5, 1970) (per curiam) *appeal dismissed,* 400 U.S. 1 (1970) (per curiam) 13, 29
McCann v. Babbitz, 320 F. Supp. 219 (E.D. Wis. 1970) (per curiam), *vacated for consideration,* 402 U.S. 903 (1971) 35
McCready v. Virginia, 94 U.S. 391 (1877) 95
Morey v. Doud, 354 U.S. 457 (1957) 46, 69, 84
Mullaney v. Anderson, 342 U.S. 415 (1952) 95

NAACP v. Alabama, 357 U.S. 449 (1958) 40
NAACP v. Button, 371 U.S. 415 (1963) 40
Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968) 66

Olmstead v. United States, 277 U.S. 438 (1928) 44
Orr v. Thorp, 308 F. Supp. 1369 (S.D. Fla. 1969) 66

Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869) 92-93
People v. Barksdale, —— Cal. App. 3d ——, —— Cal. Rptr. ——, 1 Crim. 9526 (Calif. Dist. Ct. App. July 22, 1971) 90
Perez v. Ledesma, 401 U.S. 82 (1971) 36
Pierce v. Society of Sisters, 268 U.S. 510 (1925) 24, 32, 33, 44
Poe v. Ullman, 367 U.S. 497 (1961) 30, 31, 32, 33

Rex v. Bourne [1938] 3 All Eng. Rep. 615 [1939] 1 K.B. 687 29
Reynolds v. Sims, 377 U.S. 533 (1964) 61, 65, 67

PAGE

Richards v. Townsend, 303 F. Supp. 793 (N.D. Calif. 1969) 66
Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970) (per curiam), *juris. postponed,* 402 U.S. —— (May 3, 1971) (No. 70-18, 1971 Term) ..... *passim*
Ruffalo, *In Re,* 390 U.S. 544 (1968) 79

Sams v. Ohio Valley General Hospital Ass'n, 413 F.2d 826 (4th Cir. 1969) 65
Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) 38
Shapiro v. Thompson, 394 U.S. 618 (1969) 46, 95
Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) 85
Skinner v. Oklahoma, 316 U.S. 535 (1942) 43-44, 47-48
Slochower v. Board of Higher Education, 350 U.S. 551 (1956) 22
Smith v. Texas, 233 U.S. 630 (1914) 38
Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 79
Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 30
Stanley v. Georgia, 394 U.S. 557 (1969) 44
State v. Coleman, 46 N.J. 16, 214 A.2d 393 (1965) 34
State v. Fowler, 193 N.C. 290, 136 S.E. 709 (1927) 66
State v. Swegori, 318 Mo. 998, 2 S.W.2d 747 (1924) 66
Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970) 20, 29
Swain v. Alabama, 380 U.S. 202 (1965) 61

Terrace v. Thompson, 263 U.S. 197 (1923) 33
Terry v. Ohio, 392 U.S. 1 (1968) 43
Tileston v. Ullman, 318 U.S. 44 (1943) (per curiam) 22

PAGE

Toomer v. Witsell, 334 U.S. 385 (1948) 93, 94, 95
Truax v. Raich, 239 U.S. 33 (1915) 24, 32

Union Pac. Ry. v. Botsford, 141 U.S. 250 (1891) 43, 48
United Mine Workers v. Illinois State Bar, 389 U.S. 217 (1967) 40
United States v. Freund, 290 Fed. 411 (D. Mont. 1923) 39
United States v. O'Brien, 391 U.S. 367 (1968) 41
United States v. Vuitch, 305 F. Supp. 1035 (D.D.C. Nov. 10, 1969), *modified and reversed*, 402 U.S. 62 (1971) ..... *passim*
United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971) 40
United States *ex rel.* Dr. Jesse Williams, II v. Zelker, —— F.2d ——, No. 35381 (2d Cir. July 2, 1971) (Tom C. Clark, J.) 24
United States *ex rel. Lawrence* v. *Woods*, 432 F.2d 1072 (7th Cir. 1970), *cert. denied*, 402 U.S. —— (May 17, 1971) 34

Valle v. Stengel, 176 F.2d 697 (3d Cir. 1949) 94

Ward v. Maryland, 79 U.S. 418 (1870) 93
West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) 33
Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) 22

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 48
Young v. United States, 315 U.S. 257 (1942) 27
Younger v. Harris, 401 U.S. 37 (1971) 25

PAGE

MEDICAL LITERATURE AND COMMENTARY:

Aarons, *Therapeutic Abortion and the Psychiatrist,* 124 AM. J. PSYCHIATRY 745 (1967) 75
Abortion, Proceedings of the American Medical Ass'n House of Delegates 47 (June, 1970) 52
AM. J. OBST. & GYN. 694 (1969) 58
Anderson & Speroff, *Prostaglandins,* 171 SCIENCE 502 (1971) 88
Appendectomy Profile, 1968, 7 PAS REPORTER No. 16, at 1-4 (Dec. 22, 1969) 11
AREY, L., DEVELOPMENTAL ANATOMY (7th ed. 1965) 9

Baird, D., *The Obstetrician and Society,* 60 AM. J. PUBLIC HEALTH 628 (1970) 59
BASIC DOCUMENTS OF THE WORLD HEALTH ORGANIZATION 1 (Geneva 1969 ed.) 42
Bourne, *et al., Surveillance of Legal Abortions in the United States, 1970* (Proceedings, 9th Annual Meeting, American Ass'n of Planned Parenthood Physicians, Kansas City, Mo., April 5-6, 1971) 31
Bumpass & Westoff, *The "Perfect Contraceptive" Population,* 169 SCIENCE 1177 (1970) 14, 18, 20

CALDERONE, M. (ed.), ABORTION IN THE UNITED STATES (1958) 14, 56
Chase, *Abortions to Out-of-State Residents* (June 29, 1971) (Report released by the Health Services Administration, City of New York) 15, 31, 61
Cholecystectomy Mortality, 8 PAS REPORTER No. 8, at 1 (Apr. 20, 1970) 11
CLAPESATTLE, H., THE DOCTORS MAYO (1941) 42, 90

PAGE

Crowley & Laidlaw, *Psychiatric Opinion Regarding Abortion: Preliminary Report of a Survey*, 124 Am. J. Psychiatry 145 (1967) 56

Curran, *The Right to Health in National and International Law*, 284 New Eng. J. of Medicine 1258 (1971) 42

Davis, L. E., Fellowship of Surgeons: A History of the American College of Surgeons (1960) 81

Droegemueller, Taylor & Drose, *The First Year of Experience in Colorado with the New Abortion Law*, 103

Dryfoos, *et al.*, *Eighteen Months Later: Family Planning Services in the United States, 1969*, 3 Family Planning Perspectives No. 2, at 29 (Apr. 1971) 19

Fisher, *Criminal Abortion*, in Abortion in America 3-6 (H. Rosen ed. 1967) 14

Forssman & Thuwe, *One Hundred and Twenty Children Born After Application for Therapeutic Abortion Refused*, 42 Acta Psychiatric Scandinavia 71-88 (1966) reprinted in Abortion and the Unwanted Child 123 (C. Reiterman ed. 1971) 20

Gebhard, P., *et al.*, Pregnancy, Birth and Abortion (1958) 14

Goldsmith & Margolis, *Aspiration Abortion Without Cervical Dilation*, 110 Am. J. Obstetrics & Gynecology 580 (1971) 87

Group for the Advancement of Psychiatry, the Right to Abortion: A Psychiatric View (Comm. on Law & Psychiatry, 1970) 57

Hall, *Abortion in American Hospitals*, 57 Am. J. Pub. Health 1933 (1967) 56

PAGE

HELLMAN, L., & PRITCHARD, J., WILLIAMS OBSTETRICS (14th ed. 1971) 7, 9, 55

Huntingford, *Mortality and Morbidity of Abortion,* THE LANCET 1012 (May 15, 1971) 86

Hook, *Refused Abortion,* 37 ACTA PSYCHIAT 203 (1961) 56

Israel & Mazer, *Safety and Advantage of Office Curettage,* 36 AM. J. OBSTETRICS & GYNECOLOGY 445 (1938) 88

Margolis & Overstreet, *Legal Abortion Without Hospitalization,* 36 OBSTETRICS & GYNECOLOGY 479 (1970) 86

Need For Subsidized Family Planning Services: United States, Each State and County, 1968 Table I, p. 92 (Office of Economic Opportunity, 1968) 19

NOVAK, E., *et al.,* TEXTBOOK OF GYNECOLOGY (8th ed. 1970) 16

Overstreet, *Abortion and Obstetrics,* in II ABORTION IN A CHANGING WORLD 74 (R. Hall ed. 1970) 55

PAS Hospitals, 8 PAS REPORTER No. 1, at 1 (Jan. 12, 1970) 10, 11

PATTEN, B., HUMAN EMBRYOLOGY (3d ed. 1968) 9

PEEL, J., & POTTS, M., CONTRACEPTIVE PRACTICE (1969) 17

Penfield, *Abortion Under Paracervical Block,* 71 N. Y. STATE J. OF MEDICINE 1185 (1971) 87

Pike, *Therapeutic Abortion and Mental Health,* 111 CALIF. MEDICINE, 318 (1969) 56, 58

Potts, *Postconceptive Control of Fertility,* 8 INTERNATIONAL J. OF GYNECOLOGY & OBSTETRICS 957 (1970) .. 8, 12

Regine, *A Study of Pregnancy Wastage,* 13 MILBANK MEM. FUND QUART. No. 4, at 347-65 (1935) 14

PAGE

Rochat, *et al., An Epidemiological Analysis of Abortion in Georgia,* 61 AM. J. PUBLIC HEALTH 543 (1971) 16, 60, 64, 71

Russell & Jackson, *Therapeutic Abortions in California,* 105 AM. J. OBST. & GYN. 757 (1969) 57

Ryan, *Humane Abortion Laws and the Health Needs of Society,* 17 W. RES. L. REV. 424 (1965) 10, 58, 73

SCHWARZ, R. H., SEPTIC ABORTION (1968) 15, 57

Speroff & Ramwell, Prostaglandins in Reproductive Physiology, 107 AM. J. OBSTETRICS & GYNECOLOGY 1111 (1970) 88

T & A Profile, 8 PAS REPORTER No. 5 (Mar. 9, 1970) 11

TAUSSIG, F., ABORTION: SPONTANEOUS AND INDUCED (1936) 14

Thompson, Cowen & Berris, *Therapeutic Abortion: A Two-Year Experience in One Hospital,* 213 J. AM. MEDICAL ASS'N. 991 (1970) 59

Tietze, *Abortion Laws and Abortion Practices in Europe,* in V ADVANCES IN PLANNED PARENTHOOD 194 (1969) (Proceedings of the Seventh Annual Meeting of the American Ass'n of Planned Parenthood Physicians) 12, 71

Tietze, *United States: Therapeutic Abortions, 1963-1968,* 59 STUDIES IN FAMILY PLANNING 5 (1970) ..... *passim*

Tietze, *et al., Teaching of Fertility Regulation in Medical Schools,* 196 J. AMERICAN MEDICAL ASS'N 20 (1966) 19

Walter, *Psychologic and Emotional Consequences of Elective Abortion,* 36 OBSTETRICS & GYNECOLOGY 482 (1970) 50

PAGE

White, *Induced Abortions: A Survey of their Psychiatric Implications, Complications, and Indications,* 24 TEX. REPS. OF BIOLOGY & MEDICINE 531 (1966) 57, 58

Willson, *Abortion—A Medical Responsibility?,* 30 OBSTETRICS & GYNECOLOGY 294 (1967) 51

Willson, *et al.,* OBSTETRICS AND GYNECOLOGY 178 (4th ed. 1971) 77

LEGAL COMMENTARY:

BICKEL, A., THE LEAST DANGEROUS BRANCH (1962) 32, 34

Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal,* 2 LOYOLA UNIV. (L.A.) L. REV. 1 (1969) .....*passim*

Comment, 50 CALIF. L. REV. 137 (1962) 32

Declaratory Relief in the Criminal Law, Note, 80 HARV. L. REV. 1940 (1967) 32

Louisell, *Abortion, the Practice of Medicine and the Due Process of Law,* 16 U.C.L.A.L. REV. 233 (1969) 58

Louisell & Noonan, *Constitutional Balance,* in THE MORALITY OF ABORTION 249 (Noonan ed. 1970) 57

Moyers, *Abortion Laws: A Study in Social Change,* 7 SAN DIEGO L. REV. 237 (1970) 59

Overstreet, in *Symposium—Pregnancy Termination: The Impact of New Laws,* 6 J. REPRODUCTIVE MEDICINE 274 (June 1971) 77

Packer & Gampell, *Therapeutic Abortion: A Problem in Law and Medicine,* 11 STAN. L. REV. 417 (1959) ... 57

PAGE

Roemer, *Abortion Law Reform and Repeal: Legislative and Judicial Developments,* 61 AM. J. PUBLIC HEALTH 500 (1971) 14

Schwartz, *Moral Offenses and the Model Penal Code,* 63 COLUM. L. REV. 669 (1963) 37

Sedler, *Standing to Assert Constitutional Jus Tertii,* 71 YALE L.J. 599 (1962) 24

Smith, *et al., Report to the Legislature: State of Hawaii—Hawaii's Abortion Law* 15 (Apr. 20, 1971) 80

WILLIAMS, G., THE SANCTITY OF LIFE AND THE CRIMINAL LAW (1966) 25

OTHER AUTHORITIES:

Abortion Regulations Adopted by the Washington State Board of Health (Dec. 10, 1970) 89

Accreditation Manual for Hospitals 1 (JCAH 1970) .. 81

Bulletin No. 42, JCAH (Aug. 1966) 84

Chase, *Abortions to Out-of-State Residents* (June 29, 1971) (Report by Health Services Administration, City of New York) 91

Constitution of the World Health Organization, in BASIC DOCUMENTS OF THE WORLD HEALTH ORGANIZATION 1 (Geneva 1969 ed.) 50

Hospitals, 44 J. AM. HOSPITAL ASS'N 1 (1970) (Guide Issue) 91

Jain & Sinding, *North Carolina Abortion Law 1967* (Carolina Population Center 1968) 59

PAGE

MODEL PENAL CODE §207.11, Comments (Tent. Draft No. 9, 1959) 52, 81

Model Penal Code §230.3(2) (Proposed Official Draft, 1962) 14

Policy on Abortion, American College of Obstetricians and Gynecologists (Aug. 1970) 52

Recommended Standards for Abortion Services (APHA 1970) 89

Statement by John I. Brewer, M.D., Commissioner JCAH (July 9, 1971) 82, 83

UNIFORM ABORTION ACT (2d Tent. Draft 1970) 52, 80

1 U.S. Bureau of the Census, *Census of Population* ch. a (1960) 62

U.S. Bureau of the Census: *Statistical Abstracts of the United States: 1970*, Table 69, at 55 (91st ed.) .. 10, 20

IN THE

Supreme Court of the United States

No. 70-40, 1971 Term

MARY DOE, *et al.*,

Appellants,

—v.—

ARTHUR K. BOLTON, Attorney General of the State of Georgia, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN MEDICAL WOMEN'S ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, NEW YORK ACADEMY OF MEDICINE, MEDICAL SCHOOL DEANS AND PROFESSORS, AND CERTAIN INDIVIDUAL PHYSICIANS AS *AMICI CURIAE*

Interest of *Amici Curiae*

The professional and personal interests of the *Amici Curiae* in the subject matter of this case are described in the Motion for leave to file this brief, *supra.*

Questions Presented

I. Whether the district court should have granted both declaratory and injunctive relief to the class of physician plaintiffs, to prevent continuing drastic and irreparable

injury caused by the statute in question, which sharply curtails access to the medical procedure of induced abortion.

II. Whether the classifications in Georgia Criminal Code §§26-1201, -1202(a)(1)-(3), -1202(b)(1)-(9), -1202(c), and -1202(e), which differentiate the medical procedure of induced abortion from all other forms of therapeutic and elective health care, by:

[A] confining the procedure to the limited number of hospitals both accredited by the Joint Commission on Accreditation of Hospitals [JCAH] and licensed as hospitals by the Georgia State Board of Health; and

[B] requiring that the patient's chosen physician obtain the approval of (1) two additional examining physicians, and (2) a hospital committee of three or more physicians before performing a medical abortion; and

[C] limiting the medical justifications for the procedure to instances certified by all of the above physicians wherein: (1) continuation of pregnancy would "endanger the life" of the woman, or "seriously and permanently injure her health," or (2) "[t]he fetus would very likely be born with a grave, permanent, and irremedial mental or physical defect," or (3) "[t]he pregnancy resulted from forcible or statutory rape;" and further

[D] restricting access to the medical procedure of induced abortion to the single class of patients who are "bona fide legal resident[s] of the State of Georgia,"

violate the Equal Protection and Due Process clauses of the Fourteenth Amendment by unjustifiably abridging the fundamental personal rights to administer and seek medical care.

Statute Involved

GEORGIA CRIMINAL CODE §§26-1201, through -1203, at 85-89 (1969) provides:

26-1201. *Criminal abortion.*—Except as otherwise provided in section 26-1202, a person commits criminal abortion when he administers any medicine, drug or other substance whatever to any woman or when he uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion.

26-1202. *Exception.*—(a) Section 26-1201 shall not apply to an abortion performed by a physician duly licensed to practice medicine and surgery pursuant to Chapter 84-9 or 84-12 of the Code of Georgia of 1933, as amended, based upon his best clinical judgment that an abortion is necessary because:

(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or

(2) The fetus would very likely be born with a grave, permanent, and irremedial mental or physical defect; or

(3) The pregnancy resulted from forcible or statutory rape.

(b) No abortion is authorized or shall be performed under this section unless each of the following conditions is met:

(1) The pregnant woman requesting the abortion certifies in writing under oath and subject to the penal-

ties of false swearing to the physician who proposes to perform the abortion that she is a bona fide legal resident of the State of Georgia.

(2) The physician certifies that he believes the woman is a bona fide resident of this State and that he has no information which should lead him to believe otherwise.

(3) Such physician's judgment is reduced to writing and concurred in by at least two other physicians duly licensed to practice medicine and surgery pursuant to Chapter 84-9 of the Code of Georgia of 1933, as amended, who certify in writing that based upon their separate personal medical examinations of the pregnant woman, the abortion is, in their judgment, necessary because of one or more of the reasons enumerated above.

(4) Such abortion is performed in a hospital licensed by the State Board of Health and accredited by the Joint Commission on Accreditation of Hospitals.

(5) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose.

(6) If the proposed abortion is considered necessary because the woman has been raped, the woman makes a written statement under oath, and subject to the penalties of false swearing, of the date, time and place of the rape and the name of the rapist, if known. There must be attached to this statement a certified copy of any report of the rape made by any law enforcement officer or agency and a statement by the solicitor general of the judicial circuit where the rape occurred or allegedly occurred that, according to his best information, there is probable cause to believe that the rape did occur.

(7) Such written opinions, statements, certificates, and concurrences are maintained in the permanent files of such hospital and are available at all reasonable times to the solicitor general of the judicial circuit in which the hospital is located.

(8) A copy of such written opinions, statements, certificates, and concurrences is filed with the Director of the State Department of Public Health within 10 days after such operation is performed.

(9) All written opinions, statements, certificates, and concurrences filed and maintained pursuant to paragraphs (7) and (8) of this subsection shall be confidential records and shall not be made available for public inspection at any time.

(c) Any solicitor general of the judicial circuit in which an abortion is to be performed under this section, or any person who would be a relative of the child within the second degree of consanguinity, may petition the superior court of the county in which the abortion is to be performed for a declaratory judgment

whether the performance of such abortion would violate any constitutional or other legal rights of the fetus. Such solicitor general may also petition such court for the purpose of taking issue with compliance with the requirements of this section. The physician who proposes to perform the abortion and the pregnant woman shall be respondents. The petition shall be heard expeditiously and if the court adjudges that such abortion would violate the constitutional or other legal rights of the fetus, the court shall so declare and shall restrain the physician from performing the abortion.

(d) If an abortion is performed in compliance with this section, the death of the fetus shall not give rise to any claim for wrongful death.

(e) Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b) (5). A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person.

26-1203. *Punishment.*—A person convicted of criminal abortion shall be punished by imprisonment for not less than one nor more than 10 years.

Statement of the Case

The specific facts which gave rise to this action and appeal are fully set out in appellants' brief. *Amici* will accordingly not repeat those matters, but will concentrate instead upon the broader national impact of the Court's decision in this case, and background data which may aid the Court in its deliberations.

I. *Medical Aspects of Abortion*

The standard text on obstetrics and gynecology, coauthored by the dean of American gynecology, now Deputy Assistant Secretary for Population Affairs, HEW, Louis M. Hellman, M.D., defines abortion, both *spontaneous* and *induced,* as follows:

> "Abortion is the termination of a pregnancy at any time before the fetus has attained a stage of viability. Interpretations of the word 'viability' have varied between fetal weights of 400 g (about 20 weeks of gestation) and 1,000 g (about 28 weeks of gestation) . . . . Although our smallest surviving infant weighed 540 g at birth, survival even at 700 or 800 g is unusual." L. HELLMAN & J. PRITCHARD, WILLIAMS OBSTETRICS 493 (14th ed. 1971).

The procedure of *induced* abortion differs from *spontaneous* not in the result, nor in the underlying reason for the abortion but primarily in its being conscious and volitional. For example, a patient infected with rubella (German measles) may abort spontaneously, because her *body* rejects a badly damaged embryo. Another similarly situated patient may seek an *induced* abortion as part of a reasoned *mental* judgment in order to reject a damaged embryo in favor of a subsequent normal pregnancy. From

this perspective, "spontaneous abortion can be regarded as an important biologic mechanism which has evolved in viviparous animals to deal with the numerous embryologic errors arising during development." Potts, *Postconceptive Control of Fertility,* 8 INTERNATIONAL J. OF GYNECOLOGY & OBSTETRICS 957 (1970).

Spontaneous abortions cannot be brought about, under current technology, solely by the will of the patient. Yet, the bio-chemical systems of patients play an increasing role in what had previously been regarded as an accidental phenomenon. One recent study of spontaneously aborted embryos showed that 38% "had a chromosomal abnormality." Carr, *Chromosome Studies in Selected Spontaneous Abortions,* 37 OBSTETRICS & GYNECOLOGY 750 (1971). Not only do fetal defects frequently cause spontaneous abortion, but numerous other causes beyond the patient's control, and often working in her favor, appear to be involved. In fact, "[w]hen pregnancy is defined as beginning at fertilization or implantation, then the rate of spontaneous wastage is even higher and may approach 50%." Potts, *supra.*

No law requires that a patient seek or a physician provide treatment to prevent *spontaneous* abortion. Neither nature nor the law values an embryo which the patient's bio-chemical system rejects. In such cases the needs of the patient, and the treatment provided by the physician are committed by law in every state to the discretion of the physician and patient, and accepted medical practice. No hospital committees interfere with this relationship; no government programs seek to promote confinement and treatment in cases of threatened spontaneous abortion.

Indeed, spontaneous abortions before the fourth week of pregnancy are "perceived by the patient as delayed men-

struation or may not be recognized at all." L. HELLMAN & J. PRITCHARD, WILLIAMS OBSTETRICS 496 (14th ed. 1971). This is perhaps the case because in early pregnancy, when the overwhelming number of all abortions take place, embryonic development has scarcely begun. "The 4 weeks old embryo measures 5 mm. [1/5 in.]. . . ." Shettles, *Fertilization and Early Development From the Inner Cell Mass,* in SCIENTIFIC FOUNDATIONS OF OBSTETRICS AND GYNECOLOGY 154 (E. E. Philipp, *et al.,* eds. 1970). As noted in standard embryology texts,

> "during these early stages, the development of all mammals is fundamentally the same. The specific characteristics of any form emerge but slowly, and relatively late. . . . The illustrations of sections of 5-mm human embryos are quite applicable, for example, to similarly located sections of 5-mm pig embryos. The basic plan of early body structure is amazingly similar." B. PATTEN, HUMAN EMBRYOLOGY 5 (3d ed. 1968).

The 5-mm embryo, for example, still has "a conspicuous *tail* . . ." L. AREY, DEVELOPMENTAL ANATOMY 98 (7th ed. 1965) (italics in original).

Neither the medical profession nor state health authorities treat spontaneous or induced abortions prior to 20 weeks of development as events which in any way are comparable to the loss of human life. As one prominent physician recently stated:

> "To the medical profession operating within its present framework, the conceptus, prior to twenty weeks of age, does not have the same legal status as one after that time. Should there be an untimely birth before twenty weeks, the act is considered an abortion, not a delivery, and is not listed on the

> mother's parity record. A birth or death certificate is not required and the body is handled as a pathological specimen without requiring legal interment." Ryan, *Humane Abortion Laws and the Health Needs of Society,* 17 W. Res. L. Rev. 424, 427 (1965).

Induced abortion, in medical practice, is a relatively minor surgical procedure, insofar as risks to the patient's physical or mental well-being are concerned. This exceptional safety consideration was noted by Dr. John McKelvey, former head of obstetrics and gynecology at the University of Minnesota:

> "Under ideal circumstances, abortions can be done with very little vital risk. The procedures which are open to the poor on the contrary can be very risky not only to the life of the individual but to her future health." McKelvey, *The Abortion Problem,* 50 Minn. Med. 119, 124 (1967).

The degree of safety can be readily seen by comparing patient mortality rates for induced abortion with those of childbirth and other typical medical procedures.

The maternal mortality rate in the United States for 1967 averaged 28.0 deaths per 100,000 live births. For nonwhites the rate was almost three times as high, 69.5 deaths per 100,000 live births.[1] The comparable mortality rates for various surgical procedures in the United States, per 100,000 operations, have been as follows:[2] Appendectomy[3]

---

[1] U.S. Bureau of the Census: *Statistical Abstracts of the United States: 1970,* Table 69, at 55 (91st ed.).

[2] The data are derived from surveys by the Commission on Professional and Hospital Activities, in Ann Arbor, Michigan, which are published in the Professional Activities Survey (PAS) Re-

—400 per 100,000; Cholecystectomy[4] (gall bladder operation)—1,600 per 100,000; Tonsillectomy/adenoidectomy[5]—5.2 per 100,000.

In the years 1963 to 1968, therapeutic abortions were unavailable in the United States on any large scale. Most patients had to show serious physical or mental disease to obtain the procedure. Of the 9,722 therapeutic abortions in the 1963-68 survey by the Commission on Professional and Hospital Activities only a single death "unequivocally resulted from the operation."[6] This death represents the equivalent of a mortality rate of 10.3 per 100,000 therapeutic abortions. Even this figure is misleadingly high in that the abortion was induced by an abdominal operation (hysterotomy) which poses substantial hazards of its own. Nonetheless, a 10.3 rate is 2.7 times safer than childbirth, 38.8 times safer than appendectomy, and 155 times safer than cholecystectomy, all other factors being equal.

A more correct estimation of the surgical risks from induced abortion can be made by examining the induced abortion mortality rates from other jurisdictions, in which abortion is available as an elective procedure in cases of contraceptive failure.

---

porter. Over 1,200 hospitals provide the Commission with data for more than 10 million patients per year. *See PAS Hospitals*, 8 PAS Reporter No. 1, at 1 (Jan. 12, 1970).

[3] *Appendectomy Profile, 1968*, 7 PAS Reporter No. 16, at 1-4 (Dec. 22, 1969).

[4] *Cholecystectomy Mortality*, 8 PAS Reporter No. 8, at 1 (Apr. 20, 1970).

[5] *T & A Profile*, 8 PAS Reporter No. 5 (Mar. 9, 1970).

[6] Tietze, *United States: Therapeutic Abortions, 1963-1968*, 59 Studies in Family Planning 5, 7 (1970).

In England and Wales, which only recently reformed their 1803 abortion law, the 1968-1969 data showed a total of 15 deaths from 54,000 legal abortions, a rate of 28.0 per 100,000.[7] This included, however, "the many surgeons within the N.H.S. [National Health Service] who perform a few abortions each [and] have had a higher death rate (36/100,000) than the few surgeons who do many abortions in private practice (14.2/100,000)."[8]

Again, the British data do not begin to demonstrate the safety of elective abortion in a sample wherein the patients are healthy, the medical practitioners skilled, and the procedures undertaken in very early pregnancy. This circumstance, moreover, does not exist even in northern Europe "where rates of about 40 per 100,000 have been reported in recent years."[9] There, higher mortality rates resulted in large part from "the fact that a substantial proportion of legal abortions is performed after the third month of gestation."[10] Only in eastern Europe, where "almost all legal abortions are performed in the first trimester of pregnancy with the majority in the second month,"[11] have mortality rates fallen to as few as 1.2 per 100,000 operations (Hungary: 1964-67, 9 deaths, 739,000 legal abortions).

The extent to which elective induced abortion for healthy women is enormously safer than childbirth and various

---

[7] Potts, *Postconceptive Control of Fertility*, 8 INTERNATIONAL J. OF GYNECOLOGY & OBSTETRICS 957, 967 (1970).

[8] *Id.*

[9] Tietze, *Abortion Laws and Abortion Practices in Europe*, in V ADVANCES IN PLANNED PARENTHOOD 194, 208 (1969) (Proceedings of the Seventh Annual Meeting of the American Ass'n of Planned Parenthood Physicians).

[10] *Id.*

[11] *Id.*

other medical procedures can be seen by tabulating the figures given above:

Medical Procedure or Event	Mortality (per 100,000 procedures)
Elective induced abortion (Hungary: 1964-67)	1.2
Tonsillectomy (U. S.: PAS 1969)	5.2
Therapeutic induced abortion (U. S.: 1963-68)	10.3
Childbirth (U. S.: 1967)	28.0
Appendectomy (U. S.: PAS 1968)	400
Cholecystectomy (U. S.: PAS 1968)	1,600

From these figures, it should be abundantly clear that a state must carry a heavy burden of persuasion to classify induced abortion apart from other medical procedures in terms of any public health or safety considerations.

In sum, the medical procedure of induced abortion, which is severely restricted by the statute involved in this case, is potentially 23.3 (28/1.2) times as safe as the process of going through ordinary childbirth. Numerous lower state and federal courts have reviewed or taken judicial notice of the facts set out in holding that no legitimate public health rationale could justify restrictive abortion legislation. *See, e.g., California* v. *Belous,* 71 Cal.2d 954, 965, 458 P.2d 194, 200, 80 Cal. Rptr. 354, 360 (1969), *cert. denied,* 397 U.S. 915 (1970); *McCann* v. *Babbitz,* 310 F. Supp. 293, 301 (E.D. Wis.) (per curiam), *appeal dismissed,* 400 U.S. 1 (1970) (per curiam).

II. *Incidence of Medically Induced Abortion*

In the United States on the whole, induced abortion under medical auspices was relatively restricted until 1967, when the first of twelve states, Colorado, enacted the American

Law Institute abortion law proposal in the Model Penal Code.[12] Georgia followed in 1968.

Only 5,000 therapeutic abortions were estimated to have been done in United States medical facilities in 1963,[13] as contrasted with 200,000 to 1,000,000 unwanted pregnancies thought to be terminated annually outside of the clinical setting.[14] These are over and above the "nearly 20 percent of all recent births [which] were unwanted," according to the "1965 National Fertility Study (NFS) . . . ." Bumpass & Westoff, *The "Perfect Contraceptive" Population*, 169 SCIENCE 1177, 1180 (1970).

Since 1967, the incidence of abortions in medical facilities has risen substantially, but only in the few states which have removed virtually all restrictions that previously differentiated abortion from other forms of medical treatment.

In New York City alone, for example, nearly 165,000 abortions were performed between July 1, 1970, and May

---

[12] MODEL PENAL CODE §230.3(2) (Proposed Official Draft, 1962). The Twelve states are Arkansas, California, Colorado, Delaware, Georgia, Kansas, Maryland, New Mexico, North Carolina, Oregon, South Carolina, and Virginia. *See generally* Roemer, *Abortion Law Reform and Repeal: Legislative and Judicial Developments*, 61 AM. J. PUBLIC HEALTH 500 (1971).

[13] Tietze, *supra* note 6.

[14] Secret induced abortions are inherently incapable of quantification. Nonetheless, one can be certain that the number is very high. For estimates, see Fisher, *Criminal Abortion*, in ABORTION IN AMERICA 3-6 (H. Rosen ed. 1967); M. CALDERONE (ed.), ABORTION IN THE UNITED STATES 180 (1958); P. GEBHARD *et al.*, PREGNANCY, BIRTH AND ABORTION 136-37 (1958); F. TAUSSIG, ABORTION: SPONTANEOUS AND INDUCED 25 (1936); Regine, *A Study of Pregnancy Wastage*, 13 MILBANK MEM. FUND QUART. No. 4, at 347-55 (1935).

31, 1971.[15] Nearly 40,500 of these women were not residents of New York State![16]

III. *Incidence and Sequelae of Nonmedical Abortion*

The problem of abortions induced by nonmedical personnel, in circumstances conducive to infection, psychic trauma, and not infrequently death, remains with the medical profession in most other states, however.

> "[S]eptic abortion has become a leading cause of maternal deaths. In Philadelphia over 50 percent of the maternal deaths result from complications of abortion, and this fact apparently holds true in other areas of the country: Stevenson reports 57 percent in Michigan; Hellman, 33 percent at the Kings County Hospital in Brooklyn; and Fox, 28 percent in California." R. SCHWARZ, SEPTIC ABORTION 7 (1968).

The booklength treatment by Dr. Schwarz of the University of Pennsylvania School of Medicine could never have been written but for the legal restrictions on abortion. The chapters describe in detail the medical techniques of treating patients who are refused abortion by physicians and then resort to incompetent, nonmedical practitioners. These patients often return for treatment of complications that can be traced back to statutes such as that in question in this case.

Georgia remains among the states with an exceptionally low number of medical abortions. Despite an ostensibly more generous statute, Georgia has a serious continuing public health problem in illegal abortions induced by un-

---

[15] Chase, *Abortions to Out-of-State Residents* (June 29, 1971) (Report released by the Health Services Administration, City of New York).

[16] *Id.*

trained practitioners in dangerous settings. For the 1968-1970 period Georgia was *last* in number of abortions per 1,000 births among the twelve states with Model Penal Code-type therapeutic abortion acts. In Georgia the ratio was 4.0, by contrast with California where a similar law resulted in 194.2 abortions per 1,000 births for 1970 (*See* APPENDIX B, *infra,* Table I-2, at B-5, 6, for data on all twelve states). Only "5 percent of the practicing physicians in Georgia reported performing abortions in 14 percent of Georgia's counties during 1968 and 1969." Rochat, *et al., An Epidemiological Analysis of Abortion in Georgia,* 61 AM. J. PUBLIC HEALTH 543, 547 (1971).

IV. *Abortion and Contraception*

A. *Contraceptive Failure:*

Significant contraceptive failure rates, and widespread lack of information about contraception, are two of the many factors which must be understood in assessing the impact of abortion laws on families and individuals in Georgia, and the United States.

A wealth of medical evidence shows that the factual basis for this position is sound.

The most effective contraceptive known, "the pill" or oral contraceptive, has in practice produced side effects "disagreeable enough to cause a 20 to 40 per cent drop-out rate" among those patients who were informed of and chose to use the method in the first place. E. NOVAK, *et al.,* TEXTBOOK OF GYNECOLOGY 647 (8th ed. 1970). The vast proportion of the population not receiving family planning services never reach that option, of course. Other methods are less effective in practice than the 99% effective oral contraceptive. *Id.* These range from the intrauterine devices, which pose problems of their own and vary in

effectiveness, to abstention and rhythm, which are not seriously regarded by the medical profession in this century.[17]

The following chart illustrates the contraceptive failure problem:

Failure Rates of Contraceptive Methods

Method	*Pregnancy rates for 100 woman-years of use*[18]	
	High	*Low*
No contraceptive	80	80
Aerosol foam	—	29
Foam tablets	43	12
Suppositories	42	4
Jelly or cream	38	4
Douche	41	21
Diaphragm and jelly	35	4
Sponge and foam powder	35	28
Condom	28	7
Coitus interruptus	38	10
Rhythm	38	0
Lactation	26	24
Steroid contraception (the "pill")	2.7	0
Abortion	0	0
Intrauterine contraception (averages)		
Lippes loop (large)		
0-12 months	2.4	
12-24 months	1.4	

SOURCE: After Berelson et al., *Family Planning and Population Programs,* University of Chicago Press, 1966.

[17] For discussion of contraceptive-techniques, effectiveness, and the full range of complex factors involved, *see generally* J. PEEL & M. POTTS, CONTRACEPTIVE PRACTICE (1969).

[18] The factor of patient *use*, or non-use is always relevant. Highly motivated, sophisticated users might have no failure with a contraceptive foam, for example.

The number 80 in the first line indicates that among 100 women utilizing no contraception for one year, 80 will become pregnant.

B. *Lack of Access to Contraception:*

All too frequently it is presumed that people have access to and are able to use highly effective contraceptives, and are themselves at fault in cases of unwanted or unplanned pregnancy. This assumption could not be further from medical reality. Contraception is not widely available in the United States. In fact, Congress passed the *Family Planning Services and Population Research Act of 1970*, Pub. L. No. 91-572 (Dec. 24, 1970), with an overall appropriation exceeding $380 million "to assist in making comprehensive voluntary family planning services readily available to all persons. . . ." National studies on the magnitude of unwanted births, such as data from HEW's 1965 National Fertility Study, for example, showed:

> "[In] the period 1960 to 1965 there were 4.7 million births that would have been prevented by 'perfect contraception.' These births represent one fifth of all births during the period. Approximately two million of these births occurred among the poor and the near-poor and half of these among Negro poor and near-poor." [19]

The most recent studies identify as a principal problem the absence of adequate information and services for people with a need to know about contraception, and when

---

[19] Bumpass & Westoff, *The "Perfect Contraceptive" Population*, 169 SCIENCE 1177, 1179 (1970).

that fails, medically induced abortion. As late as the close of 1969,

> "some 4.3 million women in need of subsidized family planning services were not receiving them insofar as could be determined from reports of organized programs; no programs at all could be identified in 1,636 counties—53 percent of all counties—containing one-fourth of the unmet need. Services continue to be concentrated in relatively few populous counties. . . ." [20]

The basic 1968 study covered each State by county. In Georgia a total of 179,932 medically indigent women in need of family planning information were shown to be unserved. This amounted to 88% of such women.[21] These individuals can hardly be thought to be able to protect their marital and personal privacy through contraception, when that is altogether unavailable to them.

This deficiency is not confined to patients. Only a few short years ago, a review of texts used in medical schools revealed that "[t]wo thirds of the texts (25 texts) contained either no mention of contraception or only isolated reference to it, with no complete discussion." Tietze, *et al., Teaching of Fertility Regulation in Medical Schools,* 196 J. AMERICAN MEDICAL ASS'N 20, 23 (1966).

Patients have limited access to contraceptive methods and information. Physicians have limited willingness to

---

[20] Dryfoos, *et al., Eighteen Months Later: Family Planning Services in the United States, 1969,* 3 FAMILY PLANNING PERSPECTIVES No. 2, at 29 (Apr. 1971).

[21] *Need for Subsidized Family Planning Services: United States, Each State and County, 1968,* Table I, p. 50, cols. 10 & 11 (OEO, 1968).

prescribe contraception. As if this were not enough, contraceptive devices, techniques, and use are far from effective as a means whereby a family can determine how many children they will have and no more.

While a narrow concern is occasionally voiced that "'those who dance must pay the piper,'"[22] such an approach to judicial reasoning obscures the medical and legal issues. In the first place, studies of unwanted fertility, such as Bumpass & Westoff, *supra,* were of samples of *married* couples. This study did not evaluate the fact that 339,200 illegitimate births occurred in 1968, which at that time were 9.7% of all births.[23]

In or out of wedlock, unwanted pregnancy can have damaging consequences, not only for the married couple, or unmarried woman, but more so for the society which must face and deal with anti-social behavior, delinquency, and crime brought about to some degree by unwantedness. A detailed study of 120 children who were born after their mothers' applications for therapeutic abortions had been turned down in Sweden casts light upon the social consequences of restrictive abortion laws.[24] Among the "unwanted" group, by their twenty-first birthday, 28.3% had received psychiatric care, 18.3% had been registered with child welfare boards for delinquency, 8.3% were on the penal register, and 14.2% had received public assistance. The authors concluded:

---

[22] Steinberg v. Brown, 321 F. Supp. 741, 747 (N.D. Ohio 1970).

[23] U.S. Bureau of the Census, *Statistical Abstract of the United States: 1970,* Table 58, at 50 (91st ed.).

[24] Forssman & Thuwe, *One Hundred and Twenty Children Born After Application for Therapeutic Abortion Refused,* 42 Acta Psychiatric Scandinavia 71-88 (1966), reprinted in Abortion and the Unwanted Child 12 (C. Reiterman ed. 1971).

"[T]he very fact a woman applies for legal abortion means that the prospective child runs a risk of having to surmount greater social and mental handicaps than its peers, even when the grounds for the application are so slight that it is refused." [25]

• • • • •

Amici have presented the above analysis and data to introduce the medical and social context of this case. The data and conclusions which follow therefrom, are not intended to suggest that this Court, or any judicial body, ought to weigh policy matters to determine questions of constitutional law. Only when it is claimed that a statute interferes with a litigant's fundamental personal rights, is it incumbent upon the Court to inquire into the case. Such an inquiry must ask the nature of the rights asserted, whether such rights are implicit or express in constitutional doctrine, and whether a legislative body might justifiably abridge the rights asserted. The very nature of the rights in this case necessitates an understanding of contraception, abortion, and associated phenomena. The response to possible legislative justifications similarly requires an examination of medical and social facts. In the threshold treatment above, and in the arguments which follow, *Amici* will concentrate on particularly relevant medical data thought to be necessary to the Court's ultimate determination of law.

---

[25] *Id.* at 143.

ARGUMENT

JURISDICTION

I.

The District Court had jurisdiction to grant declaratory and injunctive relief to the class of physicians.

A. Physicians have standing to assert their own fundamental personal rights, and those of the class of their patients who seek medical advice and treatment, because enforcement of the statute in question is almost solely against physicians, the physicians' interests are inextricably related to those of their patients, and the rights of patients cannot be adequately protected unless considered along with those of physicians.

1. *Standing of Physicians*

The sub-class of physicians alleged throughout that the statute in question directly curtailed their own interests in providing adequate medical advice and treatment for patients. These interests are aspects of "liberty," "property," and association directly protected by the First and Fourteenth Amendments. There can no longer be doubt that the opportunity to pursue one's profession is encompassed within the concepts of "liberty" and "property." This has been the teaching of decisions involving members of and aspirants to the bar, *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96, 102-03 (1963); teachers, *Slochower* v. *Board of Higher Educ.,* 350 U.S. 551 (1956); scientists, *Greene* v. *McElroy,* 360 U.S. 474, 492 (1959); and physicians as well, *Birnbaum* v. *Trussell,* 371 F.2d 672 (2d Cir. 1966).

The present case, therefore, is wholly unlike *Tileston* v. *Ullman,* 318 U.S. 44 (1943) (per curiam). There a physi-

cian, who claimed no rights whatsoever of his own, sought declaratory relief against a statute which prohibited *patients* from using contraceptives. Here, physicians are drastically affected by direct enforcement provisions of the challenged statute. Tileston, however, had made "no allegations asserting any claim under the Fourteenth Amendment of infringement of [his] liberty or his property rights." 318 U.S. at 44. It is abundantly clear that the physician sub-class

> "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962), quoted in *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968).

2. *Physician's Standing to Assert Patient's Right to Seek Medical Care*

The physicians also invoked the rights of their present, past, and prospective patients. A pregnant woman is generally in no position to undertake protracted litigation to establish her right to an abortion, and none has ever been prosecuted. Neither a physician's rights, nor those of his patients, should depend upon the ability to find a cooperative martyr, to be indicted as a principal.

This case, then, is a close parallel to *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), because

> "[t]he rights of [patients] are likely to be diluted or adversely affected unless those rights are considered in a suit involving [physicians] who have this kind of confidential relationship to them." 381 U.S. at 479,

Similarly, it has been held in abortion prosecutions that the physician may assert his patient's rights, a proposition which the lower court correctly accepted, and *California* v. *Belous*[26] considered so self-evident as to justify no more than a footnote. In fact, each federal and state court decision in recent months has concluded, without the need for extensive discussion, that physicians in both declaratory and defensive actions have standing to assert the rights of patients. *E.g., United States ex rel. Dr. Jesse Williams, II* v. *Zelker*, —— F.2d ——, No. 35381 (2d Cir. July 2, 1971) (Tom C. Clark, J.); *Crossen* v. *Breckenridge*, —— F.2d ——, No. 20852 (6th Cir. June 23, 1971) (Miller, J.). *See also Truax* v. *Raich*, 239 U.S. 33 (1915); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *see generally* Sedler, *Standing to Assert Constitutional Jus Tertii*, 71 YALE L.J. 599 (1962).

Physicians, in light of their direct involvement in the day to day effects and enforcement of the statute, are situated in much the same way as the defendant-covenantor in *Barrows* v. *Jackson*, 346 U.S. 249 (1953), because here as there "it would be difficult if not impossible for the persons whose rights are asserted to present their grievances before any court." 346 U.S. at 257. In any medical context it is meaningless to speak of physicians without patients and patients without physicians. In law it would be equally meaningless to hold that a physician may not rely upon her or his patients' rights.

---

[26] 71 Cal.2d 954, 963 n. 5, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969) ("Dr. Belous' standing to raise this right is unchallenged."), *cert. denied*, 397 U.S. 915 (1970).

B. The drastic regular and recurring impact of the statute upon physicians and their patients poses a continuing case or controversy, which is ripe for adjudication, because physicians are deterred and hampered by the statute in advising and treating their patients, and repeatedly compelled to refuse to provide medical care out of a reasonable fear of enforcement of the statute.

"There can be little doubt that fear of the law is a determining factor in the policy adopted by hospitals and surgeons, both in the United States and in Great Britain." G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 168 (1966). Medical professionals, commendably, do not habitually flout laws in order to contest their validity. This Court, and lower courts, should not force such anti-social conduct by taking an unduly narrow view of the Article III case or controversy requirement, as was done by the lower court. Nothing in Article III, prior decisions by this Court, or considerations of judicial management remotely suggests that a physician must flout a statute and risk fines, imprisonment, and license revocation in order to challenge a law which poses concrete cases and controversies in the physician's office day after day.

The nature of the recurring case or controversy produced by the challenged statute is understandable, specific, and fully manageable within sound judicial procedures. Physicians do not simply "'feel inhibited'" by the restrictions on reasons and procedures for medical abortions in Georgia. *See Younger* v. *Harris,* 401 U.S. 37, 42 (1971). They *are inhibited* in a very serious, plainly demonstrable, concrete, and specific manner.

Georgia, and to a similar degree eleven other states, have singled out for criminal sanctions the medical procedure of abortion, separating it from all other procedures.

This in itself is a threat to physicians whose patients over a period of time may include hundreds who request abortions for valid personal reasons not covered by the law.

Georgia has enacted a special criminal statute which a physician must obey when processing applications for medical abortion. Otherwise he risks license revocation, fines, and imprisonment. These sanctions do not exist for other medical procedures.

While it is not incorrect to state that "whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered," *United States* v. *Vuitch*, 402 U.S. 62, 72 (1971), this does not terminate what must be a more searching inquiry. A decision reached between Scylla and Charybdis, or "under the Sword of Damocles," *Doe* v. *Randall*, 314 F. Supp. 32, 36 (D. Minn. 1970) (Neville, J., concurring), is qualitatively different from one of proceeding with a routine appendectomy.

Performance of even the most perilous surgery does not require approval by three examining physicians and *ex parte* rehearing *de novo* before a special hospital committee. More importantly, in no other sphere of medical practice could a physician perform a medical procedure believed to be in the patient's best interests and requested by the patient, complete the treatment with total satisfaction to himself and the patient, and nonetheless face license revocation and ten years in state prison, indeed ten years per patient.

The difference between routinely evaluating the need for requested surgery, and applying the Georgia law on medically-induced abortion, lies in the wide-ranging and irrec-

oncilable points of view among physicians as to when a patient "deserves" an abortion, the novelty of the law, the severe penalty provision, and the unique impact upon the physician-patient relationship of such laws.

Traditionally, the medical profession has been subject only to generalized limitations upon the scope of patient treatment. First, the physician must undertake necessary training and secure by license the right to practice his profession. This license is general in terms, and removes the physician from scrutiny by the criminal law in his treatment of patients.[27] State medical licensing laws are uniformly upheld, as in *Dent* v. *West Virginia*, 129 U.S. 114 (1889). The rationale for limited legislative intervention in the complex sphere of medicine is reasonable and not difficult to discern. As stated by Mr. Justice Field in *Dent*:

> "Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which life and health depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relationship to each other, as well as their influence upon the mind." 129 U.S. at 122.

Even with respect to the dispensing of hard narcotics, legislatures have never sought to prescribe the patient's symptoms which justify treatment and those which do not, much less to require treatment only in a particular type of medical facility. In fact, *Young* v. *United States*, 315 U.S. 257 (1942), construed the Harrison Narcotic Act to

[27] An obvious exception would be wanton and reckless misconduct.

exempt altogether "physicians administering to patients whom they personally attend." 315 U.S. at 259. No inquiry was to be made into the complexities of diagnosis and treatment.

With respect to the medical abortion procedure, however, physicians could reasonably anticipate criminal and administrative sanctions if they engaged in the ordinary practice of medicine. Normally a physician only seeks consultation for specialized problems. For abortions, he must call in an additional two examining physicians, *and* present his patient's case to a three or more member hospital abortion committee. With other surgery he would simply schedule the operating room for a given hour.

In ordinary medical practice, some procedures are done in the physician's clinic, some perhaps as a volunteer in a public free clinic, and others in a hospital, which may or may not be accredited by the Joint Commission on Accreditation of Hospitals [hereinafter JCAH]. With respect to medical abortion, however, the JCAH-accredited hospital is the sole institution authorized by Georgia law to permit abortions. The law further permits hospital owners to refuse to allow any abortions at all, regardless of the types of other comparable surgery normally undertaken there.

The low rate and maldistribution of medical abortions in Georgia, the very fact that this lawsuit was joined in by a physician subclass, and the severity of penalties which a physician might incur by violating the statute or hospital rules, are evidence of "a specific live grievance." *Golden v. Zwickler*, 394 U.S. 103, 110 (1969). While the lower court did not find a case or controversy between the physician subclass and state officials, that conclusion was unaccom-

panied by explanation. By contrast, federal courts in Wisconsin,[28] Texas,[29] Colorado,[30] Illinois,[31] North Carolina,[32] and Ohio[33] have faced the same questions of pre-indictment case or controversy, and ruled in the manner suggested by *Amici*.

It is not the province of a physicians' brief for *Amici Curiae* to undertake a lengthy review of this Court's decisions in the ripeness and case or controversy field. As *Amici*, physicians note, however, that prospective lawyers are not required to be disbarred or refused admission to the bar in order to contest statutes which affect the conduct of law students. *LSCRRC* v. *Wadmond*, 401 U.S. 154, 158-59 (1971). The teachers in *Epperson* v. *Arkansas*, 393 U.S. 97 (1968), and *Baggett* v. *Bullitt*, 377 U.S. 360 (1964), did not face a court-imposed dilemma forcing them to flout an anti-evolution statute in the Scopes tradition, or risk entanglement in a perjury prosecution which might follow the signing of a loyalty oath. The Scopes trial was an exciting event. Abortion prosecutions are another matter altogether. Only two physicians in Anglo-American history have had sufficient courage to choose the latter route. *See Rex* v. *Bourne* [1939] 1 K.B. 687; *Hodgson* v. *Randall*,

---

[28] McCann v. Babbitz, 310 F. Supp. 293 (E.D. Wis.) (per curiam), *appeal dismissed*, 400 U.S. 1 (1970) (per curiam).

[29] Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970) (per curiam), *juris. postponed to merits*, 402 U.S. —— (May 3, 1971) (No. 70-18, 1971 Term).

[30] Doe v. Dunbar, 320 F. Supp. 1297 (D. Colo. 1970).

[31] Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill.), *appeal docketed sub nom.* Hanrahan v. Doe, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (No. 70-105, 1971 Term).

[32] Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C.), *appeal docketed*, 40 U.S.L.W. 3048 (U.S. July 17, 1971) (No. 71-92, 1971 Term).

[33] Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970).

314 F. Supp. 32 (D. Minn. 1970), *aff'd mem.*, 402 U.S. — (May 17, 1971). In neither instance was the recurring conflict between the physician's duty to the patient, and the physician-citizen's obligation to obey the law, resolved by defense of criminal charges.

Similarly, the drug companies in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), were permitted by this Court to make a broad attack on labelling regulations promulgated by the Commissioner of Food and Drugs. Physicians, even more than drug companies, "deal in a sensitive [profession], in which public confidence," 387 U.S. at 153, is especially important.

Indeed, even the earlier "ripeness" cases which found no controversy support the presence of a sufficient degree of justiciable adversity on the facts presented here.[34]

A bare majority in *Poe* v. *Ullman*, 367 U.S. 497 (1961), for example, found no controversy over the unenforced Connecticut law against the use of contraceptives. Justice Frankfurter's plurality opinion relied upon four factors: (1) a history of non-enforcement of the statutes against physicians and patients. 367 U.S. at 501-02; (2) the fact

---

[34] The present action recalls the election cases where judicial review was sought too late, but underlying issues would recur again and again. As the Court stated in *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969), "[t]he problem is . . . 'capable of repetition, yet evading review,' *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515. The need for its resolution thus reflects a continuing controversy. . . ." And so it is here. Physicians seek to challenge the full statutory scheme on its face, and as applied in recurring kinds of cases. The problem here is repeated on a scale far exceeding that of recurring four-year presidential elections.

This is not a case like *Hall* v. *Beals*, 396 U.S. 45 (1969) (per curiam), where no continuing injury whatsoever was present. Nor is *Brockington* v. *Rhodes*, 396 U.S. 41 (1969) (per curiam), pertinent. There the relief sought was limited in nature and rendered impossible to grant by the passage of time.

that "contraceptives are commonly and notoriously sold in Connecticut stores. Yet no prosecutions are recorded. . . ." 367 U.S. at 502; (3) the absence of "real threat of enforcement," 367 U.S. at 507; and (4) the failure to find "deterrent effect . . . grounded in a realistic fear of prosecution." 367 U.S. at 508.

Each of these features is different in the present case, and additional considerations make this case even more appropriate for decision, on the merits.

(1) Physicians can easily document the fact that abortion statutes are regularly enforced by criminal prosecutions and license revocations. In addition, hospital committees in effect enforce the laws within their institutions. Neither *Poe* nor *Griswold* indicated that hospital committees in Connecticut regulated the prescription of contraceptives to patients.

(2) Abortions in Georgia's hospitals are obviously not "commonly and notoriously" available upon request.

(3) There is more than "real threat of enforcement" of Georgia's abortion laws. There is frequent actual enforcement at the administrative level of decision making.

Georgia residents from July to December, 1970, were 27th nationally in abortion-to-birth ratios. Approximately 67% were forced to leave the State for treatment. *See* APPENDIX B, *infra*, Figure I-2, at B-7. From July 1, 1970 to March 31, 1971, a total of 838 Georgia residents obtained legal abortions in *New York City*. Chase, *Abortions to Out-of-State Residents* (June 29, 1971) (report released by Health Services Administration, City of New York).

The above analysis considers the *Poe* plurality opinion in isolation and assumes the case was correctly decided.

However, *Poe* was handed down over persuasive dissents by Justices Harlan and Douglas, and memorandum notations of dissent from Justices Stewart and Black. *Poe* has been repeatedly criticized and suggestions made that it be or was limited to its facts.[35] These criticisms largely derive from the sentiment that no civilized legal system should require an honest citizen to risk prison and disgrace to test the constitutionality of a statute.[36]

Poe appears to be one of the exceedingly few decisions which requires a litigant to invite and undergo criminal prosecution. Ultimately, the physicians prevailed, seven-to-two, four years later. Suppose they had not? The *Poe* decision would have consigned them to accepting the penalty. Other decisions, as Justices Harlan and Douglas pointed out, dissenting in *Poe*, imposed no such Hobson's choice.[37]

Justice Harlan's dissent in *Poe* undertook at length to demonstrate that the majority was in substantial error. 367 U.S. at 522-39. The Justice placed chief reliance on *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), and *Truax* v. *Raich*, 239 U.S. 33 (1915). Both permitted anticipatory relief to avoid damage caused by the present *effect* of a

---

[35] *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 143-55 (1962); Note, 62 COLUM. L. REV. 106 (1962); Comment, 50 CALIF. L. REV. 137 (1962). For an excellent general discussion of the "ripeness" question in the context of criminal law, see Note, *Declaratory Relief in the Criminal Law*, 80 HARV. L. REV. 1490 (1967).

[36] A corollary is the not infrequent condemnation of those who flagrantly break a law to test its validity.

[37] After Thomas Hobson (1544-1631), of Cambridge, England, who rented horses, but gave customers only the horse nearest the door. Here the physician must often choose between sending the patient out the door, or being taken out himself by law enforcement officers.

statute rather than imminence of enforcement. Significantly, in *Pierce*

> "a Court which included Justices Holmes, Brandeis, and Stone rejected a claim of prematureness and then passed upon and held unconstitutional a state statute whose sanctions were not even to become effective for more than seventeen months after the time the case was argued. . . ." *Poe* v. *Ullman,* 367 U.S. 497, 538 (1961) (Harlan, J., dissenting).

See also West Virginia Board of Education v. *Barnette,* 319 U.S. 624 (1943) (students allowed to challenge possible expulsions prior to actual dismissal, and prior to effective date of rule which, if enforced, would have required expulsion); *Terrace* v. *Thompson,* 263 U.S. 197, 216 (1923) ("They are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights").

Moreover, Congress, in passing the Declaratory Judgment Act, recognized the need to provide a federal anticipatory remedy in lieu of defense to a criminal prosecution. A Senate Report reflected this specific concern:

> "It is often necessary, in the absence of the declaratory judgment procedure, to violate or purport to violate a statute in order to obtain a judicial determination of its meaning or validity." S. Rep. No. 1005, 73d Cong., 2d Sess., at 2-3.

In the instant case, physicians positively refrain from treating and advising patients for the reason that they fear criminal prosecution, or administrative sanctions. They are not uninterested citizens urging an academic

question, but are a class of citizens greatly affected and deterred by the challenged statutes. As Professor Bickel suggested, in a slightly different context, "it may be true that by hypothesis no more suitable case can ever be constructed, because those who are unjustifiably deterred will never be prosecuted, and what deters them is precisely the prospect of litigation." [38]

In light of the considerations set out above, the lower court erred in dismissing claims of the physician subclass for want of a case or controversy.

C. Injunctive relief was necessary to prevent inevitable grave and immediate injury to physicians and their patients, because defense of criminal and/or administrative proceedings in a single case could not eliminate the recurring controversy, and the mere fact of such a state proceeding would drastically invade the physician-patient relationship, as well as exert an *in terrorem* effect upon the profession.

Amici, as physicians, can point to three substantial reasons why the lower court should have issued an injunction to enforce the extent of declaratory relief granted.

(1) First, the law is unclear on the extent to which state law enforcement authorities are bound by federal declaratory judgments pending appeal. There is authority that the Georgia courts would not have been bound by any aspects of the lower court's opinion, should officials have determined to institute state court proceedings against a physician. *See United States ex rel. Lawrence* v. *Woods*, 432 F.2d 1072 (7th Cir. 1970), *cert. denied*, 402 U.S. —— (May 17, 1971); *State* v. *Coleman*, 46 N.J. 16, 214 A.2d 393 (1965); *Iowa Nat'l Bank* v. *Stewart*, 214 Iowa 1229, 232 N.W. 445 (1930). Under such an interpretation, Georgia

[38] A. BICKEL, THE LEAST DANGEROUS BRANCH 149-50 (1962).

authorities would have been free to proceed against any physicians or hospitals that altered their practices.

The suggested dilemma is not fanciful. Under similar facts state officers in Wisconsin sought to defy and circumvent judgments by federal courts in two different districts of the state. *See McCann* v. *Babbitz*, 320 F. Supp. 219 (E.D. Wis. 1970) (per curiam), *vacated for reconsideration*, 402 U.S. 903 (1971); *Kennan* v. *Nichol*, —— F. Supp. ——, 71-C-118 (W.D. Wis. Apr. 27, May 5, 6, 1971).

An injunctive order removes any doubt about the rights of the respective parties, not only with respect to the scope of permissible conduct, but also concerning which party should appeal, and to what appellate court. The parties in Wisconsin made one trip to this Court only to learn that the attorney general had appealed to the wrong forum, as had the physician. *McCann* v. *Babbitz*, 310 F. Supp. 293 (E.D. Wis.) (per curiam), *appeal dismissed*, 400 U.S. 1 (1970) (per curiam).

(2) Where, as here, an injunction is needed to clarify the effect of a declaratory judgment, the order serves to avoid altogether the state-federal friction which might otherwise ensue. In many respects a bare declaratory judgment is an open invitation to state authorities to ignore the federal court at their option. By contrast, an injunction brings certainty and finality to the dispute, and at least discourages state officials from threatening or initiating any administrative or criminal proceedings or investigations. More importantly, an injunction *ab initio* obviates the possibility of a subsequent need to enjoin state court judges and proceedings under one of the express exceptions to 28 U.S.C. 2283 (1964 ed.). In this

sense, the injunction at the outset is sensible preventive medicine.

(3) The third reason for initial injunctive relief is to avoid the kind of grave irreparable injury which would befall physicians and their patients should the declaratory judgment be ignored at the administrative or any other level. There is no adequate remedy at law, or in the state courts, for a woman who is compelled to continue a pregnancy against her will. What was not undone by contraception, or by medical abortion in early pregnancy, or by spontaneous abortion in many cases, cannot be recompensed after birth. It is the unwilling mother who must accept the role of child-rearing for up to twenty years, not the legislators, and not the judges of the lower court.

By the same token, defense of a single criminal charge or license revocation proceeding would neither be an adequate forum in which to resolve the "continuing controversy between [physicians] and the State . . . ," *Perez* v. *Ledesma,* 401 U.S. 82, 102 (1971) (Brennan, J., concurring), nor an avenue that posed no threat of grave irreparable injury. If *Abbott Laboratories* means anything, it is that the mere fact of prosecution in a sensitive health-related industry is presumed to have disastrous consequences. Where, as in this case, the physicians present a straightforward legal issue, "the [statute] is directed at them in particular; it requires them to make significant changes in their everyday [professional] practices; if they fail to observe the [statute] they are quite clearly exposed to the imposition of strong sanctions," 387 U.S. at 154, then injunctive relief is both necessary and proper. Even more so is this the case, when one recalls that Abbott Laboratories, Inc., was a corporation asserting purely economic interests.

THE MERITS

II.

The provisions in Georgia Criminal Code §§26-1201, -1202(a)(1)-(3), -1202(b)(1)-(9), -1202(c), and -1202(e), which differentiate the medical procedures of therapeutic and elective induced abortion from all other forms of health care, deprive physicians of the fundamental personal right to administer to their patients, and patients of the right to seek medical care, in violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment.

The statute in question undoubtedly restricts a physician in the practice of his profession. It limits his right to exercise his skills and apply his overall knowledge to the patient's benefit. By the same token, the statute deprives the patient of the right to seek health care in connection with the medical procedure of induced abortion.

The magnitude of the restrictions imposed by statutes such as the Model Penal Code-type abortion law is far reaching. As the co-reporter to the Code observed in a critical examination of its limitations, "[it] is not a question of restricting the freedom of a few eccentrics to avoid inflicting great psychic injury on the bulk of the population, but of restricting the freedom of scores of millions of citizens, having conflicting but equally respectable sensibilities to be protected." Schwartz, *Morals Offenses, and the Model Penal Code,* 63 COLUM. L. REV. 669, 683 (1963).

The contention of *Amici Curiae,* in full support of the Appellants in the case, is that the restrictions in the statute

as is necessary to preserve their health." The *Vuitch* decision went on to construe the term health to encompass "psychological as well as physical health," and " 'the state of being sound in body or mind.' "

The present case also has First and Fourteenth Amendment freedom of association implications, namely, the right of the physician to provide medical information, followed by treatment, for his patients, and the right of the patient to receive same. The right of a competent licensed physician to give medical advice can be characterized as free expression alone, or when viewed as an aspect of the physician-patient relationship, it becomes part of the freedom of association between physician and patient. The First Amendment has long been held to accord presumptive protection for the "freedom to associate and privacy in one's associations." *NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958). This has been the case with the marital relationship,[39] and that of attorney and client.[40] The relationship between physician and patient is no different; it promotes the fundamental purpose of maintaining the health and well-being of the American people.

The advice aspect of medical practice is but one part of claim, for medical treatment involving interruption of the

---

[39] *See* Griswold v. Connecticut, 381 U.S. 479, 486 (1965), describing the "marriage relationship" as

> "an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."

[40] *See* NAACP v. Button, 371 U.S. 415 (1963); Brotherhood of Railway Trainmen v. Virginia, 377 U.S. 1 (1964); United Mine Workers v. Illinois State Bar, 389 U.S. 217 (1967); United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971).

unwanted pregnancy may be what the patient ultimately requests, and the criminal statute proscribes.

> "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest . . . must appear. . . ." *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968).

The nature of this interest has been described by a "variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong." 391 U.S. at 376-77 (citations omitted).

The interests of patients must also be considered before examining the implementation of this law.

2. *Patients Have a Fundamental Right to Seek Health Care Which Includes the Treatment of Medical Abortion*

United States v. *Vuitch*, 402 U.S. 62 (1971), took the initial steps toward recognition of a right to seek medical treatment as a fundamental personal right protected by the Constitution. There this Court suggested a right of patients to "such treatment as is necessary to preserve their health."

While *Vuitch* had no need to hold, as a matter of constitutional law, that the right of access to health care was a fundamental personal right, such a holding in the present case would be judicially sound, and expressive of a manageable judicial principle.

Some measure of the recognition which nations give to the right of access to health care can be seen in the Constitution of the World Health Organization:

> "The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition." [41]

Congress, in passing the Comprehensive Health Planning Act of 1966, took a similar position:

> "[T]he fulfillment of our national purpose depends on promoting and assuring the highest level of health attainable for every person, in an environment which contributes positively to healthful individual and family living . . . ." [42]

The text of the Constitution supports this position by directly recognizing the rights to "life and liberty" in the Fourteenth Amendment. The term "life," in particular, was used in the 19th century in the manner that "life and health" are used today. As late as the 1880's Sir Joseph Lister's surgical techniques were only beginning to be used in the United States. " 'First Listerian operations' were still dotting the American surgical scene all through the eighties." H. CLAPESATTLE, THE DOCTORS MAYO 194 (1941). Only after Listerism gained a firm position in American surgery did non-emergency operations become feasible, not simply as "a last desperate throw of the dice with death, but a means of restoring *health* deliberately chosen in the early, curable stages of disease." *Id.* at 269 (emphasis added).

---

[41] BASIC DOCUMENTS OF THE WORLD HEALTH ORGANIZATION 1 (Geneva 1969 ed.). *See also* Curran, *The Right to Health in National and International Law*, 284 NEW ENG. J. OF MEDICINE 1258 (1971).

[42] Public Law 89-749.

In addition to the decisions upholding rights associated with access to health care (and marital privacy), an overlapping body of precedent extends significant constitutional protection to the citizen's sovereignty over his or her own physical person.

As early as 1891 this Court stated:

> "No right is more sacred, [n]or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right to one's person may be said to be a right of complete immunity: to be let alone.'" *Union Pac. Ry.* v. *Botsford*, 141 U.S. 250, 251 (1891),[43] quoted in *Terry* v. *Ohio*, 392 U.S. 1, 8-9 (1968).

This right, like all rights, has limits, as illustrated by *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1904). There the Court upheld a compulsory vaccination law, but only to avoid "great dangers" and to protect "the safety of the general public." 197 U.S. at 29. The lengths to which the Court went, however, to justify a shot in the arm, point up the degree to which personal autonomy in health matters is entitled to protection.

In family matters relating to child rearing and procreation, the Court has recognized and sustained individual rights on a constitutional plane. "The freedom to marry . . . ," *Loving* v. *Commonwealth*, 388 U.S. 1, 12 (1967); "the right to have offspring," *Skinner* v. *Oklahoma*, 316

[43] *Botsford* involved government coercion in forcing a medical examination.

U.S. 535, 536 (1942); "the liberty of parents and guardians to direct the upbringing and education of children under their control," *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534-35 (1925); as well as the right, at least of a married woman, to use contraceptives, *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), are all protected constitutionally.

Most recently the Court reaffirmed the "fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy," *Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969) (Marshall, J.), and embraced with approval Mr. Justice Brandeis' dissent in *Olmstead* v. *United States*:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." 277 U.S. at 478.

Chief Justice, then Circuit Judge, Burger, in *Application of Georgetown College, Inc.,* 331 F.2d 1010, 1016-17 (D.C. Cir.) (en banc), *cert. denied,* 377 U.S. 978 (1964), also urged a right to be let alone, in the context of a religious objection to blood transfusions, which could include "even absurd ideas which do not conform, such as refusing medical treatment even at great risk." 331 F.2d at 1017. If refusing health care might be constitutionally protected,

surely the right to seek health care for sensible reasons should enjoy equal or greater constitutional status.

Retired Justice Tom C. Clark has also suggested that constitutional concepts should include control over family planning beyond the stage of contraception. He wrote:

> "[A]bortion falls within that sensitive area of privacy —the marital relation. One of the basic values of this privacy is birth control, as evidenced by the *Griswold* decision. Griswold's act was found to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent conception, why can he not nullify that conception when prevention has failed?"[4]

B. The Equal Protection and Due Process clauses of the Fourteenth Amendment require that restrictive classifications in the challenged statute be narrowly drawn and supported by compelling state interests, in order not to abridge fundamental personal rights.

Several basic considerations have been articulated for the evaluation of competing interests in equal protection cases. One, which applies in matters of unique local interest involving taxes and business regulations, states:

> "Under traditional equal protection principles, a State retains broad discretion to classify as long as its classification has a reasonable basis." Blackmun, J., in *Graham* v. *Richardson,* 402 U.S., ——, —— (June 14, 1971).

---

[4] Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal,* 2 LOYOLA UNIV. (L.A.) L. REV. 1, 9 (1969) [hereinafter "Clark"].

However, a somewhat different technique is necessary when a "suspect classification" appears or important fundamental personal rights are threatened. As stated with respect to the fundamental personal right to travel in *Shapiro* v. *Thompson,* 394 U.S. 618, 638 (1969):

> "[T]he traditional criteria do not apply in these cases. Since the classification here touches upon [a] fundamental right . . . its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest." (Emphasis by the Court.)

This is also the case with the "suspect classification":

> "The classifications . . . are inherently suspect and are therefore subject to strict judicial scrutiny whether or not a fundamental right is impaired." *Graham* v. *Richardson,* 402 U.S. ——, —— (June 14, 1971).

In all cases, moreover,

> "a statutory discrimination must be based on differences that are reasonably related to the purposes of the Act in which it is found." *Morey* v. *Doud,* 354 U.S. 457, 465 (1957).

Stringent standards are more appropriate for the present case. These standards apply because the Georgia statute does more, far more, than regulate the medical procedure of abortion in the same way it might regulate some other medical practice, *i.e.,* by requiring that all clinics or hospitals obtain State licensure, or that all physicians obtain a license to practice.

The Georgia Therapeutic Abortion Act touches heavily upon the fundamental rights of physicians and patients.

Its classifications specify State-imposed "conditions" which a private physician and patient must satisfy to avoid criminal responsibility.

These "conditions" have no parallel in other medical procedures. They abridge the fundamental rights of some individuals by altogether prohibiting abortions for them, *i.e.*, women whose physical or mental health would be "seriously," but not "permanently" impaired by continuation of pregnancy, or "healthy" women who had contraceptive failure. The classifications make abortions exceedingly difficult for others to obtain, *i.e.*, those women in areas of Georgia where the only accredited hospitals refuse to do any abortions, or those who lack the financial resources to obtain psychiatric certification and cover hospitalization costs (barriers erected not by the patient, but by the State). Because of the statute's impact on *fundamental* rights, its classifications cannot stand unless supported by "a countervailing state interest of overriding significance." *Boddie* v. *Connecticut*, 401 U.S. 371, 377 (1971). Also, if any such compelling State interest is promoted by a classification, the class must not be unnecessarily restrictive. "'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.'" *Griswold* v. *Connecticut*, 381 U.S. 479, 497, 498 (1965) (Mr. Justice Goldberg, concurring).

Here, a reading of the statute shows suspect classifications which impinge upon the marital relationship, as affected by the timing and spacing of children, *cf. Griswold* v. *Connecticut*, 381 U.S. 479 (1965); the personal interest in access to medical care, *cf. United States* v. *Vuitch*, 402 U.S. 62 (1971); the "human right" [not] "to have offspring," *cf. Skinner* v. *Oklahoma*, 316 U.S. 535, 536 (1942);

and the right announced as early as 1891 by Mr. Justice Gray (within limits) "to the control and possession of his [or her] own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. Ry.* v. *Botsford,* 141 U.S. 250, 251 (1891). As to the latter, this Court only upheld the compulsory vaccination laws to avoid "great dangers" and to protect "the safety of the general public." *Jacobson* v. *Massachusetts,* 197 U.S. 11, 29 (1904) (Harlan, J.).

The stringent standards of review apply not only to the arbitrary features of the statute which appear *on its face,* but also to *applications and effects* of the statute which come about in practice.

C. The Georgia law on medical abortion, and similar laws in eleven other states, restrict access to this medical procedure in a manner which offends the Equal Protection clause of the Fourteenth Amendment.

It is settled that a law "applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights [constitutes] the denial of equal justice . . . ." *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373-74 (1886) (Matthews, J.). In several respects, the administration of the statute in question has created a patchwork of invidious discriminations.

1. *The "Health" Clause Is Interpreted Differently in Every State, Community, and Hospital, and Has Been Demonstrated to Be Without a Reasonably Specific Meaning*

Georgia's restriction on reasons for medical abortion, in words, is not so strict as the typical statute remaining in thirty jurisdictions. The standard pre-1967 prohibition forbade a woman to obtain an abortion "unless the same is necessary to preserve her life, or that of the child whereof she is pregnant . . . ." 40A MINN. STAT. ANN. §617.19, at 286 (1964); *accord,* 2A TEXAS PENAL CODE art. 1196, at 436 (1961). That is, a pregnancy may wreck a woman's physical health, create insuperable psychiatric difficulties, and leave her bedridden in Minnesota and Texas, but the laws require that she accept this burden, unless she aborts spontaneously.

In Georgia the burden is almost as severe. The woman and her physician must conclude that continued pregnancy would "seriously and permanently injure her health . . . ." GA. CRIM. CODE §26-1202(a)(1), at 85 (1969). If pregnancy *seriously* injures her health, that is not enough. If pregnancy *permanently* injures her health, that too is insufficient. Like the Eighth Amendment, the statute is in the conjunctive, not the disjunctive. For actual wording of the "health" justifications in the other eleven similar states, *see* APPENDIX B, *infra,* Table I-1, at B-1.

To some physicians and laymen, "health" means "physical survival." Permanent *and* serious injuries to "health" to them may mean inevitable lifetime invalidism, and nothing less.

To other physicians and laymen, "health" means "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." *Constitution*

of the World Health Organization, in BASIC DOCUMENTS OF THE WORLD HEALTH ORGANIZATION 1 (Geneva 1969 ed.). A "physically healthy" woman with no classic "mental health" problems such as neurosis, may nonetheless become a victim of rape or contraceptive failure, and find that termination of the pregnancy would enhance some additional category of her "mental health." Indeed, "for the healthy woman with a happy marriage, abortion is most often truly therapeutic." Walter, *Psychologic and Emotional Consequences of Elective Abortion,* 36 OBSTETRICS & GYNECOLOGY 482, 487 (1970).

It is not so much what "health" can mean, as the way such a term is used, whether as a reason for undertaking surgery, or a reason for declining to do so. With ordinary elective surgery, a physician seeks "health" reasons why the procedure should be done, *i.e.,* "indications," as well as "health" reasons why it should not, *i.e.,* "contra-indications." The two avenues of inquiry, moreover, may not at all overlap and may be altogether unrelated. For example, cosmetic surgery may be indicated as necessary to alleviate irrational self-doubt. However, the procedure may be contra-indicated in an unusual case by likelihood of uncontrollable blood loss.

If valid "indications" for a procedure are found, and these are not overcome by "contra-indications," the surgeon proceeds. The trouble with abortion statutes is that they reveal an understandable, but nonetheless substantial ignorance of how medicine is practiced. As much could be expected if physicians drafted statutes stipulating how attorneys should practice law. Attorneys would be required to do "justice" to their clients, particularly physician-clients, and failure to do so would result in ten years' imprisonment.

The practice of medicine is no more standardized than the practice of law. An instrument as blunt as the criminal law cannot begin to define and regulate "those subtle and mysterious influences upon which life and health depend . . . ." *Dent* v. *West Virginia,* 129 U.S. 114, 122 (1889).

Physicians differ widely in their evaluation of indications and contra-indications for medical abortion, probably more so than in any field of practice. Rather than avoiding abortion practice altogether, however, physicians with narrow concepts of indications remain on hospital committees and other bodies which affect or control the interpretation of abortion laws.[45]

A lawyer or judge, after reading the statute, can examine the medical literature to assess how the statute affects medical practice, and whether its implementation is arbitrary or discriminatory. The literature presents an unending array of scholarly medical analysis with careful explanations of how arbitrary, indefinite, and standardless abortion laws have been.

Retired Justice Tom C. Clark set a commendable medico-legal example in his full treatment of the very question presented in this section. According to Justice Clark:

> "The increasing number of abortions subjects physicians to increased dangers of liability for incorrectly interpreting a statute . . . . [D]octors face an uncertain fate when performing an abortion. This uncer-

[45] *Amicus* Dr. J. Robert Willson, a former president of the American College of Obstetricians, spoke volumes when he stated: "After all, legal abortion is controlled by individual hospitals, not by the state capitol." *Abortion—A Medical Responsibility?,* 30 OBSTETRICS & GYNECOLOGY 294, 302 (1967).

> tainty will continue unless the legislatures or courts provide relief from liability." [46]

Indeed, the commentators for the Model Penal Code provision on abortion, which in essence is under attack in this case, foresaw that "[p]sychiatric justifications for abortion are harder to classify and verify, and psychiatrists themselves have expressed concern at the shadowy line between medical and social justification." MODEL PENAL CODE §207.11, Comments, at 153 (Tent. Draft No. 9, 1959). The A.L.I. had "no body of experience," *id.* at 156, with reform abortion laws at that time and took no position on the need for further modifications of the Code. It appears that the A.L.I. has since been inactive on this subject.

The "body of experience" over the period from 1959 to date has been catalogued in the medical journals with increasing frequency and in growing volume. In response, both the American Medical Association[47] and the American College of Obstetricians and Gynecologists[48] have found Model Penal Code-type policies on abortion to be unworkable. In 1970 both organizations abandoned their previous Code-type approach for policies permitting the physician to consider the patient's entire family setting (without fear of reprimand for defining "health" more generously than his department chairman). Similarly, in 1970, the Second Tentative Draft of the UNIFORM ABORTION ACT eliminated previous listings of "health" reasons for abortion.[49]

---

[46] Clark, *supra* note 44, at 7.

[47] *Abortion*, Proceedings of the American Medical Ass'n House of Delegates 47 (June, 1970); *see* 213 J. AMERICAN MEDICAL ASS'N 1242 (1970).

[48] *Policy on Abortion*, American College of Obstetricians and Gynecologists (Aug. 1970); Appendix A, *infra*, at A-1.

[49] UNIFORM ABORTION ACT (2d Tent. Draft, Aug. 1970).

One facet of experience has been to understand that concepts such as "health," "physical health," "mental health," "social conditions," and "patient's environment," are flexible abstract constructs, not a part of measurable scientific matter. Not one or two factors enter into a physician's judgment in assessing the "health" justifications for a medical abortion, but many; indeed, more than could be resolved in ten exercises of a state law remedy in state courts. Some of the questions which are not illuminated by the language and history of the Georgia statute are as follows:

(1) To what extent, if any, may "mental health" factors be considered?

(2) If only "physical health" factors are permissible, what kinds of physical injuries are contemplated by the statute?

(3) Are the dangers of physical injury brought on by mental response to unwanted pregnancy, *i.e.*, attempted suicide, self-mutilation, resort to quack or self-abortion, sufficient under the law?

(4) Must the pending physical injury be from a preexisting condition directly associated with the reproductive organs?

(5) If "mental health" factors are cognizable, must these be diagnosed by one or more psychiatric specialists, or is the private physician enough?

(6) To what extent, if any, may the two extra examining physicians rely upon the private physician's evaluation, as contrasted with their independent findings?

(7) By the same token, to what degree must the hospital committee conduct an independent evaluation?

(8) Is a history or pre-existing mental illness with confinement in an institution necessary?

(9) Is any history of prior psychological difficulty necessary?

These are not fine-spun, legalistic distinctions. The examples are taken from the lengthy medical literature on difficulties of administering the twelve A.L.I.-style abortion laws.

Illustrations from principal medical authorities and texts show that hospitals, their committees, department heads, and individual physicians interpret this type of statute in an impermissibly fluctuating manner. The consequence has been arbitrary and discriminatory implementation of access to this medical procedure.

Louis M. Hellman, M.D., co-author of the definitive text on obstetrics and gynecology, reviewed the recent experience as follows:

> "Because concepts are changing rapidly, the definition of therapeutic abortion lacks precision. The word 'health' in particular is variously interpreted. . . .
>
> In a time of rapidly changing laws, concepts, and mores, therapeutic abortion cannot be defined nor can the listing of its indications carry any degree of accuracy or permanence. • • •
>
> The reform of abortion laws along the guidelines drawn by the American Law Institute has not worked well. Although the number of abortions has increased markedly, the poor still find it difficult to obtain abortions even in situations of obvious merit." L. HELLMAN

& J. PRITCHARD, WILLIAMS OBSTETRICS 1085, 1087 (14th ed. 1971).

The then-Chairman of the Department of Obstetrics and Gynecology at the University of California School of Medicine, San Francisco, Edmund W. Overstreet, M.D., related a similar experience under the California therapeutic abortion law, which also is of the Model Penal Code variety:

> "[P]sychiatrists will vary greatly in their diagnosis of mental illness and the nonpsychiatric physician finds it even more difficult to decide whether or not a patient has mental illness to the point of [legally, not medically] justifying therapeutic abortion. . . .
>
> "[T]he adjudication of therapeutic abortion, especially the mental illness area (and that is 88 per cent of our cases at the present time), is uneven, inequitable, and discriminatory. No one is happy about it in California. No satisfactory guidelines are developing as to how to approach candidates for therapeutic abortion. Several studies going on now in California, and some of the Swedish results, suggest that forcing a woman to carry an unwanted pregnancy to term against her will always impairs her mental health." Overstreet, *Abortion and Obstetrics* (Panel), in II ABORTION IN A CHANGING WORLD 74-75 (R. Hall ed. 1970).

The intimation by Dr. Overstreet that deeply unwanted pregnancy *per se* in a "physically" healthy woman might impair her "mental" health has become the focal point of further studies which verify his suggestion. Today, much of the medical literature recognizes "the undeniable effects of sociological factors on an individual's mental health."

Pike, *Therapeutic Abortion and Mental Health*, 111 CALIF. MEDICINE 318, 319 (1969). *See generally* Hook, *Refused Abortion*, 37 ACTA PSYCHIAT 203 (1961).

Nonetheless, in this area of medicine, the physician-patient relationship is non-existent at the hospital committee level. There a woman may find her application blocked by a physician she has never seen who is "convinced that women have a need to give birth and urge[s] that there be no interference with their doing so." Crowley & Laidlaw, *Psychiatric Opinion Regarding Abortion: Preliminary Report of a Survey*, 124 AM. J. PSYCHIATRY 145, 147 (1967).

It would unduly lengthen this brief for *Amici* to point out the many additional studies on capricious and discriminatory administration of the type statute involved here. For the Court's reference, and to emphasize this important point, *Amici* are including excerpts from such studies below.[50]

---

[50] Materials from medical and psychiatric literature which illustrate the wide-ranging interpretations of language in laws on abortion, and the sometimes arbitrary implementation of these laws include the following authorities:

(1) Hall, *Abortion in American Hospitals*, 57 AM. J. PUB. HEALTH 1933, 1935 (1967):

"Abortion policies vary not only from hospital to hospital but also from service to service within the same hospital. They also vary widely from doctor to doctor on the same service of the same hospital."

(2) M. CALDERONE, (ed.), ABORTION IN THE UNITED STATES 34-35, 52 (1958):

"[N]ecessity as a sine qua non of performing an abortion . . . leaves the doctor's position perilous and uncertain. • • • The current laws provide no accurate criteria by which the doctor can govern his actions."

(3) For a vivid illustration of the variations among California hospitals in assessing the legality of therapeutic abortion on

A final observation, however, should be that even the more prominent opponents of abortion reform acknowledged this statutory uncertainty. Father John T. Noonan, Jr., criticized the A.L.I. proposal's "physical or mental 'health'" terminology because "[t]here is nothing in the statute which would aid the physician in making the determination." Louisell & Noonan, *Constitutional Balance*, in THE MORALITY OF ABORTION 249 (Noonan ed. 1970). An earlier article by Professor Louisell stated: "'Mental

---

a given set of facts, see the questionnaire study and analysis of results in Packer & Gampell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417, 423 (1959). The study is discussed and relied on in *California* v. *Belous*, 71 Cal.2d 954, 972, 458 P.2d 194, 205, 80 Cal. Rptr. 354, 365 (1969).

(4) White, *Induced Abortions: A Survey of their Psychiatric Implications, Complications, and Indications*, 24 TEX. REPS. OF BIOLOGY & MEDICINE 531, 541 (1966):

"[T]he enormous variability in the frequency of therapeutic abortions from one hospital to another . . . must surely reflect, more than anything else, differences in the personal values, religious beliefs, and social ideology of the staffs of the respective hospitals about the matter of abortion."

(5) R. H. SCHWARZ, SEPTIC ABORTION 11 (1968):

"The legal status of abortion varies not only throughout the world but from state to state. Interpretation and enforcement differ from community to community; professional assessment varies from hospital to hospital, and from physician to physician."

(6) GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, THE RIGHT TO ABORTION: A PSYCHIATRIC VIEW 40 (Comm. on Law & Psychiatry, 1970):

"[T]he rate of therapeutic abortion varies dramatically from hospital to hospital within a state, even though all are supposedly governed by the same statutes."

(7) Russell & Jackson, *Therapeutic Abortions in California*, 105 AM. J. OBST. & GYN. 757, 762, 765 (1969):

"It is obvious that there exists wide variability in the application of the [statute]. . . . Variation exists from com-

health of the mother' is particularly nebulous and susceptible to subjective value judgments." Louisell, *Abortion, the Practice of Medicine and the Due Process of Law*, 16 U.C.L.A.L. REV. 233, 252 n. 83 (1969). Opponents of reform in North Carolina "attacked the vagueness of such

---

munity to community, and from hospital to hospital within the same community.

Many factors have contributed to this state of affairs. Some of these are:

"1. A certain vagueness in what is intended, legislatively speaking, by 'mental' and 'physical' health. • • • [T]he definition of mental health is one of the most vague parts of an often vague piece of legislation."

(8) Droegemueller, Taylor & Drose, *The First Year of Experience in Colorado With the New Abortion Law*, 103 AM. J. OBST. & GYN. 694, 697 (1969):

"There is a great deal of variation in the interpretation of psychiatric indications. . . .

"The hospitals in the small and medium-sized towns are performing very few therapeutic abortions."

In addition to the above authorities, who stress variations from place-to-place and person-to-person, much research and analysis has examined some of the many reasons why physicians and psychiatrists have difficulty with the statutes, including specific aspects of confusion:

(9) Ryan, *Humane Abortion Laws and the Health Needs of Society*, 17 W. RES. L. REV. 424, 431 (1965):

"Distinctions between physical and mental health are meaningless in terms of modern medical thinking. Health cannot be divorced from socio-economic factors which influence people's lives since health is a product of these conditions."

(10) White, *supra* no. (4), at 532:

"[T]here are no generally accepted policies, little or no systematically gathered data, and remarkably few well and objectively substantiated points of view among psychiatrists about 'legally' or 'illegally' induced abortions."

(11) Pike, *Therapeutic Abortion and Mental Health*, 111 CALIF. MED. 318, 319 (Oct. 1969).

"One of the controversial aspects of the situation is the undeniable effect of sociological factors on an individual's

terms as . . . 'substantial risk,' 'gravely impair,' 'grave physical or mental defect' and urged greater precision. . . ." Jain & Sinding, *North Carolina Abortion Law 1967*, at 29 (Carolina Pop. Center 1968).

Further factors in the implementation of Georgia's law increase its irregular impact. The problem of construing

---

mental health. The stress and consequences of an unwanted pregnancy as they affect mental health must be determined for an individual patient, taking into consideration her total life situation. Factors such as marital status, family support, economic conditions, subcultural attitudes toward the pregnancy, and personality structure all contribute toward her ability to maintain and complete her pregnancy without damage to her mental functioning.

The new law requires physicians to make judgments that are difficult to make, impossible to prove and of crucial importance to the patient's welfare and the welfare of those dependent on her and intimately involved with her."

(12) Sir Dugald Baird, *The Obstetrician and Society*, 60 AM. J. PUBLIC HEALTH 628, 635 (1970).

"[E]ven in a basically stable woman, emotional health and subsequently physical health can be undermined by adverse social conditions: for example, substandard housing, overcrowding, illness in other children, elderly or bedridden parents, alcoholic husband, and economic necessity for the mother to work outside the home."

(13) Thompson, Cowen & Berris, *Therapeutic Abortion: A Two-Year Experience in One Hospital*, 213 J.A.M.A. 991, 994 (1970):

"Psychiatric and socioeconomic problems are so intertwined that it is difficult for the Therapeutic Abortion Board to extract the relevant data in order to make a just and lawful decision. . . . In light of the previously stated vagueness of the law, the evaluation of the patient for psychiatric indications has been one of our major problems."

(14) Moyers, *Abortion Laws: A Study in Social Change*, 7 SAN DIEGO L. REV. 237, 241 (1970):

"Although some hospitals in the state have done away with the requirement, most committees still require psychiatric consultation when a request for abortion is presented on this [mental health] ground."

"health" rests not solely with her personal physician. Two additional examining physicians are required by the statute. Moreover, any conclusion reached by the first three physicians may be overturned by the hospital committee possibly composed of yet three more physicians, at a minimum. All of the uncertainties set out above are multiplied at this stage by the further examining and committee physicians. Putting to one side the extraordinary waste of highly skilled professional time consumed by this cumbersome ritual, the multiple physician evaluation has a common denominator effect. This is a particular problem in Georgia because "[m]aternal mental health indications are more restrictively defined by the medical community in Georgia than in other states with similar laws." Rochat, *et al.*, *An Epidemiological Analysis of Abortion in Georgia*, 61 Am. J. Public Health 543, 551 (1971).

The victim of this confusion is the patient, the very individual whose health interests should be of prime concern. Throughout the literature on discriminatory implementation of abortion laws, mention of her is slight or nonexistent. Under the statutory language, her health interests are penultimate. In practice, her interests are secondary to state and county lines, hospital quotas, professional disputes among schools of psychiatric philosophy, and a host of sub-conscious motivating factors present in the individuals who stand between her and her private physician. In short, to obtain a medical abortion in Georgia and similar states, a patient must find physician A, sympathetic examining colleagues B and C, cooperative JCAH-accredited hospital D, in county E, a sympathetic committee of physicians F, G, and H at the hospital, and personal patience of an exceptional variety.

2. *Widespread discrimination on the basis of a patient's place of abode has resulted from the statute and its uneven administration*

None of the barriers described above stand between a physician and patient with respect to any other medical procedure, not even organ transplants or brain surgery. It is no statistical aberration that 67% of the Georgia residents who obtained legal medical abortions between July and December, 1970, did so *in another state.* APPENDIX B, Figure 1-2, *infra,* at B-5, 6. A total of 838 Georgia residents obtained legal abortions in New York City alone as of March 31, 1971. Chase, *Abortions to Out-of-State Residents* (June 29, 1971) (report released by Health Services Administration, City of New York). The figure of 838 for nine months extrapolates to 1,117 for twelve months. This compares with the 1968-1970 in-state Georgia total of 939 legal abortions, for almost three full years (April 12, 1968 to December 31, 1970; 2.72 years), or 1,035 for three years as extrapolated. In short, New York City physicians provided legal medical abortions for more Georgia residents in one year than Georgia itself has permitted in three years.

Abortion may be a recent subject insofar as litigation is concerned, but the data presented here reveal the same kinds of discriminations dealt with forcefully in the past by this Court. One need only review a few of the decisions on jury selection,[51] voting rights,[52] and legislative malapportionment.[53] In every area wherein the rights of any

[51] *E.g.*, Swain v. Alabama, 380 U.S. 202 (1965).

[52] *E.g.*, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

[53] *E.g*, Gray v. Sanders, 372 U.S. 363 (1963); Reynolds v. Sims, 377 U.S. 533 (1964).

American citizen are abridged for arbitrary reasons, "figures speak and when they do, Courts listen . . . ." *Brooks* v. *Beto*, 366 F.2d 1, 9 (5th Cir. 1966). This has increasingly been the case with respect to important personal needs, particularly where the State exercises monopolistic control over access to the means to vindicate the need. *E.g., Boodie* v. *Connecticut*, 401 U.S. 371 (1971); *Hawkins* v. *Town of Shaw, Mississippi*, 437 F.2d 1286 (5th Cir. 1971).

Data on the availability and distribution of legal medical abortion in Georgia and other A.L.I. states reveal an arbitrary and discriminatory pattern inherent in the statutes themselves. This has been the studied concensus of proponents and opponents of abortion reform alike, and is verified by available data.

Tables I-2, II-A & III-A, supplemented by Figures II-A-1 & II-A-2, APPENDIX B, *infra*, at B-5, 6, *et seq.*, shows the numbers of legal abortions by county in Georgia, and the distribution within the state.

Georgia is a state with 159 counties. However, only 56 counties have a JCAH-accredited hospital, while 103 (65%) do not. Although only 38% (5/13) of the metropolitan counties[54] lack JCAH-accredited facilities, a full 67% (98/146) of rural counties are without facilities authorized to do legal abortions. Even more significant is the fact that 96% (153/159) of Georgia's counties had 10 or fewer legal abortions in the most recent year, 1970. 54% of the metropolitan counties had fewer than 10 legal

[54] The standard definition of "metropolitan county" is one containing at least one city of 50,000 or more inhabitants, or a county integrated with such a city in a neighboring county. Figures are based on the 1960 census data. *See* I U.S. Bureau of the Census, *Census of Population* ch. A (1960).

abortions in 1970, but a full 100% of the rural counties had fewer than 10. Of the 150 Georgia hospitals which are licensed by the State, 79 (53%) are not JCAH-accredited, and accordingly not permitted to perform legal abortions. 71 of these 79 are in non-metropolitan counties.

Data from the other A.L.I. states, where available, have been included in the additional tables and charts which make up Appendix B to this brief. These show a comparable state of affairs in other jurisdictions which are operating under the Model Penal Code-type statute. *See* APPENDIX B, *esp.* Table 1-2, *infra,* at B-5, 6.

The ratio of legal abortions to births, which is a rough measure of the availability of abortion, varied from a 4.0 low in Georgia to a 194.2 high in California, although both have essentially the same statute.

The percentages of counties in A.L.I. states wherein fewer than 10 legal abortions were performed in 1970 exceeded 50% in eight of the ten states for which data were available: Georgia (96%), South Carolina (85%), North Carolina (79%), Virginia (91%), Maryland (68%), Colorado (86%), New Mexico (78%), and Oregon (53%).

These figures point to a systematic pattern of discrimination. In practice the A.L.I. statute excludes an extraordinarily disproportionate number of: (1) rural patients; (2) patients lacking sufficient access to any family planning measures at all, and funds for a legal medical abortion when needed; (3) patients lacking access to the few hospitals and physicians who are most sympathetic to legal abortion; (4) black patients who, as a class, are more economically deprived in Georgia, for example,

and account there for 88% of the non-medical abortion deaths (1965 to date). Rochat, *et al., An Epidemiological Analysis of Abortion in Georgia,* 61 Am. J. Public Health 543 (1971).

As to these classes of patients, their entitlement to scrupulous judicial scrutiny of the statute's effects is particularly well-established. Not only do they suffer in the inability to exercise the fundamental personal rights described previously, but they are also denied access to medical abortion on grounds of: (1) place of residence; (2) financial status; (3) lack of information; and (4) race.[55] As physicians, *Amici* contend that such factors should have no bearing upon an individual's entitlement to medical care.

Discrimination against persons on the basis of place of residence has been uniformly condemned, provided that factor had no relevance to the person's status in relation to the particular law. The medical data in this case show vast disparities in access to medical care from county-to-county and hospital-to-hospital. Patients are the victims of this disparity. In the same way that "white children" had "accredited schools" in Prince Edward County, *Griffin* v. *County School Board,* 377 U.S. 218, 230 (1964) (Black, J.), white, urban, and affluent patients have access to JCAH-accredited medical facilities in urban Georgia. The State imposes the JCAH requirement, forbids rural non-JCAH hospitals to offer this single medical procedure, and permits even the JCAH general community hospital governing boards to forbid entirely the medical procedure of abortion.

---

[55] Other arbitrary classifications in the statute are examined *infra,* such as the structures on medical justifications for abortion, the limitation to JCAH-accredited hospitals, and the requirement of residency.

In *Griffin* and the reapportionment cases this Court held that persons "cannot be classified, constitutionally, on the basis of where they live . . . ." *Reynolds* v. *Sims*, 377 U.S. 533, 560 (1964). The cumulative effect of the restrictions on medical abortion in Georgia, however, accomplishes this forbidden result. By statute Georgia creates the obstacles which inherently work to the disfavor of rural physicians and their patients.[56] While it is commendable that at least this discrimination may not have been foreseen, or

---

[56] In light of the fact that the rural counties in Georgia have 81% of the State's hospitals, and account for 42% of births, it cannot be maintained that the rural discrimination results from lack of facilities, or other special rural characteristics.

Discrimination based on location within the state has frequently been held to violate the Equal Protection clause. *See, e.g.*, Avery v. Midland County, 390 U.S. 474, 480 (1967) (White, J.):

> "A city, town, or county may no more deny the equal protection of the laws than it may abridge freedom of speech. . . ."

Hawkins v. Town of Shaw, Mississippi, 437 F.2d 1286, 1292 (5th Cir. 1971):

> "[N]o compelling state interests can possibly justify the discriminatory *results* of Shaw's administration of municipal services. . . ." (Emphasis in original.)

Long v. Robinson, 316 F. Supp. 22, 27 (D. Md. 1970), *aff'd*, 436 F.2d 1116 (4th Cir. 1971):

> "[T]here is no psychological or physical basis for distinguishing between sixteen and seventeen year olds residing in Baltimore City and in the Counties."

Sams v. Ohio Valley General Hospital Ass'n, 413 F.2d 826, 827 (4th Cir. 1969):

> "[W]ithout semblance of reason for the differentiation, these hospitals accord full participation to doctors with offices and practices *within Ohio County* but refuse the same entitlement to those not so classifiable." (Emphasis added.)

Clayton v. North Carolina State Bd. of Elections, 317 F. Supp. 915, 920 (E.D.N.C. 1970):

> "[N]o evidence has been adduced to show why the *six counties* should be *treated differently* from the other ninety-four with

"thoughtless," [57] the lack of overt invidious intent is of little consolation to the poverty-stricken rural mother of ten who is facing her eleventh pregnancy. The Constitution forbids "sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the [right in question]. . . . " *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939) (Frankfurter, J.).

---

respect to the distance from the polling place at which electioneering may lawfully be conducted." (Emphasis added.)

Orr v. Thorp, 308 F. Supp. 1369, 1372 (S.D. Fla. 1969):

"[D]efendants have made no effort to demonstrate that Palm Beach County is in any way unique so as to justify placing its educational employees in a class apart from those of other Florida counties."

Richards v. Townsend, 303 F. Supp. 793, 795 (N.D. Calif. 1969):

"The equal protection clause applies not only to unreasoned distinctions based on race or relative affluence, but also to those based on accidents of geography."

Alabama State Teachers Ass'n v. Lowndes County Bd. of Education, 289 F. Supp. 300, 304-05 (M.D. Ala. 1968):

". . . Alabama denied the benefits of the teacher tenure law to eight counties which, with one exception, are among the twelve counties in this State having a preponderantly Negro population."

See also Canale v. Steveson, —— Tenn. ——, 458 S.W.2d 797 (1970) (statute prohibiting fortune-telling in counties of more than 400,000 population invalid); State v. Fowler, 193 N.C. 290, 136 S.E. 709 (1927) (statute punishing illegal manufacture of alcohol in six counties with fine, while imposing imprisonment elsewhere, held invalid); State v. Swegori, 318 Mo. 998, 2 S.W.2d 747 (1924) (statute setting juvenile court jurisdiction at 17 for some counties and 18 for others, held invalid).

[57] *See* Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 931 (2d Cir. 1968):

"[T]he arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."

If it be objected that *Lane* and *Reynolds* involved the right to vote, and *Griffin* the right to go to school, then *Amici* can only respond that the rights to medical care and autonomy of the family are "older than the Bill of Rights—older than our political parties, older than our school system." *Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965).

A second suspect classification resulting from the statute is the discrimination made between the patient with means, and the patient with none. This is a far-reaching defect of most abortion legislation, and appears to be inherent in the statute, rather than an inadvertent consequence of differences in personal wealth. This issue is discussed in the able brief filed by counsel for the OEO National Legal Program on the Health Problems of the Poor. These *Amici* will not duplicate that effort.

The socio-economic and racially discriminatory aspects of this type of legislation are also covered by the OEO brief. It is sufficient for *Amici* to confirm that this kind of legislation has built-in hurdles for patients to overcome, which cannot be surmounted without time, information, sophistication, and the ability to pay additional sums for consulting physicians and hospital stays. Georgia makes no such imposition upon patients for any other medical procedure.

In concluding this discussion of the various arbitrary and discriminatory features of Georgia's abortion law, *Amici* contend that this in itself is adequate justification for invalidating the entire statutory scheme. Georgia could then start anew, with an obligation to avoid regulation, except for overriding reasons, which themselves must be reflected in narrowly drawn statutes. Thus it might be

that the State could enact comprehensive family planning legislation, emphasizing thorough public education, extensive programs of contraception and where requested, sterilization. All hospitals could be encouraged to make legal medical abortion available as a back-up measure for contraceptive failure or nonuse, and the State, through administrative action, could make funds and technical assistance available to this end.

Under the present state of affairs, medical abortion in Georgia is available to the individuals with means. Those without knowledge, sophistication, funds, and political power, are also largely without access to legal abortion.

D. The provisions in Georgia Criminal Code §§26-1201, -1202(a) (1)-(3), -1202(b) (1)-(9), -1202(c), and -1202(e) are not narrowly drawn and do not advance a compelling state interest

The previous section established that the Georgia law regulating the medical procedure of induced abortion, *as applied* and implemented, was inconsistent with the Equal Protection clause of the Fourteenth Amendment. Similarly, the statute favors certain classes of patients, and excludes others, *on its face* in a manner offensive to Equal Protection concepts.

Four types of classifications appear invalid. These will be taken up seriatim.

1. The limitation of medical justifications to cases in which: (1) continuation of pregnancy would "endanger the life" of the woman, or "seriously and permanently injure her health," or (2) "[t]he fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect," or (3) "[t]he pregnancy resulted from forcible or statutory rape," is neither narrowly drawn nor supported by any compelling state interests

Essentially three reasons are permissible for the medical procedure of abortion under Georgia law. These occur when the patient can persuade three physicians, the JCAH-hospital abortion committee, and other required signatories that:

(1) "continuation of the pregnancy would . . . seriously and permanently injure [their] health . . .", or

(2) "[t]he fetus would very likely be born with a grave permanent and irremedial mental or physical defect," or

(3) "[t]he pregnancy resulted from forcible or statutory rape."

The equal protection inquiry with regard to the *reasons* said to justify legal medical abortions must begin with asking who are excluded, and why? As seen earlier, the classifications herein are suspect. Moreover, they must be "based on differences that are reasonably related to the purposes of the Act. . . . " *Morey* v. *Doud,* 354 U.S. 457, 465 (1957).

The *excluded* class of legal abortion applicants is difficult to describe, particularly in light of the varying interpretations given to the statute from county-to-county and hospital-to-hospital. However, an approximation of those

whose reasons for abortion do not fit into the statutory justifications would be the patients in whose cases:

(1) continuation of pregnancy would *seriously, but not permanently* injure their health, or

(2) continuation of pregnancy would *permanently, but not seriously* injure their health, or

(3) continued pregnancy would injure their physical or mental health to some degree not deemed both serious *and* permanent by the certifying authorities, or

(4) continued pregnancy would have damaging effects upon the family unit, the husband, or other children, or

(5) continued pregnancy would disrupt the family plan of limiting the number of children to those already existing, or

(6) any other case in which both physician and patient agree that no valid medical reasons exist for not going forward with the abortion requested by the patient, in that her overall well-being would be enhanced thereby.

a. The limiting provisions are not rationally related to a public health interest

On pages 10 to 13 of this brief, *Amici* set forth the data on safety aspects of medical abortion. These data indicated that mortality rates increased with factors such as (i) duration of pregnancy caused by delay in the system or otherwise, (ii) illness in the patient, and (iii) lack of skill in the physician. In particular, the mortality rates in jurisdictions with elective abortion were lowest, primarily

because the patients were generally in good physical and mental "health." [58] In comparative samples from Hungary (1964-67), and Denmark (1961-65), the rates respectively were 1.2 and 41 deaths per 100,000 operations. Tietze, *supra* note 9, at 198, 208. Denmark, somewhat like Georgia, "require[s] the unanimous authorization of a committee of three persons, attached to the local Mothers' Aid, a publicly supported organization, which conducts a thorough medical and social investigation." *Id.* at 196. The added delay, in addition to the statutory limitations in Denmark, are responsible for the 41 less 1.2 deaths per 100,000. Rather than promoting public health, the Georgia statute is undoubtedly responsible for the death of a substantial number of women who endure the long waiting period for full certification, or who seek an abortion outside the clinical setting. A recent report on this precise problem stated:

> "Of the 205 nonhospital abortion deaths which occurred between 1950 and 1969, 143 or 69 per cent were of black women. Of the 25 women who died as a consequence of abortion in the last five years, 22 or 88 per cent were black." Rochat, *et al., An Epidemiological Analysis of Abortion in Georgia,* 61 AM. J. PUBLIC HEALTH 543 (1971).

Accordingly, it cannot be argued that this statute serves a public health interest. It appears to do quite the contrary, particularly in sanctioning medical abortion only in the cases wherein the patient already has some physical or mental health problem.

---

[58] Inadvertent use of the terms "physical and/or mental health" in this brief is not intended to suggest that such terms would be intelligible in a criminal statute carrying severe sanctions. Declaratory expression and statutory proscription are altogether different word usages.

b. The provisions advance no legitimate interest in protecting human life

There is nothing in the legislative history of this statute which explains its purposes and how they relate to the individual provisions. On its face the statute does not purport to bestow value upon an embryo at every stage of development. Indeed, the same legal justifications for an induced abortion in the first week of pregnancy are also applicable at 20 weeks. Yet, at the outset of pregnancy, the fertilized ovum is scarcely visible to the eye, while at stages beyond 26 weeks, a possibility exists that the fetus could be sustained outside the woman's body.

The statutory provisions also do not seem predicated upon any assumption about the value of an embryo. For example, statutory rape (age 14) with consent which results in pregnancy is still a permissible justification for medical abortion, as is forcible rape. This condition, however, relates solely to events which affected the pregnant woman, not to any qualitative aspect of the embryo.

Similarly, the limitation of health justifications for legal abortion is difficult to explain or justify in terms of any principled rationale. Why, for example, must the patient be both *seriously and permanently* threatened in her health? What justification is there for excluding a woman who is only *seriously* threatened, or whose health would be *permanently* damaged, but not seriously? Certainly, the damage to the patient has no logical relation to the quality of the embryo, yet it is the criterion for the abortion.

c. The provisions do not advance any rational moral value

A last possible rationale which some might offer for the restrictions on induced abortion in this law is a moral one, *i.e.*, the deterrence of premarital or extra-marital sexual relations. Nothing in the statute, however, supports such a purpose. No distinction is made between the married and unmarried, even assuming that such a classification could otherwise withstand analysis. *See Eisenstadt* v. *Baird*, 429 F.2d 1398 (1st Cir. 1970), *prob. juris. noted*, 401 U.S. 934 (1971) (No. 70-17, 1971 Term).

No evidence exists that limited access to abortion curtails promiscuity, nor is it conceivable that such a correlation could exist. The widespread availability of contraception would seem to be a more significant factor. In any event, from the physician's standpoint, a patient is no less worthy of medical care simply because she has unfortunately conceived out of wedlock. Moreover, as one prominent physician observed, "[t]he fear that the availability of abortion will lead to promiscuity is sheer nonsense. . . ." Ryan, *Humane Abortion Laws and the Health Needs of Society*, 17 W. Res. L. Rev. 424, 432 (1965).

Decisions by this Court also indicate that such a justification for a statute must be more carefully tailored, and could be satisfied by enforcement of statutes outlawing adultery and fornication, if the State chose to do so. *See King* v. *Smith*, 392 U.S. 309, 320 (1968); *Griswold* v. *Connecticut*, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring).

2. The requirement that patients requesting a therapeutic or elective abortion be examined and certified by three physicians, and that certifications be approved further by a hospital committee of three or more physicians, is neither narrowly drawn nor supportive of a compelling state interest

In regard to no other medical procedure does Georgia law require that a patient's case be evaluated or approved by anyone other than her chosen physician. In medicine, as in law, the right to the physician of one's choice, and to privacy in the physician-patient relationship, has not been invaded by state legislation, except in this single area. Not only do the triple examination provision and committee certification procedure impose a burden upon physicians and patients from a policy standpoint, but there appears to be no rational basis whatever for such procedures, other than the impermissible reason of curtailing access to health care.

Three features of the multiple consultation-examination-certification process are unsupportable.

a. The consulting requirement precludes a clinical relationship by creating an adversarial one, which serves no medical purpose

By the time a patient requests aid from her physician in obtaining a medical abortion, she has generally made the decision to go forward unless some overwhelming physical or psychic hazard dictates otherwise. As seen previously, no such hazards exist, particularly in the case of healthy women.

It is an elementary medical proposition that proper treatment requires a relationship of confidence and trust between doctor and patient. The proposition applies more

forcefully when examination and treatment are psychiatric in nature. Where the statute requires written approval by consulting physicians regarding prescribed indications, however, the trust relationship is impossible:

> "[A] word should be said about the conditions for making a valid psychiatric evaluation of a woman who presents herself in a state of acute anxiety attendant upon being pregnant, and is determined to find ways and means of aborting. This is a most prejudicial situation for a psychiatric interview, because under such circumstances optimal cooperation from the patient is not obtainable. She has a tendentious purpose which she must pursue; therefore, it is difficult for her to be candid. The psychiatric interview is compromised from the outset. . . . To conduct such an interview with a patient who is committed to the ulterior motive of obtaining consent for an abortion is to do so against odds; too much must be left to the opinion and value judgment of the psychiatrist." Aarons, *Therapeutic Abortion and the Psychiatrist,* 124 AM. J. PSYCHIATRY 745, 747 (1967).

The state interference with a normal physician-patient relationship is complicated by the statute's listing of legal justifications for a medical procedure. The patient knows this fact, and that she must persuade a line of physicians that she "fits" into the classifications. Advocacy, rather than treatment, is her goal. Rather than imposing trust in her private physician, she realizes that two additional examining physicians and an anonymous hospital committee must also be persuaded, and that the latter will not even see or examine her overall problem. The first defect

in the procedure, therefore, is its destruction of the physician-patient relationship. Without the multiple physician procedure, the patient would be more willing to reveal her overall problem, and to request whatever collateral treatment and counseling might be needed in connection with the abortion procedure.

b. Multiple physician consultations have no rational justification where the patient has no specialized medical problem which could complicate the induced abortion procedure

In medicine, as in law, a generalist calls in specialist consultation when the patient (or client) has a specialized problem. For example, without abortion-specific statutes, a gynecologist would have no need to seek consultation unless non-gynecological problems might complicate the procedure. In a case of a potentially complicating heart condition, a gynecologist might call in a cardiologist. For a patient with a kidney condition, the gynecologist might call in an expert on the renal function. For the patient with serious mental problems, a psychiatrist might be called in. Rarely would more than one specialist be called upon. As the medical literature shows, such consultations simply serve no medical purpose. For this reason, the policy statement of the ACOG recommends the following:

> "When abortion is requested by a patient, a consultation is not necessary. When abortion is recommended by a physician, the indication for the procedure should be approved by a consultant knowledgeable in regard to the condition thought to indicate abortion." APPENDIX A, *infra*, at A-1.

ACOG does not recommend more than one consultation, and that in the limited circumstance of a recommended abortion. Clearly, no multiple examination and certification procedure can be justified, and none is recommended.

Medical texts, and recent studies of abortion law implementation, have pointed out the lack of medical necessity for consultation, and in strong unequivocal language. The text co-authored by *Amicus* J. Robert Willson, immediate past-president of ACOG, for example, states:

> "When abortion becomes legal in all states there will be no need for 'therapeutic abortion committees' or even for consultation except under unusual circumstances." J. R. WILLSON, *et al.*, OBSTETRICS AND GYNECOLOGY 178 (4th ed. 1971).

Dr. Edmund Overstreet, recently retired chairman of obstetrics and gynecology at the University of California, San Francisco, Medical Center, and also an *Amicus*, agrees, and has recommended:

> "Determination by the patient's physician alone (private or resident) of the validity of the patient's desire for termination of pregnancy—with resort to consultations only when he is in doubt.
>
> "The Hospital Therapeutic Abortion Committee should be abolished. Current practice shows it to be essentially worthless, almost purely pro forma in operation, an enormous waste of physician time, and a hindrance to prompt, effective abortion practice." Overstreet, in *Symposium—Pregnancy Termination: The Impact of New Laws*, 6 J. REPRODUCTIVE MEDICINE 274, 285 (June 1971).

In sum, the hospital certification and multiple physician consultation procedures should be recognized for what they are and always have been: devices designed to reduce the numbers of abortions in a hospital, and to avoid possible criminal and administrative sanctions against the institution. There is no evidence that they serve any other function.

c. The committee process is devoid of procedures which remotely resemble those required by the due process clause

Not only is the multiple physician approval system unwarranted by medical or psychiatric considerations, but there is no procedure whereby the physicians' and patients' fundamental claims can be evaluated in an orderly fashion. As previously shown in this brief, the interests asserted by both physician and patient are fundamental and of significant constitutional stature. Yet neither has an opportunity to be heard before the hospital abortion committee, nor any other administrative agency. Indeed, under the law in question, there is no requirement that a hospital even set up such a committee.

A hearing requirement would not eliminate the more fundamental objections to the statutory restrictions, but at least it would permit physician and patient to present facts and argument in support of the application for a therapeutic abortion. Moreover, procedural due process would require that hospital committees articulate more definitive policies than those in the statute, and that reasoned justification be given for the rejection of any patient's application.

The procedural due process decisions by this Court, from *Baldwin* v. *Hale,* 68 U.S. (1 Wall.) 223 (1864), to *Goldberg*

v. *Kelly*, 397 U.S. 254 (1970), and *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), require that the statutory provisions for additional examining physicians, and hospital committee approval, be stricken as contrary to the Fourteenth Amendment due process clause.

The Georgia therapeutic abortion act imposes state control over all medical procedures directed toward interruption of pregnancy. Administration of this act is vested in hospital governing boards, therapeutic abortion committees, and miscellaneous additional consulting physicians. The act establishes "the State's monopoly," over decisions which bear in an important way upon physicians, women, and their families. *See Boddie* v. *Connecticut*, 401 U.S. 371, 375 (1971). Under such circumstances, resort to hospital committees and consultation with additional examining physicians "is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court." *Boddie, supra*, at 376-77. As Mr. Justice Harlan stated for the Court in *Boddie*:

> "Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the [administrative] process must be given a meaningful opportunity to be heard." *Id.* at 377.

Procedural due process hearings have been held necessary under the due process clause before professional disciplinary sanctions could be imposed, *In re Ruffalo*, 390 U.S. 544 (1968), before public assistance could be terminated, *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), and before wages could be garnished, *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969). *See also Greene* v. *McElroy*, 360 U.S.

474 (1959). Where, as here, the fundamental right of access to health care is at stake, and a particular form of medical care has been singled out, an administrative system which denies any hearing whatever cannot withstand scrutiny under the concepts of due process enunciated by this Court. *Cf. Baxtrom* v. *Herold,* 383 U.S. 107 (1966).

3. The requirement that the medical procedure of abortion be undertaken only in hospitals accredited by the Joint Commission on Accreditation of Hospitals unjustifiably discriminates against a single medical procedure, and seriously limits the availability of medical facilities for abortion, without advancing any compelling state interest

Nothing in the Model Penal Code draft abortion law suggested that all medical abortions be performed in those hospitals accredited by the Joint Commission on Accreditation of Hospitals [JCAH]. The Code, which was innovative when the 1955 first draft was circulated,[59] made the following recommendation with respect to the type of facility:

> "Hospital facilities are overburdened, and in some rural areas inaccessible. It may be assumed that hospitals maintained by some religious groups would not permit abortion under any circumstances. The operation is ordinarily not difficult or dangerous when performed by a competent physician, so that medical considerations alone do not call for hospitalization. Accordingly, Subsection 2(b) leaves it open to the state. . . ."

---

[59] More recently, in 1970, the second tentative draft of the UNIFORM ABORTION ACT (Aug. 1970), stipulated that the procedure could be performed "in a medical clinic, or in a hospital . . . ."

MODEL PENAL CODE §207.11, Comments, at 157 (Tent. Draft No. 9, 1959).

Eight of the twelve A.L.I. states[60] failed to heed the Code's recommendation, and went even further by requiring that all medical abortions be undertaken in JCAH-accredited facilities. This excluded licensed hospitals which had not sought accreditation, as well as specialized hospital-affiliated medical facilities designed for the abortion procedure and other family planning medical care.

As a preliminary matter, it is necessary to identify the JCAH, its nature, history, and standards, as well as the purpose behind those standards.

The JCAH is not a unit of Georgia government, nor indeed of any governmental unit in the United States. It is a private, nonprofit corporation, with headquarters in Chicago, and is not even within the jurisdiction of any states with accreditation requirements, much less subject to their control.[61]

JCAH was an outgrowth from the Hospital Standardization Program established by the American College of Surgeons in 1918 for the purpose of encouraging uniform medical records. *Accreditation Manual for Hospitals* 1 (JCAH 1970). *See generally* L. E. DAVIS, FELLOWSHIP OF SURGEONS: A HISTORY OF THE AMERICAN COLLEGE OF SURGEONS (1960). In 1951 JCAH came into existence to

---

[60] Georgia, Virginia, California, Colorado, Delaware, Kansas, Maryland, and Arkansas.

[61] JCAH is located at 645 North Michigan Avenue, Chicago, Illinois 60611. Publications of the Commission are available to the general public, and are contained in most medical libraries.

broaden the aforesaid program, and to promulgate standards for voluntary evaluation of "community general hospitals. . . ." *Statement by John I. Brewer, M.D., Commissioner, JCAH* (July 9, 1971), APPENDIX A, *infra,* at A-2.

Seven different versions of *JCAH Standards* have been promulgated since the original December 1953 version, including the more recent which came into effect during the pendency of this litigation. These seven were in January 1956, October 1957, December 1960, January 1964, December 1965, and July 1971. The most recent is a massive, thoroughly revised 152 page document, as contrasted with the previous 10 page standards from 1965.

In at least three respects, the incorporation into Georgia law of the JCAH standards cannot be reconciled with the requirements of the Equal Protection clause.

a. The JCAH itself does not advocate that medical procedures be confined to a given type of facility or limited to particular patient circumstances

The very purpose behind legislative incorporation of JCAH standards has been misconceived from the outset. As shown by the JCAH standards themselves, and the statement of JCAH Commissioner Brewer, "[t]he principal function of the Joint Commission . . . is to develop standards of quality for *community general hospitals* . . . ." (emphasis added) *Id.* [hereinafter Brewer Statement]. JCAH is simply not involved in accrediting special purpose institutions at the present time, except for "long term care facilities (such as nursing homes) and for rehabilitation facilities." *Id.* At some future date, JCAH may well set up a program for this purpose, but the Commission does not now pretend to approve or disapprove specialized family planning facilities.

Ironically, if JCAH were to establish a specialty program in the near future, a JCAH-accredited family planning facility, affiliated with or accessible to a hospital, still could not offer the medical procedure of induced abortion in Georgia. Such a facility would have the JCAH stamp of approval as a specialized facility, but not as "a hospital . . . accredited by the" JCAH. GA. CRIM. CODE §26-1202(b)(4) (1969).

Not only does JCAH expressly disavow application of its standards to specialized medical facilities, but JCAH also has no policies and no procedures with respect to any particular medical treatment. JCAH is concerned with the physical plant and general administrative operation of community hospitals, not with non-hospital medical facilities, nor with the specifics of any given medical treatment. As stated by Commissioner Brewer,

> "The Joint Commission does not now have and has never had a policy or a standard which attempts to limit medical practice or any of its individual components to the confines of an accredited hospital, nor indeed to any specific location." Brewer Statement.

Similarly, with respect to medical practice in a given sphere,

> "The [JCAH] standards do not attempt to establish any indication of the content of medical practice, but rather refrain from imposing any specific national criteria of quality of that nature. . . . The Joint Commission neither advocates nor opposes any particular position with respect to elective abortions." *Id.*

In light of the JCAH position, the limitation of medical abortions in Georgia to JCAH-accredited facilities cannot be sustained. It is not "based on differences that are reasonably related to the purposes of the [standards incorporated in] the Act in which it is found." *Morey* v. *Doud*, 354 U.S. 457, 465 (1957).

Similarly, the provision in GA. CRIM. CODE §26-1202(b)(5) (1969), requiring that hospital therapeutic abortion committees be "established and maintained in accordance with the standards promulgated by the [JCAH] . . . ," is meaningless. The JCAH has no such standards for these committees, and never has. One can search the JCAH Standards and Bulletins in vain for any guidance. The nearest item is an August, 1966 Bulletin, since replaced by the 1971 revision,[63] which recommended consultation in cases of interruption of pregnancy, in particular because of laws "identifying the conditions, if any, under which the procedures may be undertaken." [64] As to "standards promulgated by the [JCAH] . . . " GA. CRIM. CODE §26-1202(b)(5) (1969), the JCAH referred this back to the medical facility:

> "The Joint Commission has no ruling making such [therapeutic abortion approval] committees mandatory. It is expected that each hospital medical staff will include in its by-laws the controls which it considers appropriate for that hospital's practice." [65]

Whatever the result of this circular shifting of responsibility may be, it is clear that with respect to hospital abortion committees, there are no JCAH standards.[66]

---

[63] Bulletin No. 42, JCAH (Aug. 1966).

[64] *Id.*

[65] *Id.*

[66] In light of this consideration, it is unnecessary to resolve the further problem presented by the fact that JCAH standards change

b. No public health justification can be advanced for confining the medical procedure of abortion to those limited institutions which are JCAH-accredited

What has been found concerning the irrelevance and express inapplicability of JCAH standards to specialized medical facilities and procedures should be sufficient to conclude the argument that the GA. CRIM. CODE §26-1202(b)(4)-(5) (1969), provisions violate the Due Process and Equal Protection clauses of the Fourteenth Amendment. In addition, however, *Amici* would like to point out other defects in the statutory limitation of medical abortions to JCAH-accredited facilities.

Earlier in this brief, *Amici* established beyond dispute the comparative safety of induced abortion as contrasted with other medical procedures. *See* pp. 10-13, *supra*. If the statutory purpose of confining medical abortions to JCAH hospitals is an interest in patient welfare, the interest is misplaced. Not only may all forms of heart surgery be done in non-accredited facilities, but the same medical procedure performed to interrupt a pregnancy may be done in any other medical facility when there is no suspected pregnancy. Indeed, every medical procedure except induced abortion can lawfully be undertaken in any medical facility selected by the physician and patient, regardless of surgical complexity. It is not even a crime in Georgia

---

from time to time, in a manner entirely beyond the regulatory power of Georgia or other A.L.I. jurisdictions.

In addition, it is not necessary to deal with the fact that Georgia and the other A.L.I. states attempted to delegate regulatory powers to a private corporation outside their jurisdiction, without providing any guidelines for exercise of the regulatory authority. *Compare* Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969).

for major surgery to be undertaken in altogether unlicensed and inadequate facilities.

In light of the comparative safety factor, there is no rational basis for setting induced abortion apart from all other medical procedures.

If, however, one assumes *arguendo* a valid legislative purpose in prohibiting the medical procedure of abortion, except in approved facilities, the limitation to fully accredited general community hospitals is still medically unjustifiable. Not only do data from specialized medical facilities for abortion show acceptable safety, but medical science may be only a matter of years away from the development of abortion-inducing drugs which surely need not be swallowed within a JCAH-accredited general community hospital.

A study based on experience under California's A.L.I.-type statute at the University of California Medical Center, San Francisco, sought to identify complications from abortion procedures and the extent of necessity for full hospitalization. *See* Margolis & Overstreet, *Legal Abortion Without Hospitalization*, 36 OBSTETRICS & GYNECOLOGY 479 (1970). The physicians found that "none of [the] post-abortal complications—all of which were handled with minimal therapy—developed earlier than 2 days after the abortion, and most occurred from 3 to 30 days after the procedure." *Id.* at 480-481. They concluded that "the conventional 12- to 48-hour hospital admission for aspiration abortion patients serves no real purpose either in preventing or discovering post-abortal complications." *Id.* at 481.[47]

---

[47] Similar experience has been recorded in England. *See* Huntingford, *Mortality and Morbidity of Abortion*, THE LANCET, at 1012 (May 15, 1971):

A more recent study at the same California institution confirmed and strengthened the earlier conclusions. *See* Goldsmith & Margolis, *Aspiration Abortion Without Cervical Dilation,* 110 Am. J. Obstetrics & Gynecology 580 (1971). Using a newly developed technique which reduced the need for anesthetic and cervical dilation, the reporting physicians concluded:

> "With well-qualified personnel who are careful to accept only pregnancies early in the first trimester, and who perform the aspiration technique skillfully, out-of-hospital abortion in well-equipped, licensed facilities seems feasible." *Id.* at 582.

Similar experience was recorded by the Medical Director of Planned Parenthood of Syracuse, in a study of 600 cases of early induced abortion. Penfield, *Abortion Under Paracervical Block,* 71 N. Y. State J. of Medicine 1185 (1971). Dr. Penfield's scholarly analysis, which included a systematic review of much overlooked literature in the field, concluded:

> "A review of the world literature has demonstrated that dilatation and curettage [the early abortion operative procedure] under paracervical block [local anesthesia] is a safe and usually painless procedure.
>
> "The author's series of more than 600 first-trimester surgical abortions has also shown the acceptability of this technic when performed in a well equipped outpatient or office facility." *Id.* at 1189.

"The evidence available does not show that prolonging the duration of stay of women in hospital after abortion prevents complications, although it may serve to increase the detection-rate. But the detection-rate could also be increased by an adequate system of follow-up. . . ."

Comparable observations can be traced back to as early as 1925, and a paper by the famed Howard A. Kelly, M.D., of Johns Hopkins, on non-hospital uterine curettage, 9 Am. J. Obstetrics & Gynecology 78 (1925). *See also* Israel & Mazer, *Safety and Advantage of Office Curettage,* 36 Am. J. Obstetrics & Gynecology 445 (1938).

In addition, current research is underway in numerous American medical centers, as well as abroad, to perfect a safe, reliable abortifacient in tablet form. *See* Anderson & Speroff, *Prostaglandins,* 171 Science 502 (1971); Speroff & Ramwell, *Prostaglandins in Reproductive Physiology,* 107 Am. J. Obstetrics & Gynecology 1111 (1970). When developed, however, such a substance would still be unlawful in Georgia unless taken in a JCAH-accredited hospital after the full range of consultant physician approvals and committee certification. This possibility, which may become reality in a very few years, perhaps best illustrates the unjustifiable nature of the legislation under review in this case.

The logic of the most recent findings set out above goes far beyond the position necessary to invalidate the JCAH-accreditation requirement. *Amici,* however, take no position beyond that necessary to support Appellants' constitutional objections to the JCAH rule. Admittedly, the medical procedure of induced abortion, late in the pregnancy of an unhealthy patient, performed in an inferior facility by an incompetent operator, is a dangerous procedure. Administrative regulations may be thought necessary to establish specific standards of care directly related to this or any other medical procedure. The statute in question, however, is not a finely tailored administrative regulation,

but a blunt prohibition. It contravenes the principle so often enunciated by this Court that

> "[l]egitimate legislative goals 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" *Elfbrandt* v. *Russell*, 384 U.S. 11, 18 (1966).

By contrast, the States of Washington and New York, through health department regulations, have promulgated guidelines for medical facilities outside of the JCAH-accredited institution. *Abortion Regulations Adopted by the Washington State Board of Health* (Dec. 10, 1970); *Abortion Services*, N.Y.C. HEALTH CODE tit. III, art. 42, 98 CITY RECORD 6313-6315 (Oct. 23, 1970). These illustrate the concept of carefully drawn health regulations for specialized facilities.[68] Reproductions are included in the offset Supplementary Appendix to this brief. SUPPLEMENTARY APPENDIX, at 15, 11.

In sum, the lower court passed lightly over the Appellants' objections to the JCAH-accreditation requirement. A deeper analysis was necessary to a meaningful adjudication. *Amici* have attempted to provide this Court with the materials and arguments necessary to a full evaluation of this question, and have reached a conclusion in accord with the better reasoned precedent in point. *See People*

---

[68] A study of the Hawaii abortion law, which initially required hospitalization, has concluded with the recommendation that:

> "It is possible to perform safe, efficient abortions on an outpatient basis on women pregnant less than twelve weeks. Clinics set up to do this would probably result in significantly lower individual patient costs." R. Smith, *et al.*, *Report to the Legislature: State of Hawaii—Hawaii's Abortion Law* 15 (Apr. 20, 1971).

See also Recommended Standards for Abortion Services (APHA 1970).

v. *Barksdale*, —— Cal. App. 3d ——, —— Cal. Rptr. ——, 1 Crim. 9526 (Calif. Dist. Ct. App. July 22, 1971).

4. The Prohibition Further Limiting Access to the Medical Procedure of Induced Abortion to the Single Class of Patients Who Are "Bona Fide Legal Resident[s] of the State of Georgia" Violates the Privileges and Immunities Clause of Article IV, §2, and the Equal Protection Clause of the Fourteenth Amendment by Excluding Non-resident Patients for Reasons Which Are Neither Narrowly Drawn Nor Supportive of Any Legitimate, Compelling State Interest

The final unconstitutional provision of the Georgia abortion law limits this medical procedure to "bona fide legal resident[s] of the State of Georgia." GA. CRIM. CODE §26-1202(b)(1)-(2) (1969). Without discussion, the lower court upheld the requirement. *Doe* v. *Bolton*, 319 F. Supp. 1048, 1056 (N.D. Ga. 1970) (per curiam). A contrary view was taken by a three-judge federal district court in North Carolina, with respect to a four month durational residency requirement. *Corkey* v. *Edwards*, 322 F. Supp. 1248, 1254 (W.D.N.C.), *appeal docketed*, 40 U.S.L.W. 3048 (U.S. July 17, 1971) (No. 71-92, 1971 Term).

From the medical standpoint, a patient's needs are not less deserving of care by virtue of his or her residence in any particular city or town. The history of medicine is replete with instances of great medical centers frequented by prominent citizens from other states and nations. Presidents and Justices of this Court have travelled to the Mayo Clinic for decades. *See* H. CLAPESATTLE, THE DOCTORS MAYO (1941). If the Georgia residency require-

ment is valid, a like provision limiting medical care in general to state residents would be equally valid.

It requires little analysis, and less data, to demonstrate the arbitrary nature of the residency requirement in this and similar statutes. The requirement of residency is not limited to those patients seeking free medical care at public institutions, in which case different considerations would be involved. Instead, the private patient of a private physician in a private medical facility must present a passport of Georgia state residency in order to be considered as an applicant for the medical procedure of induced abortion. Both she and the physician must certify to her residency under oath.

The provision has no basis in the possibility that Georgia hospital beds will otherwise be utilized beyond capacity. According to the annual report of the American Hospital Association, the 29,872 beds in the State's 153 non-federal hospitals were in use during 1969 only 80.8% of the time. *Hospitals* (pt. 2), 44 J. Am. Hospital Ass'n 1, 483, Table 3 (1970) (Guide Issue). As previously pointed out, 96% of Georgia's counties had fewer than 10 legal abortions in 1970. Indeed, more Georgia residents obtained legal abortions in New York City from July 1, 1970 to March 31, 1971 than in their State of residence. It is New York, if any state, which has standing to complain of an influx of abortion applicants. Yet, all New York officials agree that both the State and a large part of the nation have been accommodated without sacrificing the quality of medical care. *See* Chase, *Abortions to Out-of-State Residents* (June 29, 1971) (Report released by the Health Services Administration, City of New York).

Two traditional constitutional bases can be invoked to invalidate the residency provision.

Article IV, §2 of the Constitution guarantees that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

A classical exposition of the purpose of the clause is Justice Washington's opinion in *Corfield* v. *Coryell,* 6 Fed. Cas. 546, 550 (C.C.E.D. Pa., 1832) (No. 3,230):

> "The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have at all times been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, the right to acquire property of every kind, and to pursue and obtain happiness and *safety,* subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole" (emphasis added).

Since that early interpretation, this Court has repeatedly upheld the citizen's right to enter another state for the purpose of engaging in lawful commerce, trade, or business; to acquire personal property; to take and hold real estate; to maintain actions; and to be exempt from any higher taxes or excises than are imposed upon its own citizens. *See, e.g., Paul* v. *Virginia,* 75 U.S. (8 Wall.) 168,

180 (1869); *Ward* v. *Maryland,* 79 U.S. 418, 430 (1870); *Blake* v. *McClung,* 172 U.S. 239, 248-254 (1898); *Toomer* v. *Witsell,* 334 U.S. 385, 395-397 (1948). In *Blake,* a Tennessee statute afforded resident creditors a preference over non-residents in the distribution of assets of insolvent foreign corporations with property in the state. In an action by Tennessee creditors seeking distribution of assets of an insolvent foreign corporation, non-resident creditors who were citizens of other states intervened and resisted the priority given the resident creditors. The Court held the statute to infringe the rights of the intervenors:

> "It was the right of citizens of Tennessee to deal with it [a foreign corporation], as it was their right to deal with corporations created by Tennessee. And it was equally the right of citizens of other states to deal with that corporation. . . . But the enjoyment of these rights is materially obstructed by the statute in question, for that statute, by its necessary operation, excludes citizens of other states from transacting business with that corporation upon terms of equality with citizens of Tennessee." 172 U.S. at 252-253.

Similarly, *Ward* v. *Maryland, supra,* struck down a Maryland law which imposed a licensing fee on non-residents for selling goods not produced within the state in certain areas. The Court held that the statute imposed on other states' citizens a discriminatory tax which infringed their rights to trade on equal terms with Maryland citizens.

The *Blake* and *Ward* cases both concerned state citizens who entered other states in order to ply their trade. No less deserving constitutional protections, however, are state citizens who enter other states in order to partake of an-

other's business. This was recognized in *Valle* v. *Stengel*, 176 F.2d 697 (3d Cir. 1949), which held, alternatively, that New York citizens' rights under the Privileges and Immunities clause were infringed when they were denied access to a swimming pool operated by a private corporation, but open to the public upon payment of a fee.

Here, the residence requirement precludes citizens of other states from seeking particular medical treatment in Georgia, whereas Georgia citizens are not so constrained. Citizens and residents of Florida, Alabama, Tennessee, North Carolina and South Carolina who live near the Georgia border are prohibited from receiving medical care for abortion even if their regular gynecologists are Georgia doctors. Citizens from other states who visit Georgia cannot be aborted even in the most compelling medical emergencies. The statute may not only infringe rights to engage professional services on equal terms with Georgia residents, but may cause severe injury as well.

In order to avoid invalidation under Article IV, §2, a discriminatory statute must be based on a substantial independent justification. The Court in *Toomer* v. *Witsell*, 334 U.S. 385 (1948), stated this test:

> "... [T]he privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where they are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with

whether such do exist and whether the degree of discrimination bears a close relation to them" 334 U.S. at 396.

No substantial reason exists for Georgia to prohibit non-resident women from seeking medical services there to terminate pregnancies. A desire to conserve medical resources for the exclusive use of residents cannot justify the residence requirement; medical resources often are private and are not "common property" of the State. *Cf. McCready* v. *Virginia,* 94 U.S. 391 (1877), as limited by *Toomer* v. *Witsell,* 334 U.S. 385 (1948), and *Mullaney* v. *Anderson,* 342 U.S. 415 (1952). At the same time, any such conservation policy is invidiously underinclusive: non-residents are prohibited from seeking medical services only if they seek to terminate pregnancy through abortion. Neither can a desire to conserve state funds for the use of state residents justify this section, for it applies equally to private and public hospitals, physicians, and patients. *Cf. American Commuters Ass'n* v. *Levitt,* 279 F. Supp. 40 (S.D.N.Y. 1967). Without a substantial justification, the residence requirement violates Article IV, §2.

For substantially the same reasons, the residency requirement cannot withstand analysis under the Equal Protection clause of the Fourteenth Amendment. In this context, Article IV, §2, and the Equal Protection clause run together. *See Graham* v. *Richardson,* 402 U.S. —— (June 14, 1971); *Shapiro* v. *Thompson,* 394 U.S. 618, 638 (1969).

CONCLUSIONS

For the reasons set forth, this Court should modify the judgment below by affirming the District Court's decision that certain portions of Georgia Criminal Code §26-1202 violate Appellants' federal constitutional rights, reversing the decision below to the extent that other portions were held valid, and reversing the decision to deny injunctive and declaratory relief to the class of physician appellants.

Respectfully submitted,

ROY LUCAS
James Madison Constitutional
Law Institute, Inc.
Four Patchin Place
New York, N. Y. 10011
Tel.: 212—691-2020
Attorney for Amici Curiae

CONCLUSIONS

For the reasons set forth, this Court should modify the judgment below by affirming the District Court's decision that certain portions of Georgia Criminal Code §26-1202 violate Appellants' federal constitutional rights, reversing the decision below to the extent that other portions were held valid, and reversing the decision to deny injunctive and declaratory relief to the class of physician appellants.

Respectfully submitted,

ROY LUCAS
James Madison Constitutional
Law Institute, Inc.
Four Patchin Place
New York, N. Y. 10011
Tel.: 212—691-2020
Attorney for Amici Curiae

APPENDIX A

PAGE

The American College of Obstetricians and Gynecologists Policy Statement A-1

Statement by John I. Brewer, M.D., Commissioner, Joint Commission on Accreditation of Hospitals, July 9, 1971 ..... A-2

A-1

THE AMERICAN COLLEGE
OF OBSTETRICIANS AND GYNECOLOGISTS
79 West Monroe Street • Chicago, Illinois 60603
Telephone 312-236-6814

POLICY ON ABORTION

Policies covering abortions should be designed by the medical staff to safeguard the patient's health or improve her family life situation. They should have due regard for local legal statutes and judicial decrees. Abortion should only be performed in facilities that are administered by a hospital approved by the Joint Commission on Accreditation of Hospitals and/or licensed by a state or province.

It is recognized that abortion may be performed at a patient's request, or upon a physician's recommendation. No physician should be required to perform, nor should any patient be forced to accept an abortion.

When abortion is requested by a patient, the request should be obtained in writing from the patient, or, in the case of a minor, from her parent or guardian. The patient should be informed of the medical nature of the procedure and of its potential consequences. When abortion is recommended by a physician, the indications should be stated in the patient's record, and informed consent obtained from the patient and her husband, or herself if she is unmarried, or from her nearest relative or guardian if she is under the age of consent. When abortion is requested by a patient, a consultation is not necessary. When abortion is recommended by a physician, the indication for the procedure should be approved by a consultant knowledgeable in regard to the condition thought to indicate abortion.

Abortion is an operative procedure and should only be performed: (1) by a physician who has hospital privileges for the care of obstetric-gynecologic patients and (2) in a hospital-facility adequately equipped to care properly for unexpected complications.

In order to assure that adequate facilities will be available for indicated care of other obstetric-gynecologic patients in some communities, consideration should be given by hospitals to (1) providing a room or entirely separate facilities where abortion can be performed with minimal disruption of other hospital procedures and the hospital based educational program, and (2) utilizing hospital personnel who volunteer to care for patients admitted to be aborted.

Approved by the Executive Board
August 1970

NINETEENTH ANNUAL CLINICAL MEETING
Civic Auditorium, San Francisco, California, May 3-6, 1971

A-2

Statement by John I. Brewer, M.D., Commissioner,
Joint Commission on Accreditation of Hospitals
July 9, 1971

Joint Commission on Accreditation of Hospitals
645 North Michigan Avenue Chicago, Illinois 60611

July 9, 1971

JOHN D. PORTERFIELD, M.D.
Director (312) 642-6061

	AB	7/13		

Allan C. Barnes, M.D.
Vice President
The Rockefeller Foundation
111 West 50th Street
New York, New York 10020

Dear Doctor Barnes:

It has come to my attention that the origin, background and purposes of the Joint Commission on Accreditation of Hospitals should be more widely and more accurately known. This is particularly true where the actions of the Joint Commission are a factor in judicial considerations. I should like to submit therefore a brief account of the Joint Commission and its purposes.

The Joint Commission on Accreditation of Hospitals was incorporated in late 1951 as a voluntary corporation not for profit. Its corporate members are the American College of Physicians, the American College of Surgeons, the American Hospital Association and the American Medical Association. It was created to continue a program begun by the American College of Surgeons in 1918, the Hospital Standardization Program.

The principal function of the Joint Commission, as was true of its predecessor program, is to develop standards of quality for community general hospitals, to promulgate these standards among health professionals, on invitation to evaluate the condition and procedures of hospitals, and to recognize substantial conformance to its standards by granting a certificate of accreditation. Evaluation is made in a survey visit, requested by the hospital, which must be repeated at least biennially. The survey visit is carried out by a professional team, headed by a physician trained in accreditation methods.

Present hospital accreditation standards were adopted by the Joint Commission Board of Commissioners in 1970. In their formulation extensive use was made of outside expert advisors, some 250 in all. Before adoption, the standards were also submitted to formal and informal review by substantial numbers of interested individuals and organizations.

The standards address themselves to the safety and maintenance of the physical plant of the hospital; to the organization and functioning of the hospital's governing authority and its medical staff; to the provision of adequate and efficient space, equipment and personnel for the necessary diagnostic and therapeutic resources; and to the continuing exercise of appropriate controls to assure effective performance, among which most particularly shall be a regular, critical review by the medical staff of the calibre of clinical work being done by each of its members.

A-3

The standards do not attempt to establish any indication of the content of medical practice, but rather refrain from imposing any specific national criteria of quality of that nature. Instead the organized medical staff of each hospital seeking voluntary accreditation is expected to define, in its bylaws, rules and regulations, those clinical policies which identify the essential factors of good medical practice. The Joint Commission neither advocates nor opposes any particular position with respect to elective abortions. Each physician's practice must be measured by his hospital's medical staff against the clinical policies adopted in that hospital.

While the standards are written for and the program is directed primarily toward community general hospitals, many special hospitals - such as psychiatric, orthopedic, pediatric and others - have sought, and frequently have obtained, accreditation within this program, in lack of a comparable program for the particular specialty. A criterion for eligibility for accreditation survey is registration as a hospital with the American Hospital Association. The Joint Commission does not therefore offer accreditation to clinics or group practice situations as such.

Recently, the Joint Commission has agreed to an organization relationship with groups of national associations wishing to develop special accreditation programs in fields of health-related services. Presently, by this arrangement, accreditation programs are available for long term care facilities (such as nursing homes) and for rehabilitation facilities. Standards are currently being developed by other associated groups for psychiatric facilities and for facilities for the mentally retarded.

The Joint Commission does not now have and has never had a policy or a standard which attempts to limit medical practice or any of its individual components to the confines of an accredited hospital, nor indeed to any specific location. It concerns itself only with the institutional setting of medical practice and does not presume to concern itself with medical practice in any setting outside the purview of its formally organized programs.

A much more detailed description of the work of the Joint Commission is available upon request to its office at 645 North Michigan Avenue, Chicago, Illinois 60611.

Sincerely,

John I. Brewer, M.D.
Commissioner
Joint Commission on Accreditation of Hospitals

Professor
Department of Obstetrics and Gynecology
Northwestern University Medical School

JIB:sp

STATE OF ILLINOIS
COUNTY OF COOK

Subscribed and sworn to before
me this 12th day of July, 1971.

Patricia A. Carnell
Notary Public
Commission expires April 24, 1973.

APPENDIX B

APPENDIX B

PAGE

Explanatory Notes ..... i-iv

I.

SUMMARY OF STATUTES AND STATISTICAL DATA ON THERAPEUTIC ABORTION IN STATES WITH A.L.I. MODEL PENAL CODE-TYPE STATUTES.

Table I-1. **Twelve Reform Statutes and Proposed Codes on Therapeutic Abortion: Basic Provisions** B-1

Figure I-1. **Medical Abortion: Implementation of Abortion Statutes By State, August, 1971** B-4

Table I-2. **States With A.L.I. Model Penal Code-Type Therapeutic Abortion Statutes: Cumulative Basic Data** B-5–6

Figure I-2. **Ratios of Reported Legal Abortions to Live Births By State of Residence, July-December 1970** B-7

Table I-3. Indications for Which Therapeutic Abortions Were Performed in States With A.L.I. Model Penal Code-Type Statutes B-8

II.

SUMMARY OF DATA BY STATE ON IMPLEMENTATION OF A.L.I. MODEL PENAL CODE-TYPE THERAPEUTIC ABORTION STATUTES.

Table II-A. Georgia: Summary of Data on Implementation of Therapeutic Abortion Act, 1968-1970 B-9

Figure II-A-1. Georgia: Access to Therapeutic Abortion By County—Therapeutic Abortion Ratios, 1968-1970 ..... B-10

PAGE

Figure II-A-2. Georgia: Counties Lacking Facilities Required by Law for Therapeutic Abortion Or Where Few Abortions Were Performed in 1970 .... B-11

Table II-B. South Carolina: Summary of Data on Implementation of Therapeutic Abortion Act, 1970 .... B-12

Figure II-B-1. South Carolina: Access to Therapeutic Abortion By County—Therapeutic Abortion Ratios, 1970 .... B-13

Figure II-B-2. South Carolina: Counties Lacking Facilities Required by Law Or Where Few Abortions Were Performed in 1970 .... B-14

Table II-C. North Carolina: Summary of Data on Implementation of Therapeutic Abortion Act, 1967-1970 .... B-15

Figure II-C-1. North Carolina: Access to Therapeutic Abortion By County—Therapeutic Abortion Ratios, 1967-1970 .... B-16

Figure II-C-2. North Carolina: Counties Lacking Facilities Required by Law for Therapeutic Abortion Or Where Few Abortions Were Performed in 1970 .... B-17

Table II-D. Virginia: Summary of Data on Implementation of Therapeutic Abortion Act, 1970 .... B-18

Figure II-D-1. Virginia: Access to Therapeutic Abortion By County—Therapeutic Abortion Ratios, 1970 .... B-19

Figure II-D-2. Virginia: Counties Lacking Facilities Required by Law for Therapeutic Abortion Or Where Few Abortions Were Performed in 1970 .... B-20

PAGE

Table II-E. Maryland: Summary of Data on Implementation of Therapeutic Abortion Act, 1969-1970 .. B-21

Figure II-E-1. Maryland: Access to Therapeutic Abortion By County—Therapeutic Abortion Ratios, 1969-1970 ..... B-22

Figure II-E-2. Maryland: Counties Lacking Facilities Required by Law for Therapeutic Abortion Or Where Few Abortions Were Performed in 1970 ..... B-23

Table II-F. Delaware: Summary of Data on Implementation of Therapeutic Abortion Act, 1970 ..... B-24

Figure II-F-1. Delaware: Access to Therapeutic Abortion By County—Therapeutic Abortion Ratios, 1970 ..... B-25

Figure II-F-2. Delaware: Counties Lacking Facilities Required by Law for Therapeutic Abortion Or Where Few Abortions Were Performed in 1970 ..... B-26

Table II-G. Colorado: Summary of Data on Implementation of Therapeutic Abortion Act, 1967-1970 B-27

Figure II-G-1. Colorado: Access to Therapeutic Abortion By County—Therapeutic Abortion Ratios, 1967-1970 ..... B-28

Figure II-G-2. Colorado: Counties Lacking Facilities Required by Law for Therapeutic Abortion Or Where Few Abortions Were Performed in 1970 ..... B-29

Table II-H. New Mexico: Summary of Data on Implementation of Therapeutic Abortion Act, 1970 .... B-30

Figure II-H-1. New Mexico: Access to Therapeutic Abortion By County—Therapeutic Abortion Ratios, 1970 ..... B-31

PAGE

Figure II-H-2. New Mexico: Counties Lacking Facilities Required by Law for Therapeutic Abortion Or Where Few Abortions Were Performed in 1970 B-32

Table II-I. Oregon: Summary of Data on Implementation of Therapeutic Abortion Act, 1969-1970 ..... B-33

Figure II-I-1. Oregon: Access to Therapeutic Abortion By County—Therapeutic Abortion Ratios, 1969-1970 ..... B-34

Figure II-I-2. Oregon: Counties Lacking Facilities Required by Law for Therapeutic Abortion Or Where Few Abortions Were Performed in 1970 .... B-35

Table II-J. California: Summary of Data on Implementation of Therapeutic Abortion Act, 1970 ..... B-36

Figure II-J-1. California: Access to Therapeutic Abortion By County—Therapeutic Abortion Ratios, 1970 ..... B-37

Figure II-J-2. California: Counties Lacking Facilities Required by Law for Therapeutic Abortion Or Where Few Abortions Were Performed in 1970 .... B-38

III.

Detailed Data on Distribution of Therapeutic Abortion By County and Medical Facility in States With A.L.I.-Model Penal Code-Type Statutes

Table III-A. Georgia: Distribution of Therapeutic Abortion—By County, 1968-1970 ..... B-39

Table III-B. South Carolina: Therapeutic Abortion Distribution—By County and Medical Facility, 1970 ..... B-47

PAGE

Table III-C. North Carolina: Therapeutic Abortion Distribution—By County and Medical Facility, 1967-1970 ..... B-52

Table III-D. Virginia: Therapeutic Abortion Distribution—By County, 1970 ..... B-63

Table III-E. Maryland: Therapeutic Abortion Distribution—By County and Medical Facility, 1969-1970 ..... B-68

Table III-F. Delaware: Therapeutic Abortion Distribution—By County and Medical Facility, 1970 .... B-71

Table III-G. Colorado: Therapeutic Abortion Distribution—By County and Medical Facility, 1967-1970 ..... B-72

Table III-H. New Mexico: Therapeutic Abortion Distribution—By County and Medical Facility, 1970 ..... B-78

Table III-I. Oregon: Therapeutic Abortion Distribution—By County, 1969-1970 ..... B-82

Table III-J. California: Therapeutic Abortion Distribution—By County, 1970 ..... B-84

EXPLANATORY NOTES

SECTION I. This Section contains information in summary form on therapeutic abortion in the United States. In particular, it focuses on the implementation in ten states of the therapeutic abortion provisions of the American Law Institute's Model Penal Code as enacted in varying forms. Little data could be obtained from the two other states, Arkansas and Kansas, which have adopted this type of statute.

SECTION II. This Section consists of state summaries in table and map form on trends in therapeutic abortion in the ten A.L.I. states for which data was available. The data in Table II is presented in a manner that draws distinctions between metropolitan and non-metropolitan areas. This format, it was thought, most clearly demarcates the trends in the implementation of the therapeutic abortion statutes.

A "metropolitan county" as it is used herein is one which is located within Standard Metropolitan Statistical Area (SMSA) as calculated in Bureau of the Census, 1960 Census of the Population, Vol. 1, Ch. A.

SECTION III. The final Section consists of tables presenting the actual distribution of therapeutic abortions by county and hospital of occurence for the A.L.I. states. The data is by county only for Georgia, Virginia, Oregon and California where a hospital by hospital breakdown was not available.

1. "TA Ratio" is the therapeutic abortion ratio, the number of therapeutic abortions per 1000 live births. It is the standard measure of abortion frequency. *E.g.*, the ratio of 15 therapeutic abortions to 50 live births is 300.

2. Statistics on therapeutic abortion, including frequencies, places of occurrence, and indications, were obtained from the appropriate state agencies, *infra*. The source for the numbers of births for each year was *Guide Issue*- Journal of the American Hospital Association (August, 1968, 1969, 1970). Because the 1971 issue, which contains the 1970 births, was not available when the tables were being prepared, the 1970 issue was used for the 1969 and 1970 statistics.

State sources for therapeutic abortion data:
Georgia: Department of Public Health (unpublished material).
South Carolina: State Board of Health (personal communication from Dr. J.E. Padgett, Jr., Chief, Bureau of Maternal and Child Care). (Time period for therapeutic abortion is February, 1970 to May, 1971; births have been adjusted accordingly).
North Carolina: State Office of Vital Statistics (unpublished material, January 28, 1971). (Represents 75% of all therapeutic abortions performed in North Carolina to that date. J. May, *Therapeutic Abortion Experience in North Carolina under the Liberalized 1967 Law*, N.C. Med. J. 186, 194 (May, 1971)).
Virginia: Bureau of Maternal Health, Department of Health (unpublished material). (Time period for therapeutic abortion is July to December, 1970; the number of therapeutic abortions was adjusted accordingly).
Maryland: Maternity and Family Planning Section, Department of Health (unpublished material). (Therapeutic abortion data is for fiscal years).
Delaware: Division of Physical Health, Department of Health and Social Services, Report of Abortions, 1970.
Colorado: Statistics Section, Department of Health, Summary Statistics Therapeutic Abortions, March 4, 1971.
New Mexico: Data gathered by Professor Robert Munsick for Conference on Abortion, Sterilization, and Population, (University of New Mexico, February, 1971). (Time period for therapeutic abortion is five, six or seven months period, depending upon the hospital; the number of therapeutic abortions was adjusted accordingly).
Oregon: State Board of Health, Therapeutic Abortions Occurring in Oregon Hospitals, 1969; and 1970, February 26, 1970; and February 25, 1971.
California: Department of Public Health and personal communication from Mrs. T. Hunt.

3. "Out-of-State Abortions" are those performed outside of the woman's state of residence. The "% of Residents' Abortions Received Out-of-State" was calculated from data in C. Tyler, J. Bourne, S. Conger, and J. Kahn, Reporting and Surveillance of Legal Abortions in the United States, 1970 (Center for Disease Control, HEW) (June 3, 1971) Figure 2.

The "Number of Residents Received Abortions in New York City, July, 1970 - March, 1971" is based on statistics issued by the Health Services Administration, The City of New York, June 29, 1971.

4. "Counties Lacking Facilities Required by Law for Therapeutic Abortion" are those counties which lack the medical facilities

specified by the particular state statute for the legal performance of therapeutic abortion.

All twelve A.L.I. Model Penal Code-type states require that abortions be performed in state licensed hospitals. The sources for state licensed hospitals was obtained from the state when possible.

Georgia: Licensure Service, Department of Public Health, Licensed Hospitals in Georgia, April 1, 1971.
Virginia: Bureau of Medical and Nursing Facilities Services, State Department of Health, Virginia Hospitals, January, 1971.
New Mexico: Health Facilities Services Division, Health and Social Services Department, Hospital Facilities in New Mexico, March, 1970.
California: Bureau of Health Facilities Licensing Certification, State Department of Public Health, Hospitals, Homes, and Related Health Facilities, March 31, 1970.
Otherwise, the *Guide Issue*'s "general" hospital classification was used.

Of all twelve states, all but South Carolina, North Carolina, New Mexico and Oregon require that the procedure occur in an accredited hospital as well. Of these eight states, the group which accredits the hospital must be the Joint Commission on Accreditation of Hospitals, except in Delaware, where accreditation must be "by a nationally recognized hospital accrediting authority". The source of accreditation of hospitals was the *Guide Issue*, (1970).

5. The source for "Unmet Family Planning Needs by County" ("Per cent Medically Indigent Women Without Family Planning Program" and "Illegitimate Births per 1000 Live Births") is Family Planning Program, Office of Economic Opportunity, Need for Subsidized Family Planning Services: United States, Each State and County, 1968. "Medically indigent women" as defined by this source are those women of child bearing age who are unable to afford private medical care. The county-by-county statistics from this source are based on the county of residence of the woman. The therapeutic abortion data used herein (See note 2) are based on the county of occurence of abortions and births. This difference accounts for the apparent inconsistencies in Table III (such as illegitimate birth rates for counties in which no births took place).

6. The figures in Tables II-A to II-J have been percentagized vertically; that is, under the appropriate column, "Metropolitan County" or "Non-Metropolitan County." *E.g.*, if a state consisted of ten counties (5 metropolitan and 5 non-metropolitan) of which only one metropolitan county had no therapeutic abortions in 1970, the percentage listed in the "Metropolitan County" column for "No.

T.A.'s in 1970" would be 20%, meaning that one county of the five metropolitan counties fit this category. However, the two key rows "Number of Metrop. and Non-Metrop. Counties" and "Number of Licensed General Hospitals" have been percentagized horizontally.

7. The abbreviation "NA" in Table III indicates that a hospital is not accredited by the Joint Commission on Hospital Accreditation. All other listed hospitals, in the states which require accreditation, are accredited.

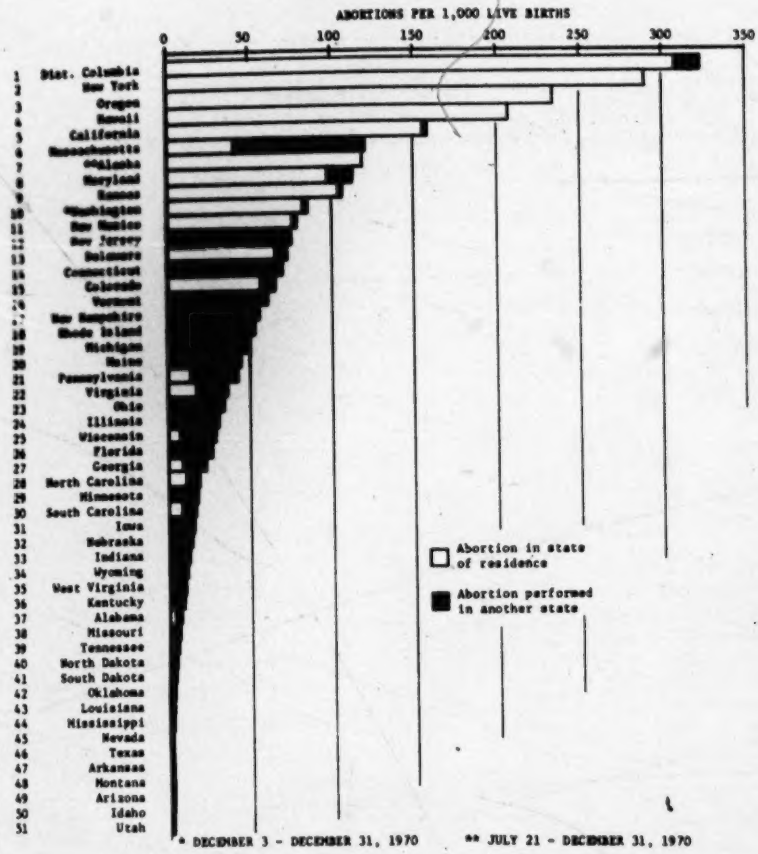
I.

Summary of Statutes and Statistical Data on Therapeutic Abortion in States With A.L.I. Model Penal Code-Type Statutes.

	"Life"		PENALTY	OTHER SIGNIFICANT PROVISIONS
ance of Fair st	x**		1 to 5 yrs.; 1 to 10 yrs. where beyond 26 weeks	
.. Co A (1), t S	x	ie (b) 5.	1 to 10 yrs.	
SO.. Co or S 16-87 1	x			
RO N tion of Ae life - said (a L N	x		1 to 10 yrs. fined at discretion of the court	
VId Va l or 6 1 1	x	ed vit	1 to 10 yrs.	Husband must consent to abortion if it is being performed because of fetal defect.
MAtion Anir the Are 10	x		not more than $5,000, or 3 years, or both	

**"x"
a th

FIGURE I-2. RATIOS OF REPORTED LEGAL ABORTIONS TO LIVE BIRTHS BY STATE OF RESIDENCE, JULY-DECEMBER, 1970



From: Tyler et al., Reporting and Surveillance of Legal Abortions in the United States (Center for Disease Control, HEW) (June 3, 1971).

TABLE I-3,

INDICATIONS FOR WHICH THERAPEUTIC ABORTIONS WERE PERFORMED IN STATES WITH A.L.I. MODEL PENAL CODE-TYPE STATUTES

STATE Time period	Indications						
	% Mental Health	% Physical Health	% Fetal Defects	% Rape or Incest	% Other	% Socio-economic Hardship	% Contra-ception Fail
GEORGIA							
1968	41%	22%	33%	4%	-	-	-
1969	61	14	17	5	2	-	1
1970	72	10	5	2	1	9	1
1971 (1st qtr.)	43	14	1	2	1	34	6
S. CAROLINA							
1970 Feb/June	78.6	14.3	6.4	0.7	0		
N. CAROLINA							
1967	46	36	14	4	0		
1968	47	37	14	3	0		
1969	69	21	7	3	2		
1970	88	10	1	1	0		
VIRGINIA							
1970 July/Jan	87	4	1	0+	8		
1971 Jan/May	94	3	1	1	2		
MARYLAND							
1969 (FY)	91.6	5.7	1.8	0.7	0.2		
1970 (FY)	97	2	1	0+	0+		
DELAWARE							
1969 June/Dec	94.4 [not differentiated]		5.6	0	0		
1970	98		1	0+	0+		
COLORADO							
1968	57	14	-	12	17		
1969	73	14	-	8	4		
1970	89	7	-	3	1		
OREGON							
1969	79	4	[combined: 1]		15		
1970	93	5	1	1	0+		
CALIFORNIA							
1969	94	2	-	4	-		
1970	98	1	-	1	-		

*Following the decision in *Doe v. Bolton* striking down portions of the Georgia statute, the categories of indications were expanded by the Georgia Department of Public Health in their reports.

II.

Summary of Steps By States on Implementation of A.L.I. Model Penal Code-Type Therapeutic Abortion Statutes.

TABLE II-A.

GEORGIA: SUMMARY OF DATA ON IMPLEMENTATION OF THERAPEUTIC ABORTION ACT, 1968-1970

	STATE TOTALS	METROPOLITAN[6] COUNTIES	NON-METROPOLITAN[6] COUNTIES
# of T.A.'s	939	863	76
# of Births	236,065	133,959	102,106
T.A. Ratio	4.0	7.6	0.7
Distribution of T.A.'s in State	-	92%	8%
Distribution of Births in State	-	57%	43%
# [and %] of Metrop. and Non-Metrop. Counties	159	13(8%)	146(92%)
# [and %] of Counties with No T.A.'s in 1970	129(81%)	4(31%)	125(86%)
# [and %] of Counties With 10 or Fewer T.A.'s in 1970	153(96%)	7(54%)	146(100%)
# [and %] of Counties Lacking Facilities Required by Law for T.A.'s	103(65%)	5(38%)	98(67%)
# of Licensed General Hospitals	150	29(19%)	121(81%)
# [and %] of Non-Accredited (JCAH) Hospitals	79 (53%)	8(28%)	71(59%)

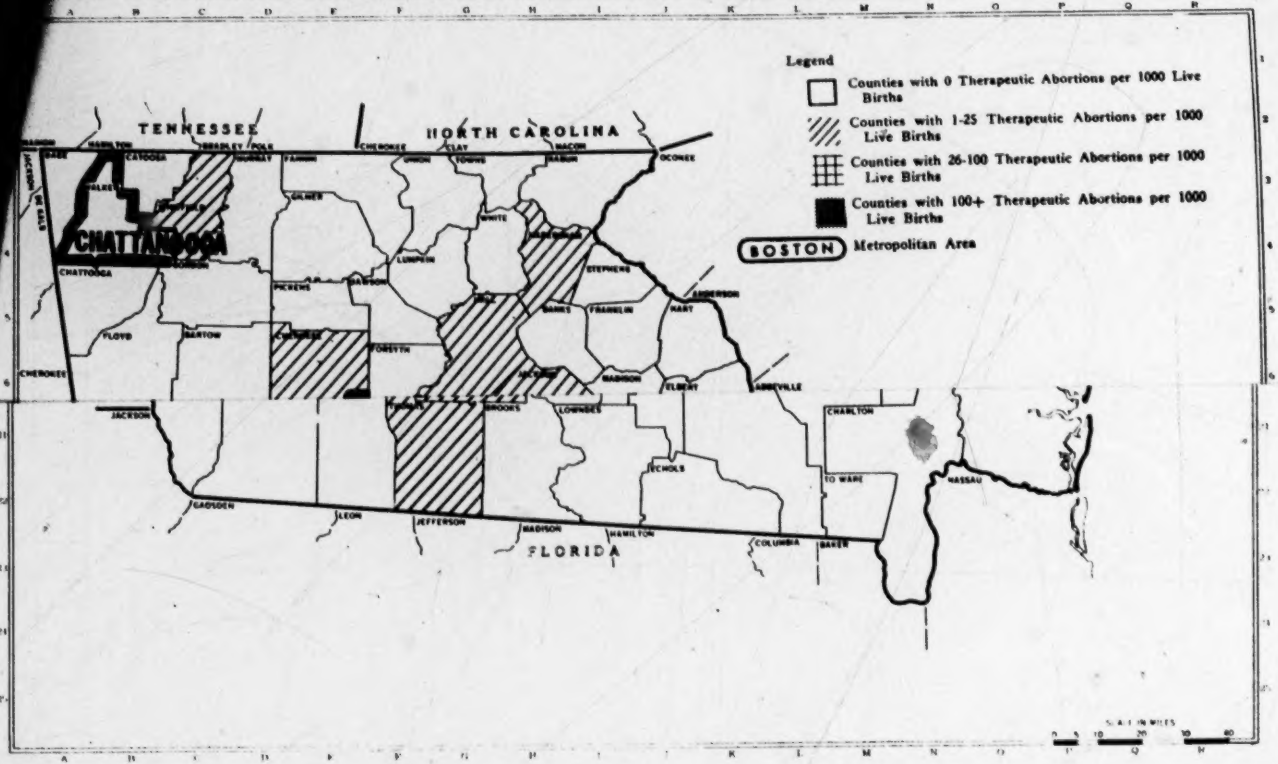

Legend
Counties with 0 Therapeutic Abortions per 1000 Live Births
Counties with 1-25 Therapeutic Abortions per 1000 Live Births
Counties with 26-100 Therapeutic Abortions per 1000 Live Births
Counties with 100+ Therapeutic Abortions per 1000 Live Births
BOSTON Metropolitan Area
TENNESSEE
NORTH CAROLINA
CHATTANOOGA
FLORIDA

TABLE II-B.

SOUTH CAROLINA: SUMMARY OF DATA ON IMPLEMENTATION OF THERAPEUTIC ABORTION ACT, 1970

	STATE TOTALS	METROPOLITAN COUNTIES	NON-METROPOLITAN COUNTIES
# of T.A.'s	684	538	146
# of Births	44,648	17,138	27,510
T.A. Ratio	15.3	31.4	5.3
Distribution of T.A.'s in State	-	79%	21%
Distribution of Births in State	-	38%	62%
# [and %] of Metrop. and Non-Metrop. Counties	46	5(11%)	41(89%)
# [and %] of Counties with No T.A.'s in 1970	24(52%)	1(20%)	23(56%)
# [and %] of Counties With 10 or Fewer T.A.'s in 1970	39(85%)	2(40%)	37(90%)
# [and %] of Counties Lacking Facilities Required by Law for T.A.'s	6(13%)	1(20%)	5(12%)
# of Licensed General Hospitals	69	16 (23%)	53 (77%)
# [and %] of Hospitals With No T.A.'s in 1970	32(46%)	6(38%)	26(49%)
# [and % of State Total] of T.A.'s Performed by 3 Hospitals with Greatest Number of T.A.'s in 1970	487(71%)	-	-

Legend

- Counties with 0 Therapeutic Births
- Counties with 1-25 Therapeu Live Births
- Counties with 26-100 Therape Live Births
- Counties with 100+ Therapeu Live Births
- BOSTON Metropolitan Area

SCALE IN MILES

TABLE II-C

NORTH CAROLINA: SUMMARY OF DATA ON IMPLEMENTATION OF THERAPEUTIC ABORTION ACT, 1967-1970

	STATE TOTALS	METROPOLITAN COUNTIES	NON-METROPOLITAN COUNTIES
# of T.A.'s	1687	743	944
# of Births	354,987	108,542	246,445
T.A. Ratio	4.8	6.8	3.8
Distribution of T.A.'s in State	-	44%	56%
Distribution of Births in State	-	31%	69%
# [and %] of Metrop. and Non-Metrop. Counties	100	6(6%)	94(94%)
# [and %] of Counties with No T.A.'s in 1970	47(47%)	0(0%)	47(50%)
# [and %] of Counties With 10 or Fewer T.A.'s in 1970	79(79%)	0(0%)	79(84%)
# [and %] of Counties Lacking Facilities Required by Law for T.A.'s	15(15%)	0(0%)	15(16%)
# of Licensed General Hospitals	141	22(16%)	119(84%)
# [and %] of Hospitals With No T.A.'s in 1970	72(51%)	9(41%)	63(53%)
# [and % of State Total] of T.A.'s Performed by 5 Hospitals with Greatest Number of T.A.'s in 1970	1184(70%)		

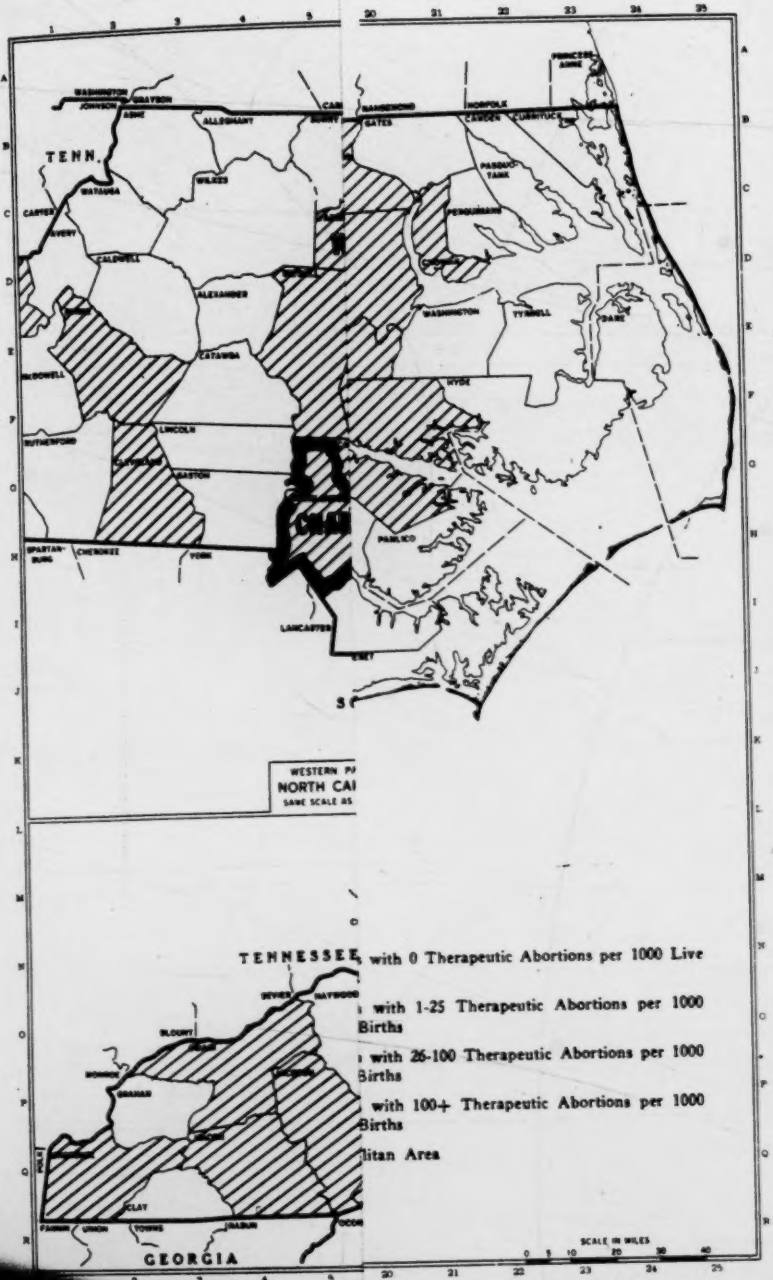
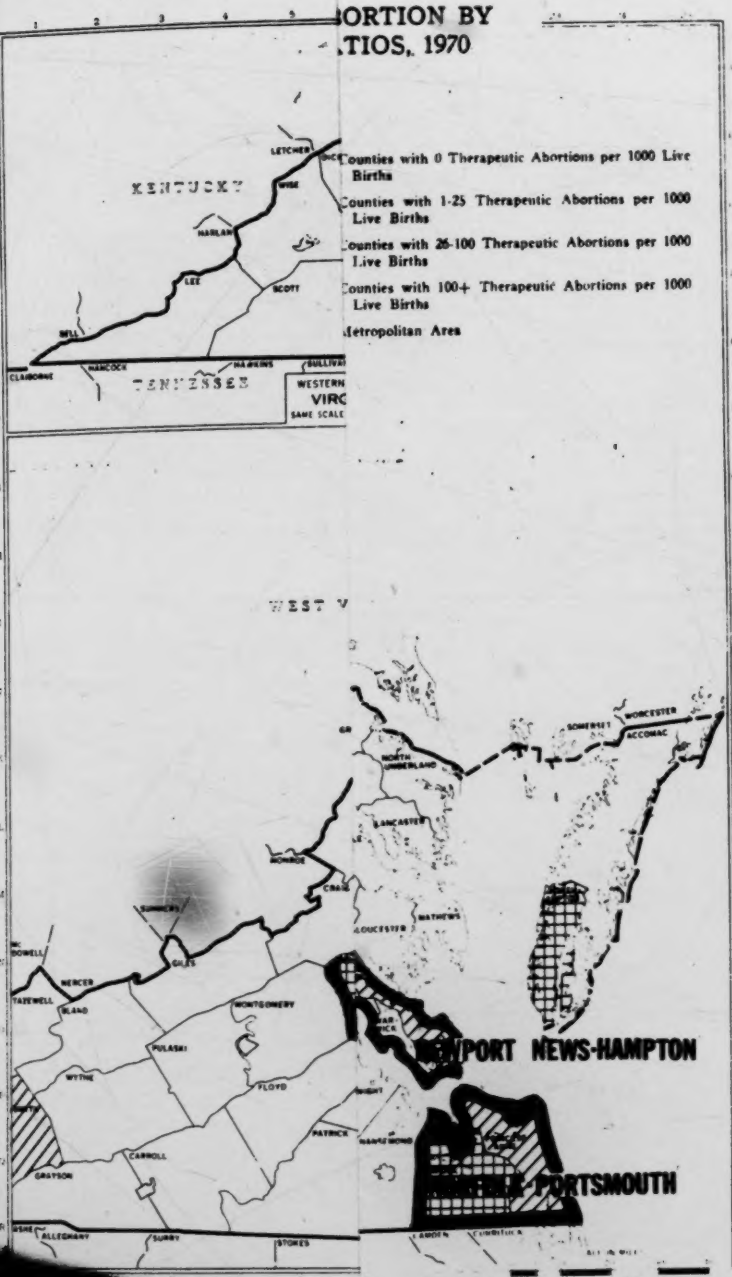

TENN.
WESTERN PI
NORTH CAI
SAME SCALE AS
TENNESSEE
GEORGIA
with 0 Therapeutic Abortions per 1000 Live
with 1-25 Therapeutic Abortions per 1000
Births
with 26-100 Therapeutic Abortions per 1000
Births
with 100+ Therapeutic Abortions per 1000
Births
litan Area
SCALE IN MILES

TABLE II-D

VIRGINIA: SUMMARY OF DATA ON IMPLEMENTATION OF THERAPEUTIC ABORTION ACT, 1970

	STATE TOTALS	METROPOLITAN COUNTIES	NON-METROPOLITAN COUNTIES
# of T.A.'s	2,214	1,924	290
# of Births	64,787	37,478	27,309
T.A. Ratio	34.2	51.3	10.6
Distribution of T.A.'s in State	-	87%	13%
Distribution of Births in State	-	58%	42%
# [and %] of Metrop. and Non-Metrop. Counties	99	10(10%)	89(90%)
# [and %] of Counties with No T.A.'s in 1970	79(80%)	3(30%)	76(85%)
# [and %] of Counties With 10 or Fewer T.A.'s in 1970	90(91%)	4(40%)	86(97%)
# [and %] of Counties Lacking Facilities Required by Law for T.A.'s	54(55%)	2(20%)	52(58%)
# of Licensed General Hospitals	110	44(40%)	66(60%)
# [and %] of Non-Accredited (JCAH) Hospitals	43(39%)	5(11%)	38(58%)

ORTION BY
TIOS, 1970



Counties with 0 Therapeutic Abortions per 1000 Live Births

Counties with 1-25 Therapeutic Abortions per 1000 Live Births

Counties with 26-100 Therapeutic Abortions per 1000 Live Births

Counties with 100+ Therapeutic Abortions per 1000 Live Births

Metropolitan Area

TABLE II-E

MARYLAND: SUMMARY OF DATA ON IMPLEMENTATION OF THERAPEUTIC ABORTION ACT, 1969-1970

	STATE TOTALS	METROPOLITAN COUNTIES	NON-METROPOLITAN COUNTIES
# of T.A.'s	7,667	7,442	225
# of Births	111,290	89,582	21,708
T.A. Ratio	68.9	83.1	10.4
Distribution of T.A.'s in State	-	97%	3%
Distribution of Births in State	-	80%	20%
# [and %] of Metrop. and Non-Metrop. Counties	24	7(29%)	17(71%)
# [and %] of Counties with No T.A.'s in 1970	8(33%)	1(14%)	7(41%)
# [and %] of Counties With 10 or fewer T.A.'s in 1970	15(68%)	3(43%)	12(71%)
# [and %] of Counties Lacking Facilities Required by Law for T.A.'s	6(25%)	1(14%)	5(29%)
# of Licensed General Hospitals	42	26(62%)	16(38%)
# [and %] of Non-Accredited (JCAH) Hospitals	3(7%)	1(4%)	2(12%)
# [and %] of Hospitals With No T.A.'s in 1970	15(36%)	8(31%)	7(44%)
# [and % of State Total] of T.A.'s Performed by 5 Hospitals with Greatest Number of T.A.'s in 1970	5,536(72%)		

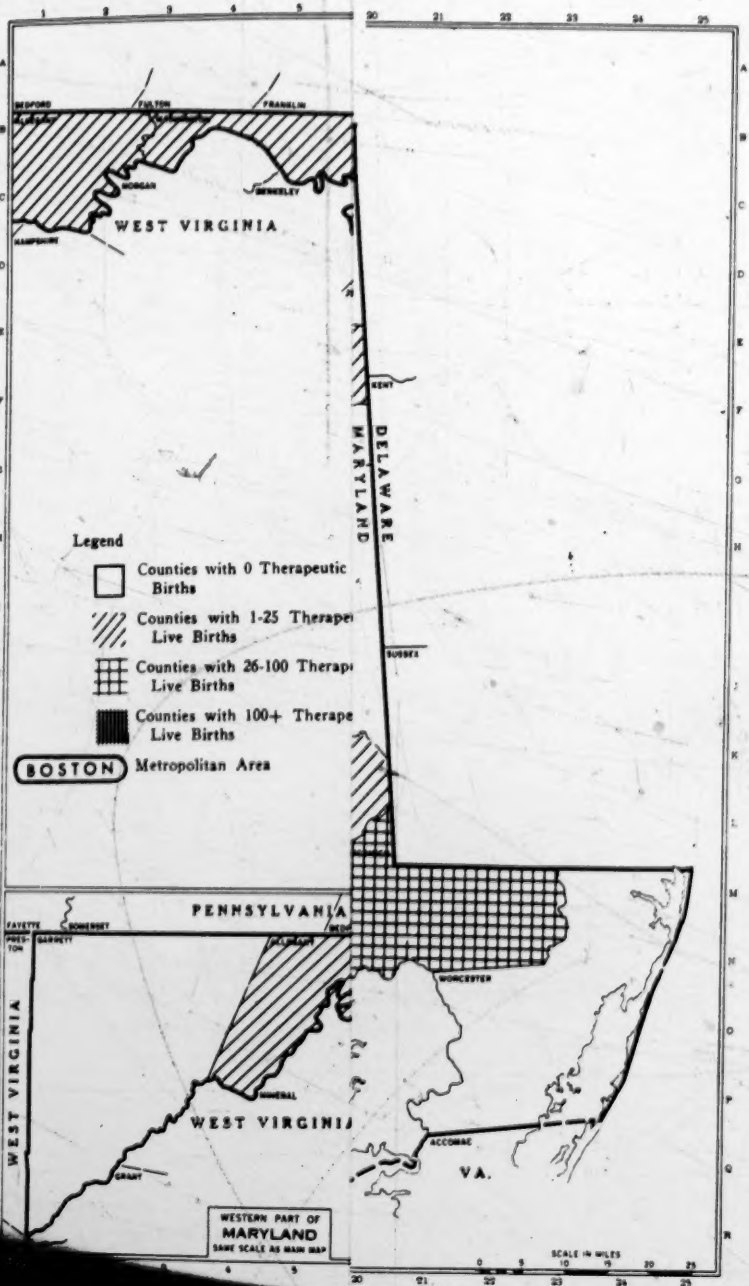

WEST VIRGINIA
MARYLAND
DELAWARE
PENNSYLVANIA
WEST VIRGINIA
WEST VIRGINIA
VA.
Legend
Counties with 0 Therapeutic Births
Counties with 1-25 Therapeutic Live Births
Counties with 26-100 Therapeutic Live Births
Counties with 100+ Therapeutic Live Births
BOSTON
Metropolitan Area
WESTERN PART OF MARYLAND
SAME SCALE AS MAIN MAP
SCALE IN MILES

TABLE II-P.

DELAWARE: SUMMARY OF DATA ON IMPLEMENTATION OF THERAPEUTIC ABORTION ACT, 1970

	STATE TOTALS	METROPOLITAN COUNTIES	NON-METROPOLITAN COUNTIES
# of T.A.'s	558	525	33
# of Births	9,287	6,878	2,409
T.A. Ratio	60.1	76.3	13.7
Distribution of T.A.'s in State	-	94%	6%
Distribution of Births in State	-	74%	26%
# [and %] of Metrop. and Non-Metrop. Counties	3	1(33%)	2(67%)
# [and %] of Counties with No T.A.'s in 1970	0(0%)	0(0%)	0(0%)
# [and %] of Counties With 10 or Fewer T.A.'s in 1970	0(0%)	0(0%)	0(0%)
# [and %] of Counties Lacking Facilities Required by Law for T.A.'s	0(0%)	0(0%)	0(0%)
# of Licensed General Hospitals	7	3(43%)	4(44%)
# [and %] of Non-Accredited (JCAH) Hospitals	0(0%)	0(0%)	0(0%)
# [and %] of Hospitals With No T.A.'s in 1970	1(14%)	1(33%)	0(0%)
# [and % of State Total] of T.A.'s Performed by Hospital with Greatest Number of T.A.'s in 1970	522(94%)	-	-

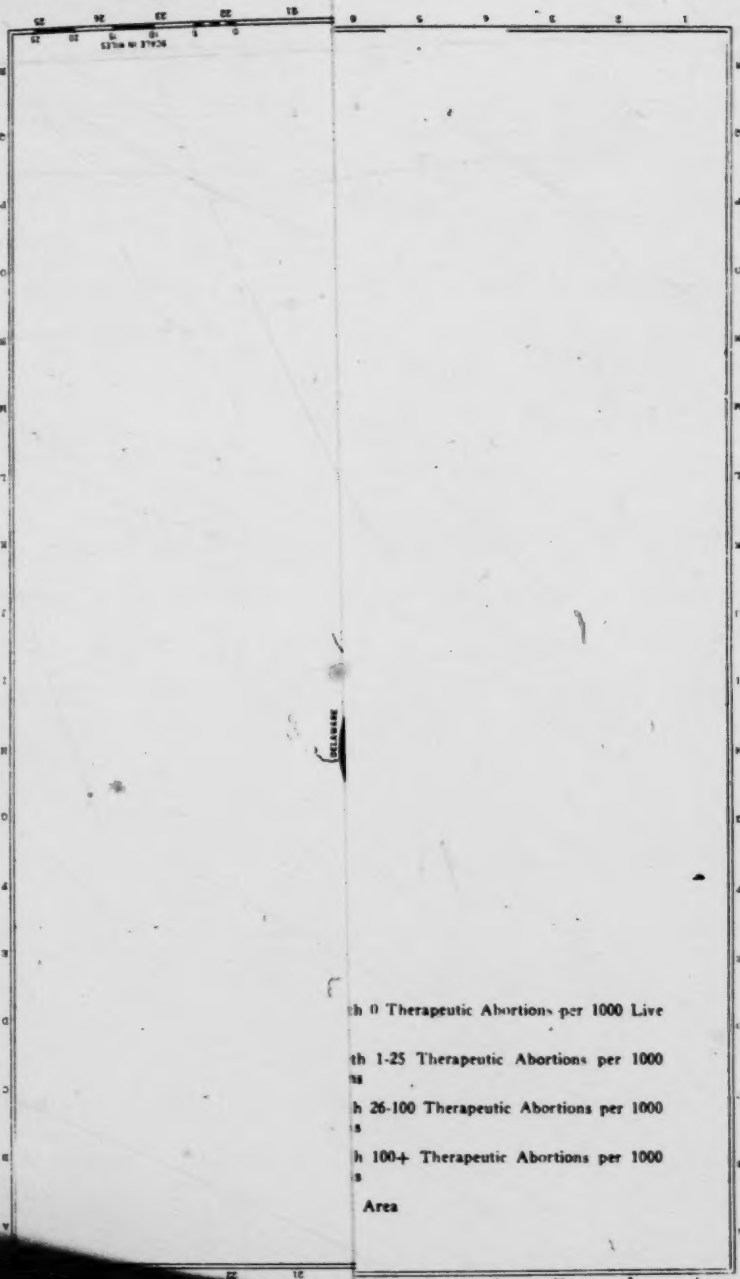

th 0 Therapeutic Abortions per 1000 Live
th 1-25 Therapeutic Abortions per 1000
h 26-100 Therapeutic Abortions per 1000
h 100+ Therapeutic Abortions per 1000
Area

TABLE II-G.

COLORADO: SUMMARY OF DATA ON IMPLEMENTATION OF THERAPEUTIC ABORTION ACT, 1967-1970

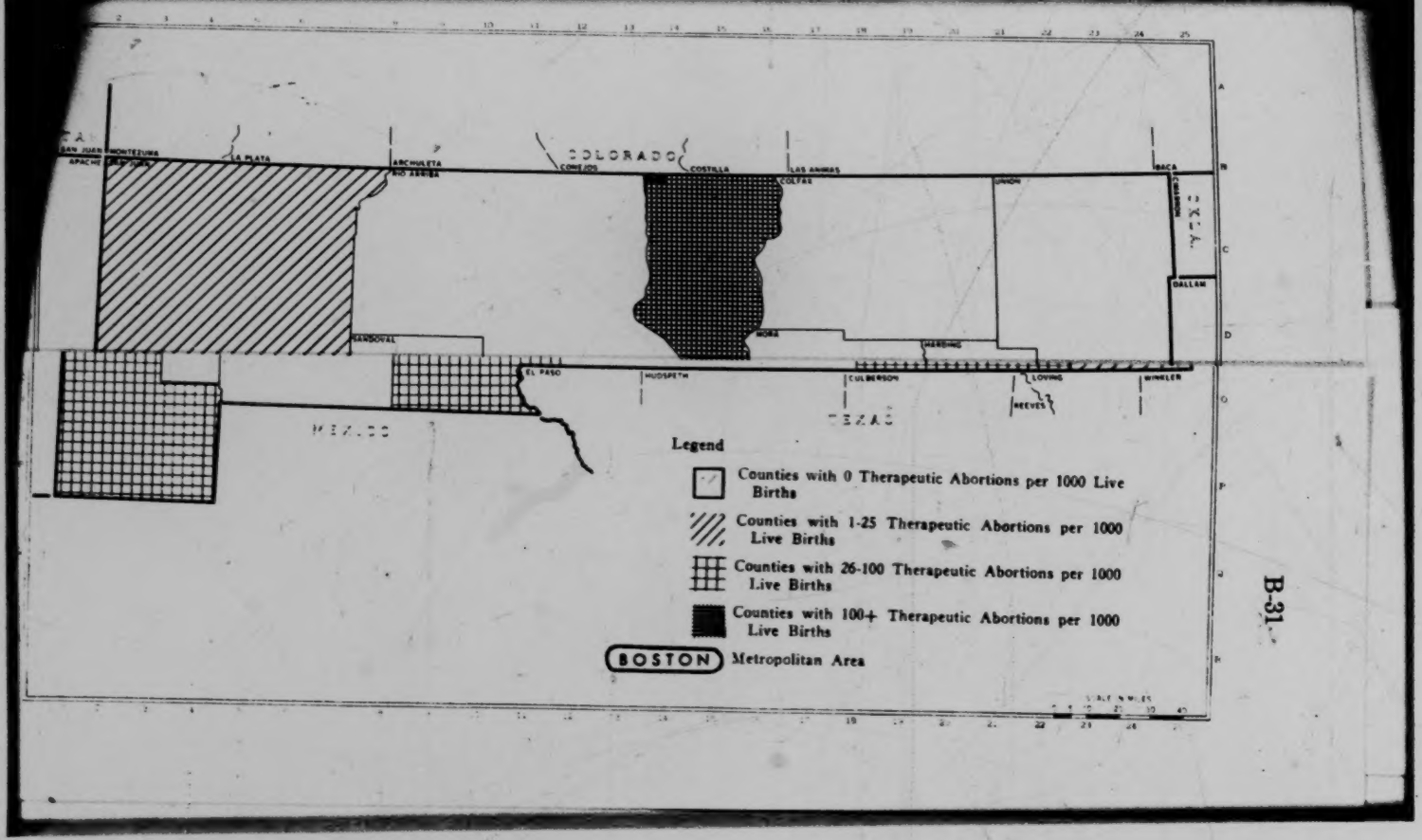
	STATE TOTALS	METROPOLITAN COUNTIES	NON-METROPOLITAN COUNTIES
# of T.A.'s	3,900	3,819	81
# of Births	140,664	107,034	33,630
T.A. Ratio	27.7	35.7	2.4
Distribution of T.A.'s in State	-	98%	2%
Distribution of Births in State	-	76%	24%
# [and %] of Metrop. and Non-Metrop. Counties	63	7(11%)	56(89%)
# [and %] of Counties with No T.A.'s in 1970	48(76%)	0(0%)	48(86%)
# [and %] of Counties With 10 or Fewer T.A.'s in 1970	54(86%)	1(14%)	53(95%)
# [and %] of Counties Lacking Facilities Required by Law for T.A.'s	39(62%)	0(0%)	39(70%)
# of Licensed General Hospitals	72	25(35%)	47(65%)
# [and %] of Non-Accredited (JCAH) Hospitals	30(42%)	4(16%)	26(55%)
# [and %] of Hospitals With No T.A.'s in 1970	50(69%)	10(40%)	40(85%)
# [and % of State Total] of T.A.'s Performed by 6 Hospitals with Greatest Number of T.A.'s in 1970	1913(78%)	-	-

Counties with 0 Therapeutic Abortions per 1000 Live Births
Counties with 1-25 Therapeutic Abortions per 1000 Live Births
Counties with 26-100 Therapeutic Abortions per 1000 Live Births
Counties with 100+ Therapeutic Abortions per 1000 Live Births
BOSTON Metropolitan Area
MONTEZUMA
DOLORES
SAN MIGUEL
MESA
MONTROSE
OURAY
SAN JUAN
HINSDALE
DELTA
GUNNISON
SAGUACHE
CHAFFEE
FREMONT
PARK
TELLER
EL PASO
CUSTER
HUERFANO
LAS ANIMAS
BENT
PROWERS
KIT CARSON
CROWLEY
OTERO
KIOWA
BACA
PUEBLO
SCALE IN MILES
0 5 10 20 30 40
B-28

TABLE II-H

NEW MEXICO: SUMMARY OF DATA ON IMPLEMENTATION OF THERAPEUTIC ABORTION ACT, 1970

	STATE TOTALS	METROPOLITAN COUNTIES	NON-METROPOLITAN COUNTIES
# of T.A.'s	1,300	1,040	259
# of Births	17,264	5,942	11,322
T.A. Ratio	75.3	175.2	22.9
Distribution of T.A.'s in State	-	80%	20%
Distribution of Births in State	-	34%	66%
# [and %] of Metrop. and Non-Metrop. Counties	32	1(3%)	31(97%)
# [and %] of Counties with No T.A.'s in 1970	22(69%)	0(0%)	22(71%)
# [and %] of Counties With 10 or Fewer T.A.'s in 1970	25(78%)	0(0%)	25(81%)
# [and %] of Counties Lacking Facilities Required by Law for T.A.'s	13(41%)	0(0%)	13(42%)
# of Licensed General Hospitals	43	7(16%)	36(84%)
# [and %] of Hospitals With No T.A.'s in 1970	28(65%)	3(43%)	25(69%)
# [and % of State Total] of T.A.'s Performed by the Hospitals with Greatest Number of T.A.'s in 1970	3 1,058(81%)		

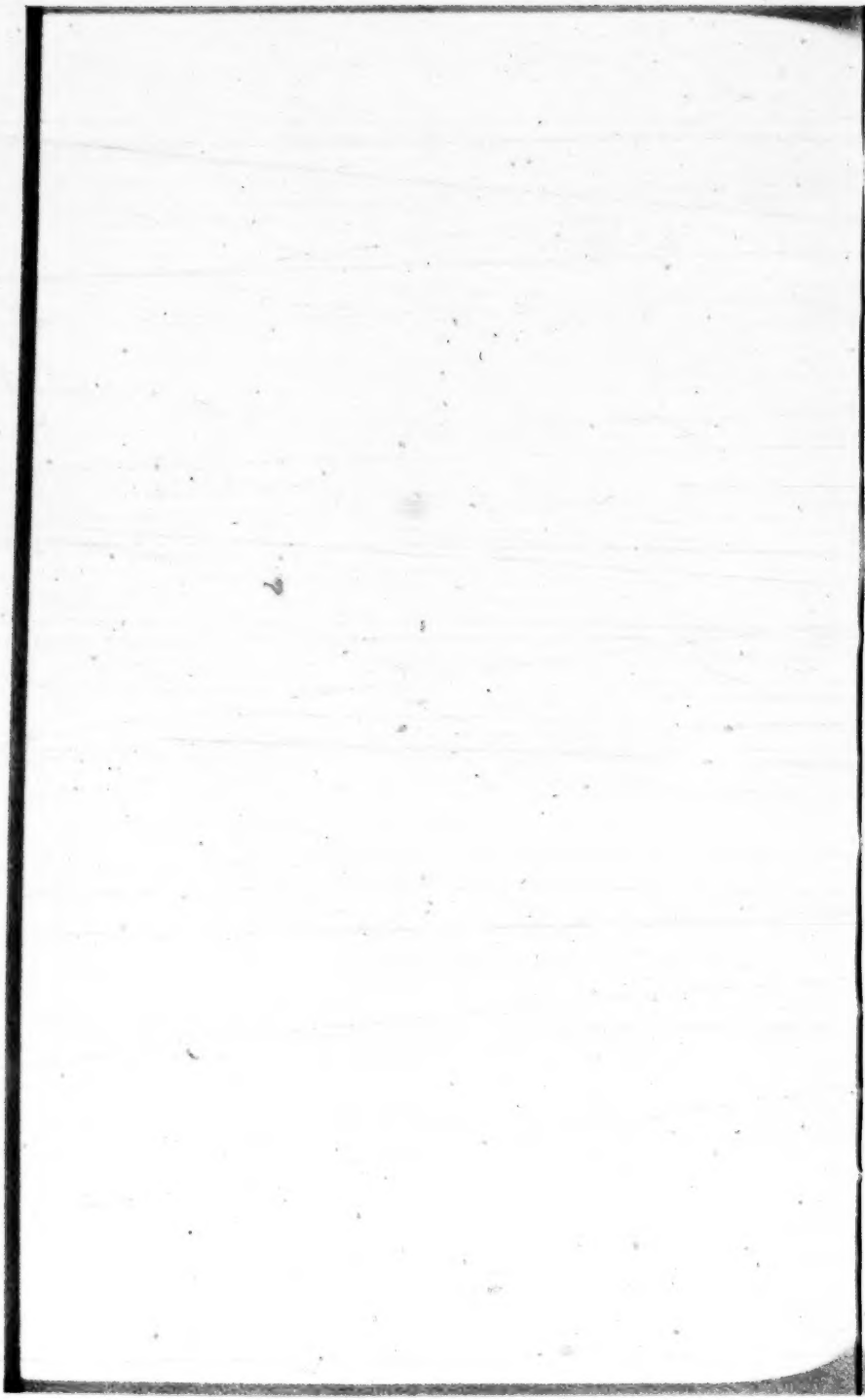

COLORADO
TEXAS
NEW MEXICO
SAN JUAN
MONTEZUMA
APACHE
LA PLATA
ARCHULETA
RIO ARRIBA
CONEJOS
COSTILLA
LAS ANIMAS
BACA
PROWERS
BENT
OTERO
KIOWA
CROWLEY
LINCOLN
EL PASO
HUDSPETH
CULBERSON
LOVING
WINKLER
REEVES
Legend
Counties with 0 Therapeutic Abortions per 1000 Live Births
Counties with 1-25 Therapeutic Abortions per 1000 Live Births
Counties with 26-100 Therapeutic Abortions per 1000 Live Births
Counties with 100+ Therapeutic Abortions per 1000 Live Births
BOSTON Metropolitan Area

B-31

TABLE II-I

OREGON: SUMMARY OF DATA ON IMPLEMENTATION OF THERAPEUTIC ABORTION ACT, 1969-1970

	STATE TOTALS	METROPOLITAN COUNTIES	NON-METROPOLITAN COUNTIES
# of T.A.'s	8,603	7,708	895
# of Births	68,764	14,674	54,090
T.A. Ratio	125.1	525.3	16.5
Distribution of T.A.'s in State	-	90%	10%
Distribution of Births in State	-	21%	79%
# [and %] of Metrop. and Non-Metrop. Counties	36	4(11%)	32(89%)
# [and %] of Counties with No T.A.'s in 1970	8(22%)	0(0%)	8(25%)
# [and %] of Counties With 10 or Fewer T.A.'s in 1970	19(53%)	0(0%)	19(59%)
# [and %] of Counties Lacking Facilities Required by Law for T.A.'s	3(8%)	0(0%)	3(9%)
# [and % of State Total] of T.A.'s Performed by 5 Hospitals with Greatest Number of T.A.'s in 1970	6,143(71%)	-	-



BLEED THROUGH

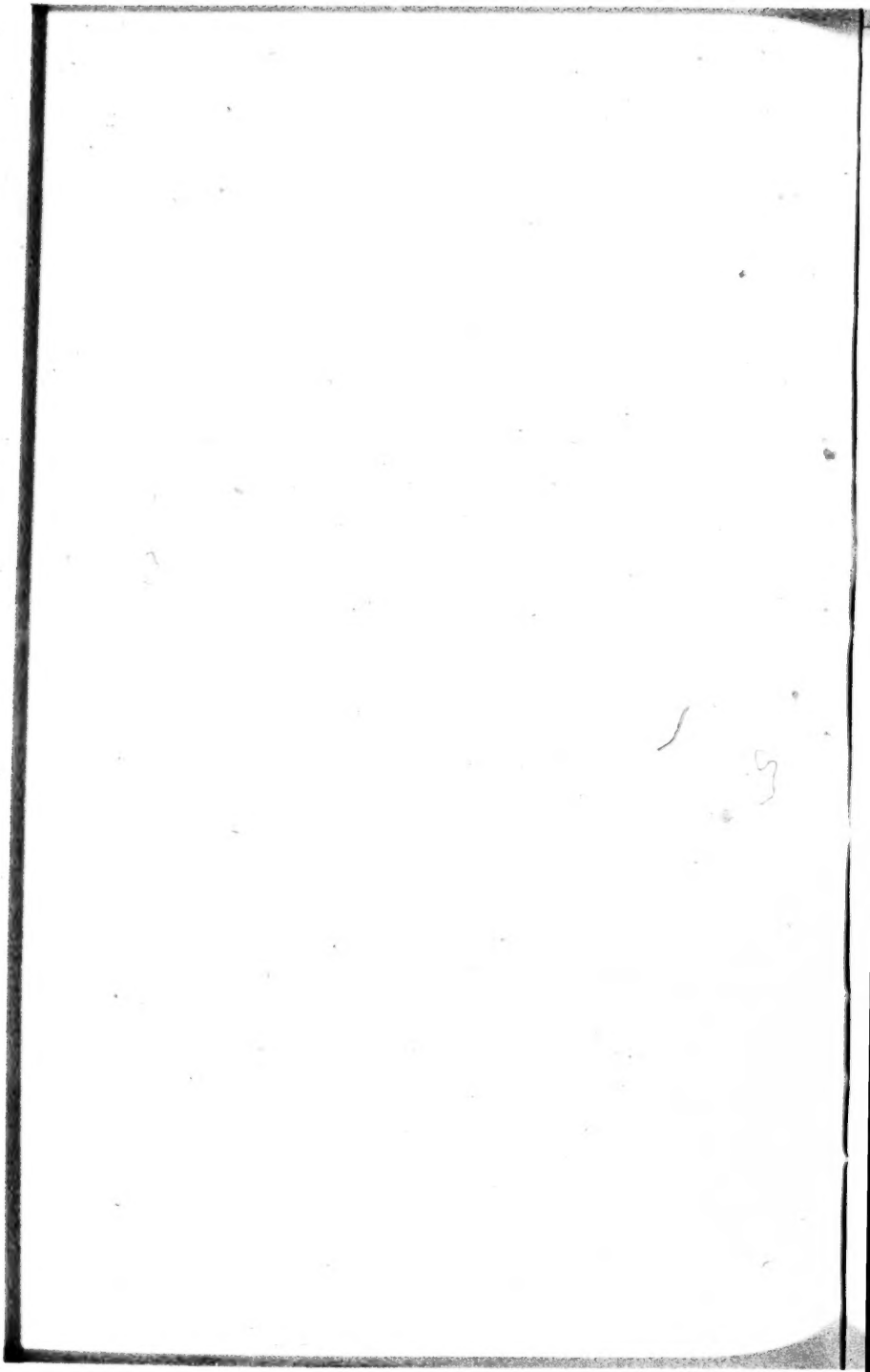
POOR COPY

PREVIOUS FOLDOUTS TOO
LARGE FOR FILMING

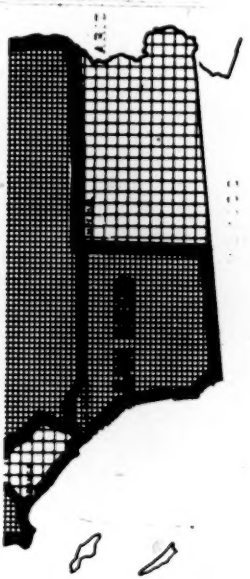
TABLE II-J

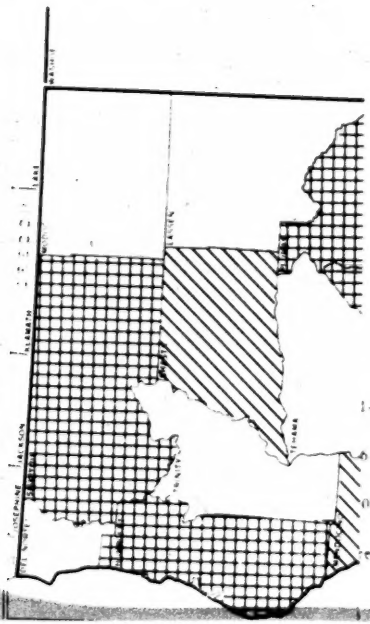
CALIFORNIA: SUMMARY OF DATA ON IMPLEMENTATION OF THERAPEUTIC ABORTION ACT, 1970

	STATE TOTALS	METROPOLITAN COUNTIES	NON-METROPOLITAN COUNTIES
# of T.A.'s	62,672	59,842	2,830
# of Births	322,464	286,098	36,366
T.A. Ratio	194.2	209.2	77.8
Distribution of T.A.'s in State	-	95%	5%
Distribution of Births in State	-	89%	11%
# [and %] of Metrop. and Non-Metrop. Counties	58	17(29%)	41(71%)
# [and %] of Counties with No T.A.'s in 1970	14(24%)	0(0%)	14(34%)
# [and %] of Counties With 10 or Fewer T.A.'s in 1970	22(38%)	0(0%)	22(54%)
# [and %] of Counties Lacking Facilities Required by Law for T.A.'s	8(14%)	0(0%)	8(20%)
# of Licensed General Hospitals	518	374(72%)	144(28%)
# [and %] of Non-Accredited (JCAH) Hospitals	75(15%)	37(10%)	38(26%)



BLEED THROUGH POOR COPY





Therapeutic Abortions per 1000 Live

1-25 Therapeutic Abortions per 1000

6-100 Therapeutic Abortions per 1000

00+ Therapeutic Abortions per 1000

ea

PREVIOUS FOLDOUTS TOO
LARGE FOR FILMING

III.

Detailed Data on Distribution of Therapeutic Abortion By County and Medical Facility in States With A.L.I. Model Penal Code-Type Statutes.

TABLE III-A.

GEORGIA: DISTRIBUTION OF THERAPEUTIC ABORTION - BY COUNTY, 1968-1970

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1968-1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
STATE TOTALS	88	--	939	236,065	4.0		
APPLING	91		0	444	0	0	0.2
ATKINSON	87		0	0	0	0	0
BACON	97		0	0	0	0	0
BAKER	92		0	0	0	0	0
BALDWIN	93		0	772	0	0	0.3
BANKS	97		0	0	0	0	0
BARROW	95		0	885	0	0	0.4
BARTOW	98		0	1,347	0	0	0.6
BEN HILL	79		0	0	0	0	0
BERRIEN	94		0	95	0	0	0+
BIBB	91		37	9,033	4.1	3.9	3.8
BLECKLEY	92		0	0	0	0	0
BRANTLEY	96		0	0	0	0	0
BROOKS	91		0	0	0	0	0
BRYAN	94		0	0	0	0	0
BULLOCH	95		0	1,552	0	0	0.7
BURKE	98		0	387	0	0	0.2
BUTTS	76		0	230	0	0	0.1
CALHOUN	98		0	0	0	0	0
CAMDEN	94		0	327	0	0	0.1
CANDLER	92		0	0	0	0	0

TABLE III-A

GEORGIA: DISTRIBUTION OF THERAPEUTIC ABORTION - BY COUNTY, 1968-1970

(cont.)

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1968-1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
CARROLL	100	--	0	3,748	0	0	1.6
CATOOSA	98		0	2,826	0	0	1.9
CHARLTON	97		0	411	0	0	0.2
CHATHAM	88		76	9,059	8.4	8.0	3.8
CHATTAHOOCHEE	--		0	0	0	0	0
CHATTOOGA	97		0	468	0	0	0.2
CHEROKEE	100		2	1,038	1.9	0.2	0.5
CLARKE	90		9	5,519	1.6	0.9	2.3
CLAY	53		0	226	0	0	0.1
CLAYTON	97		0	0	0	0	0
CLINCH	89		0	801	0	0	0.4
COBB	97		12	8,525	1.4	1.2	3.6
COFFEE	92		0	1,387	0	0	0.6
COLQUITT	93		3	1,197	2.5	0.3	0.5
COLUMBIA	100		0	0	0	0	0
COOK	91		0	566	0	0	0.2
COWETA	90		5	2,391	2.1	0.5	1.0
CRAWFORD	76		0	0	0	0	0
CRISP	92		0	835	0	0	0.4
DADE	95		0	0	0	0	0
DAWSON	100		0	0	0	0	0

TABLE III-A.

GEORGIA: DISTRIBUTION OF THERAPEUTIC ABORTION - BY COUNTY, 1968-1970

(cont.)

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1968-1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
DECATUR	96	--	0	931	0	0	0.4
DE KALB	71		13	34,782	0.4	1.3	14.7
DODGE	99		1	0	--	0.1	0
DOOLY	96		0	0	0	0	0
DOUGHERTY	98		3	5,683	0.6	0.3	2.4
DOUGLAS	98		0	0	0	0	0
EARLY	99		0	460	0	0	0.2
ECHOLS	99		0	0	0	0	0
EFFINGHAM	98		0	0	0	0	0
ELBERT	99		0	687	0	0	0.3
EMANUEL	97		0	785	0	0	0.3
EVANS	86		0	56	0	0	0+
FANNIN	100		0	0	0	0	0
FAYETTE	91		0	0	0	0	0
FLOYD	98		1	6,394	0.2	0.1	2.7
FORSYTH	98		0	0	0	0	0
FRANKLIN	100		0	0	0	0	0
FULTON	59		595	33,389	17.8	63.2	14.1
GILMER	97		0	369	0	0	0.2
GLASCOCK	51		0	0	0	0	0
GLYNN	97		1	3,332	0.3	0.1	1.4
GORDON	99		0	782	0	0	0.3

TABLE III-A.

GEORGIA: DISTRIBUTION OF THERAPEUTIC ABORTION - BY COUNTY, 1968-1970

(cont.)

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1968-1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
GRADY	93	--	0	598	0	0	0.2
GREENE	90		0	379	0	0	0.1
GWINNETT	97		0	2,038	0	0	0.9
HABERSHAM	95		1	741	1.3	0.1	0.3
HALL	98		13	10,760	1.2	1.3	4.6
HANCOCK	90		0	0	0	0	0.1
HARALSON	96		0	242	0	0	0.1
HARRIS	84		0	0	0	0	0
HART	88		0	259	0	0	0.1
HEARD	91		0	195	0	0	0.1
HENRY	93		0	0	0	0	0
HOUSTON	94		3	1,754	1.7	0.3	0.7
IRWIN	93		0	0	0	0	0
JACKSON	94		4	943	4.2	0.4	0.4
JASPER	78		0	0	0	0	0
JEFF DAVIS	97		0	598	0	0	0.2
JEFFERSON	99		0	0	0	0	0
JENKINS	85		0	401	0	0	0.2
JOHNSON	92		0	0	0	0	0
JONES	93		0	0	0	0	0
LAMAR	88		0	0	0	0	0
LANIER	87		0	220	0	0	0.1

TABLE III-A.

GEORGIA: DISTRIBUTION OF THERAPEUTIC ABORTION - BY COUNTY, 1968-1970

(cont.)

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1968-1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
LAURENS	91	--	2	1,955	1.0	0.2	0.7
LEE	97		0	0	0	0	0
LIBERTY	92		0	234	0	0	0.1
LINCOLN	99		0	0	0	0	0
LONG	97		0	0	0	0	0
LOWNDES	90		0	2,607	0	0	1.1
LUMPKIN	99		0	0	0	0	0
McDUFFIE	99		0	415	0	0	0.2
McINTOSH	100		0	0	0	0	0
MACON	96		0	241	0	0	0.1
MADISON	98		0	0	0	0	0
MARION	97		0	0	0	0	0
MERIWETHER	86		0	961	0	0	0.7
MILLER	100		0	0	0	0	0
MITCHELL	90		0	0	0	0	0
MONROE	88		0	435	0	0	0.2
MONTGOMERY	98		0	0	0	0	0
MORGAN	96		0	595	0	0	0.3
MURRAY	100		0	0	0	0	0
MUSCOGEE	82		3	7,387	0.4	0.3	3.1
NEWTON	95		8	1,174	6.8	0.8	0.5
OCONEE	86		0	0	0	0	0

TABLE III-A

GEORGIA: DISTRIBUTION OF THERAPEUTIC ABORTION - BY COUNTY, 1968-1970

(cont.)

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1968-1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
OGLETHORPE	98	--	0	0	0	0	0
PAULDING	93		0	837	0	0	0.4
PEACH	87		2	919	2.2	0.2	0.4
PICKENS	100		0	0	0	0	0
PIERCE	87		0	0	0	0	0
PIKE	83		0	0	0	0	0
POLK	95		0	40-	0	0	0.2
PULASKI	86		0	575	0	0	0.2
PUTNAM	98		0	34	0	0	0+
QUITMAN	99		0	0	0	0	0
RABUN	97		0	124	0	0	0.1
RANDOLPH	84		0	220	0	0	0.1
RICHMOND	85		121	21,882	5.5	12.8	9.3
ROCKDALE	90		0	0	0	0	0
SCHLEY	91		0	0	0	0	0
SCREVEN	80		1	211	4.7	0.1	0.1
SEMINOLE	99		0	221	0	0	0.1
SPALDING	88		1	2,575	0.4	0.1	1.1
STEPHENS	93		0	1,367	0	0	0.6
STEWART	97		0	38	0	0	0+
SUMTER	87		0	1,625	0	0	0.7
TALBOT	94		0	0	0	0	0
TALIAFERRO	86		0	0	0	0	0

TABLE III-A.

GEORGIA: DISTRIBUTION OF THERAPEUTIC ABORTION - BY COUNTY, 1968-1970

(cont.)

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1968-1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
TATTNALL	98	--	0	0	0	0	0
TAYLOR	96		0	434	0	0	0.2
TELFAIR	95		0	0	0	0	0
TERRELL	100		0	0	0	0	0
THOMAS	91		1	1,818	0.6	0.1	0.8
TIFT	98		6	1,334	4.5	0.6	0.6
TOOMBS	93		0	663	0	0	0.3
TOWNS	100		0	0	0	0	0
TREUTLEN	90		0	150	0	0	0.1
TROUP	91		0	2,406	0	0	1.0
TURNER	99		0	441	0	0	0.2
TWIGGS	88		0	0	0	0	0
UNION	99		0	0	0	0	0
UPSON	100		2	0	--	0.2	0
WALKER	95		0	382	0	0	0.2
WALTON	95		2	892	2.2	0.2	0.4
WARE	96		0	2,206	0	0	0.9
WARREN	78		0	0	0	0	0
WASHINGTON	93		0	644	0	0	0.3
WAYNE	92		0	0	0	0	0
WEBSTER	64		0	0	0	0	0

TABLE III-A.

GEORGIA: DISTRIBUTION OF THERAPEUTIC ABORTION - BY COUNTY, 1968-1970
(cont.)

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1968-1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
WHEELER	89	--	0	0	0	0	0
WHITE	87		0	0	0	0	0
WHITFIELD	95		7	3,619	1.9	0.7	1.5
WILCOX	92		0	0	0	0	0
WILKES	92		0	666	0	0	0.3
WILKINSON	74		0	0	0	0	0
WORTH	97		4	376	6.9	0.4	0.2

BLEED THROUGH POOR COPY

TABLE III- B.

SOUTH CAROLINA: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1970

COUNTY Hospital	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
STATE TOTALS	84	143	684	44,648	15.3		
ABBEVILLE	90	156	4	0	-	0.6	0
Abbeville Cnty. Mem.			4	0	-	0.6	0
AIKEN	98	72	10	1,062	9.4	1.5	2.4
Aiken County			10	1,062	9.4	1.5	2.4
ALLENDALE	79	347	0	202	0	0	0.5
Allendale Cnty.			0	202	0	0	0.5
ANDERSON	93	53	6	2,700	2.2	0.9	6.0
Anderson Mem.			5	2,700	1.9	0.7	6.0
Willismston			1	0	-	0.3	0
BAMBERG	84	185	0	242	0	0	0.5
Bamberg Cnty. Mem.			0	242	0	0	0
BARNWELL	92	143	0	218	0	0	0.5
Barnell Cnty.			0	218	0	0	0.5
BEAUFORT	69	239	1	458	2.2	0.1	1.0
Beaufort Cnty. Mem.			1	458	2.2	0.1	1.0
BERKELEY	92	129	0	294	0	0	0.7
Berkeley Cnty.			0	294	0	0	0.7
CALHOUN	76	229	0	0	0	0	0
CHARLESTON	79	167	259	6,510	39.8	37.9	14.6
Baker Mem.			1	182	5.5	0.1	0.4
Charleston Cnty.			78	0	--	11.4	0
McClennan Banks Mem.			0	229	0	0	0.5

COPY BOUND SLOSE IN STAPLE

TABLE III-B.

SOUTH CAROLINA: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1970
(cont.)

COUNTY Hospital	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
Medical Univ. Hsp. U. of S.C.			167	2,798	59.7	24.4	6.3
Roper			12	2,021	5.9	1.8	4.5
St. Franxis Xavier			0	1,289	0	0	2.9
(Other)			1	0	-	0.1	0
CHEROKEE	98	118	2	945	2.1	0.3	2.1
Cherokee Cnty.Mem.			2	945	2.1	0.3	2.1
CHESTER	77	159	4	685	5.8	0.6	1.5
Chester County			4	685	5.8	0.6	1.5
CHESTERFIELD	44	154	2	422	4.7	0.3	0.9
Chesterfield Cnty.Mem.			2	422	4.7	0.3	0.9
CLARENDON	84	225	0	298	0	0	0.7
Clarendon Mem.			0	298	0	0	0.7
COLLETON	85	146	9	519	17.3	1.3	1.2
Colleton Cnty.			9	519	17.3	1.3	1.2
DARLINGTON	67	155	16	933	17.1	2.3	2.1
Coleman-Aimar			2	245	8.2	0.3	0.5
Wilson Cln.			12	230	52.2	1.8	0.5
Byerly			2	458	4.4	0.3	1.0
DILLON	77	214	0	396	0	0	0.9
St. Eugene			0	396	0	0	0.9
DORCHESTER	93	93	0	266	0	0	0.6
Dorchester Cnty.			0	266	0	0	0.6
EDGEFIELD	75	150	0	0	0	0	0

POOR COPY

TABLE III-B.

SOUTH CAROLINA: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1970
(cont.)

COUNTY Hospital	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
FAIRFIELD	97	170	0	255	0	0	0.6
Fairfield Mem.			0	255	0	0	0.6
FLORENCE	93	133	12	662	18.1	1.8	1.5
McCleod Inf.			11	0	-	1.8	0
Saunders Mem.			1	424	2.4	0.1	0.9
Lower Florence Cnty.			0	238	0	0	0.5
GEORGETOWN	94	200	0	784	0	0	1.8
Georgetown Cnty. Mem.			0	784	0	0	1.8
GREENVILLE	89	120	250	5,118	48.8	36.6	11.5
Allen Bennett Mem.			2	881	2.3	0.3	2.0
Greenville Gen.			242	3,382	71.6	35.4	7.6
Hillcrest			6	221	27.1	0.9	0.5
St. Francis Comm.			0	634	0	0	1.4
GREENWOOD	95	126	0	1,438	0	0	3.2
Self Mem.			0	1,438	0	0	3.2
HAMPTON	96	165	0	319	0	0	0.7
Hampton Gen.			0	319	0	0	0.7
HORRY	88	140	39	1,132	34.5	5.7	2.5
Conway			20	718	27.9	2.9	1.6
Louis Comm.			3	414	7.2	0.4	0.9
Ocean View Mem.			16	0	0	2.3	0
JASPER	80	241	0	0	0	0	0
KERSHAW	88	162	17	710	23.9	2.5	1.6
Kershaw Cnty. Mem.			17	710	23.9	2.5	1.6
LANCASTER	70	113	0	1,011	0	0	2.3
Elliott White Spgs. Mem.			0	1,011	0	0	2.3

TABLE III- B.

SOUTH CAROLINA: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1970
(cont.)

COUNTY Hospital	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
LAURENS	92	96	0	757	0	0	1.7
Bailey Mem.			0	456	0	0	1.0
Whitten Village			0	2	0	0	0+
Laurens District			0	299	0	0	0.7
LEE	69	253	0	198	0	0	0.4
Lee Cnty. Mem.			0	198	0	0	0.4
LEXINGTON	84	105	0	0	0	0	0
MCCORMICK	77	75	0	0	0	0	0
MARION	78	201	8	633	12.6	1.2	1.4
Finger Clinic			2	154	13.0	0.3	0.3
Marion Cnty. Mem.			5	189	26.5	0.7	0.4
Martin			0	45	0	0	0.1
Mullins			1	245	4.1	0.1	0.5
MARLBORO	62	242	0	592	0	0	1.3
Marlboro Gen			0	592	0	0	1.3
NEWBERRY	91	237	0	394	0	0	0.9
Newberry Cnty. Mem.			0	394	0	0	0.9
OCONEE	99	61	3	946	3.2	0.4	2.1
Oconee Mem.			3	946	3.2	0.4	2.1
ORANGEBURG	82	175	1	1,235	0.8	0.1	2.8
Orangeburg Regional			1	1,235	0.8	0.1	2.8
PICKENS	94	81	0	1,046	0	0	2.3
Easley Baptist			0	800	0	0	1.8
Cannon Mem.			0	246	0	0	0.6

POOR COPY

TABLE III-B.

SOUTH CAROLINA: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1970
(cont.)

COUNTY Hospital	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
RICHLAND	72	130	19	4,448	4.3	2.8	10.0
Columbia			1	0	-	0.1	0
Good Samaritan Wav.			0	71	0	0	0.2
Providence			1	1,665	1.0	0.1	3.7
S.C. Baptist			17	2,694	6.3	2.5	6.0
S.C. State			0	18	0	0	0+
SALUDA	70	147	0	0	0	0	0
SPARTENBURG	88	126	7	3,088	2.3	1.0	6.9
Mary Black Mem.			0	676	0	0	1.5
Spartanburg Gen.			7	2,412	2.9	1.0	5.4
Woodruff Gen.			0	0	0	0	0
SUMTER	94	129	7	1,239	5.6	1.0	2.8
Tuomey			7	1,239	5.6	1.0	2.8
UNION	100	138	1	729	1.4	0.1	1.6
Hope			0	29	0	0	0.1
Wallace Thompson			1	700	1.4	0.1	1.6
WILLIAMSBURG	87	201	0	285	0	0	0.6
Willaimsburg Cnty. Mem.			0	285	0	0	0.6
YORK	86	163	7	1,893	3.7	1.0	4.2
York Gen.			7	1,591	4.4	1.0	3.6
Divine Saviour			0	302	0	0	0.7

TABLE III-C.

NORTH CAROLINA: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1967 - 1970

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1967-1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
STATE TOTALS	87	117	1,687	354,987	4.8		
ALAMANCE	93	93	17	6,924	2.4	1.0	1.9
Alamance Co			14	5,151	2.7	0.8	1.4
Mem. Hosp. of Alamance Co.			3	1,793	1.6	0.2	0.5
ALEXANDER	90	39	0	584	0	0	0.1
Alexander Co.			0	584	0	0	0.1
ALLEGHANY	97	33	0	476	0	0	0.1
Alleghany Co. Mem.			0	476	0	0	0.1
ANSON	90	217	0	762	0	0	0.2
Anson Co.			0	762	0	0	0.2
ASHE	96	63	0	1,047	0	0	0.3
Ashe Co. Mem.			0	1,047	0	0	0.3
AVERY	99	17	0	1,213	0	0	0.3
Chas. H. Cannon Jr. Mem.			0	735	0	0	0.2
Garrett Mem.			0	478	0	0	0.1
BEAUFORT	91	149	10	2,840	3.5	0.6	0.8
Pungo Dist.			6	477	12.5	0.4	0.1
Beaufort Co.			4	2,363	1.6	0.2	0.7
BERTIE	91	169	1	1,059	0.9	0.1	0.3
Bertie Co. Mem.			1	1,059	0.9	0.1	0.3
BLADEN	97	157	0	1,294	0	0	0.3
Bladen Co.			0	1,294	0	0	0.3

POOR COPY

TABLE III-C.

NORTH CAROLINA: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1967 - 1970
(cont.)

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1967 - 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
BRUNSWICK	87	197	0	560	0	0	0.1
J. Arthur Dosher Mem.			0	560	0	0	0.1
BUNCOMBE	89	94	45	11,014	4.0	2.7	3.1
Aston Park			1	0	--	0.1	0
Mem. Mission			44	5,443	8.0	2.6	1.5
St. Joseph's			0	5,571	0	0	1.6
BURKE	97	68	11	3,625	3.0	0.7	1.0
Grace			4	2,657	1.5	0.2	0.7
Valdese Gen'l.			7	968	7.2	0.4	0.3
CABARRUS	94	104	22	5,644	3.8	1.3	1.5
Cabarrus Mem.			22	5,644	3.8	1.3	1.5
CALDWELL	98	61	0	3,960	0	0	1.1
Caldwell Mem.			0	3,868	0	0	1.1
Blackwelder			0	0	0	0	0
Dula			0	92	0	0	0+
CAMDEN	91	159	0	0	0	0	0
CARTERET	77	117	4	538	7.4	0.2	0.1
Carteret Gen'l.			4	467	8.5	0.2	0.1
Sea Level			0	68	0	0	0+
CASWELL	89	128	0	0	0	0	0
CATAWBA	95	76	68	6,839	9.9	4.0	2.0
Catawba Mem.			30	1,809	16.5	1.8	0.5
Hickory Mem.			0	1,972	0	0	0.5
Richard Baker			38	3,058	12.4	2.3	0.9

TABLE III-C

NORTH CAROLINA: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1967 - 1970

(cont.)

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1967 - 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
CHATHAM	96	139	1	1,176	0.9	0.1	0.3
Mathiesen Clinic			0	316	0	0	0.1
Chatham			1	760	1.3	0.1	0.2
CHEROKEE	93	31	1	1,189	0.8	0.1	0.3
District Memorial Hospital of Southwestern N.C.			1	645	1.5	0.1	0.2
Providence			0	544	0	0	0.1
CHOWAN	80	184	3	1,200	2.5	0.2	0.3
Chowan			3	1,200	2.5	0.2	0.3
CLAY	93		0	0	0	0	0
CLEVELAND	95	123	48	7,282	6.5	2.8	2.0
Royster Memorial			0	452	0	0	0.1
Kings Mountain			1	2,245	0.4	0.2	0.6
Cleveland Memorial			47	4,585	10.2	2.8	1.3
COLUMBUS	92	18	0	2,077	0	0	0.6
Columbus County			0	2,077	0	0	0.6
CRAVEN	85	94	1	5,996	0.1	0.1	1.7
Craven County			1	5,996	0.1	0.1	1.7
CUMBERLAND	87	81	9	36,151	0.2	0.5	10.1
Cape Fear Valley			1	33,750	0+	0.1	9.5
Highsmigh - Rainy Memorial			8	1	--	0.5	0+
Veterans Administration			0	0	0	0	0
(other)			0	2,401	0	0	0.6

POOR COPY

TABLE III-C

NORTH CAROLINA: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1967 - 1970
(cont.)

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1967-1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
CURRITUCK	89	145	0	0	0	0	0
DARE	97	33	0	0	0	0	0
DAVIDSON	100	73	1	4,154	0.2	0.1	1.1
Lexington Memorial			1	2,569	0.3	0.1	0.7
City Memorial			1	1,585	0	0	0.4
DAVIE	100	72	0	1,026	0	0	0.2
Davie County			0	1,026	0	0	0.2
DUPLIN	78	145	0	839	0	0	0.2
Duplin General			0	839	0	0	0.2
DURHAM	72	123	148	14,491	10.2	8.8	4.1
Duke University Medical Center			124	6,621	18.7	7.4	2.0
Lincoln			9	1,408	6.3	0.5	0.3
Veterans Administration			0	0	0	0	0
Watts			15	6,462	2.3	0.9	1.8
EDGECOMBE	80	271	8	2,120	1.5	0.5	0.6
Memorial			0	626	0	0	0.1
Edgecombe General			8	1,398	5.7	0.5	0.4
Quigless Clinic			0	96	0	0	0.1
FORSYTH	76	128	214	17,843	11.9	12.7	5.0
Casstevens			0	0	0	0	0
Forsyth Memorial			6	8,212	0.7	0.4	2.3
N. Carolina Baptist			206	7,091	29.0	12.2	2.0
Reynold Memorial			2	2,540	0.7	0.1	0.7
FRANKLIN	93	136	3	1,061	2.8	0.2	0.2
Franklin Memorial			3	1,061	2.8	0.2	0.2

COPY BOUND CLOSE IN CENTER

TABLE III-C

NORTH CAROLINA: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1967 - 1970
(cont.)

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1967 - 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
GASTON	92	71	0	9,701	0	0	2.7
Garrison General			0	1,809	0	0	0.5
Gaston Memorial			0	7,892	0	0	2.2
GATES	74	178	0	0	0	0	0
GRAHAM	100	29	0	0	0	0	0
GRANVILLE	97	121	14	0	--	0.8	0
GREENE	83	194	0	0	0	0	0
GUILFORD	92	109	129	22,377	5.7	7.6	6.3
L. Richardson Memorial			0	2,031	0	0	0.5
Moses H. Cone Memorial			117	5,347	21.8	6.9	1.5
Wesley Long Community			0	7,136	0	0	2.0
Highpoint Memorial			12	7,863	1.5	0.7	2.2
HALIFAX	87	239	0	694	0	0	0.2
Roanoke Rapids			0	694	0	0	0.2
Oar Community			0	0	0	0	0
HARNETT	92	161	0	2,303	0	0	0.6
Good Hope			0	923	0	0	0.2
Betsy Johnson Memorial			0	1,380	0	0	0.4
HAYWOOD	98	48	4	2,801	1.4	0.2	0.7
Haywood County			4	2,801	1.4	0.2	0.7
HENDERSON	100	43	3	3,117	0.9	0.2	0.8
Valley Clinic			0	144	0	0	0
Mountain Sanitarium and Hospital			0	287	0	0	0.1
Margaret R. Pardee Memorial			3	2,688	1.1	0.2	0.7

BLEED THROUGH POOR COPY

TABLE III-C

NORTH CAROLINA: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1967 - 1970
(cont.)

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1967 - 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
HERTFORD	91	226	5	2,075	2.4	0.3	0.6
Roanoke-Chowan			5	2,075	2.4	0.3	0.6
HOKE	91	277	0	0	0	0	0
HYDE	90	294	0	0	0	0	0
IREDELL	96	128	12	6,413	1.8	0.7	1.8
Lawrance			8	1,921	4.1	0 5	0.5
Davis			0	1,851	0	0	0.5
Iredell Memorial			4	2,641	1.5	0.2	0.7
JACKSON	100	75	6	373	16.0	0.4	0.1
C.J. Harris Community			6	373	16.0	0.4	0.1
JOHNSTON	95	129	0	800	0	0	0.2
Johnston Memorial			0	800	0	0	0.2
JONES	61	149	0	0	0	0	0
LEE	81	137	0	723	0	0	0.2
Lee County			0	723	0	0	0.2
LINCOLN	89	157	1	4,537	0.2	0.1	1.2
[illegible] Memorial			1	4,151	0.2	0.1	1.2
[illegible] Memorial			0	386	0	0	0.1
[illegible]	93	73	0	990	0	0	0.2
[illegible] Memorial			0	990	0	0	0.2
[illegible]	98	33	0	1,375	0	0	0.3
[illegible]			0	1,375	0	0	0.3
[illegible]	99	57	1	556	1.7	0.1	0.1
[illegible]			1	408	2.4	0.1	0.1
[illegible]			0	148	0	0	0+

TABLE III-C

NORTH CAROLINA: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1967 - 1970 (cont.)

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1967 - 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
MADISON	93	55	0	0	0	0	0
MARTIN	83	264	1	531	1.8	0.1	0.1
Robersonville Township			0	67	0	0	0+
Martin General			1	464	2.1	0.1	0.1
MECKLENBURG	21	138	179	27,087	6.6	10.6	7.6
Charlotte Memorial			179	13,529	13.2	10.6	3.8
Presbyterian			0	1,757	0	0	2.7
Mercy			0	2,801	0	0	1.1
MITCHELL	98	53	1	991	1.0	0.1	0.2
Spruce Pine Community			1	991	1.0	0.1	0.2
MONTGOMERY	85	145	2	1,351	1.4	0.1	0.3
Montgomery Memorial			2	1,351	1.4	0.1	0.3
MOORE	93	126	17	3,541	4.8	1.0	1.0
Moore Memorial			17	3,493	4.8	1.0	1.0
St. Joseph of the Pines			0	48	0	0	0+
NASH	85	196	22	4,191	5.2	1.3	1.1
Parkview			20	3,033	6.5	1.2	0.8
Rocky Mountain Sanitarium			2	1,158	1.7	0.1	0.3
NEW HANOVER	93	149	0	5,164	0	0	1.4
Cape Fear Memorial			0	955	0	0	0.2
New Hanover Memorial		0	0	4,209	0	0	1.2
NORTH HAMPTON	84	237	0	0	0	0	0
ONSLOW	96	48	10	9,566	1.0	0.6	2.6
Onslow Memorial			5	2,308	2.1	0.3	0.6
(other)			5	7,258	0.6	0.3	2.0

BLEED THROUGH POOR COPY

TABLE III-C

NORTH CAROLINA: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1967 - 1970
(cont.)

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1967 - 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
ORANGE	78	76	558	4,417	126.3	33.1	1.2
N. Carolina Memorial			558	4,417	126.3	33.1	1.2
PAMLICO	87	183	0	0	0	0	0
PASQUOTANK	92	93	0	2,838	0	0	0.7
Albemarle			0	2,838	0	0	0.7
PENDER	93	214	0	1,106	0	0	0.3
Pender Memorial			0	1,106	0	0	0.3
PERQUIMANS	81	162	0	0	0	0	0
PERSON	78		0	1,780	0	0	0.5
Person County Memorial			0	1,780	0	0	0.5
PITT	93	120	8	4,650	1.7	0.5	1.3
Pitt County Memorial			8	4,650	1.7	0.5	1.3
POLK	100	181	0	916	0	0	0.2
St. Lukes			0	916	0	0	0.2
RANDOLPH	100	63	19	2,882	6.5	1.1	0.8
Randolph			19	2,882	6.5	1.1	0.8
RICHMOND	99	147	3	2,420	1.2	0.2	0.6
Hamlet			0	214	0	0	0.1
Richmond Memorial			3	2,206	1.3	0.2	0.6
ROBESON	93	173	66	7,244	9.1	3.9	2.0
Southeastern General			66	7,244	9.1	3.9	2.0
ROCKINGHAM	91	103	7	5,904	1.1	0.4	1.6
Morehead Memorial			0	2,746	0	0	0.7
Annie Penn Memorial			7	3,158	2.2	0.4	0.8

CPOY BOUND CLOSE IN CENTER

TABLE III-C

NORTH CAROLINA: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1967 - 1970
(cont.)

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1967 - 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
ROWAN	91	83	10	4,706	2.1	0.6	1.3
Rowan Memorial			10	4,706	2.1	0.6	1.3
RUTHERFORD	93	109	0	793	0	0	0.2
Rutherford			0	793	0	0	0.2
SAMPSON	98	128	1	2,225	0.4	0.1	0.6
Sampson County Memorial			1	2,225	0.4	0.1	0.6
SCOTLAND	85	222	6	4,088	1.4	0.4	1.1
Scotland Memorial			6	4,088	1.4	0.4	1.1
STANLY	97	96	3	2,653	1.1	0.2	0.7
Stanly County			3	2,653	1.1	0.2	0.7
STOKES	100	36	0	45	0	0	0+
Stokes-Reynolds Memorial			0	45	0	0	0+
SURRY	92	41	0	4,537	0	0	1.2
Hugh Chatham Memorial			0	1,440	0	0	0.4
Northern Hospital of Surry County			0	3,097	0	0	0.8
SWAIN	150	155	1	1,035	0.9	0.1	0.3
Swain County			1	721	1.3	0.1	0.2
U.S. Public Health Service Indian			0	314	0	0	0.1
TRANSYLVANIA	94	74	1	1,083	0.9	0.1	0.3
Transylvania Community			1	1,083	0.9	0.1	0.3
TYRELL	29	182	0	0	0	0	0

BLEED THROUGH POOR COPY

TABLE III-C

NORTH CAROLINA: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1967 - 1970 (cont.)

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1967 - 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
UNION	93	92	1	3,903	0.2	0.1	1.0
Union Memorial			1	3,903	0.2	0.1	1.0
VANCE	91	159	4	2,426	1.6	0.2	0.6
Maria-Parham			4	2,426	1.6	0.2	0.6
WAKE	95	109	28	15,730	1.7	1.7	4.4
Fuquay-Varina Branch of Wake County Hospitals			0	121	0	0	0+
Mary Elizabeth			0	0	0	0	0
Wake Memorial			4	5,761	0.7	0.2	1.6
Rex			24	9,848	2.4	1.4	2.7
WARREN	74	157	0	18	0	0	0+
Warren General			0	18	0	0	0+
WASHINGTON	83	218	0	103	0	0	0+
Washington County			0	103	0	0	0+
WATUGA	96	7	0	476	0	0	0.1
Watuga County			0	476	0	0	0.1
Blowing Rock			0	0	0	0	0
WAYNE	83	124	15	3,266	4.5	0.9	0.9
Wayne County			15	3,250	4.5	0.9	0.9
(other)			0	16	0	0	0+
WILKES	98	60	0	2,944	0	0	0.8
Wilkes General			0	2,944	0	0	0.8
WILSON	98	188	14	4,358	3.2	0.8	1.2
Wilson Memorial			14	4,358	3.2	0.8	1.2
YADKIN	98	34	1	653	1.5	0.1	0.1

CPOY BOUND CLOSE IN CENTER

TABLE III-C

NORTH CAROLINA: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1967 - 1970
(cont.)

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1967 - 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
Lula Conrad Hoots Memorial			1	653	1.5	0.1	0.1
YANCEY	95	28	0	539	0	0	0.1
Yancey			0	539	0	0	0.1

TABLE III-D

VIRGINIA: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY, 1970

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
STATE TOTALS	96	105	2,214	64,787	34.1		
ACCOMACK	100	319	0	0	0	0	0
ALBEMARLE	74	82	155	2,361	65.6	7.0	3.6
ALLEGHANY	100	58	0	584	0	0	1.0
AMELIA	100	217	0	0	0	0	0
AMHERST	100	117	0	10	0	0	0+
APPOMATTOX	100	103	0	0	0	0	0
ARLINGTON	100	72	388	4,413	87.9	17.6	7.0
AUGUSTA	100	75	0	1,256	0	0	2.0
BATH	100	22	0	0	0	0	0
BEDFORD	100	118	0	262	0	0	0.4
BLAND	100	23	0	0	0	0	0
BOTETOURT	100	78	0	0	0	0	0
BRUNSWICK	100	212	0	0	0	0	0
BUCHANAN	100	61	0	451	0	0	0.7
BUCKINGHAM	100	183	0	0	0	0	0
CAMPBELL	100	96	0	2,274	0	0	3.5
CAROLINE	100	160	0	0	0	0	0
CARROLL	100	41	0	0	0	0	0
CHARLES CITY	100	143	0	0	0	0	0

TABLE III-D

VIRGINIA: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY, 1970
(cont.)

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
CHARLOTTE	100	180	0	0	0	0	0
CHESAPEAKE CITY			0	0	0	0	0
CHESTERFIELD	100	48	0	0	0	0	0
CLARKE	100	127	0	0	0	0	0
CRAIG	100	-	0	0	0	0	0
CULPEPER	100	109	0	314	0	0	0.5
CUMBERLAND	100	267	0	0	0	0	0
DICKENSON	100	53	0	0	0	0	0
DINWIDDIE	100	218	0	1,136	0	0	1.8
ESSEX	100	117	0	87	0	0	0.1
FAIRFAX	100	38	600	4,886	122.7	27.1	7.5
FAUQUIER	100	115	8	436	18.3	0.4	0.7
FLOYD	100	42	0	0	0	0	0
FLUVANNA	100	241	0	0	0	0	0
FRANKLIN	100	69	0	317	0	0	0.5
FREDERICK	100	71	20	1,628	12.3	0.9	2.6
GILES	100	85	0	273	0	0	0.4
GLOUCESTER	100	93	0	0	0	0	0
GOOCHLAND	100	244	0	0	0	0	0
GRAYSON	100	71	0	502	0	0	0.8
GREENE	100	173	0	0	0	0	0
GREENSVILLE	100	235	0	300	0	0	0.5
HALIFAX	100	122	42	738	56.9	1.9	1.1

POOR COPY

TABLE III-D

VIRGINIA: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY, 1970
(cont.)

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
HANOVER	100	107	0	0	0	0	0
HENRICO	43	158	0	0	0	0	0
HENRY	100	98	2	1,205	1.7	0.1	1.9
HIGHLAND	100	91	0	0	0	0	0
ISLE OF WIGHT	100	225	0	0	0	0	0
JAMES CITY	100	202	0	338	0	0	0.5
KING AND QUEEN	100	140	0	0	0	0	0
KING GEORGE	100	182	0	0	0	0	0
KING WILLIAM	100	172	0	0	0	0	0
LANCASTER	100	247	0	0	0	0	0
LEE	100	56	0	185	0	0	0.3
LOUDOUN	100	105	0	508	0	0	0.8
LOUISA	100	220	0	0	0	0	0
LUNENBURG	100	87	0	0	0	0	0
MADISON	100	113	0	0	0	0	0
MATHEWS	100	108	0	0	0	0	0
MECKLENBURG	100	170	2	0	-	0.1	0
MIDDLESEX	100	95	0	0	0	0	0
MONTGOMERY	100	61	0	30	0	0	0+
NANSEMOND	100	224	0	824	0	0	1.3
NELSON	100	86	0	0	0	0	0
NEW KENT	100	152	0	0	0	0	0

TABLE III-D

VIRGINIA: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY, 1970 (cont.)

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
NORFOLK	84	140	196	6,722	29.2	8.8	11.3
NORTHAMPTON	100	363	12	339	35.3	0.5	0.5
NORTHUMBERLAND	100	233	0	0	0	0	0
NOTTOWAY	100	226	0	0	0	0	0
ORANGE	100	120	0	0	0	0	0
PAGE	100	78	0	73	0	0	0.1
PATRICK	100	49	0	252	0	0	0.4
PITTSYLVANIA	100	129	6	1,619	3.7	0.3	2.5
POWHATAN	100	102	0	0	0	0	0
PRINCESS ANNE	-	-	10	897	1.1	0.5	1.4
PRINCE EDWARD	100	177	0	732	0	0	1.1
PRINCE GEORGE	100	75	0	259	0	0	0.4
PRINCE WILLIAM	100	31	2	896	2.2	0.1	1.4
PULASKI	100	53	0	1,897	0	0	2.9
RAPPAHANNOCK	100	106	0	0	0	0	0
RICHMOND	100	133	574	11,005	52.2	25.9	17.0
ROANOKE	100	95	132	3,289	40.1	6.0	5.1
ROCKBRIDGE	100	97	0	412	0	0	0.6
ROCKINGHAM	100	75	2	1,187	1.7	0.1	1.8
RUSSELL	100	70	0	0	0	0	0
SCOTT	100	15	0	0	0	0	0
SHENANDOAH	100	57	0	197	0	0	0.3

BEST COPY

TABLE III-D

VIRGINIA: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY, 1970

(cont.)

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
SMYTH	100	34	4	519	7.7	0.2	0.8
SOUTHAMPTON	100	264	0	0	0	0	0
SPOTSYLVANIA	100	106	2	1,406	1.4	0.1	2.2
STAFFORD	100	56	0	0	0	0	0
SURRY	100	260	0	0	0	0	0
SUSSEX	100	236	0	0	0	0	0
TAZEWELL	100	72	0	928	0	0	1.4
WARREN	100	94	0	333	0	0	0.5
WASHINGTON	100	59	4	492	8.1	0.2	0.8
WESTMORELAND	100	265	0	0	0	0	0
WISE	100	51	0	679	0	0	1.0
WYTHE	100	52	0	172	0	0	0.3
YORK	100	104	24	3,992	6.0	1.1	6.2

TABLE III-E

MARYLAND: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1969-1970

COUNTY Hospital	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1969-1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
STATE TOTALS	66	--	7,667	111,290	68.9		
ALLEGANY	93		13	2,982	0	0	2.7
Mem.			13	1,860	0	1.7	1.7
Miners			0	172	0	0	0.2
Sac. Heart			0	950	0	0	0.9
ANNE ARUNDEL	72		170	2,806	60.6	2.2	2.5
Anne Arundel Gen.			170	2,736	62.1	2.2	2.5
No. Arundel			0	70	0	0	0.1
BALTIMORE	44		266	10,300	25.8	3.5	9.3
Greater Balt. Med.			266	5,162	51.5	3.5	4.6
St. Joseph			0	5,138	0	0	4.6
BALTIMORE CITY			6,592	53,246	123.8	86.0	47.8
Balt. City			468	9,786	47.8	6.1	8.8
Bon Secours			0	2,214	0	0	2.0
Church Home			478	2,612	183.0	6.2	2.3
Franklin Sq.			178	960	185.4	2.3	0.9
John Hopkins			2,808	4,572	614.1	36.6	4.1
Lutheran			475	2,608	182.1	6.2	2.3
Md.Gen.			323	2,584	125.0	4.2	2.3
Mercy			0	2,944	0	0	2.6
Provident			272	880	309.1	3.5	0.8
St. Agnes			0	5,742	0	0	5.2
Sinai			1,307	8,450	154.7	17.0	7.6
Sc. Balt. Gen.			80	2,072	38.6	1.0	1.9
Union Mem.			88	2,910	30.2	1.1	2.6
Univ. of Md.			115	4,912	23.4	1.5	4.4
CALVERT	72		2	482	4.1	0+	0.4
Calvert County NA	72		2	482	4.1	0+	0.4

BLEED THROUGH POOR COPY

TABLE.III-E

MARYLAND: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1969-1970

(cont.)

COUNTY Hospital	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1969-1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
CAROLINE	78	--	0	0	0	0	0
CARROLL	89		3	1,420	2.1	0+	1.3
Carroll Cty. Gen.			3	1,420	2.1	0+	1.3
CECIL	86		0	1,374	0	0	1.2
Union	86		0	1,374	0	0	1.2
CHARLES	88		0	1,018	0	0	0.9
Physicians Mem.	88		0	1,018	0	0	0.9
DORCHESTER	87		14	866	16.1	0.2	0.8
Cambridge	87		14	866	16.1	0.2	0.8
FREDERICK	85		8	2,228	3.6	0.1	2.0
Frederick Mem.	85		8	2,228	3.6	0.1	2.0
GARRETT	98		0	714	0	0	0.6
Garrett Mem.	98		0	714	0	0	0.6
HARFORD	80		1	2,216	0+	0+	2.0
Harford Mem.	80		1	2,216	0+	0+	2.0
HOWARD	69		0	0	0	0	0
KENT	70		3	650	4.6	0+	0.6
Kent & Queen Ann.	70		3	650	4.6	0+	0.6

CPOY BOUND CLOSE IN CENTER

Table III-E

MARYLAND: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1969-1970 (cont.)

COUNTY Hospital	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1969-1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
MONTGOMERY	79		401	13,634	29.4	5.2	12.3
Holy Cross Hosp. of Silver Spg.			0	7,374	0	0	6.6
Montgomery Gn. Hosp.			10	742	13.5	0.1	0.7
Suburban Hosp. Ass'n.			342	3,222	106.1	4.5	2.9
Washington San. & Hosp.			49	2,296	21.3	0.6	2.0
PRINCE GEORGES	86		10	8,176	1.2	0.1	7.3
Prince Geo. Gen.			10	8,176	1.2	0.1	7.3
Eugene Leland Mem.			0	0	0	0	0
Clinton Mem. NA			0	0	0	0	0
QUEEN ANNES	76		0	0	0	0	0
ST. MARYS	80		2	1,280	1.6	0+	1.1
St. Marys Hosp. NA			2	1,280	1.6	0+	1.1
SOMERSET	91		0	224	0	0	0.2
Edw. W. McCready's Mem.			0	224	0	0	0.2
TALBOT	87		30	1,540	19.5	0.4	1.4
Memorial			30	1,540	19.5	0.4	1.4
WASHINGTON	89		14	3,440	4.1	0.2	3.1
Washington Cnty.			14	3,440	4.1	0.2	3.1
WICOMICO	75		138	3,176	43.4	1.8	2.9
Peninsula Gen.			138	3,176	43.4	1.8	2.9
WORCHESTER	71		0	0	0	0	0

TABLE III-F

DELAWARE: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1970

COUNTY Hospital	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
STATE TOTALS	63	122	558	9,287	60.1		
KENT	86	94	20	816	24.5	3.6	8.8
Kent Gen.			20	816	24.5	3.6	8.8
NEWCASTLE	46	116	525	6,878	76.3	94.1	74.1
Riverside Osteo.			3	100	30	0.5	1.1
St. Francis			0	634	0	0	6.8
Wilmington Med. Ctr.			522	6,144	85.0	93.5	66.2
SUSSEX	80	177	13	1,593	8.2	2.3	17.2
Beebe			2	373	5.4	0.4	4.0
Milford Mem.			7	743	9.4	1.3	8.0
Nanticoke			4	477	8.4	0.7	5.1

TABLE III-G

COLORADO: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1967-1970

COUNTY Hospital	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1967-1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
STATE TOTALS	71	--	3,900	140,664	27.7		
ADAMS	68		1	598	1.7	0+	0.4
Brighton Comm.			1	598	1.7	0+	0.4
ALAMOSA	100		0	1,244	0	0	0.9
Alamosa Comm.			0	1,244	0	0	0.9
ARAPAHOE	85		135	8,025	16.8	3.5	5.7
Swedish Hos.			135	8,025	16.8	3.5	5.7
ARCHULETTA	96		0	0	0	0	0
BACA	100		0	0	0	0	0
BENT	96		0	0	0	0	0
BOULDER	88		693	7,687	90.2	17.8	5.5
Boulder Comm.			655	3,895	168.2	16.7	2.8
Boulder Mem.			20	1,778	11.2	0.5	1.3
Longmont Comm.			18	2,004	9.2	0.5	1.4
Longs Peak Osteo. Comm. NA			0	0	0	0	0
CHAFFEE	100		0	767	0	0	0.5
Salida NA			0	767	0	0	0.5
CHEYENNE	100		0	230	0	0	0.2
St. Jos. of the Plains			0	230	0	0	0.2
CLEAR CREEK	100		0	0	0	0	0

POOR COPY

TABLE III-G

COLORADO: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1967-1970 (cont.)

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 19				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
CONEJOS	77		0	599	0	0	0.4
Conejos County			0	599	0	0	0.4
COSTILLA	90		0	0	0	0	0
CROWLEY	100		0	0	0	0	0
CUSTER	100		0	0	0	0	0
DELTA	100		0	745	0	0	0.5
Delta Memorial NA			0	745	0	0	0.5
DENVER	8		2,676	74,307	36.0	68.6	52.8
Beth Israel			603	6,550	92.1	15.5	4.7
Colorado Gen.			314	7,835	40.1	8.1	5.6
Denver Gen.			525	6,279	85.2	13.7	4.5
Fitzsimmons			58	2,492	23.3	1.5	1.8
General Rose			956	11,258	84.9	24.5	8.0
Porter			69	3,736	18.5	1.8	2.1
Presbyterian			83	3,660	22.7	2.1	2.6
Mercy			0	4,070	0	0	2.9
Rocky Mountains Osteo. NA			0	1,384	0	0	1.0
St. Anthony			0	8,154	0	0	5.8
St. Joseph			0	10,570	0	0	7.5
St. Lukes			58	5,547	10.5	1.5	3.9
Valley View NA			0	674	0	0	0.5
(Other)			0	2,098	0	0	1.5
DOLORES	100		0	0	0	0	0
DOUGLAS	100		0	0	0	0	0
EAGLE	23		0	0	0	0	0
ELBERT	100		0	0	0	0	0
EL PASO	90		154	9,654	16.0	3.9	6.8
Mamie Eisenhower Osto. NA			0	264	0	0	0.2
Memorial- Colo.Spgs.			154	2,418	63.7	3.9	1.7
Penrose			0	4,506	0	0	3.2
St. Francis			0	2,466	0	0	1.8

TABLE III-G

COLORADO: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1967-1970 (cont.)

COUNTY Hospital	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1967-1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
FREMONT	100		0	979	0	0	0.7
St. Thomas More			0	669	0	0	0.5
St. Joseph			0	310	0	0	0.2
GARFIELD	100		4	1,137	3.5	0.1	0.8
Valley View			4	898	4.5	0.1	0.6
Clagett Mem.			0	239	0	0	0.2
GILPIN	100		0	0	0	0	0
GRAND	100		0	0	0	0	0
GUNNISON	100		0	433	0	0	0.3
Gunnison County NA			0	433	0	0	0.3
HINSDALE	100		0	0	0	0	0
HUERFANO	82		0	0	0	0	0
Huerfano Mem.			0	0	0	0	0
JACKSON	100		0	0	0	0	0
JEFFERSON	100		151	3,495	43.2	3.9	2.5
Lutheran			151	3,495	43.2	3.9	2.5
KIOWA	100		0	0	0	0	0
KIT CARSON	100		0	533	0	0	0.4
Kit Carson Mem. NA			0	533	0	0	0.4
LAKE	100		0	864	0	0	0.6
St. Vincent			0	864	0	0	0.6
LA PLATA	90		0	1,365	0	0	1.0
La Plata County NA			0	362	0	0	0.3
Mercy			0	1,003	0	0	0.7

TABLE III-G

COLORADO: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1967-1970 (cont.)

COUNTY Hospital	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1967-1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
LARIMER	95		43	2,868	14.9	1.1	2.0
Poudre Valley			42	2,194	19.1	1.0	1.6
Loveland Mem.			1	674	1.5	0 +	0.5
LAS ANIMAS	73		0	155	0	0	0.1
Mt. San Rafael NA			0	155	0	0	0.1
LINCOLN	100		0	0	0	0	0
LOGAN	100		1	1,165	0.9	0 +	0.8
Logan County			1	1,165	0.9	0 +	0.8
MESA	98		0	3,174	0	0	2.3
Plateau Valley NA			0	24	0	0	0 +
Lower Valley NA			0	189	0	0	0.1
Grand Junction NA			0	552	0	0	0.4
Mesa Memorial NA			0	248	0	0	0.2
St. Mary's			0	2,227	0	0	1.6
MINERAL	100		0	0	0	0	0
MOFFAT	100		0	851	0	0	0.6
Memorial			0	851	0	0	0.6
MONTEZUMA	100		0	1,158	0	0	0.8
Southwest Memorial			0	1,158	0	0	0.8
MONTROSE	100		9	1,013	8.9	0.2	0.7
Montrose Memorial			9	1,013	8.9	0.2	0.7
MORGAN	100		0	750	0	0	0.5
East Morgan NA			0	228	0	0	0.2
Fort Morgan Comm.			0	522	0	0	0.4

TABLE III-G

COLORADO: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1967-1970 (cont.)

COUNTY Hospital	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1967-1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
OTERO	100		1	2,097	0.5	0 +	1.5
La Junta Med. Ctr.			0	1,291	0	0	0.9
Pioneers Mem.			1	806	1.2	0 +	0.6
OURAY	100		0	0	0	0	0
PARK	100		0	62	0	0	0 +
Park County NA			0	62	0	0	0 +
PHILLIPS	100		0	274	0	0	0.2
Haxtun NA			0	71	0	0	0.1
Melissa NA			0	203	0	0	0.1
PITKIN	100		0	288	0	0	0.2
Aspen Valley NA			0	288	0	0	0.2
PROWERS	100		0	1,049	0	0	0.7
Prowers Med. Ctr. NA			0	1,049	0	0	0.7
PUEBLO	80		19	6,323	3.0	0.5	4.5
Parkview Episc.			19	2,165	8.8	0.5	1.5
St. Mary Corwin			0	4,158	0	0	3.0
RIO BLANCO	100		0	386	0	0	0.3
Pioneers NA			0	251	0	0	0.2
Rangely NA			0	135	0	0	0.1
RIO GRANDE	87		0	964	0	0	0.7
St. Joseph NA			0	403	0	0	0.3
Monte Vista NA			0	426	0	0	0.3
ROUTT	100		0	229	0	0	0.2
Routt County Mem. NA			0	229	0	0	0.2

TABLE III-G

COLORADO: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1967-1970
(cont.)

COUNTY Hospital	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1967-1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
SAGUACHE	64		0	0	0	0	0
SAN JUAN	100		0	0	0	0	0
SAN MIGUEL	100		0	0	0	0	0
SEDGWICK	100		1	237	4.2	0 +	0.2
Sedgwick County	NA		1	237	4.2	0 +	0.2
SUMMIT	100		0	0	0	0	0
TELLER	100		0	0	0	0	0
WASHINGTON	100		0	96	0	0	0.1
Washington Pub.	NA		0	96	0	0	0.1
WELD	84		12	4,522	2.7	0.3	3.2
Weld County			12	1,094	11.0	0.3	0.8
Memorial	NA		0	3,428	0	0	2.4
YUMA	100		0	476	0	0	0.3
Wray Comm.	NA		0	238	0	0	0.2
Yuma	NA		0	238	0	0	0.2

TABLE III-H

NEW MEXICO: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1970

COUNTY Hospital	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
STATE TOTALS	70.8	--	1,300	17,264	75.3		
BERNALILLO	71		1,041	5,942	175.2	80.1	34.4
A.T. & S.F.			0	0	0	0	0
Bataan Mem.			74	524	141.2	5.7	3.0
Bernalillo Cnty. Med.			0	1,260	0	0	7.3
Doctors Hosp. Ass'n.			48	0	-	3.7	0
Osteopathic			7	718	9.7	0.5	4.2
Presbyterian			912	2,522	361.6	70.2	14.6
St. Joseph			0	918	0	0	5.3
CATRON	100		0	0	0	0	0
CHAVES	77		80	769	104	6.2	4.5
Eastern N. Mex. Med.			72	639	112.7	5.5	3.7
Memorial Osteo.			8	130	61.5	0.6	0.8
St. Marys			0	0	0	0	0
COLFAX	100		0	243	0	0	1.4
Miner's			0	208	0	0	1.2
Colfax Gen.			0	35	0	0	0.2
CURRY	95		0	627	0	0	3.6
Clovis Mem.			0	627	0	0	3.6
DEBACA	100		0	0	0	0	0
DONA ANA	86		34	1,157	29.4	2.6	6.7
Memorial Gen.			34	1,157	29.4	2.6	6.7
EDDY	90		18	306	58.8	1.4	1.8
Artesia Gen.			6	306	19.6	0.5	1.8
Carlsbad Regional Med. Ctr.			12	0	-	0.9	0
GRANT	100		0	515	0	0	3.0
Hillcrest Gen.			0	515	0	0	3.0

TABLE III-H

NEW MEXICO: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1970
(cont.)

COUNTY Hospital	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
GUADALUPE	100		0	59	0	0	0.3
Guadalupe Gen.			0	59	0	0	0.3
HARDING	100		0	0	0	0	0
HIDALGO	100		2	71	28.2	0.2	0.4
Hidalgo Gen.			2	71	28.2	0.2	0.4
LEA	100		6	851	7.1	0.5	4.9
Hobbs Lea Gen.			0	590	0	0	3.4
Lovington Lea Gen.			6	219	27.4	0.5	1.3
(Other)			-	42	-	-	0.2
LINCOLN	100		0	117	0	0	0.7
Ruidoso-Hondo Val. Gen.			0	103	0	0	0.6
(Other)			-	14	-	-	0.1
LOS ALAMOS	100		42	211	199.1	3.2	1.2
Los Alamos Med.			42	211	199.1	3.2	1.2
LUNA	100		0	304	0	0	1.8
Mimbres Mem.			0	304	0	0	1.8
MCKINLEY	75		27	1,443	18.7	2.1	8.4
Gallup Indian Med. Ctr.			27	732	36.9	2.1	4.2
McKinley Gen. NA			0	226	0	0	1.3
Rehoboth Christian NA			0	113	0	0	0.7
(Other)			-	372	-	-	2.2
MORA	100		0	0	0	0	0
OTERO	96		0	445	0	0	2.6
Gerald Champion Mem.			0	390	0	0	2.3
(Other)			-	65	-	-	0.4

TABLE III-H

NEW MEXICO: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1970 (cont.)

COUNTY Hospital	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
QUAY	92		0	179	0	0	1.0
Trigg Mem.			0	179	0	0	1.0
RIO ARRIBA	93		0	524	0	0	3.0
Embudo Presby.			0	234	0	0	1.4
Espanola			0	290	0	0	1.7
ROOSEVELT	96		0	172	0	0	1.0
Roosevelt Gen.			0	172	0	0	1.0
SANDOVAL	98		0	0	0	0	0
SAN JUAN	74		10	1,125	8.9	0.8	6.5
Navajo			10	524	19.1	0.8	3.0
San Juan			0	601	0	0	3.5
SAN MIGUEL	42		0	474	0	0	2.8
Las Vegas			0	266	0	0	1.5
Las Vegas Med. Cntr.	NA		0	0	0	0	0
St. Anthony's			0	208	0	0	1.2
SANTA FE	88		0	1,132	0	0	6.6
St. Vincent			0	970	0	0	5.6
(Other)			-	162	-	-	0.9
SIERRA	100		0	39	0	0	0.2
St. Ann's	NA		0	39	0	0	0.2
SOCORRO	100		0	179	0	0	1.0
Socorro Gen.			0	179	0	0	1.0
TAOS	93		40	126	317.5	3.1	0.7
Holy Cross			40	126	317.5	3.1	0.7

TABLE III-H

NEW MEXICO: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY AND MEDICAL FACILITY, 1970
(cont.)

COUNTY Hospital	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
TORRANCE	98		0	0	0	0	0
UNION	98		0	53	0	0	0.3
Union City Gen.			0	53	0	0	0.3
VALENCIA	100		0	191	0	0	1.1
Cibola Gen.			0	191	0	0	1.1

TABLE III-I.

OREGON: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY, 1969-1970

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1969-1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
STATE TOTALS	93	66	8,603	68,764	125.1		
BAKER	100	14	0	366	0	0	0.5
BENTON	100	44	83	1,810	45.8	1.0	2.6
CLACKAMAS	94	49	43	1,196	40.0	0.5	1.7
CLATSOP	75	42	6	904	6.6	0.1	1.3
COLUMBIA	100	25	7	400	17.5	0.1	0.6
COOS	100	62	50	868	57.6	0.6	1.3
CROOK	100	53	13	314	41.4	0.2	0.5
CURRY	100	18	0	0	0	0	0
DESCHUTES	100	66	56	656	85.4	0.7	1.0
DOUGLAS	93	41	58	2,280	25.4	0.7	3.3
GILLIAM	100	45	0	0	0	0	0
GRANT	100	--	0	230	0	0	0.3
HARNEY	100	31	6	0	--	0.1	0
HOOD RIVER	100	23	5	382	13.1	0.1	0.6
JACKSON	100	35	280	4,146	67.5	3.3	6.0
JEFFERSON	100	78	5	244	20.5	0.1	0.3
JOSEPHINE	100	43	23	1,030	22.3	0.3	1.5
KLAMATH	100	39	4	1,832	2.2	0.1	2.7
LAKE	100	23	0	1,062	0	0	1.5
LANE	100	58	655	9,616	68.1	7.6	14.0

TABLE III-I.

OREGON: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY, 1969-1970

(cont.)

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1969-1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
LINCOLN	100	79	9	216	41.7	0.1	0.3
LINN	100	41	9	1,078	8.3	0.1	1.6
MALHEUR	100	34	9	1,750	5.1	0.1	2.5
MARION	100	62	102	6,458	15.8	1.2	9.4
MORROW	100	--	0	448	0	0	0.6
MULTNOMAH	79	110	6,904	25,728	268.3	80.3	37.4
POLK	86	77	28	308	90.9	0.3	0.4
SHERMAN	100	--	0	0	0	0	0
TILLAMOOK	100	69	12	466	25.8	0.1	0.7
UMATILLA	91	60	50	2,064	24.2	0.6	3.0
UNION	100	57	29	666	43.5	0.3	1.0
WALLOWA	100	38	1	144	6.9	0.1	0.2
WASCO	100	70	47	812	57.9	0.5	1.2
WASHINGTON	96	49	106	1,290	82.2	1.2	1.9
WHEELER	100	--	0	0	0	0	0
YAMHILL	96	36	3	0	--	0.1	0

TABLE III-J

CALIFORNIA: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY, 1970

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
STATE TOTALS	80	--	62,672	322,464	194.2		
ALAMEDA	59		5,271	18,353	287.2	8.4	5.7
ALPINE	29		0	0	0	0	0
AMADOR	97		0	120	0	0	0+
BUTTE	94		46	946	48.6	0.1	0.3
CALAVERAS	100		2	103	19.4	0+	0+
COLUSA	99		2	158	12.7	0+	0+
CONTRA COSTA	82		1,175	6,474	181.5	1.9	2.0
DEL NORTE	99		0	273	0	0	0.1
EL DORADO	86		46	543	84.7	0.1	0.2
FRESNO	83		568	7,427	76.5	0.9	2.3
GLENN	99		0	264	0	0	0.1
HUMBOLDT	100		59	1,342	44	0.1	0.4
IMPERIAL	100		39	1,512	25.8	0.1	0.5
INYO	93		11	286	38.5	0+	0.1
KERN	86		355	5,307	66.9	0.6	1.6
KINGS	98		7	1,477	4.7	0+	0.5
LAKE	100		0	123	0	0	0+
LASSEN	100		8	0	-	0+	0
LOS ANGELES	74		25,993	122,852	211.6	41.5	38.1
MADERA	83		0	593	0	0	0.2

TABLE III-J

CALIFORNIA: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY, 1970
(cont.)

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	Births
MARIN	67		472	1,626	290.3	0.8	0.5
MARIPOSA	100		0	52	0	0	0+
MENDOCINO	97		2	650	3.1	0+	0.2
MERCED	82		23	1,377	16.7	0+	0.4
MODOC	100		0	79	0	0	0+
MONO	100		0	0	0	0	0
MONTEREY	100		565	3,356	168.4	0.9	1.0
NAPA	97		0	803	0	0	0.2
NEVADA	69		2	372	5.4	0+	0.1
ORANGE	88		1,672	24,941	67.0	2.7	7.7
PLACER	63		41	1,135	36.1	0.1	0.4
PLUMAS	100		14	150	93.3	0+	0+
RIVERSIDE	97		831	7,195	115.5	1.3	2.2
SACRAMENTO	91		3,420	10,204	335.2	5.5	3.1
SAN BENITO	68		2	0	-	0+	0
SAN BERNARDINO	96		668	11,497	58.1	1.1	3.5
SAN DIEGO	92		4,434	17,920	247.4	7.1	5.4
SAN FRANCISCO	29		6,413	14,407	445.1	10.2	4.4
SAN JOAQUIN	97		441	5,963	74	0.7	1.8
SAN LUIS OBISPO	79		529	627	843.7	0.8	0.2
SAN MATEO	72		1,180	6,159	191.6	1.9	1.9
SANTA BARBARA	43		984	2,524	389.9	1.6	0.8

TABLE III-J

CALIFORNIA: THERAPEUTIC ABORTION DISTRIBUTION - BY COUNTY,1970
(cont.)

COUNTY	Unmet Family Planning Needs, 1968		Number of Therapeutic Abortions, Births, and Abortions per 1000 Births, (T.A. Ratio), 1970				
	% Wom. w/o Fam. Plan. Program	Illeg. Bths./ 1000	# of T.A.'s	# of Births	T.A. Ratio	% State's: T.A.'s	% State's: Births
SANTA CLARA	92		5,737	20,716	276.9	9.2	6.3
SANTA CRUZ	90		2	559	3.6	0+	0.2
SHASTA	100		24	2,130	11.3	0+	0.6
SIERRA	100		0	32	0	0	0+
SISKIYOU	100		17	313	54.3	0+	0.1
SOLANO	89		228	2,533	90.0	0.4	0.8
SONOMA	81		603	697	865.1	1.0	0.2
STANISLAUS	95		55	4,987	11.0	0.1	1.5
SUTTER	98		55	1,083	50.8	0.1	0.3
TEHAMA	99		0	430	0	0	0.1
TRINITY	100		0	58	0	0	0+
TULARE	90		56	3,339	16.8	0.1	1.0
TUOLUMNE	100		16	288	55.6	0+	0.1
VENTURA	83		471	5,140	91.6	0.8	1.6
YOLO	59		101	854	118.3	0.2	0.3
YUBA	99		0	115	0	0	0+
(Other)			32	-	-	0.1	-

SUPPLEMENTARY APPENDIX TO BRIEF:
MATERIALS ON LEGAL, MEDICAL, AND
SOCIAL IMPACT OF ABORTION LAW
RESTRICTIONS IN THE UNITED STATES

This Supplementary Appendix consists of offset reproductions of particularly relevant legal, medical, and social science publications, all of which are in the public domain.

Legal materials and commentary include a table showing in simplified form the types of statutes regulating the medical procedure of induced abortion in the United States. Also set out are the most recent versions of proposals by the Commissioners on Uniform State Laws, and the American Law Institute, as well as statutes and regulations from the State of Washington and New York.

Similarly included, for the Court's convenience, are offset copies of all major court decisions, both state and federal, which passed upon significant substantive and procedural points in cases which questioned the validity of restrictions on medical abortion.

Finally, the principal medical and social science publications concerning relevant aspects of medical abortion incidence, safety, and need, have also been offset and included in this Appendix. None of the materials are highly technical, and several have been noticed judicially in support of state and federal decisions. E.g., California v. Belous, 71 Cal. 2d 954, 965, 458 P.2d 194, 200, 80 Cal. Rptr. 354, 360 (1969), cert. denied, 397

915 (1970); McCann v. Babbitz, 310 F. Supp. 293, 301 (E.D. Wis.) (per curiam), appeal dismissed, 400 U.S. 1 (1970)(per curiam). These materials are included to ensure that the Court will not be without what Judge Learned Hand denominated as "the aid of unpartisan and authoritative scientific assistance in the administration of justice" in this case. Parke-Davis & Co. v. H.K. Mulford Co., 189 Fed. 95, 115 (C.C.S.D.N.Y. 1911).

The subject matter of this case - restrictions on the medical procedure of abortion - is particularly susceptible to predisposition. What in scientific circles is accepted fact may in other circles be heresy. The folklore on abortion, contraception, and human fertility in general is not likely to rest on firm scientific foundations. Only a few short years ago, an examination of texts used in medical schools revealed that "[t]wo thirds of the texts (25 texts) contained either no mention of contraception or only isolated reference to it, with no complete discussion." Tietze, et al., Teaching of Fertility Regulation in Medical Schools, 196 J. American Medical Ass'n 20, 23 (1966). If the medical profession only recently began to examine and understand contraception, with abortion lagging years behind, it is not to be expected that lawyers, judges, and the public at large would be fully knowledgeable in either or both fields.

As indicated above, the lower state and federal courts have taken judicial notice of non-record scientific materials needed for a full understanding of the subject matter of abortion. This

practice has firm foundations in decisions dating back throughout this century. Facts pertaining to the discriminatory impact of laws fair on their face have been noticed in Reynolds v. Sims, 377 U.S. 533 (1964)(voter distribution); social and economic conditions in West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1936); studies by public and private agencies in Muller v. Oregon, 208 U.S. 412, 419-21 (1908); published statistics in Parker v. Brown, 317 U.S. 341, 363 (1942); and even letters from knowledgeable citizens, as in American Federation of Labor v. American Sash & Door Co., 335 U.S. 538, 551 (1949)(Frankfurter, J. concurring).

Much of the scientific data relevant to this case was not in assembled or published form until recent months. Other items were not unearthed from medical libraries until recently. All of what is included has been carefully sifted in order to present the most directly relevant materials. It is the hope of the parties that these materials will be of use to the Court in reaching an informed and just decision.

CONTENTS

tem o.	Author, Title, Description	Page in App.	[No. pp.
	I. REGULATIONS, LAWS, AND GUIDELINES CONCERNING ACCESS TO MEDICAL ABORTION IN THE UNITED STATES.		
1.	National Center for Family Planning Services, Health Services and Mental Health Administration, Department of Health, Education and Welfare, *Current Status of Abortion Laws--August 1, 1970* (1970) (updated). (Chart indicating current provisions of abortion laws in effect in all fifty states.)	1	[1]
2.	Commissioners on Uniform State Laws, Uniform Abortion Act (2d Tentative Draft, 3d Working Draft, Aug. 4, 1970). (Draft sanctioning medical procedure of abortion as lawful in first 24 weeks and permitting non-hospital clinics.)	3	[2]
3.	American Law Institute, Model Penal Code §230.3 (Proposed Official Draft, 1962).	5	[3]
4.	New York State Abortion Law, N.Y. Penal Law §125.05(3), at 79 (McKinney Supp. 1970-1971). (Statute permitting elective abortion in first 24 weeks of gestation, as a sanctioned medical procedure.)	9	[1]
5.	New York City Health Code, tit. III, art. 42, 98 City Record 6313-15 (Oct. 23, 1970). (Guidelines for non-hospital abortion clinics.)	11	[4]
6.	Washington State Abortion Law, Rev. Code Wash. Ann., tit. 9, §§9.02.060 to 9.02.090 (Supp., 1970) (Laws 1970, c.3). (Referendum statute permitting elective abortion up to 18 weeks of pregnancy.)	15	[2]
7.	Abortion Regulations Adopted by the Washington State Board of Health, WAC 248-140 (December 10, 1970). (Guidelines for licensure of non-hospital abortion clinics.)	17	[6]
8.	American College of Obstetricians and Gynecologists, Policy on Abortion (Aug. 1970). (Policy of the A.C.O.G. giving medical sanction to the performance of abortion upon request of the patient.)	23	[1]

BLEED THROUGH POOR COPY

American Public Health Association, Recommended Standards for Abortion Services (Nov. 1970). (Statement of the A.P.H.A. recognizing abortion services as an integral part of health care and sanctioning the performance of abortion outside of hospitals in specialized clinics.) 25 [8]

American Medical Association, Policy Regarding Abortion (June, 1970). 33 [1]

Constitution of the World Health Organization. (Statement stressing the right of access to health care.) 35 [1]

National Association for the Repeal of Abortion Laws, National Organizations Recommending Repeal of Abortion Laws. 37 [1]

II. FEDERAL AND STATE COURT DECISIONS

A. CASES BEFORE THE SUPREME COURT OF THE UNITED STATES

United States v. Vuitch, 402 U.S. 62 (April 21, 1971). 39 [38

Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex., June 17, 1970) (per curiam) (GOLDBERG, Cir. J. and HUGHES & TAYLOR, D.JJ.), *juris. postponed*, 402 U.S. ___(No. 808, 1970 Term; renumbered No. 70-18, 1971 Term). (Decision of a three-judge Federal court granting standing to a pregnant woman and a physician, and holding the Texas anti-abortion statute unconstitutional as an infringement of the right to privacy, unsupported by a compelling state interest; and void for vagueness. The court declined to grant injunctive relief.) 77 [9]

Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga., July 31, 1970; *Supplemental Opinion*, Oct. 14, 1970) (per curiam) (MORGAN, Cir. J. and SMITH & HENDERSON, D.JJ.) *juris. postponed*, 402 U.S. ___(No. 971, 1970 Term; renumbered No. 70-40, 1971 Term). (Decision of a three-judge Federal court granting standing to plaintiffs and holding portions of the Georgia Therapeutic Abortion Act unconstitutional. The court held that the state cannot limit the reasons for which an abortion is sought, although it can regulate abortion procedures beyond the basic requirement that they be performed by licensed physicians. In a Supplemental Opinion the court held that 87 [1

hospital committees cannot adopt strict abortion standards similar to those struck down in the statute.)

B. DECISIONS BY HIGHEST STATE COURTS

California v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (Sept. 5, 1969) (per PETERS, 4-3 decision), *cert. denied*, 397 U.S. 915 (1970). (Landmark decision of California Supreme Court striking down pre-1967 anti-abortion statute, permitting abortion only when "necessary to preserve her life," as void for vagueness. The Court also found "a fundamental right of the woman to choose whether to bear children" following from "right to privacy" decisions. The Court argued that the compelling state interest, based on the medical dangers of abortion in an earlier time, which would be required before such a strict abortion statute could be held constitutional, no longer exists today.) 99 [19

State v. Jamieson, 480 P.2d 87 (Kan., Jan. 23, 1971). (Decision of Kansas Supreme Court overturning conviction of a physician under anti-abortion statute on grounds that the information was invalid for failing to negate the exception to the definition of criminal abortion, "unless necessary to preserve the life of said woman.") 119 [5]

C. DECISIONS BY FEDERAL DISTRICT COURTS

1) DECISIONS INVALIDATING ABORTION LAWS IN WHOLE OR IN PART

Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill., Jan. 29, 1971) (SWYGERT Cir. J. and ROBSON & CAMPBELL, D.JJ.) (2-1 decision, Campbell dissenting), *appeal docketed sub nom. Hanrahan v. Doe*, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (No. 1522, 1970 Term; renumbered No. 70-105, 1971 Term). (Decision of a three-judge Federal court granting standing to women seeking abortions and to certain physicians, declaring Illinois anti-abortion statute unconstitutional, and granting permanent injunction. The court held that the statute (permitting abortion only to preserve the woman's life) was unconstitutionally vague and a violation of a woman's right to life and privacy. No legitimate or compelling state interest in fetal life permitted the state to prohibit first trimester abortions performed by licensed physicians in licensed medical facilities.) 125 [13]

Doe v. Rampton, No. C-234-70 (D. Utah, Sept. 14, 1970) (per curiam) (RITTER, D.J.). (Order of a single Federal district judge temporarily restraining enforcement of Utah anti-abortion statute in light of its probable unconstitutionality.) 139 [2]

Doe v. Bolton, supra.

Roe v. Wade, supra.

Babbitz v. McCann (I), 310 F. Supp. 293 (E.D. Wis., March 5,1970) (per curiam) (KERNER, Cir. J. and REYNOLDS & GORDON, D.JJ.), *appeal dismissed*, 400 U.S. 1 (1970) (per curiam). (Decision of a three-judge court declaring Wisconsin's anti-abortion statute unconstitutional as an invasion of a woman's right to privacy guaranteed by the Ninth Amendment. The court held that any state interest in the fetus was out-weighed by the rights of the pregnant woman.) 141 [1

Babbitz v. McCann (II), 320 F. Supp. 219 (E.D. Wis., Nov. 18, 1970) (per curiam) (KERNER, Cir. J. and REYNOLDS & GORDON, D.JJ.), *vacated*, 402 U.S. 903 (1971). (Decision of three-judge court granting previously denied injunctive relief, vacated by the Supreme Court for reconsideration in light of *Younger v. Harris*, 401 U.S. 37 (1971), and companion cases.) 151 [5

Harling v. Department of Health and Social Services, 323 F. Supp. 899 (E.D. Wis., March 11, 1971) (GORDON, D.J.). (Decision of district court judge setting aside conviction of a non-physician for violation of abortion law, in light of *Babbitz v. McCann* (I), *supra*.) 157 [3

Kennan v. Nichol, No. 71-C-118 (W.D. Wis., April 27, 1971) (DOYLE, D.J.). (Decision of district judge enjoining prosecution of doctor for violations of Wisconsin abortion statute in light of *Babbitz v. McCann* (I), *supra*, on the ground that the federal proceeding pre-dated the state criminal proceeding and was therefore not precluded by the "anti-injunction" statute.) 161 [5

Kennan v. Warren, No. 71-C-132 (W.D. Wis., May 5, 1971; Supplemental Opinion, May 6, 1971) (DOYLE, D.J.). (Decision of district judge enjoining additional civil proceedings taken against same physician as in *Kennan v. Nichol, supra*.) 167 [

2) FEDERAL DECISIONS UPHOLDING ABORTION LAWS

Corkey v. Edwards, 322 F. Supp. 1248 (W.D. N.C., Feb 1, 1971) (CRAVEN, Cir. J. and JONES & McMILLAN, D.JJ.), *appeal docketed*, 40 U.S.L.W. 3048 (U.S. July 17, 1971) (No. 71-92, 1971 Term). (Decision of three-judge court upholding North Carolina's Therapeutic Abortion Act. The court held that a state interest in the fetus was sufficient to support the statute against constitutional challenge. The court struck down a four month residency requirement for abortion as a violation of the right to travel.) 181 [8]

Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio, Dec. 18, 1970) (WEICK, Cir. J. and GREEN & YOUNG, D.JJ.) (2-1 decision, Green dissenting) (not appealed). (Decision of a three-judge court upholding Ohio anti-abortion statute by finding the statute not vague and a legitimate exercise of state power to protect the fetus. In a dissenting opinion Judge Green found the statute in violation of the Fourteenth Amendment and the right to privacy. In addition, he challenged the majority's interpretation of the statute's legislative history.) 189 [21]

Rosen v. Louisana, 318 F. Supp. 1217 (E.D. La., Aug. 7, 1970) (AINSWORTH, Cir. J. and CASSIBRY & BOYLE, D.JJ.) (2-1 decision, Cassibry dissenting), *appeal docketed*, 39 U.S.L.W. 3247 (U.S. Nov. 27, 1970) (No. 1010, 1970 Term; renumbered No. 70-42, 1971 Term). (Decision of three-judge court upholding Lousiana statute authorizing revocation of medical doctor's license for performing abortions. The court found the statute not vague and a valid exercise of power to protect the fetus. In his dissent Judge Cassibry held the statute constitutionally infirm on numerous grounds including violation of the right to privacy, and denial of equal protection to the poor.) 211 [29]

D. STATE LOWER COURT DECISIONS

1) STATE LOWER COURT DECISIONS INVALIDATING ABORTION LAWS IN WHOLE OR IN PART

Rogers v. Danforth, No. 315512 (Mo. Cir. Ct. St. Louis, June 7, 1971) (LASKY, J.). (Decision of trial court finding Missouri anti-abortion statute void for vagueness and in violation of the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. 241 [3]

People v. Gwynne, No. 173309 (Central Orange Cnty. Mun. Ct., Calif., June 16, 1970) (THOMPSON, J.). (Decision of a trial judge that California statute goes beyond legitimate health purposes and is an unconstitutional infringement of the rights to life and liberty protected by the Fourteenth Amendment.) 245 [5

People v. Robb, Nos. 149005 and 159061 (Central Orange Cnty. Mun. Ct., Calif., Jan. 7, 1970) (MAST, J.). (Decision of trial judge finding California statute in violation of U.S. Constitution on various grounds including: improper delegation of legislative authority (accreditation and hospital committee provisions), vagueness, denial of equal protection, and interference with the right to privacy.) 251 [8

People v. Barksdale, No. 33237C (San Leandro-Hayward Mun. Ct., Alameda Cnty., Calif., March 24, 1970) (FOLEY, J.). (Decision of trial judge indicating his concurrence in *People v. Robb, supra*.) 259 [9

People v. Barksdale, ___Cal.App. 3d__, __ Cal. Rptr. ___, 1 Crim. 9526 (Calif. Dist. Ct. App. July 22, 1971). (Decision of intermediate appellate court invalidating major portions of A.L.I.-type therapeutic abortion act, in particular a provision limiting abortions to hospitals accredited by the private Joint Commission on Accreditation of Hospitals.) 268-1 [

Shively v. Board of Medical Examiners, No. 590333 (Calif. Super. Ct. San Francisco Cnty., Sept. 24, 1968) (HYMAN, J.) *on remand from* 65 Cal. 2d 475, 421 P.2d 65, 55 Cal. Rptr. 217 (1968). (Decision of a trial judge that defendant physician was not guilty of performing criminal abortion under pre-1967 statute in performing therapeutic abortion in conformity with accepted medical practice on women who had contracted rebella. The court held that a woman's right to therapeutic abortion in these circumstances was protected by the Eighth and Fourteenth Amendments. The court also held that the state must prove that the exception ("necessary to preserve her life") had not been met.) 269

People v. Anast, No. 69-3429 (Ill. Cir. Ct. Cook Cnty., July 29, 1970) (DOLEZAL, J.) (Decision of trial judge holding Illinois anti-abortion statute unconstitutionally vague and in violation of a woman's right to privacy. The court also held that the indictment failed to state the crime of "soli- 275

tation" in alleging only that the defendant encouraged women to procure abortions.)

4. *Commonwealth v. Page*, No. 1968-353 (Pa. Ct. Comm. Pl., Centre Cnty., July 23, 1970) (CAMPBELL, J.). (Decision of a trial court holding Pennsylvania statute unconstitutional as violative of due process and equal protection standards of the Fourteenth Amendment and as an infringement of a woman's right to privacy.) 279

5. *State v. Munson*, No. 24949 (S. Dak. 7th Cir. Ct., Pennington Cnty., April 6, 1970) (COOPER, J.). (Decision of trial court holding South Dakota statute unconstitutionally vague and an invasion into private conduct unsupported by vital interests of the state.) 283

6. *State v. Ketchum*, (Mich. Dist. Ct., March 30, 1970) (REID, J.). (Decision of a trial judge holding Michigan anti-abortion law void for vagueness and in violation of the right to privacy.) 287

2) STATE LOWER COURT DECISIONS UPHOLDING ABORTION LAWS

7. *State v. Hodgson*, No. 23789 (Minn. Dist. Ct., Ramsey Cnty., June 29, 1970) (HACKEY, J.). (Decision of trial court upholding Minnesota anti-abortion statute in prosecution of a physician for performing a therapeutic abortion in a hospital. The court held that the state's interest in the fetus was sufficient to support the law.) 289

Commonwealth v. Brunelle, No. 83879 (Mass. Super. Ct., Middlesex Cnty., Dec. 1970) (MOYNIHAN, J.). (Decision of trial judge upholding the constitutionality of the Massachusetts anti-abortion statute. The court found no establishment of religion by the statute and no interference with the woman's right to privacy in light of the state's interest in the fetus.) 307

III. LEGAL COMMENTARY

Tom C. Clark, *Religion, Morality and Abortion: A Constitutional Appraisal*, 2 Loyola U. (L.A.) Law Rev. 1 (1969). (Article by the retired Supreme Court Justice who argues that no compelling state interest exists that would 315

constitutionally permit the state to place restrictions on obtaining abortion other than those designed to insure the safety of the procedure.

William Curran & S.M. Hyg, *The Right to Health in National and International Law,* 284 New England J. of Med. 1258 (1971). (Brief discussion of an emerging concept, the "right to health.") 327

Ruth Roemer, *Abortion Law Reform and Repeal: Legislative and Judicial Developments,* 61 Am. J. Pub. Health 500 (1970). (Review of recent judicial decisions and legislative action concerning abortion.) 329

IV. MEDICAL AND SOCIAL SCIENCE STUDIES ON ABORTION PRACTICES

L. Bumpass & C. Westoff, *The "Perfect Contraceptive" Population,* 169 Science 1177 (Sept. 1970). (Demographic analysis finding high degree of unwanted fertility in the U.S. and measuring the effects of unwanted births on population trends.) 339

R. Lerner, *Geographic Distribution of Need for Family Planning and Subsidized Services in the United States,* 60 Am. J. Pub. Health 1945 (Oct. 1970). (Review of a massive government survey of the availability of family planning services to low-income women which found that 85% of such women had no access to family planning programs.) 345

C. Muller, *Socioeconomic Outcomes of Restricted Access to Abortion,* 61 Am. J. Pub. Health 1110 (June, 1971). (Review of the impact of restricted abortion and the resultant unwanted births on a broad range of social problems.) 357

H. Forssman & I. Thuwe, *One Hundred and Twenty Children Born After the Application for Therapeutic Abortion Refused,* in Abortion and the Unwanted Child, Carl Reiterman, ed. (1970). (Long-term study of the psychological development of unwanted children born after an application for abortion was denied.) 367

R. Hall, *Abortion in American Hospitals,* 57 Am. J. Pub. Health 1933 (Nov. 1967). (Study of the practice of 391

abortion in American hospitals finding gross inequality and inconsistency in the administration of abortion regulations.)

7. R. Hall, *Therapeutic Abortion, Sterilization, and Contraception*, 91 Am. J. Obstetrics & Gynecology 518 (Feb. 1965). (Results of a survey of hospitals finding, in particular, a far higher incidence of therapeutic abortion for private patients than for ward patients.) 396

8. A. Margolis, *et al.*, *Therapeutic Abortion Follow-Up Study*, 110 Am. J. Obstetrics & Gynecology 243 (May, 1970). (Results of a study of women who had undergone an abortion, finding no evidence of psychological damage.) 411

9. G. Walter, *Psychologic and Emotional Consequences of Elective Abortion*, 36 Obstetrics & Gynecology 482 (Sept. 1970). (Review of studies of psychological reaction to abortion, finding no evidence of significant abortion-related distress.) 419

B. HEALTH AND SAFETY ASPECTS OF ABORTION

Eastman & Hellman, Williams Obstetrics .1085 (13th ed. 1966). (Medical discussion of therapeutic abortion from the leading obstetrical textbook.) 429

C. Tietze, *Morality With Contraception and Induced Abortion*, 45 Studies in Family Planning 6 (Sept. 1969). (Comparison of safety rates among induced abortion, childbirth, and contraception- medical abortion found 7 times safer than childbirth.) 437

C. Tietze, *Abortion Laws and Abortion Practices in Europe*, V Advances in Planned Parenthood 194 (Excerpta Medica International Congress Series No. 207, 1969). (Detailed analysis of abortion practices in Europe, as to safety, incidence, and patient characteristics.) 439

A. Margolis & E. Overstreet, *Legal Abortion Without Hospitalization*, 36 Obstetrics & Gynecology 479 (Sept. 1970). (Study showing that overnight hospital stay after abortion not likely to reduce the minimal future complications.) 459

H. Harvey & B. Pyle, *On the Healthiness of Four Thousand Abortions in a Free Standing Clinic* (unpublished material). (Study of excellent medical safety rate at non-hospital clinic in New York City.) 463

S. Goldsmith & A. Margolis, *Aspiration Abortion Without Cervical Dilation*, 110 Am. J. Obstetrics & Gynecology 580 (June, 1971). (Study of relatively uncomplicated abortion technique adaptable for non-hospital use with exceptional safety features.) 469

Penfield, *Abortion Under Paracervical Block*, 71 N.Y. State J. of Med. 1185 (June, 1971). (Analysis of 600 first trimester abortions under local anesthesia, concluding that procedure suitable for well-equipped office.) 473

I.

REGULATIONS, LAWS, AND GUIDELINES CONCERNING ACCESS TO MEDICAL ABORTION IN THE UNITED STATES

CURRENT STATUS OF ABORTION LAWS - August 1, 1970

Statutes provide that abortions are permitted for the reasons indicated and under the conditions specified.

State	Year	Physician	Hospital	Life	Health	Physical Health	Mental Health	Fetal Deformity	Forcible Rape	Statutory Rape (Age)	Incest	Time Limit (Weeks)	M.D. Approval	Residency
ALABAMA	1951													
ALASKA	1970	√	√[1]	√	√							•		√ 30 days
ARIZONA	1965			√										
ARKANSAS	1969	√	√	√	√									
CALIFORNIA	1967	√	√	√		√	√	√	√		√		3C	√ 4 mos
COLORADO	1967	√	√	√		√	√	√	√	√(15)	√	√(20)	2 3B[3]	
CONNECTICUT	1860			√					√	√(16)	√	√(16)[3]	3B	
DELAWARE	1969	√	√	√		√	√	√	√		√	√(20)[4]	1C RA	√ 4 mos[5]
DIST. OF COL.	1901			√	√									
FLORIDA	1868			√										
GEORGIA	1968	√	√	√	√			√	√	√(14)		•	2C 3B	√
HAWAII	1970	√	√											√ 20 days[6]
IDAHO	1863			√										
ILLINOIS	1876			√										
INDIANA	1838			√										
IOWA	1843			√										
KANSAS	1969	√	√[7]	√		√	√	√	√	√(16)	√		3C	
KENTUCKY	1910			√										
LOUISIANA	1914			√										
MAINE	1840			√									1C	
MARYLAND	1968	√	√	√		√	√	√	√			√(20)[8]	RA	
MASSACHUSETTS	1845			√[9]	√[9]									
MICHIGAN	1846			√										
MINNESOTA	1861			√										
MISSISSIPPI	1966	√		√					√[10]	√[10]				
MISSOURI	1836			√									2C	

State	Year	Physician	Hospital	Life	Health	Physical Health	Mental Health	Fetal Deformity	Forcible Rape	Statutory Rape (Age)	Incest	Time Limit (Weeks)	M.D. Approval	Residency
MONTANA	1864			√										
NEBRASKA	1873			√										
NEVADA	1861			√										
NEW HAMPSHIRE	1848			√										
NEW JERSEY	1849			√[11]										
NEW MEXICO	1969	√	√	√		√	√	√	√	√(18)	√		2B	
NEW YORK	1970	√										√(24)[13]		
N. CAROLINA	1967	√	√	√	√			√	√		√		3C	√ 30 days
N. DAKOTA	1943			√										
OHIO	1841			√										
OKLAHOMA	1910			√										
OREGON	1969	√	√	√		√[12]	√[12]	√	√	√(18)	√	√ 150 days[14]	1C	√
PENNSYLVANIA[15]	1860													
PUERTO RICO	1913			√										
RHODE ISLAND	1868			√										
S. CAROLINA	1970	√	√	√		√	√	√	√		√		3C	√ 90 days
S. DAKOTA	1939			√										
TENNESSEE	1883			√										
TEXAS	1859			√										
UTAH	1876			√										
VERMONT	1867			√										
VIRGINIA	1970	√	√	√		√	√	√	√		√		Board	√ 120 days[16]
WASHINGTON	1970	√	√									√ 16		√ 90 days
WEST VIRGINIA	1849			√										
WISCONSIN	1849			√									2C	
WYOMING	1959			√										

C – Consultant; B – Therapeutic Abortion Board; RA – Hospital Review Authority

*Non-Viable Fetus

[1] Abortion must be "performed in a hospital or other facility approved for the purpose by the Department of Health and Welfare or a hospital operated by the federal government or an agency of the federal government . . ." Abortion may not be performed unless "consent has been received from the parent or guardian of an unmarried woman less than 18 years of age . . ."

[2] Two-member abortion board required through the 12th week of pregnancy, three-member board thereafter

[3] The 16-week time limit applies to rape and incest only.

[4] After 20 weeks a pregnancy may be terminated to preserve the women's life or where the fetus is dead

[5] Residency requirement does not apply if the woman or her husband works in Delaware or if she has previously been a patient of a Delaware physician or if her life is in danger.

[6] "The affidavit [re residency] of such a woman shall be prima facie evidence of compliance with the requirement."

[7] Abortion must be done in a hospital "or other place as may be designated by law . . ."

[8] After 26 weeks a pregnancy may be terminated to preserve maternal life or when the fetus is dead.

[9] The statute prohibits "unlawful" abortion, or abortion which is "malicious" or performed "without lawful justification." Case law, however, sanctions abortion to preserve maternal life and protect maternal health. COMMONWEALTH V. WHEELER (1968).

[10] Statute does not specify whether forcible or statutory rape (or either) is meant.

[11] The statute forbids abortions done "maliciously or without lawful justification." Case laws provide that abortions are permitted at least to preserve the life of the woman. GLEITMAN V. COSGROVE (1967).

[12] After 24 weeks pregnancy may be terminated only to preserve women's life.

[13] "In determining whether or not there is substantial risk [to her physical or mental health] account may be taken of the mother's total environment, actual or reasonably foreseeable."

[14] The 150-day time limit does not apply in cases of danger to life.

[15] "Unlawful" abortion is proscribed but not defined.

[16] Residency may be proved by affidavit.

Primary source: *Checklist of Abortion Laws in the United States*. Association for the Study of Abortion, Inc., 1970.

Lader, Lawrence. "A National Guide to Legal Abortion." *Ladies' Home Journal*. July 1970

Prepared by NATIONAL CENTER FOR FAMILY PLANNING SERVICES, HSMHA, HEW

Item No. 1

Item No. 2

August 4, 1970

Second Tentative Draft
(Third Working Draft)

UNIFORM ABORTION ACT

SECTION 1. *[Abortion defined; Prohibited; Exceptions.]*

(a) "Abortion" means the intentional termination of human pregnancy other than by live birth.

(b) No abortion shall be performed in this state unless it is performed:

(1) by a physician licensed to practice medicine [or osteopathy] in this state or by a physician practicing medicine [or osteopathy] in the employ of the government of the United States or of this state, [and the abortion is performed in the physician's office or in a medical clinic, or in a hospital approved by the [Department of Health] or operated by the United States, this state or any department, agency, or political subdivision of either;] or

(2) by a female upon herself upon the advice of a licensed physician [; and in either case]

(3) within 24 weeks after the commencement of the pregnancy; or if after 24 weeks, the physician believes there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the physical or mental health of the mother, or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape or incest, or illicit intercourse with a girl under 16 years of age.]

(c) Any person who violates this section is guilty of a [felony] and, upon conviction thereof, may be sentenced to pay a fine not exceeding [$1,000] or to imprisonment [in the state penitentiary] not exceeding [5 years], or both.

SECTION 2. *[Uniformity of Interpretation].* This Act shall be construed to effectuate its general purpose to make uniform the law of those states which enact it.

SECTION 3. *[Short Title.]* This Act may be cited as the Uniform Abortion Act.

SECTION 4. *[Severability.]* If any provision of this Act or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 5. *[Repeal.]* The following acts and parts of acts are repealed:

(1)

(2)

(3)

SECTION 6. *[Time of Taking Effect.]* This Act shall take effect _____.

Model Penal Code (Proposed Official Draft, 1962)

Section 230.3. Abortion.

(1) Unjustified Abortion. A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.

(2) Justifiable Abortion. A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for

purposes of this subsection. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable. [Additional exceptions from the requirement of hospitalization may be incorporated here to take account of situations in sparsely settled areas where hospitals are not generally accessible.]

(3) Physicians' Certificates; Presumption from Non-Compliance. No abortion shall be performed unless two physicians, one of whom may be the person performing the abortion, shall have certified in writing the circumstances which they believe to justify the abortion. Such certificate shall be submitted before the abortion to the hospital where it is to be performed and, in the case of abortion following felonious intercourse, to the prosecuting attorney or the police. Failure to comply with any of the requirements of this Subsection gives rise to a presumption that the abortion was unjustified.

(4) Self-Abortion. A woman whose pregnancy has continued beyond the twenty-sixth week commits a felony of the third degree if she purposely terminates her own pregnancy otherwise than by a live birth, or if she uses instruments, drugs or violence upon herself for that purpose. Except as justified under Subsection (2), a person who induces or knowingly aids a woman to use instruments, drugs or violence upon herself for the purpose of terminating her pregnancy otherwise than by a live birth commits a felony of the third degree whether or not the pregnancy has continued beyond the twenty-sixth week.

(5) Pretended Abortion. A person commits a felony of the third degree if, representing that it is his purpose to perform an abortion, he does an act adapted to cause abortion in a pregnant woman although the woman is in fact not

pregnant, or the actor does not believe she is. A person charged with unjustified abortion under Subsection (1) or an attempt to commit that offense may be convicted thereof upon proof of conduct prohibited by this Subsection.

(6) Distribution of Abortifacients. A person who sells, offers to sell, possesses with intent to sell, advertises, or displays for sale anything specially designed to terminate a pregnancy, or held out by the actor as useful for that purpose, commits a misdemeanor, unless:

(a) the sale, offer or display is to a physician or druggist or to an intermediary in a chain of distribution to physicians or druggists; or

(b) the sale is made upon prescription or order of a physician; or

(c) the possession is with intent to sell as authorized in paragraphs (a) and (b); or

(d) the advertising is addressed to persons named in paragraph (a) and confined to trade or professional channels not likely to reach the general public.

(7) Section Inapplicable to Prevention of Pregnancy. Nothing in this Section shall be deemed applicable to the prescription, administration or distribution of drugs or other substances for avoiding pregnancy, whether by preventing implantation of a fertilized ovum or by any other method that operates before, at or immediately after fertilization.

N. Y. Penal Law §125.05(3), at 79 (McKinney Supp.1970-1971)

* * * * *

3. "Justifiable abortional act." An abortional act is justifiable when committed upon a female with her consent by a duly licensed physician acting (a) under a reasonable belief that such is necessary to preserve her life, or, (b) within twenty-four weeks from the commencement of her pregnancy. A pregnant female's commission of an abortional act upon herself is justifiable when she acts upon the advice of a duly licensed physician (1) that such act is necessary to preserve her life, or, (2) within twenty-four weeks from the commencement of her pregnancy. The submission by a female to an abortional act is justifiable when she believes that it is being committed by a duly licensed physician, acting under a reasonable belief that such act is necessary to preserve her life, or, within twenty-four weeks from the commencement of her pregnancy.

As amended L.1970, c. 127, eff. July 1, 1970.

Item 5

HEALTH SERVICES ADMINISTRATION DEPARTMENT OF HEALTH

Resolution Adopted

AT A MEETING OF THE BOARD OF HEALTH OF THE DEPARTMENT OF Health held September 17, 1970, the following resolution was adopted:

Resolved, That the schedule of article headings of Title III of the New York City Health Code, as enacted by resolution adopted on the twenty-third day of March, nineteen hundred fifty-nine and filed with the City Clerk on the twenty-fourth day of March, nineteen hundred fifty-nine, be and the same hereby is amended by adding thereto a new article heading, to follow the article heading "ARTICLE 41 MATERNITY AND NEWBORN SERVICES," to read as follows:

ARTICLE 42 ABORTION SERVICES

Resolved further, that such Title be and the same hereby is amended, by adding a new Article 42 thereto, to follow Article 41 thereof, to be printed together with explanatory notes, to read as follows:

Section
42.01 Definitions
42.03 Requirements and standards
42.05 Filing of staff and service regulations
42.07 Records and reports; inspection
42.09 Compliance with Title V, Vital Statistics
42.11 Facilities, equipment and supplies generally
42.13 Transportation facilities for affiliated service
42.15 Elevators
42.17 Admission and examination facilities
42.19 Laboratory facilities
42.21 Operating facilities
42.23 Recovery room or rooms
42.25 Staff; physician in charge of abortion service; duties
42.27 Staff; nursing supervision of abortion patients
42.29 Staff; social service
42.31 Admission and examination procedures
42.33 Operative and post-operative requirements
42.35 Modification by Board

INTRODUCTORY NOTES

Article 42 was enacted by resolution of the Board of Health adopted on September 17, 1970 to provide public health standards of care in the performance of abortions, with proper regard for the health, safety and well-being of the patient. This article requires that abortions be performed only by physicians operating in a place or facility where there is qualified supervision in obstetrics or surgery, and where equipment, staff and facilities are provided to handle hemorrhage, shock, cardiac arrest and other emergencies, as well as to apply aseptic procedures. The article further protects the health of the patient by providing that abortions performed on women pregnant 12 weeks or less may be performed on an ambulatory basis; that pregnancies of longer duration or those involving medical, surgical, gynecological or psychiatric conditions, or complications occurring during or after the abortion, require inpatient facilities. The article also requires that family planning services should be made available to patients.

The article follows the enactment of a new abortion law (Chapter 127, Laws of 1970, effective July 1, 1970) by the State Legislature. The new law amended subdivision 3 of Section 125.05 of the State Penal Law to generally provide that an abortion performed within twenty-four weeks from the commencement of pregnancy by a physician with the consent of the pregnant female shall be a justifiable abortional act and, therefore, not subject to criminal prosecution under related provisions of the Penal Law.

§ 42.01 Definitions

When used in this article:

(a) Abortion service means a place or facility in which abortions are performed.

(b) Hospital means a hospital as defined in Section 700.2 (5) of the State Hospital Code.

(c) Affiliated abortion service means an abortion service which is located within a total transport time of ten minutes from a hospital with which such service has a written affiliation agreement for the treatment of its patients requiring care on an inpatient basis.

(d) Total transport time means the total elapsed time between the diagnosis, at an affiliated abortion service, of a complication requiring emergency care and the delivery of the patient and the transfer of responsibility for the patient's care to appropriate medical personnel at a hospital.

(e) Unaffiliated abortion service means an abortion service which is not located in a hospital and is not an affiliated abortion service.

(f) Qualified obstetrician means:

(1) A licensed physician who is a diplomate of the American Board of Obstetrics and Gynecology, or who submits evidence to the Department that his training and experience qualify him for admission to the examination by such Board; or,

(2) A licensed physician who is a fellow of the American College of Surgeons in the specialty of obstetrics and gynecology; or,

(3) A licensed physician who has the rank of associate attending obstetrician or higher at a voluntary or municipal hospital approved for residency training in obstetrics by the Council on Medical Education and Hospitals of the American Medical Association; or,

(4) A licensed physician who has the rank of assistant professor of obstetrics or gynecology or higher in a medical school approved by the Board of Regents of the University of the State of New York; or,

(5) A Doctor of Osteopathy who holds a license to practice medicine in the State of New York and who is certified by the American College of Osteopathic Obstetricians and Gynecologists, or who submits evidence to the Department that his training and experience qualify him for admission to the examination by such Board, or who submits evidence of completion of a residency in obstetrics and gynecology.

(g) Qualified surgeon means:

(1) A licensed physician who is a diplomate of the American Board of Surgery, or who submits evidence to the Department that his training and experience qualify him for admission to the examination by such Board; or

(2) A licensed physician who is a fellow of the American College of Surgeons; or

(3) A licensed physician who has the rank of associate attending surgeon or higher at an accredited voluntary or governmental hospital.

(h) Registered professional nurse means a person who is registered as a registered professional nurse by the State Department of Education pursuant to Article 139 of the Education Law.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.03 Requirements and standards

An abortion shall be performed in an abortion service operated in accordance with the provisions of this article and related provisions of this Code.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.05 Filing of staff and service regulations

An abortion service shall be maintained in accordance with a set of formal standards which define the professional qualifications of its obstetric, gynecological, surgical, nursing and administrative staff, and which govern the conduct of the service. These standards shall be prepared by the physician in charge of such service and a copy of such standards and any change or modification thereof shall be filed with the Department.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.07 Records and reports; inspection

(a) An abortion service shall keep records including admission and discharge notes, histories, results of tests and examinations, nurse's work sheets, social service records and other progress notes of patients, and it shall submit such records to the Department when the Department shall so require.

(b) An abortion service shall prepare reports which shall be submitted to the Department when it shall so require. Such reports shall include the number of:

(1) Patients requesting abortions;

(2) Patients on whom abortions were performed according to the period of gestation and method of termination of pregnancy;

(3) Patients for whom abortions were refused and the reasons therefor; and

(4) Patients referred to other abortion services.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.09 Compliance with Title V, Vital Statistics

Abortion services shall comply with applicable requirements of Title V of this Code.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.11 Facilities, equipment and supplies generally

Facilities, equipment and supplies in an abortion service shall be maintained in proper working order. Necessary solutions, drugs and medications shall be supplied and maintained pursuant to related provisions of Article 75. Knee or foot controlled sinks shall be provided in or immediately adjacent to the room where the abortion is performed. The abortion service facilities and equipment shall be maintained in a clean and sanitary condition.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.13 Transportation facilities for affiliated service

An affiliated abortion service shall have immediately available organized transportation facilities capable of insuring that a patient requiring emergency care at the hospital with which such service is affiliated will be transported to such hospital within the total transport time of ten minutes.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.15 Elevators

Any building of more than one story in height and of which an abortion service is a part shall be provided with an elevator for the use of non-ambulatory abortion patients. The elevator shall be of sufficient size to accommodate a standard stretcher. When a non-ambulatory abortion patient is moved from one floor to another, she shall be accompanied by attending medical or nursing personnel.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.17 Admission and examination facilities

An abortion service shall provide facilities for registration, medical evaluation, examination and referral, equipped with suitable furnishings and accommodations, including waiting and dressing rooms and other appurtenances for the physical comfort and convenience of patients and personnel. Sufficient, suitably equipped examining rooms shall be provided for the daily caseload. Nothing contained herein shall prohibit registration, interviewing, history-taking, medical examination and appropriate referral from being conducted in an existing prenatal, gynecology and/or family planning clinic.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.19 Laboratory facilities

(a) An unaffiliated abortion service or an abortion service located in a hospital shall have on its premises a blood bank maintained and operated pursuant to the requirements of Articles 17 and 19, a clinical laboratory maintained pursuant to Article 13 of this Code, and an X-ray laboratory which meets the requirements of Article 175. The clinical laboratory shall be qualified to perform urinalysis, hematocrit and other hematological tests including cross-matching and determinations of blood group and Rh type. The examination of surgically removed tissue, tests for pregnancy, and infrequently performed tests, or those not included within specialties or subspecialties stated on its permit, or those requiring specialized equipment and skill, may be forwarded to another laboratory approved by the Department.

(b) The affiliation agreement of an affiliated abortion service shall include provision for use in the hospital of those facilities required in subsection (a). However, the affiliated abortion service shall have on its premises such facilities as are necessary to perform clinical tests specified in the agreement.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.21 Operating facilities

(a) An unaffiliated abortion service or an abortion service located in a hospital shall have available on its premises a standard operating room capable of accommodating abdominal as well as vaginal surgical procedures. An affiliated abortion service shall include in its affiliation agreement provision for the use of a standard operating room in the treatment of its patients requiring care on an innatient basis.

(b) For abortions specified in Section 42.35(a), existing outpatient operating facilities may be utilized or new outpatient operating facilities created, if the policies established by the physician in charge of the abortion service and the patient load warrant. If it is found necessary to add to existing outpatient operating facilities, a standard sized treatment room may be converted to an operating facility.

(c) All rooms in which abortions are performed shall be adequately equipped, supplied and staffed and shall include the following in addition to the instruments and equipment needed for the performance of abortions.

(1) Anesthesia equipment and such other equipment as is necessary to treat patients for hemorrhage, shock, cardiac arrest, and other emergencies.

(2) In an unaffiliated abortion service or an abortion service located in a hospital an adequate supply of drugs, compatible whole blood, blood fractions, blood concentrates, plasma expanders and parenteral fluids immediately available at all times with appropriate refrigeration equipment therefor; in an affiliated abortion service an adequate supply of drugs, plasma expanders and parenteral fluids shall be available at all times with appropriate refrigeration equipment therefor;

(3) Dressing room and scrub-up facilities which are suitably located;

(4) A utility room with facilities for sterilization of bedpan and enema equipment.

(5) A utility room with facilities for sterilization of supplies, except in an abortion service which receives sterile supplies from a central supply service.

(d) The operating facilities and equipment shall be constructed and maintained so as to be free from sanitary hazards and safety hazards likely to cause a fire or explosion.

(e) Environmental controls to prevent infection, including the control of personnel and patient traffic, shall be maintained in the operating facilities.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.23 Recovery room or rooms

An adequately sized and separate recovery room or rooms in proximity to the operating facilities shall be provided. The recovery room shall contain adequate monitoring equipment, suction oxygen and other related equipment. Such room shall be staffed by qualified nursing personnel. An adequate number of recovery beds and/or rooms shall be provided to insure a minimum of three (3) hours for the recovery of each patient.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.25 Staff; physician in charge of abortion service; duties

(a) An abortion service shall be staffed so as to provide on the premises adequate medical, nursing, and ancillary personnel.

(b) The abortion service shall be supervised by a physician in charge who shall be a qualified obstetrician or, in a service which does not have a qualified obstetrician, by a qualified surgeon.

(c) The physician in charge of the abortion service shall be responsible for:

(1) Setting the policies and procedures pertaining to abortions and the implementation thereof; and

(2) Designating a licensed physician or physicians whom he deems qualified to supervise directly the care of all patients undergoing abortion, including their post-operative care and follow-up.

(3) Establishing standards for the observation of patients by nursing personnel during the post-operative period.

(d) A physician shall be present on the premises of the abortion service at all times during the operative and post-operative period.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.27 Staff; nursing supervision of abortion patients

(a) At least one registered professional nurse with post-graduate education or experience in obstetric or gynecologic nursing shall supervise and direct the nursing personned and care and shall be on duty in an abortion service at all times while in use.

(b) Student nurses, practical nurses, attendants and other ancillary personnel assigned to give nursing care in an abortion service shall be adequately trained in observational and emergency techniques for pre-operative and post-operative care of abortion patients and shall be supervised by registered professional nurses.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.29 Staff; social service

An abortion service shall have a social service unit available to serve its patients adequately.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.31 Admission and examination procedures

(a) Every woman seeking to terminate her pregnancy shall be registered as expeditiously as possible and, whenever possible, on the same day of registration she shall be seen by a physician and staff for history-taking, physical examination and necessary laboratory tests.

(b) If the patient cannot be accepted for registration and examination within a reasonable period of time, the abortion service shall refer her to an appropriate resource or to a central registry, and shall make every effort to secure treatment for her.

(c) Pregnancy testing should be available at the patient initial visit and may precede actual registration. The result and type of pregnancy test shall be available to the examining physician before the performance of the abortion. The diagnosis of pregnancy shall be the responsibility of the examining physician.

(d) A complete medical history shall be obtained and the physical examination shall be complete and not confined solely to a pelvic examination. The following laboratory tests shall be performed on every patient; hematocrit, complete urinalysis, blood grouping

and Rh typing. The blood specimen used for blood grouping and typing shall be retained by the blood bank in the event a cross-matching test for transfusion is required.

(e) Interviewing and counseling by social service staff shall be made available to patients before and after abortions are performed.

(f) Family planning counseling by such personnel as may be prescribed by the physician in charge of the service shall be made available to patients before and after abortions are performed.

(g) Where medical evaluation, examination and referral are made from a private physician's office, hospital, clinic or other abortion service pertinent records thereof shall be made available at the time the patient is registered and admitted to the abortion service. Proper policies and procedures for coordination or referral from various sources shall be established by the physician in charge of the abortion service and adhered to by all members of the staff.

(h) There shall be an interval of not less than two days between initial examination and termination of pregnancy to permit the reporting to and review of all laboratory tests by the examining physician and to permit and encourage thorough consideration and a firm decision by the patient regarding termination of pregnancy. No patient shall be coerced in any manner by the staff of the abortion service in arriving at her decision.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.33 Operative and post-operative requirements

(a) Abortions on patients with a gestation up to and including twelve weeks as determined by the physician may be performed on an ambulatory basis if the patient's medical condition permits.

(b) The following patients shall be treated on an inpatient basis for the abortion:

(1) Patients pregnant more than twelve weeks as determined by the physician;

(2) Patients having such medical, surgical, gynecological or psychiatric conditions or complications as specified in the rules of the chief of staff of the abortion service and filed with the Department pursuant to Section 42.05; and

(3) Patients having a sterilization procedure immediately following the abortion.

(c) Only physicians shall be permitted to perform abortions. Termination of pregnancies involving more than twenty weeks gestation shall not be performed by the physician without appropriate medical consultation.

(d) Where general or local anesthesia is administered to abortion patients it shall be administered pursuant to the requirements of Section 41.61.

(e) Pathologic examination of all tissue removed from the uterus shall be performed routinely.

(f) Patients shall receive the following post-operative care:

(1) Patients whose pregnancy was terminated on an ambulatory basis shall be observed in the abortion service for a reasonable number of hours, not less than three, to ensure that no immediate post-operative complications are present and thereafter such patients may be discharged if their course has been uneventful;

(2) Patients in whom any adverse condition exists or in whom a complication is known or suspected to have occurred during or after the performance of the abortion shall remain in the abortion service or the back-up hospital for a minimum of twenty-four hours.

(g) Written instructions shall be issued to all patients in accordance with the rules of the physician in charge of the abortion service and shall include the following:

(1) Symptoms of complications to be looked for;

(2) Activities to be avoided;

(3) Specific telephone number to be used by the patient should any complication occur or question arise;

(4) Date for follow-up or return visit after the performance of the abortion, which shall be scheduled within two to six weeks as indicated by the condition of the patient; and

(5) Information on the availability of family planning services when desired by the patient. When, in the opinion of the physician it is in the best interests of the patient, family planning services may be initiated, with the consent of the patient, prior to leaving the abortion service.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.35 Modification by Board

When the strict applicability of any provision of this article presents practical difficulties or unusual hardships, the Board, in a specific instance, may modify the application of such provision consistent with the general purpose of this article and upon such condition as are necessary, in the opinion of the Board to protect the health of abortion patients.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

Resolved further, that this resolution shall take effect immediately.

A true copy.

LORANCE HOCKERT, Secretary.

Filed with the City Clerk October 19, 1970. o23

Item No. 6

Rev. Code Wash. Ann., tit. 9, §§9.02.060 to 9.02.090 (Supp.1970) (Laws 1970, c.3):

§9.02.060. Neither the Termination by a physician licensed under Chapters 18.71 or 18.57 RCW of the pregnancy of a woman not quick with child nor the prescribing, supplying or administering of any medicine, drug or substance to or the use of any instrument or other means on, such woman by a physician so licensed, nor the taking of any medicine, drug or substance or the use or submittal to the use of any instrument or other means by such a woman when following the directions of a physician so licensed, with the intent to terminate such pregnancy, shall be deemed unlawful acts within the meaning of this act.

§9.02.070. A pregnancy of a woman not quick with child and not more than four lunar months after conception may be lawfully terminated under this act only: (a) with her prior consent and, if married and residing with her husband or unmarried and under the age of eighteen years, with the prior consent of her husband or legal guardian, respectively; (b) if the woman has resided in this state for at least ninety days prior to the date of termination; and (c) in a hospital accredited by the Joint Commission on Accreditation of Hospitals or at a medical facility approved for that purpose by the State Board of Health, which facility meets standards prescribed by regulations to be issued by the State Board of Health for the safe and adequate care and treatment of patients: PROVIDED, that if a physician determines that termination is immediately necessary to meet the medical emergency the pregnancy may be terminated elsewhere. Any physician who violates this section of this 1970 act or any regulation of the State Board of Health issued under authority of this section shall be guilty of a gross misdemeanor.

§9.02.080. No hospital, physician, nurse, hospital employee nor any other person shall be under any duty, by law or contract, nor shall such hospital or person in any circumstances be required, to participate in a termination of pregnancy if such hospital or person objects to such termination. No such person shall be discriminated against in employment or professional privileges because he so objects.

§9.02.090. If any provision of this act, or its application to any person or circumstance, is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances, is not affected.

Item No. 7

ABORTION REGULATIONS ADOPTED

BY THE WASHINGTON STATE BOARD OF HEALTH

DECEMBER 10, 1970

WAC 248-140

Section 010 PURPOSE. It is the purpose of the Washington State Board of Health to establish guidelines to assure the safe and adequate care of patients undergoing termination of pregnancy, by means of rules and regulations setting standards for medical facilities at which pregnancies are terminated, in accordance with Chapter 3, Laws of 1970.

Section 020 DEFINITIONS. Unless the context clearly indicates otherwise, the following terms, whenever used in this chapter, shall be deemed to have the following meanings:

(1) "Board" means the Washington State Board of Health.

(2) "Department" means the Washington State Department of Social and Health Services, which shall serve as agent of the board.

(3) "Secretary" means the secretary of the Department of Social and Health Services or his designee or authorized representative.

(4) "Certificate of Approval" means a certificate issued in behalf of the board by the department to a facility approved for the performance of abortion procedures.

(5) "Clean" when used in reference to a room or area means space and/or equipment for storage and handling of supplies and/or equipment which are in a sanitary or sterile condition.

(6) "Facility" means any institution, place, building or agency or portion thereof in which an abortion procedure is performed.

(7) "Physician" means a doctor of medicine or a doctor of osteopathy duly licensed in the state of Washington.

(8) "Physical barrier" means a partition or similar space divider designed to prevent splash or spray between room areas.

(9) "Recovery unit" means a room or rooms for the segregation and close or continuous observation and care of patients immediately following an abortion procedure.

(10) "Soiled" when used in reference to a room or area, means space and equipment for collection and/or cleaning of used or contaminated supplies and equipment and/or collection and/or disposal of wastes.

Section 030 APPLICABILITY OF THESE RULES AND REGULATIONS. These standards, rules and regulations apply to any facility which is not an accredited hospital as set forth in Chapter 3, Laws of 1970, in which any drug, substance, instrument, or other means is administered or used to terminate the pregnancy of a woman, except that Section 12 shall apply to all accredited hospitals.

Section 040 CERTIFICATE OF APPROVAL REQUIRED. No person shall establish, maintain, or operate a facility in which any means are employed or actions taken for the purpose of terminating the pregnancy of a woman without a certificate of approval from the department: PROVIDED, that this provision shall not apply to accredited hospitals as set forth in Chapter 3, Laws of 1970.

Section 050 APPLICATION FOR CERTIFICATE OF APPROVAL. An application for a certificate of approval may be made to the department by nonaccredited, licensed hospitals and all other facilities upon forms provided by the department and shall contain such information as the department reasonably requires and which may include affirmative evidence of ability to comply with these standards, rules and regulations. An application for renewal of license shall be made to the department upon forms provided by it and submitted thirty days prior to the date of expiration of the certificate of approval.

Section 060 ISSUANCE, DURATION AND ASSIGNMENT OF CERTIFICATE OF APPROVAL. (1) Upon receipt of an application for a certificate of approval, the department shall issue a certificate of approval if the applicant and the facility meet the requirements, standards, rules and regulations established herein. Each certificate of approval shall be issued for the premises and persons named in the application and no certificate of approval shall be transferrable or assignable.

(2) If there be failure to comply with the standards, rules and regulations, the secretary may, when, in his judgment, the well-being and safety of patients would not be jeopardized, issue to an applicant for an initial or renewed certificate of approval, a provisional certificate of approval which will permit the operation of the facility for a specific, determined period of time. A provisional certificate of approval may be issued only when, after thorough investigation, it has been determined that time can be allowed for the facility

to correct existing deficiencies without placing in jeopardy the safety or health of women who receive services for the termination of pregnancy. In no case shall provisional approval exceed six months without review and sanction by the secretary.

Section 070 FORM OF APPLICATION FOR CERTIFICATE OF APPROVAL AND INSPECTION. The secretary shall prescribe the form upon which applications for approval shall be made, shall prior to the approval, within a reasonable time after application, evaluate the findings of inspections and issue a certificate of approval if the findings demonstrate conformity to the law and to these rules and regulations. A certificate of approval shall be valid immediately and for twelve months following the first day of the month following issuance, unless revoked for cause, and may be renewable. The secretary shall have access at any reasonable time, to the premises for which approval has been requested or has been issued, for purposes of ascertaining conformance to the law or to these rules and regulations.

Section 080 PROCEDURE UPON DENIAL OF APPLICATION FOR CERTIFICATE. Applicants denied approval shall have recourse to review of the decision of the secretary in conformance with the Administrative Procedure Act.

Section 090 HOSPITAL FACILITIES APPROVED FOR TERMINATING PREGNANCY. A hospital facility approved for the purpose of terminating a pregnancy lawfully shall be:

(1) A hospital accredited by the Joint Commission on Accreditation of Hospitals; or

(2) Any other hospital licensed under chapter 70.41 RCW: PROVIDED, That such licensed hospital meets, at a minimum, the standards set forth in these regulations with the exception of Section 10 (1), (8), and (9).

Section 100 NON-HOSPITAL FACILITIES APPROVED FOR TERMINATING PREGNANCY. Any facility not an integral organizational part of an accredited or licensed hospital and not located within its premises, must meet the following requirements to be approved for termination of pregnancy.

(1) Has an agreement with an accredited or licensed hospital for medical consultation and for the transfer of patients in need of immediate hospitalization because of medical emergencies such as hemorrage, shock, perforation or infection, and is located so that it would ordinarily be practical

to transport a patient from the outpatient facility to a hospital in ten minutes or less.

Has a surgical operating room with a minimum dimension of at least ten feet and a minimum area of at least one hundred and twenty square feet; which must be well-lighted, with adequate illumination; with a suction outlet or suction machine, an oxygen outlet or oxygen tank, intravenous stand, a resucitator, storage for surgical supplies, and equipment for collection of surgical linens and wastes.

Has adequate facilities available for patients for short periods of rest and recuperation and due regard to the patient's dignity and privacy.

Has sufficient sanitary toilet facilities for patients within the premises of the facility.

Has a soiled area which includes a clinic service sink, a work-counter, a double compartment sink, storage cabinet and adequate space for linen hampers and waste containers. Soiled areas shall be separated from clean areas by a physical barrier.

Has an autoclave, with a recording thermometer, of sufficient size to accomodate medical supplies and equipment to be sterilized. If the practice of sterilizing unwrapped trays of instruments and other equipment is followed, the autoclave must be located to provide direct access to the operating room from the autoclave. The autoclave may be in either a clean or soiled room area wherein the arrangement and workflow is such that separation of contaminated items from sterile items is maintained.

There shall be sufficient storage units and clean areas to provide for storage of linens, drugs, anesthesia, solutions, instruments, utensils and other clean or sterile supplies and equipment.

No pregnancy more than ten weeks after conception may be terminated in such a facility.

Flammable anesthesia shall not be used in any terminations.

) Each patient receiving services within the facility shall be under the care of a physician. Administration of anesthesia to the patient shall be by a physician or a certified registered nurse anesthetist.

(11) A patient who has undergone a procedure which is producing hemorrhage, shock, respiratory depression or other serious complication shall be transferred to a hospital, when in the judgment of the attending physician, it is deemed medically feasible. All other patients shall be retained in a recovery unit for a period of observation and care until it has been determined that the patient's condition has stabilized to a point where she may be released without jeopardy to her health and safety.

(12) The secretary may modify or exempt an applicant from one or more of the requirements of this section when in his judgment, the well-being and safety of patients would not be jeopardized thereby: PROVIDED, That such action is taken only after thorough inspection and evaluation of all relevant circumstances and conditions.

Section 110 DISCLOSURE OF INFORMATION. Information received by the board or the department through filed reports, inspections or as otherwise authorized, shall not be disclosed publicly in such a manner as to identify any individual without her consent, except by subpoena, nor in such manner as to identify any facility except in a proceeding involving issues of certificates of approval.

Section 120 REPORTING OF PREGNANCY TERMINATIONS. In order for the board and the department to evaluate the effect of the board's rules and regulations in assuring safe and adequate care and treatment of patients, each hospital where lawful abortions are performed in accordance with chapter 3, Laws of 1970, and these rules and regulations shall, on forms prescribed and supplied by the secretary, report to the department during the following month the number and dates of abortions performed during the previous month, giving for each abortion the age and marital status of the patients, the duration of the pregnancy, the method of abortion, any complications such as perforations, infections, and incomplete evacuations, the name of the physician performing the abortion and such other relevant information as may be required by the secretary. All physicians performing abortions in other facilities approved for that purpose shall report in the same manner. All physicians performing abortions in non-approved facilities, when the physician has determined that termination of the pregnancy was immediately necessary to meet a medical emergency shall also report in the same manner, and shall additionally provide a clear and detailed statement of the facts upon which he based his judgment of medical emergency.

OR COPY

Section 130 REVIEW OF REGULATIONS. These regulations shall be reviewed and evaluated on or before six months from this date: December 10, 1970.

Section 140 EMERGENCY SECTION. (Regulations to be effective immediately.)

##

Item No. 8

THE AMERICAN COLLEGE
OF OBSTETRICIANS AND GYNECOLOGIS
79 West Monroe Street • Chicago, Illinois 60603
Telephone 312-236-6814

POLICY ON ABORTION

Policies covering abortions should be designed by the medical staff to safeguard the patient's health or improve her family life situation. They should have due regard for local legal statutes and judicial decrees. Abortion should only be performed in facilities that are administered by a hospital approved by the Joint Commission on Accreditation of Hospitals and/or licensed by a state or province.

It is recognized that abortion may be performed at a patient's request, or upon a physician's recommendation. No physician should be required to perform, nor should any patient be forced to accept an abortion.

When abortion is requested by a patient, the request should be obtained in writing from the patient, or, in the case of a minor, from her parent or guardian. The patient should be informed of the medical nature of the procedure and of its potential consequences. When abortion is recommended by a physician, the indications should be stated in the patient's record, and informed consent obtained from the patient and her husband, or herself if she is unmarried, or from her nearest relative or guardian if she is under the age of consent. When abortion is requested by a patient, a consultation is not necessary. When abortion is recommended by a physician, the indication for the procedure should be approved by a consultant knowledgeable in regard to the condition thought to indicate abortion.

Abortion is an operative procedure and should only be performed: (1) by a physician who has hospital privileges for the care of obstetric-gynecologic patients and (2) in a hospital-facility adequately equipped to care properly for unexpected complications.

In order to assure that adequate facilities will be available for indicated care of other obstetric-gynecologic patients in some communities, consideration should be given by hospitals to (1) providing a room or entirely separate facilities where abortion can be performed with minimal disruption of other hospital procedures and the hospital based educational program, and (2) utilizing hospital personnel who volunteer to care for patients admitted to be aborted.

Approved by the Executive Board
August 1970

p.23

THE AMERICAN PUBLIC HEALTH ASSOCIATION, INC
NEW YORK WASHINGTON SAN FRANCISCO BIRMINGHAM
1740 BROADWAY, NEW YORK, N. Y. 10019 Phone: (212) 245-8000

RECOMMENDED STANDARDS FOR ABORTION SERVICES

I. INTRODUCTION:

Since 1967, 15 states have responded to the increasing public demand for changes in the legal restriction of abortion practice by passing new laws. Moreover, at least 14 states have had the constitutionality of their abortion laws challenged in court. Public health agencies must be prepared, therefore, to respond to an increasing need for abortion services.

Abortion services are an integral part of comprehensive family planning and maternal and child health care. As such, abortion and contraceptive counseling and services should be available together.

Contraception should be encouraged as a means of minimizing the need for abortion. Counseling and services for abortion and contraception should receive full administrative and financial support as part of maternal and child health programs.

When there is a large demand for a service that is in limited supply, a situation exists in which human needs can be exploited for economic gain. The public interest requires that health agencies recognize this fact and make very effort to provide safe, accessible abortion services at reasonable fees for all who are in need of such services.

I. SPECIFIC RECOMMENDATIONS:

A. Referral and Counseling

1. Abortion referral services should be available through state and local health departments, in collaboration with medical societies and voluntary agencies. These services should make both private and public care known and available to women seeking abortion.

2. Counseling is an integral part of abortion services. The manner in which referral and counseling are carried out plays a major role in determining whether the abortion patient is treated in a safe, humane and dignified manner, and protected against exploitation.

3. The APHA therefore recommends the following five standards:

   a. Rapid and simple abortion referral must be readily available through state and local public health departments, medical societies, or other nonprofit organizations.

   b. An important function of counseling should be to simplify and expedite the provision of abortion services; it should not delay the obtaining of these services.

   c. Psychiatric consultation should not be mandatory. As in the case of other specialized medical services psychiatric consultation should be sought for

definite indications and not on a routine basis.

d. A wide range of individuals from appropriately trained, sympathetic volunteers to highly skilled physicians may qualify as abortion counselors.

e. Contraception and/or sterilization should be discussed with each abortion patient.

B. Public Education

Education about abortion procedures and services is a public responsibility. Public health agencies should take a leadership role in providing information to the public. They should educate the public so that there is a general awareness of the current status concerning a woman's legal right to abortion, and so that women desiring abortion know of the circumstances under which this procedure is most safely performed. The importance of having an abortion before the end of the third month of pregnancy should be stressed as a safety factor to every woman at risk of pregnancy who might want to have a pregnancy terminated. Effective education in contraceptive use is an essential part of an abortion service program and will help women seeking abortion to minimize subsequent unwanted pregnancies.

C. Surgical Care

1. While comprehensive information is not available on all factors determining the risks to life and health

associated with the performance of an abortion, three such factors are recognized as important:

a. the skill of the physician,

b. the environment in which the abortion is performed, and above all

c. the duration of pregnancy, as determined by uterine size and confirmed by menstrual history.

It stands to reason that the risks to a woman having an abortion are smaller when in the hands of a well-trained obstetrician-gynecologist than in the hands of a physician with little training or experience. It is also clear that a well equipped hospital offers a wider range of specialized personnel and equipment to cope with unforeseen difficulties than an office or clinic without such resources. It has been abundantly documented that risks to life and health increase steeply with each additional week of gestation. The factor of gestational age is of overriding importance.

2. The APHA recommends therefore that abortions in the second trimester and early abortions in the presence of pre-existing medical complications be performed in hospitals as in-patient procedures.

3. For pregnancies prior to the end of the 12th week, as measured by gestational size, abortion in the hospital with or without overnight stay is probably the safest

practice. The performance of abortions in an extramural treatment facility, however, is an acceptable alternative to abortion in a hospital provided arrangements exist in advance to admit patients promptly if unforeseen complications develop. Standards for any abortion facility should include the following essentials:

a. An operating table, or conventional gynecologic examining table with accessories, which is located in a room which is adequately lighted and ventilated and meets all other environmental standards for surgical procedures.

b. Surgical instruments sufficient in number to permit individual sterilization for each patient and which are adequate to perform conventional cervical dilatation and curettage, and electrically safe equipment for vacuum aspiration.

c. Drugs, parenteral fluid and electrolyte solutions (including plasma volume expander) in sufficient supply for emergency use.

d. Anesthesia equipment, including oxygen and equipment for artificial ventilation and administration of anesthetic gases, and resuscitation equipment.

e. Capability to transfer a patient immediately to an operating room in a hospital.

f. Supporting laboratory equipment and personnel, or immediate access to same, for preoperative and emergency laboratory determinations.

g. Special arrangements for patient emergency care including diagnostic and therapeutic contacts for postoperative follow-up on examination.

4. The APHA is concerned with the high prices charged for abortions in many areas and with the inadequate coverage of these services by Medicaid and private insurance carriers, and by the fact that in many places the burden of performing abortions appears to fall on a minority of physicians. The APHA feels that qualified physicians who do not have religious or philosophic objections to abortions are professionally obliged to make their services available at a reasonable cost.

5. The APHA is also concerned with the hostile and punitive attitudes toward women seeking abortion which are manifested by some members of the health professions and ancillary personnel. Women in need of abortion frequently have requirements for counseling, health education, tenderness, and understanding that are even greater than those of other patients.

6. At present, abortions should be performed by physicians or osteopaths who are licensed to practice in their state.

Abortions performed in hospitals should be carried out with adherence to the policies established by the chief of the hospital staff or his delegate.

7. Physicians doing abortions should have adequate training. Such training should be available to all physicians doing abortions. Abortion training should be a part of medical school education and residency training in obstetrics and gynecology and family practice.

8. New developments in the delivery of abortion services and techniques need to be explored in a way that is consonant with the same safeguards which govern all other research involving human subjects.

D. Reporting

1. Reporting of abortions performed is essential to planning for, providing, and improving abortion services. State health departments should assume the responsibility for collecting abortion reports, delegating the responsibility and authority to local health departments when appropriate. The collection of state data nationally is essential to national health planning by the federal government.

2. Confidentiality is essential to abortion reporting. Medical records must identify individuals, but reports to state and local health departments need not do so.

3. The following items are recommended for inclusion in an abortion reporting system:

   a. Date of abortion.

   b. Place of abortion (city and state).

   c. Type of facility (hospital, extramural clinic, doctor's office, other).

   d. Gestational age.

   e. Age of woman.

   f. Ethnic group.

   g. Technique of abortion.

   h. Type of care (inpatient, outpatient).

   i. Residence of woman.

   j. Number of prior pregnancies.

   k. Number of prior deliveries (20 weeks or more) (live birth + fetal deaths).

   l. Number of prior abortions (under 20 weeks)- spontaneous or induced.

   m. Marital status.

   n. Education (years of schooling).

November 1970

BLEED THROUGH POOR COPY

Item No. 10

ABORTION

The AMA policy regarding abortion as determined by its House of Delegates, June 25, 1970 is:

> Whereas, Abortion, like any other medical procedure, should not be performed when contrary to the best interests of the patient since good medical practice requires due consideration for the patient's welfare and not mere acquiescence to the patient's demands; and
>
> Whereas, The standards of sound clinical judgment, which together with informed patient consent should be determinative according to the merits of each individual case; therefore be it
>
> *Resolved,* That abortion is a medical procedure and should be performed only by a duly licensed physician and surgeon in an accredited hospital after consultation with two other physicians chosen becuase of their professional competency, acting only in conformance with standards of good medical practice and within the Medical Practice Act of his State; and be it further
>
> *Resolved,* That no physician or other professional personnel shall be compelled to perform any act which violates his good medical judgment. Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles. In these circumstances good medical practice requires only that the physician or other professional personnel withdraw from the case so long as the withdrawal is consistent with good medical practice.

- -

The AMA's Judicial Council said:

> "The Judicial Council is charged with interpreting the Principles of Medical Ethics as adopted by the House of Delegates of the AMA.
>
> The Principles of Medical Ethics of the AMA do not prohibit a physician from performing an abortion that is performed in accordance with good medical practice and under circumstances that do not violate the laws of the community in which he practices.
>
> In the matter of abortions, as of any other medical procedure, the Judicial Council becomes involved whenever there is alleged violation of the Principles of Medical Ethics as established by the House of Delegates."

Item No. 11

TEXT OF THE CONSTITUTION OF THE WORLD HEALTH ORGANIZATION

THE STATES Parties to this Constitution declare, in conformity with the Charter of the United Nations, that the following principles are basic to the happiness, harmonious relations and security of all peoples:

Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.

The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States.

The achievement of any State in the promotion and protection of health is of value to all. Unequal development in different countries in the promotion of health and control of disease, especially communicable disease, is a common danger.

Healthy development of the child is of basic importance; the ability to live harmoniously in a changing total environment is essential to such development.

The extension to all peoples of the benefits of medical, psychological and related knowledge is essential to the fullest attainment of health.

Informed opinion and active co-operation on the part of the public are of the utmost importance in the improvement of the health of the people.

Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures.

ACCEPTING THESE PRINCIPLES, and for the purpose of co-operation among themselves and with others to promote and protect the health of all peoples, the Contracting Parties agree to the present Constitution and hereby establish the World Health Organization as a specialized agency within the terms of Article 57 of the Charter of the United Nations.

Item No. 12

NARAL
NATIONAL ASSOCIATION FOR REPEAL OF ABORTION LAWS
250 WEST 57TH STREET
NEW YORK, N.Y. 10019

NATIONAL ORGANIZATIONS RECOMMENDING REPEAL OF ABORTION LAWS

American Association of Planned Parenthood Physicians
American Baptist Convention
American Civil Liberties Union
American College of Obstetricians & Gynecologists
Americans for Democratic Action
American Ethical Union
American Friends Service Committee
American Humanist Association
American Jewish Congress
American Medical Women's Association
American Protestant Hospital Association
American Psychiatric Association
American Psychoanalytic Association
American Psychological Association
American Public Health Association
Association for Voluntary Sterilization
Church Women United, Board of Managers
Citizen's Advisory Council on the Status of Women
Clergy Consultation Service on Abortion
Episcopal Churchwomen of the U. S. A.
Federation of American Scientists
Group for the Advancement of Psychiatry
Izaak Walton League
Medical Committee for Human Rights
Moravian Church, Northern Province Synod
National Association for Repeal of Abortion Laws
National Committee for Children & Youth
National Council of Jewish Women
National Council of Obstetrics-Gynecology
National Council of Women of the United States
National Emergency Civil Liberties Committee
National Medical Association
National Organization for Women
Physicians Forum
Planned Parenthood-World Population
President's Task Force on the Mentally Handicapped
Student American Medical Association
Unitarian Universalist Association
Unitarian Universalist Women's Federation
United Automobile Workers Union
United Church of Christ, United Church Board for Homeland Ministries
United Methodist Church
United Presbyterian Church in the U. S. A., Board of Christian Education
Women's Division of the United Methodist Church
Women's Liberation
Young Women's Christian Association of the U. S. A.
Zero Population Growth, Inc.

In addition, organizations in each state have declared support for repeal. For example, the following joined the recent effort to repeal Hawaii's abortion law:

American Association of University Women, Hawaii Chapter
American Civil Liberties Union of Hawaii
Associated Students of the University of Hawaii
Chamber of Commerce of Hawaii
Chamber of Commerce of Maui
Child and Family Service
Clergy Counseling Service
Commission on Children and Youth
Committee for Protection of Children
Democratic Action Group
Department of Social Services
Episcopal Diocese of Hawaii
Hawaii Council of Churches
Hawaii Government Employees Association
Hawaii Island Chamber of Commerce
Hawaii Medical Association
Hawaii Planned Parenthood
Hawaii Psychiatric Society
Hawaii Psychological Association
Hawaii Public Health Association
Hawaii State Federation of Labor, A.F.L.-C.I.O.
I. L. G. W. U., Local 142
John Howard Association
Kappa Delta Sorority Alumnae Association
Kilohana United Methodist Church
Mental Health Association of Hawaii
National Association of Social Workers, Hawaii Chapter
Salvation Army, Hawaiian Headquarters
Sierra Club of Hawaii
Unitarian Church
University Abortion & Birth Control Committee
Volunteers from VISTA
Zero Population Growth, Inc., Hawaii Chapter

II.

FEDERAL AND STATE COURT DECISIONS

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

United States, Appellant, v. Milan Vuitch.	On Appeal From the United States District Court for the District of Columbia.

[April 21, 1971]

Mr. Justice Black delivered the opinion of the Court.*

Appellee Milan Vuitch, a licensed physician, was indicted in the United States District Court for the District of Columbia for producing and attempting to produce abortions in violation of 22 D. C. Code 201. Before trial, the district judge granted Vuitch's motion to dismiss the indictments on the ground that the District of Columbia abortion law was unconstitutionally vague. 305 F. Supp. 1032 (DCDC 1969). The United States appealed to this Court under the Criminal Appeals Act, 18 U. S. C. § 3731. We postponed decision on jurisdiction to the hearing on the merits, 397 U. S. 1061, and requested the parties to brief and argue specified questions on that issue. 399 U. S. 923. We hold that we have jurisdiction and that the statute is not unconstitutionally vague. We reverse.

I

The first question is whether we have jurisdiction under the Criminal Appeals Act to entertain this direct appeal from the United States District Court for the

*The Chief Justice, Mr. Justice Douglas, Mr. Justice Stewart, and Mr. Justice White join in Part I of this opinion. The Chief Justice, Mr. Justice Harlan, Mr. Justice White, and Mr. Justice Blackmun join in Part II of this opinion.

District of Columbia. That Act [1] gives us jurisdiction over direct appeals from district court judgments "in all criminal cases . . . dismissing any indictment where such decision is based upon the invalidity . . . of the statute upon which the indictment is founded." 18 U. S. C. § 3731. The decision appealed from is a dismissal of an indictment on the ground that the District of Columbia abortion law, on which the indictment was based, is unconstitutionally vague. This abortion statute, 22 D. C. Code 201, is an Act of Congress applicable only in the District of Columbia and we suggested that the parties argue whether a decision holding unconstitutional such a statute is appealable directly to this Court under the Criminal Appeals Act. The literal wording of the Act plainly includes this statute, even though it applies only to the District. A piece of legislation so limited is nevertheless a "statute" in the sense that it was duly enacted into law by both Houses of Congress and was signed by the President. And the Criminal Appeals Act contains no language that purports to limit or qualify the term "statute." On the contrary, the Act authorizes government appeals from district courts to the Supreme Court in *"all criminal cases"* where a district court judgment dismissing an indictment is based upon the invalidity of the statute on which the indictment is founded.

---

[1] The Act states in pertinent part:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision of judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded. . . ." 18 U. S. C. § 3731.

An examination of the legislative history of the Criminal Appeals Act and its amendments suggests no reason why we should depart from the Act's literal meaning and exclude D. C. statutes from its coverage. The committee reports and floor debates contain no discussion indicating that the term "statute" does not include statutes applicable only to the District of Columbia.[2] We therefore conclude that we have jurisdiction over this appeal under the Criminal Appeals Act.

Our Brother HARLAN has argued in dissent that we do not have jurisdiction over this direct appeal. He suggests that such a result is supported by the decision in *United States* v. *Burroughs*, 289 U. S. 159 (1933), the policy underlying the Criminal Appeals Act, and the canon of construction that statutes governing direct appeals to this Court should be strictly construed.

It is difficult to see how the *Burroughs* decision lends much force to his argument, since that case held only that the term "district court" in the Criminal Appeals Act did not include the then-existing Supreme Court of the District of Columbia. *Id.*, at 163–164. The dissent goes on to suggest the Act should be construed in light of the Congressional purpose of "avoiding inconsistent enforcement of criminal laws." *Post*, at 12. This purpose would not be served by our refusing to decide this case now after it has been orally argued. In the last several years, abortion laws have been repeatedly attacked as unconstitutionally vauge in both state and federal courts with widely varying results. A number of these cases are now pending on our docket. A refusal to accept jurisdiction here would only compound confusion for doctors,

[2] See H. Conf. Rep. No. 8113, 59th Cong., 2d Sess.; H. R. Rep. No. 2119, 59th Cong., 1st. Sess.; H. R. Rep. No. 45 and S. Rep. No. 868, 77th Cong., 1st. Sess.; H. Conf. Rep. No. 2052, 77th Cong., 2d Sess.

their patients, and law enforcement officials. As this case makes abundantly clear, a ruling on the validity of a statute applicable only to the District can contribute to great disparities and confusion in the enforcement of criminal laws. Finally, my Brother HARLAN'S dissent also appears to rely on the fact that this Court has never accepted jurisdiction over a direct appeal under the Criminal Appeals Act involving the validity of a District of Columbia statute. *Post*, at 13. Since this Court has never either accepted or rejected jurisdiction of such an appeal, it is difficult to see how the complete absence of precedent in this Court lends any weight whatever to his argument. Neither previous cases nor the purpose behind the Criminal Appeals Act provides any satisfactory reason why the term "statute" should not include those statutes applicable only in the District of Columbia.

One other procedural problem remains. We asked the parties to brief the question whether the Government could have appealed this case to the Court of Appeals for the District of Columbia under 23 D. C. Code 105, and, if so, whether we should refuse to entertain the appeal here as a matter of sound judicial administration. That D. C. Code provision states:

> "In all criminal prosecutions the United States . . . shall have the same right of appeal that is given to the defendant . . . ."

The relationship between the Criminal Appeals Act and this Code section was considered in *Carroll* v. *United States*, 354 U. S. 394, 411, where the Court concluded:

> "[C]riminal appeals by the Government in the District of Columbia are not limited to the categories set forth in 18 U. S. C. 3731 [the Criminal Appeals Act], although as to cases of the type covered by that special jurisdictional statute its explicit direc-

> tions will prevail over the general terms of [23 D. C. Code 105]."

Since we have concluded above that this appeal is covered by the Criminal Appeals Act, it would seem to follow from *Carroll* that the Act's provisions control and no appeal could have been taken to the Court of Appeals. Although *Carroll* seems to be dispositive, it has been suggested that it may now be limited by *United States* v. *Sweet*, 399 U. S. 517 (1970), which contains some language suggesting that the Government may be empowered to take an appeal to the Court of Appeals under 23 D. C. Code 105, even when a direct appeal would be proper here under the Criminal Appeals Act. *Id.*, at 518. We do not elaborate upon that suggestion. We only hold that once an appeal is properly here under the Criminal Appeals Act, we should not refuse to consider it because it might have been taken to another court.

II

We turn now to the merits. Appellee Milan Vuitch was indicted for producing and attempting to produce abortions in violation of 22 D. C. Code 201. That Act provides in part:

> "Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years; . . ."

Without waiting for trial, the District Judge dismissed the indictment on the ground that the abortion statute

was unconstitutionally vague. In his view, set out substantially in full below,[3] the statute was vague for two principal reasons:

1. The fact that once an abortion was proved a physician "is presumed guilty and remains so unless a jury

---

[3] The District Judge stated:

". . . It is suggested that these words [as necessary for the preservation of the mother's life or health] are not precise; that, as interpreted, they improperly limit the physician in carrying out his professional responsibilities; and that they interfere with a woman's right to avoid childbirth for any reason. The word "health" is not defined and in fact remains so vague in its interpretation and the practice under the act that there is no indication whether it includes varying degrees of mental as well as physical health. While the law generally has been careful not to interfere with medical judgment of competent physicians in treatment of individual patients, the physician in this instance is placed in a particularly unconscionable position under the conflicting and inadequate interpretations of the D. C. abortion statute now prevailing. The Court of Appeals established by such early cases as *Peckham* v. *United States*, 96 U. S. App. D. C. 312 (1955), *cert. denied*, 350 U. S. 912, and *Williams* v. *United States*, 78 U. S. App. D. C. 147 (1943), that upon the Government establishing that a physician committed an abortion, the burden shifted to the physician to justify his acts. In other words, he is presumed guilty and remains so unless a jury can be persuaded that his acts were necessary for the preservation of the woman's life or health. These holdings, which may well offend the Fifth Amendment of the Constitution, as interpreted in recent decisions such as *Leary* v. *United States*, 395 U. S. 89 Sup. Ct. 1532, 23 L. Ed. 2d 658 (1965), and *United States* v. *Gainey*, 380 U. S. 63, 85, Sup. Ct. 754, 13 L. Ed. 2d 658 (1965), also emphasize the lack of necessary precision in this criminal statute. The jury's acceptance or nonacceptance of an individual doctor's interpretation of the ambivalent and uncertain word 'health' should not determine whether he stands convicted of a felony, facing ten years' imprisonment. His professional judgment made in good faith should not be challenged. There is no clear standard to guide either the doctor, the jury or the Court. No body of medical knowledge delineates what degree of mental or physical health or combination of the two is required to make an abortion conducted by a competent physician legal or illegal under the Code. . . ." 305 F. Supp. 1032, at 1034.

can be persuaded that his acts were necessary for the preservation of the woman's life or health."

2. The presence of the "ambivalent and uncertain word 'health.'"

In concluding that the statute places the burden of persuasion on the defendant once the fact of an abortion has been proved,[4] the court relied on *Williams* v. *United States*, 138 F. 2d 81 (CADC 1943). There the Court of Appeals for the District of Columbia held that the prosecution was not required to prove as part of its case in chief that the operation was not necessary to preserve life or health. *Id.*, at 81, 83. The court indicated that once the prosecution established that an abortion had been performed the defendant was required "to come forward with evidence which with or without other evidence is sufficient to create reasonable doubt of guilt." *Id.*, at 84. The District Court here appears to have read *Williams* as holding that once an abortion is proved, the burden of persuading the jury that it was legal (*i. e.*, necessary to the preservation of the mother's life or health) is cast upon the physician. Whether or not this is a correct reading of *Williams*, we believe it is an erroneous interpretation of the statute. Certainly a statute that outlawed only a limited category of abortions but "presumed" guilt whenever the mere fact of abortion was established, would at the very least present serious constitutional problems under this Court's previous decision interpreting the Fifth Amendment. *Tot* v. *United States*, 319 U. S. 463 (1943); *Leary* v. *United States*, 395 U. S. 6, 36 (1969). But of course statutes should be construed whenever possible so as to uphold their constitutionality.

[4] The trial court also cited *Peckham* v. *United States*, 226 F. 2d 34 (CADC 1955), as dealing with the D. C. abortion law. However, the opinion in that case does not discuss the burden of proof under the statute.

The statute does not outlaw all abortions, but only those which are not performed under the direction of a competent, licensed physician, and those not necessary to preserve the mother's life or health. It is a general guide to the interpretation of criminal statutes that when an exception is incorporated in the enacting clause of a statute, the burden is on the prosecution to plead and prove that the defendant is not within the exception. When Congress passed the District of Columbia abortion law in 1901 and amended it in 1953, it expressly authorized physicians to perform such abortions as are necessary to preserve the mother's "life or health." Because abortions were authorized only in more restrictive circumstances under previous D. C. law, the change must represent a judgment by Congress that it is desirable that women be able to obtain abortions needed for the preservation of their lives or health.[5] It would be highly anomalous for a legislature to authorize abortions necessary for life or health and then to demand that a doctor, upon pain of one to ten years' imprisonment, bear the burden of proving that an abortion he performed fell within that category. Placing such a burden of proof on a doctor would be peculiarly inconsistent with society's notions of the responsibilities of the medical profession. Generally, doctors are encouraged by society's expectations, by the strictures of malpractice law and by their own professional standards to give their patients such treatment as is necessary to preserve their health. We are unable to believe that Congress intended that a physician be required to prove his innocence. We therefore hold that under 22 D. C. Code 201, the burden is on

[5] Before 1901 the existing statute allowed abortion only "for the purpose of preserving the life of any woman pregnant . . . ." Abert, The Compiled Statutes in Force in the District of Columbia, c. XVI, pp. 158–159 (1894).

the prosecution to plead and prove than an abortion was not "necessary for the preservation of the mother's life or health."

There remains the contention that the word "health" is so imprecise and has so uncertain a meaning that it fails to inform a defendant of the charge against him and therefore the statute offends the Due Process Clause of the Constitution. See, *e. g.*, *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939). We hold that it does not. The trial court apparently felt that the term was vague because there "is no indication whether it includes varying degrees of mental as well as physical health." 305 F. Supp. 1032, at 1034. It is true that the legislative history of the statute gives no guidance as to whether "health" refers to both a patient's mental and physical state. The term "health" was introduced into the law in 1901 when the statute was enacted in substantially its present form. The House Report[*] on the bill contains no discussion of the term "health" and there was no Senate report. Nor have we found any District of Columbia cases prior to this district court decision that shed any light on the question. Since that decision, however, the issue has been considered in *Doe* v. *General Hospital of the District of Columbia*, 313 F. Supp. 1170 (DCDC 1970). There District Judge Waddy construed the statute to permit abortions "for mental health reasons whether or not the patients had a previous history of mental defects." *Id.*, at 1174–1175. The same construction was followed by the United States Court of Appeals for the District of Columbia in further proceedings in the same case. *Doe* v. *General Hospital of the District of Columbia*, 434 F. 2d 423; 434 F. 2d 427 (CADC 1970). We see no reason why this interpretation of the statute should not

[*] H. R. Rep. No. 1017, 56th Cong., 1st Sess.

be followed. Certainly this construction accords with the general usage and modern understanding of the word "health," which includes phychological as well as physical well-being. Indeed Webster's Dictionary, in accord with that common usage, properly defines health as "the state of being sound in body or mind." Viewed in this light, the term "health" presents no problem of vagueness. Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered.[7]

We therefore hold that properly construed the District of Columbia abortion law is not unconstitutionally vague, and that the trial court erred in dismissing the indictments on that ground. Appellee has suggested that there are other reasons why the dismissal of the indictment should be affirmed. Essentially, these arguments are based on this Court's decision in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965). Although there was some reference to these arguments in the opinion of the court below, we read it as holding simply that the statute was void for vagueness because it failed in that court's language to "give that certainty which due process of law considers essential in a criminal statute." 305 F. Supp. 1032, at 1034. Since that question of vagueness was the only issue passed upon by the District Court it is the

[7] Our Brother DOUGLAS appears to fear that juries might convict doctors in any abortion case simply because some jurors believe all abortions are evil. Of course such a danger exists in all criminal cases, not merely those involving abortions. But there are well-established methods defendants may use to protect themselves against such jury prejudice: continuances, changes of venue, challenges to prospective jurors on *voir dire*, and motions to set aside verdicts which may have been produced by prejudice. And of course a court should always set aside a jury verdict of guilt when there is not evidence from which a jury could find a defendant guilty beyond a reasonable doubt.

only issue we reach here. *United States* v. *Borden Co.*, 308 U. S. 188 (1939); *United States* v. *Petrillo*, 332 U. S. 1 (1947); *United States* v. *Blue*, 384 U. S. 251, 256 (1966).

The judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

United States, Appellant, v. Milan Vuitch.	On Appeal From the United States District Court for The District of Columbia.

[April 21, 1971]

Mr. Justice White, concurring.

I join the Court's opinion and judgment. As to the facial vagueness argument, I have these few additional words. This case comes to us unilluminated by facts or record. The District Court's holding that the District of Columbia statute is unconstitutionally vague on its face because it proscribes all abortions except those necessary for the preservation of the mother's life or health was a judgment that the average person could not understand which abortions were permitted and which were prohibited. But surely the statute puts everyone on adequate notice that the health of the mother, whatever that phrase means, was the governing standard. It should also be absolutely clear that a doctor is not free to perform abortions on request without considering whether the patient's health required it. No one of average intelligence could believe that under this statute abortions not dictated by health considerations are legal. Thus even if the "health" standard were unconstitutionally vague, which I agree is not the case, the statute is not void on its face since it reaches a class of cases in which the meaning of "health" is irrelevant and no possible vagueness problem could arise. We do not, of course, know whether this is one of those cases. Until we do facial vagueness claims must fail. Cf. *United States* v. *National Dairy Corp.*, 372 U. S. 29 (1963).

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

United States, Appellant, v. Milan Vuitch. | On Appeal From the United States District Court for the District of Columbia.

[April 21, 1971]

Mr. Justice Douglas, dissenting in part.

While I agree with Part I of the Court's opinion that we have jurisdiction over this appeal, I do not think the statute meets the requirements of procedural due process.

The District of Columbia Code makes it a felony for a physcian to perform an abortion "unless the same were done as necessary for the preservation of the mother's life or health." 22 D. C. Code 201.

I agree with the Court that a physician—within the limits of his own expertise—would be able to say that an abortion at a particular time performed on a designated patient would or would not be necessary for the "preservation" of her "life or health." That judgment, however, is highly subjective, dependent on the training and insight of the particular physician and his standard as to what is "necessary" for the "preservation" of the mother's "life or health."

The answers may well differ, physician to physician. Those trained in conventional obstetrics may have one answer; those with deeper psychiatric insight may have another. Each answer is clear to the particular physician. If we could read the Act as making that determination conclusive, not subject to review by judge and by jury, the case would be simple, as Mr. Justice Stewart points out. But that does such violence to the statutory

scheme that I believe it is beyond the range of judicial interpretation so to read the Act. If it is to be revised in that manner, Congress should do it.

Hence I read the Act, as did the District Court, as requiring submission to court and jury of the physician's decision. What will the jury say? The prejudices of jurors are customarily taken care of by challenges for cause and by preemptory challenges. But vagueness of criminal statutes introduces another element that is uncontrollable. Are the concepts so vague that possible offenders have no safe guidelines for their own action? Are the concepts so vague that jurors can give them a gloss and meaning drawn from their own predilections and prejudices? Is the statutory standard so easy to manipulate that although physicians can make good-faith decisions based on the standard, juries can nonetheless make felons out of them?

The Court said in *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453, that a ". . . statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process."

A three-judge court in evaluating a Texas statutory standard as to whether an abortion was attempted "for the purpose of saving the life of the mother" said:

> "How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How *imminent* must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years?" *Roe* v. *Wade*, 314 F. Supp. 1217, 1223.

The *Roe* case was followed by a three-judge court in *Doe* v. *Scott*, — F. Supp. —, which struck down an Illinois statute which sanctioned an abortion "necessary for the preservation of a woman's life." And see *People* v. *Belous*, 71 Cal. 2d 954, 458 Pac. 2d 194.

A doctor may well remove an appendix far in advance of rupture in order to prevent a risk that may never materialize. May he do the same under this abortion statute?

May he perform abortions on unmarried woman who want to avoid the "stigma" of having an illegitimate child? Is bearing a "stigma" a "health" factor? Only in isolated cases? Or is it such whenever the woman is unmarried?

Is any unwanted pregnancy a "health" factor because it is a source of anxiety?

Is an abortion "necessary" in the statutory sense if the doctor thought that an additional child in a family would unduly tax the mother's physical well-being by reason of the additional work which would be forced upon her?

Would a doctor be violating the law if he performed an abortion because the added expense of another child in the family would drain its resources, leaving an anxious mother with an insufficient budget to buy nutritious food?

Is the fate of an unwanted child or the plight of the family into which it is born relevant to the factor of the mother's "health?"

Mr. Justice Holmes, in holding that "unreasonable" restraint of trade was an adequate constitutional standard of criminality, said in *Nash* v. *United States*, 229 U. S. 373, 377, that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he

incur a fine or a short imprisonment, as here; he may incur the penalty of death."

He wrote in a context of economic regulations which are restrained by few, if any, constitutional guarantees.

Where, however, constitutional guarantees are implicated, the standards of certainty are more exacting.

Winters v. *New York*, 333 U. S. 507, 514, 519, held void-for-vagueness a state statute which as construed made it a crime to print stories of crime "so massed as to incite to crime," since such a regulatory scheme trenched on First Amendment rights of the press.

The standard of "sacrilegious" can be used in such accordion-like way as to infringe on religious rights protected by the First Amendment. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 505.

The requirement of a "narrowly drawn" statute when the regulation touches a protected constitutional right (*Cantwell* v. *Connecticut*, 310 U. S. 296, 311; *Thornhill* v. *Alabama*, 310 U. S. 88, 100) is only another facet of the void-for-vagueness problem.

What the Court held in *Herndon* v. *Lowry*, 301 U. S. 242, is extremely relevant here. The ban of publications made to incite insurrection was held to suffer the vice of vagueness:

> "The statute, as construed and applied in the appellant's trial, does not furnish a sufficiently ascertainable standard of guilt. . . . Every person who attacks existing conditions, who agitates for a change in the form of government, must take the risk that if a jury should be of opinion he ought to have foreseen that his utterances might contribute in any measure to some future forcible resistance to the existing government he may be convicted of the offense of inciting insurrection. . . . *The law, as*

thus construed, licenses the jury to create its own standard in each case." *Id.*, 261, 262, 263. (Italics added.)

If these requirements of certainty are not imposed then the triers of fact have "a power to invade imperceptibly (and thus unreviewably) a realm of constitutionally protected personal liberties." Amsterdam, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 104 (1960).

Abortion touches intimate affairs of the family, of marriage, of sex, which in *Griswold* v. *Connecticut*, 381 U. S. 479, we held to involve rights associated with several express constitutional rights and which are summed up in "the right of privacy." They include the right to procreate (*Skinner* v. *Oklahoma*, 316 U. S. 535), the right to marry across the color line (*Loving* v. *Virginia*, 388 U. S. 1), the intimate familial relations between children and parents (*Meyer* v. *Nebraska*, 262 U. S. 390; *Levy* v. *Louisiana*, 391 U. S. 68, 71–72). There is a compelling personal interest in marital privacy and in the limitation of family size. And on the other side is the belief of many that the fetus, once formed, is a member of the human family and that mere personal inconvenience cannot justify his destruction. This is not to say that government is powerless to legislate on abortions. Yet the laws enacted must not trench on constitutional guarantees which they can easily do unless closely confined.

Abortion statutes deal with conduct which is heavily weighted with religious teachings and ethical concepts.[1]

[1] "There remains the moral issue of abortion as murder. We submit that this is insoluble, a matter of religious philosophy and religious principle and not a matter of fact. We suggest that those who believe abortion is murder need not avail themselves of it. On the other hand, we do not believe that such conviction should limit

Mr. Justice Jackson once spoke of the "treacherous grounds we tread when we undertake to translate ethical concepts into legal ones, case by case." *Jordan* v. *De George*, 341 U. S. 223, 242 (dissenting). The difficulty and danger are compounded when religion adds another layer of prejudice.[2] The end result is that juries condemn what they personally disapprove.

The subject of abortions—like cases involving obscenity[3]—is one of the most inflammatory ones to reach

---

the freedom of those not bound by identical religious conviction. Although the moral issue hangs like a threatening cloud over any open discussion of abortion, the moral issuses are not all one-sided. The psychoanalyst Erik Erikson stated the other side well when he suggested that 'The most deadly of all possible sins is the mutilation of a child's spirit.' There can be nothing more destructive to a child's spirit than being unwanted, and there are few things more disruptive to a woman's spirit than being forced without love or need into motherhood." VII The Right to Abortion: A Psychiatric View, pp. 218–219 (Group for the Advancement of Psychiatry, 1969).

[2] Mr. Justice Clark recently wrote: "Throughout history religious belief has wielded a vital influence on society's attitude regarding abortion. The religious issues involved are perhaps the most frequently debated aspects of abortion. At the center of the ecclesiastical debate is the concept of 'ensoulment' or 'person-hood,' *i. e.*, the time at which the fetus becomes a human organism. The Reverend Joseph F. Donseel of Fordham University admitted that no one can determine with certainty the exact moment at which 'ensoulment' occurs, but we must deal with the moral problems of aborting a fetus even if it has not taken place. Many Roman Catholics believe that the soul is a gift of God given at conception. This leads to the conclusion that aborting a pregnancy at any time amounts to the taking of a human life and is therefore against the will of God. Others, including some Catholics, believe that abortion should be legal until the baby is viable, *i. e.*, able to support itself outside the womb. In balancing the evils, the latter conclude that the evil of destroying the fetus is outweighed by the social evils accompanying forced pregnancy and childbirth." Religion, Morality and Abortion: A Constitutional Appraisal, 2 Loy. L. Rev. 1, 4 (1969).

[3] I have expressed my views on the vagueness of criminal laws governing obscenity in *Dyson* v. *Stein*, decided February 23, 1971

the Court. People instantly take sides and the public, from whom juries are drawn, makes up its mind one way or the other before the case is even argued. The interests of the mother and the fetus are opposed. On which side should the State throw its weight? The issue is volatile; and it is resolved by the moral code which an individual has. That means that jurors may give it such meaning as they choose, while physicians are left to operate outside the law. Unless the statutory code of conduct is stable and in very narrow bounds, juries have a wide range and physicians have no reliable guideposts. The words "necessary for the preservation of the mother's life or health" become free-wheeling concepts, too easily taking on meaning from the juror's predilections or religious prejudices.

I would affirm the dismissal of this indictment and leave to the experts the drafting of abortion laws [4] that protect good-faith medical practitioners from the treacheries of the present law.

(dissenting opinion). And see the dissent of MR. JUSTICE BLACK in *Ginzburg* v. *United States*, 383 U. S. 463, 477.

[4] Clark, *supra* n. 2, at 10–11.

Cf. New York's new abortion law effective July 1, 1970, 39 McKinney's Consol. L. § 125.05:

"An abortional action is justifiable when committed upon a female with her consent by a duly licensed physician (a) under a reasonable belief that such is necessary to preserve her life, or, (b) within twenty-four weeks from the commencement of her pregnancy. A pregnant female's commission of an abortional act upon herself is justifiable when she acts upon the advice of a duly licensed physician (1) that such act is necessary to preserve her life, or, (2) within twenty-four weeks from the commencement of her pregnancy. The submission by a female to an abortional act is justifiable when she believes that it is being committed by a duly licensed physician, acting under a reasonable belief that such act is necessary to preserve her life, or, within twenty-four weeks from the commencement of her pregnancy." And see Hall, The Truth About Abortion in New York, Columbia Forum, Winter 1970, p. 18; Schwartz, The Abortion Laws, 67 Ohio St. Med. J. 33 (1971).

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

United States, Appellant, v. Milan Vuitch.	On Appeal From the United States District Court for the District of Columbia.

[April 21, 1971]

Mr. Justice Harlan, with whom Mr. Justice Brennan, Mr. Justice Marshall, and Mr. Justice Blackmun join, dissenting as to jurisdiction.

Appellee Vuitch was indicted in the United States District Court for the District of Columbia for violations of 22 D. C. Code 201, the District of Columbia abortion statute. This statute is applicable only within the District of Columbia. On pretrial motion by Vuitch, the indictments were dismissed on the ground that the abortion statute was unconstitutionally vague. The United States appealed directly to this Court under the terms of the Criminal Appeals Act of 1907, 18 U. S. C. § 3731, relying on the provision allowing direct appeal "[f]rom a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded." [1] It is not contested that, but for this provision of the Criminal Appeals Act, the Government would have a right of appeal to the Court of

[1] The text of 18 U. S. C. § 3731 was as follows:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based

Appeals for the District of Columbia under 23 D. C. Code 105, which provides:

"In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall

---

upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

"From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

"The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

"Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.

"If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

"If an appeal shall be taken pursuant to this section to any court of appeals which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court."

As noted in *United States* v. *Weller*, No. 77, October Term 1970 (decided Feb. 24, 1971), these provisions were amended by § 14 (a) of the Omnibus Crime Control Act of 1970, 84 Stat. 1890 (1971). But cases begun in the District Court before the new statute took effect are not affected. See *United States* v. *Weller*, *supra*, at n. 1.

> have the same right of appeal that is given to the defendant, including the right to a bill of exceptions: *Provided*, That if on such appeal it shall be found that there was error in the rulings of the court during a trial, a verdict in favor of the defendant shall not be set aside."

The Court today—relying on the generic reference to "statutes" and "all criminal cases" in the text of 18 U. S. C. § 3731 and the absence of an express exclusion of statutes applicable only within the District of Columbia—concludes that 18 U. S. C. § 3731 rather than 23 D. C. Code 105 provides the proper appellate route for this case. I must disagree.

I

The historical development of the Government's right to appeal in criminal cases both in the District of Columbia and throughout the Nation is surveyed in *Carroll* v. *United States*, 354 U. S. 394 (1957). Section 105 of the D. C. Code was passed in 1901 as § 935 of the Code of 1901. 31 Stat. 1341. Prior to the Criminal Appeals Act of 1907, the Government had no right of appeal in criminal cases outside of the District of Columbia. To remedy this situation, a bill was introduced in the House of Representatives. That bill practically tracked the language of the D. C. statute, and made no provision for direct appeal to this Court. 40 Cong. Rec. 5408. The accompanying House Report described the bill as follows: "The accompanying bill will extend [§ 935] of the code of the District of Columbia to all districts in the United States." H. R. Rep. No. 2119, 59th Cong., 1st Sess., at 2 (1906). That bill passed the House, but the Senate Committee on the Judiciary rejected the House approach of simply extending the provisions of the D. C. appeals statute to the rest of the Nation; the Senate Committee instead substituted a more narrowly drawn measure

which enumerated specific substantive categories of criminal cases to be appealable by the Government and allocated jurisdiction over these appeals between the Supreme Court and the then Circuit Courts of Appeals according to the allocation of appellate jurisdiction for civil cases established in the Circuit Court of Appeals Act of 1891. S. Rep. No. 3922, 59th Cong., 1st Sess. (1906). See *Carroll* v. *United States*, *supra*, at 402 n. 11. Even that bill as narrowed could not pass the Senate; it provoked extended debate in which the opponents of the measure focused on the potential for abuse of individual rights arising from repeated court proceedings, delays in appeals, and restraints on personal freedom while the Government prosecuted its appeal. See generally *United States* v. *Sisson*, 399 U. S. 267 (1970). The upshot of these debates was that Senator Nelson, the bill's floor manager in the Senate, agreed to accept a variety of amendments which further narrowed the categories of cases appealable by the Government and made special provision for the defendant's release on his own recognizance. See 41 Cong. Rec. 2818–2825.[2]

It is at this point that Senator Clarke of Arkansas offered an amendment limiting the Government's right to appeal decisions dismissing indictments or arresting judgments for insufficiency of the indictment to instances where the decision was based upon "the validity or construction of the statute." The purpose of that amendment was described by Senator Clarke as follows:

> "Mr. President, the object of the amendment is to limit the right of appeal upon the part of the General Government to the validity or constitutionality of the statute in which the prosecution is proceeding. It has been enlarged by the addition of another

[2] The bill had been amended earlier to require the Government to take an appeal within 30 days. 41 Cong. Rec. 2193–2194.

clause, which gives the right of appeal where the construction by the trial court is such as to decide that there is no offense committed, notwithstanding the validity of the statute, and in other respects the proceeding may remain intact. I think that is a broad enough right to concede to the General Government in the prosecution of persons in the court.

. . . . . .

"In view of the defects that recent years have disclosed, I do not believe it to be sound policy to go beyond the necessities as they have developed defects in our procedure. A case recently occurring has drawn attention to the fact that if a circuit judge or a district judge holding the circuit should determine that a statute of Congress was invalid, the United States is without means of having that matter submitted to a tribunal that under the Constitution has power to settle that question. I do not believe the remedy ought to be any wider than the mischief that has been disclosed. I do not believe that any additional advantages ought to be given to the General Government in the prosecution of persons arraigned in court, but I do believe the paragraph ought to be perfected in that behalf, so as to provide that there shall be an appeal to the court having authority to give uniformity to the practice which shall prevail in all the courts of the United States, and that they shall be ready to say, and say promptly, what the statute means and whether or not it is a valid statute.

. . . . . .

"So I think this amendment gives expression to the proposition that the remedy we provide here now should be no wider than the defect that has been disclosed in the preceding criminal procedure; and that is that whenever the validity of a statute has

been adversely decided by a trial court, wherever its unconstitutionality has been pronounced by a trial court, the Government ought to have the right to promptly submit that to the tribunal having authority to dispose of such questions in order that there may be a uniform enforcement of the law throughout the entire limits of the United States.

"This is the purpose, I have, Mr. President, and having discussed it with the distinguished Senator from Wisconsin . . . and the distinguished Senator from Minnesota [Mr. Nelson], we agreed that that would probably meet the defect." 41 Cong. Rec. 2819–2820. See generally 41 Cong. Rec. 2819–2822.

The bill as thus amended passed the Senate; the House disagreed to the Senate amendment, but yielded in conference. The bill in conference was amended to provide for direct appeals to the Supreme Court. See H. R. Conf. Rep. No. 8113, 59th Cong., 2d Sess. (1970). No explanation was given in the conference report for the exclusive direct appeal route.

I draw from these legislative materials the following relevant propositons: (1) The Congress was definitely advertent to the existence of a governmental appeal right in criminal cases within the District; (2) the Congress explicitly rejected the simple approach of extending the D. C. provision to the Nation; (3) the particular provision of the Act relied on by the Government as supporting its direct appeal in this case was amended with a view to limiting its reach to a relatively precise defect; *i. e.*, the debilitating effect on the enforcement of criminal laws arising from conflicting judicial intepretations; and (4) the substitution of an exclusive direct appeal to this Court, while not expressly explained, is perfectly compatible with the goal of promptly achieving uniformity in construction of statutes applicable nationwide, while at the same time being wholly unnecessary to the resolu-

tion of conflicting district court constructions of local D. C. statutes, given the existence of a right of appeal to the Court of Appeals for the District of Columbia.

II

The question of overlap between the appellate routes available to the Government in criminal cases under the D. C. Code and 18 U. S. C. § 3731 was first dealt with by this Court in *United States* v. *Burroughs*, 289 U. S. 159 (1933). In *Burroughs* the defendants were indicted in the then Supreme Court of the District of Columbia for violation of the Federal Corrupt Practices Act, a statute of nationwide applicability. They successfully demurred on two grounds: one involving the construction of the statute, and the other involving the sufficiency of the indictment as a pleading. The Government took an appeal to the Court of Appeals for the District of Columbia under the D. C. appeals statute. The appellate court certified to this Court the question whether it had jurisdiction over an appeal where a § 3731-type challenge was joined with a challenge to the sufficiency of the indictment as a pleading. The Court disposed of the question by holding that the Criminal Appeals Act is inapplicable to any criminal case appealable under the provision of the D. C. Code:

> *"The Criminal Appeals Act, in naming the courts from which appeals may be taken to this court, employs the phrase 'district courts;' not 'courts of the United States,' or 'courts exercising the same jurisdiction as district courts.' We need not, however, determine whether the statute should be construed to embrace criminal cases tried in the Supreme Court of the District if § 935 of the District Code were not in effect.* That section deals comprehensively with appeals in criminal cases from all

> of the courts of first instance of the District and confers on the Court of Appeals jurisdiction of appeals by the Government seeking review of the judgments of those courts. The Criminal Appeals Act, on the other hand, affects only certain specified classes of decisions in district courts, contains no repealing clause, and no reference to the courts of the District of Columbia or the territorial courts, upon many of which jurisdiction is conferred by language quite similar to that of the Code of Law of the District. We cannot construe it as impliedly repealing the complete appellate system created for the District of Columbia by § 935 of the Code, in the absence of expression on the part of Congress indicating that purpose. Implied repeals are not favored; and if effect can reasonably be given to both statutes, the presumption is that the earlier is intended to remain in force . . . ." 289 U. S., at 163–164.[3]

The holding in *Burroughs* established a complete separation of the two statutory schemes for Government appeals in criminal cases; the essence of the Court's rationale was a presumption against implied repeals.

In 1942, Congress amended the Criminal Appeals Act to provide for Government appeals to the Courts of Appeals from all decisions dismissing indictments or arresting judgments of convictions except where a right of direct appeal to this Court exists. 56 Stat. 271. The

[3] The Court's opinion characterizes *Burroughs* as having "'held only that the term 'district court' in the Criminal Appeals Act did not include the then-existing Supreme Court of the District of Columbia." *Ante*, at [3]. As I read the italicized portion of the above-quoted passage, that is the precise question that the *Burroughs* Court concluded it did *not* have to decide, in light of its holding that the Criminal Appeals Act could not, by implication, effect the repeal of § 935 of the District Code.

new amendment expressly included the United States Court of Appeals for the District of Columbia as one of the intermediate appellate tribunals to which the Government could appeal;[4] in addition, the Act added a new provision to the Judicial Code establishing appellate jurisdiction in the then circuit courts of appeal "in criminal cases on appeals taken by the United States in cases where such appeals are permitted by law." 56 Stat. 272. The latter provision also expressly incorporated the United States Court of Appeals for the District of Columbia.[5] *Ibid.*

The legislative history of the 1942 amendment offers no explication of Congressional intent in including the D. C. courts within the Act.[6] It is certain that this amendment generates some form of overlap between the two statutory schemes for Governmental appeals in criminal cases. In *Carroll* v. *United States*, 354 U. S. 394, 411 (1957), the Court recognized the new situation created by the 1942 amendment:

> "It may be concluded, then, that even today criminal appeals by the Government in the District of Columbia are not limited to the categories set forth in 18 U. S. C. § 3731, although as to cases of the type covered by that special jurisdictional statute, its explicit directions will prevail over the general terms of [the D. C. statute] . . . ."

---

[4] These explicit references were subsequently omitted by amendment in 1949, 63 Stat. 97, which altered the language of the statute to conform to the changed nomenclature of the federal courts.

[5] This last provision was an amendment to 28 U. S. C. § 225 (1940 ed.); see 56 Stat. 272 and *Carroll* v. *United States*, *supra*, at n. 5.

[6] The focus was on the decision to accord the Government a right of appeal to the courts of appeal where no direct appeal to this Court lay. See H. R. No. 45, 77th Cong., 1st Sess. (1941); S. Rep. No. 868, 77th Cong., 1st Sess. (1941).

That, however, leaves open the question which cases come within the categories set forth in 18 U. S. C. § 3731.

III

After this Court's holding in *Burroughs*, it was clear that if Congress wished to effectuate any displacement of the pre-1907 route for Government appeals of criminal cases within the District of Columbia, some express manifestation of its intent was required. The 1942 amendment followed the *Burroughs* decision. Since Congress then acted to create some overlap between the two statutes without further limiting the categories of directly appealable criminal cases, it may be argued that we should presume Congress intended, as of 1942, to embrace within the very special appeals procedures of 18 U. S. C. § 3731 criminal cases based upon statutes applicable only within the District.

But that presumption from a completely silent legislative record flies in the face of the principle that statutes creating a right of direct appeal to this Court should be narrowly construed. Cf. *Swift & Co.* v. *Wickham*, 382 U. S. 111, 128–129 (1965); *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73, 92–93 (Frankfurter, J., dissenting). And, in light of the legislative history of the 1907 Act and this Court's explicit holding in *Burroughs* that the 1907 Act had no impact on cases appealable under the D. C. provision, it is especially inappropriate to rely on the absence of any further limiting language in the 1942 amendment as a justification for reading the term "statute" as encompassing criminal prosecutions in the District based on local as well as nationwide statutes.

The legislative history of the 1907 Act suggests a perfectly plausible reason for interpreting the language "based upon the invalidity or construction of the statute" as excluding D. C. statutes: that language was put in the Act by Senator Clarke with the express intention of

limiting the Act's goal to remedying the precise defect of inconsistent enforcement of criminal statutes arising from the lack of a Government appeal. The Court of Appeals for the District of Columbia constitutes a perfectly adequate appellate tribunal for resolving conflicting interpretations given local statutes by judges within the District of Columbia.[7] Where, however, the Government brings a prosecution in the District of Columbia based on a statute of nationwide applicability, the Court of Appeals for the District of Columbia cannot achieve uniformity in the enforcement of the statute.

As an original proposition, then, a construction of the relevant provisions of the 1907 Act as excluding criminal cases in the District brought under local statutes but including cases brought under nationwide statutes would have been consistent both with the express purpose of Senator Clarke's amendment and the canon of strict construction as applied to direct appeals statutes.[8] But the

[7] The Government suggests a construction of the Criminal Appeals Act excluding D. C. statutes would require the Court to exclude other criminal statutes of only limited territorial application, *e. g.*, 18 U. S. C. §§ 1111–1112; (punishing homicide "[w]ithin the special maritime and territorial jurisdiction of the United States"); 18 U. S. C. §§ 1151–1165 regulating offenses within Indian territory). See Gov. Brief, at 15–16. But I would not construe 18 U. S. C. § 3731 as excluding D. C. criminal cases punishable under D. C. statutes because they are of limited territorial application; rather, the point is that given the existence of a prior right of Government appeal, the risks of disuniformity which Senator Clarke described the statute as intended to cure do not exist.

[8] The Government suggests, in its Supplemental Memorandum for the United States, at 6–7, that a construction of the 1907 Act excluding statutes applicable only within the District of Columbia from the scope of the first two provisions leads to the "anomalous consequence" that 18 U. S. C. § 3731 would still allow a direct appeal in a D. C. case where the motion-in-bar provision is concerned. *E. g., United States* v. *Sweet*, 399 U. S. 517 (1970). The alleged "anomaly" would seem to argue for the conclusion that D. C. cases

Court in *Burroughs* took the position that Congress could not displace the pre-existing appellate route to any extent without indicating an express intent to do so; *Burroughs*, significantly, involved a prosecution under a statute of nationwide applicability. Subsequently, Congress did expressly indicate an intent to displace the alternative appellate route available within the District. The extent of that displacement, I think, should now be measured by the express goal of the relevant provision of the 1907 Act, as limited by Senator Clarke: avoidance of inconsistent enforcement of criminal laws. That theory of legislative purpose—combined with the *Burroughs* holding that Congress should be required to affirmatively indicate an intent to displace the prior appellate route—yields an interpretation of the 1907 Act as amended in 1942 which is consistent with the canon of strict construction generally applied to direct appeals statutes.[9]

---

involving the motion-in-bar provision are not directly appealable here, either. Certainly, the Court's disposition in *Sweet* would not foreclose that result.

In any event, the purpose Senator Clarke had in mind in offering his limiting amendment with regard to the first two provisions of 18 U. S. C. § 3731 was rather clearly expressed; that he failed to address himself to the motion-in-bar provision—which, after all, received very little attention in the prolonged debates on the floor of the Senate—hardly justifies an expansive reading of the other provisions of the Act.

[9] The Government relies principally on *Shapiro* v. *Thompson*, 394 U. S. 618, 625 n. 4, as supporting its construction of the generic reference to "statutes" in 18 U. S. C. § 3731 to include statutes applicable only within the District of Columbia. *Shapiro* dealt with 28 U. S. C. § 2282, which requires a three-judge court to hear requests for injunctions against the enforcement of "any Act of Congress" when the ground for the requested relief is the alleged unconstitutionality of the Act. Decisions of such three-judge courts are, under the circumstances set forth in 28 U. S. C. § 1253, directly appealable to this Court. In *Shapiro*, the Court noted at least one prior instance where the Court had taken jurisdiction over

IV

I have little doubt that, had the Criminal Appeals Act not been recently amended to dispense with direct appeals to this Court, see n. 1 *supra*, the interpretation of the Act I have suggested would be adopted by the Court. This Court has never taken jurisdiction over a direct appeal from a dismissal of a prosecution brought in the

---

a case involving a statute applicable only within the District and then stated: "Section 2282 requires a three-judge court to hear a challenge to the constitutionality of '*any* Act of Congress.' We see no reason to make an exception for Acts of Congress pertaining to the District of Columbia." 394 U. S., at 625 n. 4 (emphasis in original).

The *Shapiro* approach is obviously inappropriate for the present problem. First, despite the Government's assertion to the contrary, see Gov. Brief, at 15, the phrase "*any* Act of Congress" is arguably broader than a generic reference to "statutes." Indeed, the *Shapiro* Court explicitly chose to emphasize the presence of the word "any" in the relevant portion of that statute. Second, while an exercise of jurisdiction in a case where jurisdiction is not challenged is of little precedential value, the Court in *Shapiro* still chose to take note of such a prior case; in the present context, this Court has never taken jurisdiction of a § 3731 appeal involving a statute applicable only within the District.

Third, and most importantly, Congress at the time of the three-judge court Acts altered the principles of both original and appellate jurisdiction for the substantive categories of litigation involved; the new procedural routes reflect crucial considerations of comity between sovereigns and among the branches of the Federal Government. See generally Currie, The Three-Judge Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1 (1964). There is no legislative history supporting the notion that the new procedures were narrowed to alleviate particular defects of inconsistent constitutional interpretation due to the absence of any appellate route for the substantive categories of cases to be included within the Act.

In these circumstances, it is fair to conclude that the principle of strict construction applicable to such statutes must yield to the "inert language" of the statute. Cf. *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73, 92 (1960) (Frankfurter, J., dissenting).

District of Columbia for violation of a statute applicable within the District. It is worth noting that, given the Court's adherence to the principles of *Carroll* v. *United States, supra,* the rather absurd waste of our judicial resources on cases such as *United States* v. *Waters,* 175 F. 2d 340, appeal dismissed on motion of the United States, 335 U. S. 869 (1948), and *United States* v. *Sweet,* 399 U. S. 517 (1970), see n. 7 *supra,* could not even be avoided by the exercise of governmental discretion in choosing appellate routes. In light of *Carroll,* I cannot believe that a pefectly acceptable reading of congressional purpose underpinning the definiton of categories of cases directly appealable under 18 U. S. C. § 3731 which excludes statutes applicable only within the District of Columbia would have been turned down by the Court.

Of course, the recent elimination of the direct appeal route removes a great deal of the incentive to continue the stringent standards of construction with respect to this statute that have traditionally prevailed in this Court. Indeed, at this stage of the game, the canon of strict construction produces the ironic result of compelling a relatively greater expenditure of judicial energies in assessing our jurisdiction over the remainder of the criminal cases pending in the district courts of the Nation at the time of the most recent amendment than would be involved in deciding those cases on the merits. Nonetheless, this very Term we have indicated that we intend to adhere to the rules of construction evolved by this Court during the long and tortuous history of this statute. *United States* v. *Weller,* No. 77, October Term 1970 (decided February 24, 1971).

The only response we are offered to the reading of congressional purpose I have suggested is that the interests of avoiding inconsistent enforcement of criminal laws argues for exercising jurisdiction over this case because similar statutes in other jurisdictions are under attack

on vagueness grounds. See the Court's opinion, at [3]. Surely those of my Brethren who subscribe to the views on jurisdiction expressed in the opinion of the Court must recognize that we cannot limit the category of appealable cases under this provision of the Act to prosecutions brought under D. C. statutes which are (a) duplicated in other jurisdictions, and (b) under attack on similar federal question grounds in other jurisdictions. The proffered response is, therefore, not truly a reason for concluding we have jurisdiction over the relevant category of cases; rather, it is a reason for exercising our power in this one case to settle Dr. Vuitch's vagueness claim in spite of the absence of the jurisdictional prerequisites which legitimize the exercise of that judicial power.

V

Having concluded that the Government cannot directly appeal the dismissal of the indictment to this Court under the provisions of 18 U. S. C. § 3731, it also follows that we cannot utilize the remand provisions of that statute to reroute the appeal to the Court of Appeals for the District of Columbia. However, we do have jurisdiction to determine our jurisdiction, and, in the analogous three-judge court situation where an alternative appellate route exists but the statute according this Court direct jurisdiction over the certain appeals includes no remand procedure, this Court has vacated the judgment of the court of original jurisdiction and remanded the case to that court for the entry of a fresh decree from which timely appeal may be taken to the proper appellate tribunal. *Rockefeller* v. *Catholic Medical Center of Brooklyn & Queens*, 397 U. S. 820 (1970). The instant case, of course, is a criminal prosecution, and there is a consideration not present in the three-judge court situation: *i. e.*, the additonal anxiety caused the

defendant by virtue of the Government's erroneous choice of appellate routes. But, while 18 U. S. C. § 3731 cannot empower us to transfer the case, that statute is still relevant as an expression of congressional policy to save the Government's appeal where an erroneous choice of appellate routes is made, even at the expense of additional anxiety to the defendant. Accordingly, I think the proper disposition of this case would be to vacate the judgment of the District Court and remand the case for the entry of a fresh judgment from which the Government could take a timely appeal to the Court of Appeals for the District of Columbia pursuant to 23 D. C. Code § 105.

VI

Notwithstanding the views on jurisdiction expressed above, and speaking only for myself, and not for those of my Brethren who agree with my discussion of the jurisdictional issue in this case, I have concluded, substantially for the reasons set forth in MR. JUSTICE BLACKMUN's separate opinion, that I should also reach the merits. Accordingly, I concur in Part II of the Court's opinion and the judgment of the Court.

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

United States, Appellant, v. Milan Vuitch.	On Appeal From the United States District Court for the District of Columbia.

[April 21, 1971]

Mr. Justice Stewart, dissenting in part.

I agree that we have jurisdiction of this appeal for the reasons stated in Part I of the Court's opinion.

As to the merits of this controversy, I share at least some of the constitutional doubts about the abortion statute expressed by the District Court. But, as this Court today correctly points out, "statutes should be construed whenever possible so as to uphold their constitutionality." The statute before us can be so construed, I think, simply by extending the reasoning of the Court's opinion to its logical conclusion.

The statute legalizes any abortion performed "under the direction of a competent licensed practitioner of medicine" if "necessary for the preservation of the mother's life or health." Under the statute, therefore, the legal practice of medicine in the District of Columbia includes the performing of abortions. For the practice of medicine consists of doing those things which, in the judgment of a physician, are necessary to preserve a patient's life or health. As the Court says, "whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered."

It follows, I think, that when a physician has exercised his judgment in favor of performing an abortion, he has, by hypothesis, not violated the statute. To put it an-

other way, I think the question of whether the performance of an abortion is "necessary for the mother's life or health" is entrusted under the statute exclusively to those licensed to practice medicine, without the overhanging risk of incurring criminal liability at the hands of a second-guessing lay jury. I would hold, therefore, that "a competent licensed practitioner of medicine" is wholly immune from being charged with the commission of a criminal offense under this law.

It is true that the statute can be construed in other ways, as MR. JUSTICE DOUGLAS has made clear. But I would give it the reading I have indicated "in the candid service of avoiding a serious constitutional doubt." *United States* v. *Rumely*, 345 U. S. 41, 47.

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

United States, Appellant, v. Milan Vuitch.	On Appeal From the United States District Court for the District of Columbia.

[April 21, 1971]

Mr. Justice Blackmun.

Although I join Mr. Justice Harlan in his conclusion that this case is not properly here by direct appeal under 18 U. S. C. § 3731, a majority, and thus the Court, holds otherwise. The case is therefore here and requires decision.

The five Justices constituting the majority, however, are divided on the merits. One feels that 22 D. C. Code § 201 lacks the requirements of procedural due process and would affirm the dismissal of the indictment. One would hold that a licensed physician is immune from charge under the statute. Three would hold that, properly construed, the statute is not unconstitutionally vague and that the dismissal of the indictment on that ground was error.

Because of the inability of the jurisdictional-issue majority to agree upon the disposition of the case, I feel obligated not to remain silent as to the merits. See *Screws* v. *United States*, 325 U. S. 91, 134 (1945) (addendum by Mr. Justice Rutledge); *United States* v. *Jorn*, 400 U. S. 470, 487–488 (1971) (statement of Black and Brennan, JJ.); *Mills* v. *Alabama*, 384 U. S. 214, 222–223 (1966) (separate opinion of Harlan, J.); *Kesler* v. *Department of Public Safety*, 369 U. S. 153, 174, 179 (concurring opinion of Stewart, J., and dissenting opinion of Warren, C. J.). Assuming, as I must in the light of the Court's decision, that the Court does have jurisdiction of the appeal, I join Part II of Mr. Justice Black's opinion and the judgment of the Court.

Item No. 14

juris. postponed to hearing on merits, 401 U.S ___(May 3, 1971) (No. 808, 1970 Term; renumbered No. 70-18, 1971 Term)

Jane ROE, Plaintiff,

v.

Henry WADE, Defendant,

v.

James Hubert HALLFORD, M.D., Intervenor.

John DOE and Mary Doe, Plaintiffs,

v.

Henry WADE, Defendant.

Civ. A. Nos. 3-3690-B, 3-3691-C.

United States District Court,
N. D. Texas,
Dallas Division.
June 17, 1970.

Action for judgment declaring Texas abortion laws unconstitutional and to enjoin their enforcement. The three-judge District Court held that laws prohibiting abortions except for purpose of saving life of the mother violated right secured by the Ninth Amendment to choose whether to have children and were unconstitutionally overbroad and vague, but Court would abstain from issuing injunction against enforcement of the laws.

Order accordingly.

1. Constitutional Law ⇐42

Physician challenging constitutionality of Texas abortion laws had standing to raise rights of his patients, single women and married couples, as well as rights of his own. Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196.

2. Constitutional Law ⇐42

Logical nexus existed between status asserted by plaintiffs, a married couple, single woman and practicing physician challenging constitutionality of Texas abortion laws, and claim sought to be adjudicated, and plaintiffs had standing. Vernon's Ann.Tex.P.C. art. 1196; 28 U.S.C.A. § 2201.

3. Courts ⇐300

Contentiousness between pregnant woman, physician and district attorney of Dallas County was sufficient to establish a "case of actual controversy" with respect to constitutionality of Texas abortion laws. 28 U.S.C.A. § 2201.

See publication Words and Phrases for other judicial constructions and definitions.

4. Courts ⇐280.4

In absence of possibility that adjudication in state courts would eliminate necessity for federal district court to pass upon plaintiffs' Ninth Amendment claim respecting constitutionality of Texas abortion laws or physician's attack on laws for vagueness, abstention as to plaintiffs' request for declaratory judgment was unwarranted. Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196; U.S.C.A.Const. Amend. 9.

5. Abortion ⇐1

Texas laws prohibiting abortions except for purpose of saving life of mother deprived single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children. Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196; U.S.C.A.Const. Amend. 9.

6. Constitutional Law ⇐48

District attorney had burden to demonstrate that infringement by state abortion laws upon plaintiffs' fundamental right to chose whether to have children was necessary to support compelling state interest. Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196.

7. Constitutional Law ⇐38

Fact that statutory scheme serves permissible or even compelling state interests will not save it from consequences of unconstitutional overbreadth.

8. Abortion ⇐1

While Ninth Amendment right to choose to have abortion is not unqualified or unfettered, statute designed to regulate circumstances of abortions must restrict its scope to compelling state interests. Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196; U.S.C.A.Const. Amend. 9.

9. Abortion ⇐1

Texas laws prohibiting abortions except for purpose of saving life of mother are unconstitutionally overbroad in failing to limit scope to compelling state interests. Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196; U.S.C.A.Const. Amend. 9.

10. Criminal Law ⇐13

Texas laws prohibiting abortions except for purpose of saving life of mother are unconstitutionally vague in failing to provide physicians with proper notice of what acts in their daily practice and consultation will subject them to criminal liability. Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196.

11. Courts ⇐508(7)

Federal policy of noninterference with state criminal prosecutions must be followed except in cases where statutes are justifiably attacked on their face as abridging free expression, or where statutes are justifiably attacked as applied for the purpose of discouraging protected activities. U.S.C.A.Const. Amends. 1, 9.

12. Courts ⇐508(7)

Texas abortion laws, although unconstitutional in depriving single women and married couples of right secured by Ninth Amendment to choose whether to have children and as being vague and overbroad, could not be justifiably at-

tacked on their face as abridging free expression or as being applied for purpose of discouraging protected activities, and federal court would abstain from enjoining enforcement of the laws. Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196; U.S. C.A.Const. Amends. 1, 9.

Linda N. Coffee, Dallas, Tex., Sarah Weddington, Austin, Tex., for plaintiffs.

Fred Bruner, Daugherty, Bruner, Lastelick & Anderson, Ray L. Merrill, Jr., Dallas, Tex., for intervenor.

John B. Tolle, Asst. Dist. Atty., Dallas, Tex., Jay Floyd, Asst. Atty. Gen., Austin, Tex., for defendant.

Before GOLDBERG, Circuit Judge, and HUGHES and TAYLOR, District Judges.

1. On March 3, 1970, plaintiff Jane Roe filed her original complaint in CA-3-3690-B under the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution. She alleged jurisdiction to be conferred upon the Court by Title 28, United States Code, Sections 1331, 1343, 2201, 2202, 2281, and 2284 and by Title 42, United States Code, Section 1983. On April 22, plaintiff Roe amended her complaint to sue "on behalf of herself and all others similarly situated."

On March 23, James Hubert Hallford, M. D., was given leave to intervene. Hallford's complaint recited the same constitutional and jurisdictional grounds as the complaint of plaintiff Roe. According to his petition for intervention, Hallford seeks to represent "himself and the class of people who are physicians, licensed to practice medicine under the laws of the State of Texas and who fear future prosecution."

On March 3, 1970, plaintiffs John and Mary Doe filed their original complaint in CA-3-3691-C. The complaint of plaintiffs Doe recited the same constitutional and jurisdictional grounds as had the complaint of plaintiff Roe in CA-3-3690 and, like Roe, plaintiffs Doe subsequently amended their complaint so as to assert a class action.

Plaintiffs Roe and Doe have adopted pseudonyms for purposes of anonymity.

PER CURIAM:

Two similar cases are presently before the Court on motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The defendant in both cases is Henry Wade, District Attorney of Dallas County, Texas. In one action plaintiffs are John and Mary Doe, and in the other Jane Roe and James Hubert Hallford, M.D., intervenor.[1]

[1] From their respective positions of married couple, single woman, and practicing physician, plaintiffs attack Articles 1191, 1192, 1193, 1194, and 1196 of the Texas Penal Code,[2] hereinafter referred to as the Texas Abortion Laws. Plaintiffs allege that the Texas Abortion Laws deprive married couples and single women of the right to choose whether to have children, a right secured by the Ninth Amendment.

2. *Article 1191 Abortion*

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

Article 1192 Furnishing the Means

Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

Article 1193 Attempt at Abortion

If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

Article 1194 Murder in Producing Abortion

If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

Article 1196 By Medical Advice

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

Defendant challenges the standing of each of the plaintiffs to bring this action. However, it appears to the Court that Plaintiff Roe and plaintiff-intervenor Hallford occupy positions *vis-a-vis* the Texas Abortion Laws sufficient to differentiate them from the general public. Compare Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), and Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965),[3] with Frothingham v. Mellon, 262 U.S. 447, 43 S.Ct. 597, 67 L. Ed. 1078 (1923). Plaintiff Roe filed her portion of the suit as a pregnant woman wishing to exercise the asserted constitutional right to choose whether to bear the child she was carrying. Intervenor Hallford alleged in his portion of the suit that, in the course of daily exercise of his duty as a physician and in order to give his patients access to what he asserts to be their constitutional right to choose whether to have children, he must act so as to render criminal liability for himself under the Texas Abortion Laws a likelihood. Dr. Hallford further alleges that Article 1196 of the Texas Abortion Laws is so vague as to deprive him of warning of what produces criminal liability in that portion of his medical practice and consultations involving abortions.

[2] On the basis of plaintiffs' substantive contentions,[4] it appears that there then exists a "nexus between the status asserted by the litigant[s] and the claim[s] [they present]." Flast v. Cohen, 392 U.S. 83, 102, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

[3] Further, we are satisfied that there presently exists a degree of contentiousness between Roe and Hallford and the defendant to establish a "case of actual controversy" as required by Title 28, United States Code, Section 2201. Golden v. Zwickler, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969).

Each plaintiff seeks as relief, *first*, a judgment declaring the Texas Abortion Laws unconstitutional on their face and, *second*, an injunction against their enforcement. The nature of the relief requested suggests the order in which the issues presented should be passed upon.[5] Accordingly, we see the issues presented as follows:

I. Are plaintiffs entitled to a declaratory judgment that the Texas Abortion Laws are unconstitutional on their face?

II. Are plaintiffs entitled to an injunction against the enforcement of these laws?

I.

Defendants have suggested that this Court should abstain from rendering a decision on plaintiffs' request for a declaratory judgment. However, we are guided to an opposite conclusion by the authority of Zwickler v. Koota, 389 U.S. 241, 248–249, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967):

> "The judge-made doctrine of abstention * * * sanctions * * * escape only in narrowly limited 'special circumstances.' * * * One of the 'special circumstances' * * * is the susceptibility of a state statute of a construction by the state courts that would avoid or modify the constitutional question."

The Court in Zwickler v. Koota subsequently quoted from United States v. Livingston, 179 F.Supp. 9, 12–13 (E.D. S.C.1959):

> "Regard for the interest and sovereignty of the state and reluctance

3. By the authority of *Griswold*, Dr. Hallford has standing to raise the rights of his patients, single women and married couples, as well as rights of his own.

4. "[I]n ruling on standing, it is both appropriate and necessary to look to the substantive issues * * * to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." Flast v. Cohen, 392 U.S. 83, 102, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

5. Zwickler v. Koota, 389 U.S. 241, 254, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); Cameron v. Johnson, 390 U.S. 611, 615, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968).

needlessly to adjudicate constitutional issues may require a federal District Court to abstain from adjudication if the parties may avail themselves of an appropriate procedure to obtain state interpretation of state laws requiring construction. * * * The decision in [Harrison v. N.A.A.C.P., 360 U.S. 167, 79 S.Ct. 1025, 3 L.Ed.2d 1152], however, is not a broad encyclical commanding automatic remission to the state courts of all federal constitutional questions arising in the application of state statutes. * * * Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it. Any other course would impose expense and long delay upon the litigants without hope of its bearing fruit."[6]

[4] Inasmuch as there is no possibility that state question adjudication in the courts of Texas would eliminate the necessity for this Court to pass upon plaintiffs' Ninth Amendment claim or Dr. Hallford's attack on Article 1196 for vagueness, abstention as to their request for declaratory judgment is unwarranted. Compare City of Chicago v. Atchison, T. & S. F. R. Co., 357 U.S. 77, 84, 78 S.Ct. 1063, 2 L.Ed.2d 1174 (1958), with Reetz v. Bozanich, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970).

[5] On the merits, plaintiffs argue as their principal contention[7] that the Texas Abortion Laws must be declared unconstitutional because they deprive single women and married couples of their right, secured by the Ninth Amendment,[8] to choose whether to have children. We agree.

The essence of the interest sought to be protected here is the right of choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of individuals. The manner by which such interests are secured by the Ninth Amendment is illustrated by the concurring opinion of Mr. Justice Goldberg in Griswold v. Connecticut, 381 U.S. 479, 492, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965):

"[T]he Ninth Amendment shows a belief of the Constitution's authors that *fundamental* rights exist that are not expressly enumerated in the first eight amendments and intent that the list of rights included there not be deemed exhaustive." * * *

"The Ninth Amendment simply shows the intent of the Constitution's authors that other *fundamental* personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments." (Emphasis added.)[9]

Relative sanctuaries for such "fundamental" interests have been established

6. 389 U.S. at 250–251, 88 S.Ct. at 396–397. (Citations omitted.)

7. Aside from their Ninth Amendment and vagueness arguments, plaintiffs have presented an array of constitutional arguments. However, as plaintiffs conceded in oral argument, these additional arguments are peripheral to the main issues. Consequently, they will not be passed upon.

8. "The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people."

9. At 492, 85 S.Ct. at 1686 the opinion states: "In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] * * * as to be ranked as fundamental'. Snyder v. [Commonwealth of] Massachusetts, 291 U.S. 97, 105 [54 S.Ct. 330, 78 L.Ed. 674]. The inquiry is whether a right involved 'is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." * * *' Powell v. Alabama, 287 U.S. 45, 67 [53 S.Ct. 55, 77 L.Ed. 158]."

for the family,[10] the marital couple,[11] and the individual.[12]

Freedom to choose in the matter of abortions has been accorded the status of a "fundamental" right in every case coming to the attention of this Court where the question has been raised. Babbitz v. McCann, 312 F.Supp. 725 (E.D. Wis.1970); People v. Belous, 80 Cal. Rptr. 354, 458 P.2d 194 (Cal.1969); State v. Munson, (South Dakota Circuit Court, Pennington County, April 6, 1970). *Accord*, United States v. Vuitch, 305 F.Supp. 1032 (D.D.C.1969). The California Supreme Court in *Belous* stated:

> "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." 80 Cal.Rptr. at 359, 458 P.2d at 199.

The District Court in *Vuitch* wrote:

> "There has been * * * an increasing indication in the decisions of the Supreme Court of the United States that as a secular matter a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy." 305 F.Supp. at 1035.

Writing about Griswold v. Connecticut, *supra*, and the decisions leading up to it, former Associate Justice Tom C. Clark observed:

> "The result of these decisions is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution." [13]

[6] Since the Texas Abortion Laws infringe upon plaintiffs' fundamental right to choose whether to have children, the burden is on the defendant to demonstrate to the satisfaction of the Court that such infringement is necessary to support a compelling state interest.[14] The defendant has failed to meet this burden.

10. Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); and Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944).

11. Loving v. Commonwealth of Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); and Buchanan v. Batchelor, 308 F.Supp. 729 (N.D.Tex.1970).

12. Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); and Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).

13. Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola Univ. L.Rev. 1, 8 (1969). Mr. Justice Clark goes on to write, "* * * abortion falls within that sensitive area of privacy—the marital relation. One of the basic values of this privacy is birth control, as evidenced by the *Griswold* decision. Griswold's act was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent contraception, why can he not nullify that conception when prevention has failed?" *Id.* at 9.

14. "In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' Bates v. [City of] Little Rock, 361 U.S. 516, 524 [80 S.Ct. 412, 4 L.Ed.2d 480]." Griswold v. Connecticut, 381 U.S. 479, 497, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (concurring opinion of Mr. Justice Goldberg). *See also* Kramer v. Union Free School District, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969).

To be sure, the defendant has presented the Court with several compelling justifications for state presence in the area of abortions. These include the legitimate interests of the state in seeing to it that abortions are performed by competent persons and in adequate surroundings. Concern over abortion of the "quickened" fetus may well rank as another such interest. The difficulty with the Texas Abortion Laws is that, even if they promote these interests,[15] they far outstrip these justifications in their impact by prohibiting *all* abortions except those performed "for the purpose of saving the life of the mother." [16]

[7–9] It is axiomatic that the fact that a statutory scheme serves permissible or even compelling state interests will not save it from the consequences of unconstitutional overbreadth. *E. g.*, Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940); Buchanan v. Batchelor, 308 F.Supp. 729 (N.D.Tex. 1970). While the Ninth Amendment right to choose to have an abortion is not unqualified or unfettered, a statute designed to regulate the circumstances of abortions must restrict its scope to compelling state interests. There is unconstitutional overbreadth in the Texas Abortion Laws because the Texas Legislature did not limit the scope of the statutes to such interests. On the contrary, the Texas statutes, in their monolithic interdiction, sweep far beyond any areas of compelling state interest.

[10] Not only are the Texas Abortion Laws unconstitutionally overbroad, they are also unconstitutionally vague. The Supreme Court has declared that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888 (1939). *See also* Giaccio v. Pennsylvania, 382 U.S. 399, 402–403, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). Under this standard the Texas statutes fail the vagueness test.

The Texas Abortion Laws fail to provide Dr. Hallford and physicians of his class with proper notice of what acts in their daily practice and consultation will subject them to criminal liability. Article 1196 provides:

> "Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

It is apparent that there are grave and manifold uncertainties in the application of Article 1196. How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How *imminent* must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years? These questions simply cannot be answered.

The grave uncertainties in the application of Article 1196 and the consequent uncertainty concerning criminal liability under the related abortion statutes are more than sufficient to render the Texas Abortion Laws unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment.

15. It is not clear whether the Texas laws presently serve the interests asserted by the defendant. For instance, the Court gathers from a reading of the challenged statutes that they presently would permit an abortion "for the purpose of saving the life of the mother" to be performed *anywhere* and quite possibly by *one other than a physician*.

16. Article 1196.

II.

We come finally to a consideration of the appropriateness of plaintiffs' request for injunctive relief. Plaintiffs have suggested in oral argument that, should the Court declare the Texas Abortion Laws unconstitutional, that decision would of itself warrant the issuance of an injunction against state enforcement of the statutes. However, the Court is of the opinion that it must abstain from granting the injunction.

Clearly, the question whether to abstain concerning an injunction against the enforcement of state criminal laws is divorced from concerns of abstention in rendering a declaratory judgment. Quoting from Zwickler v. Koota,

> "[A] request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against enforcement of that statute. We hold that a federal district court has the duty to decide the appropriateness and merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction." 389 U.S. at 254, 88 S.Ct. at 399.

[11] The strong reluctance of federal courts to interfere with the process of state criminal procedure was reflected in Dombrowski v. Pfister, 380 U.S. 479, 484–485, 85 SCt. 1116, 1120–21, 14 L.Ed. 2d 22 (1965):

> "[T]he Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."

This federal policy of non-interference with state criminal prosecutions must be followed except in cases where "statutes are justifiably attacked on their face as abridging free expression," or where statutes are justifiably attacked "as applied for the purpose of discouraging protected activities." Dombrowski v. Pfister, 380 U.S. at 489–490, 85 S.Ct. at 1122.

[12] Neither of the above prerequisites can be found here. While plaintiffs' first substantive argument rests on notions of privacy which are to a degree common to the First and Ninth Amendments, we do not believe that plaintiffs can seriously argue that the Texas Abortion Laws are vulnerable "on their face as abridging free expression." [17] Further, deliberate application of the statutes "for the purpose of discouraging protected activities" has not been alleged. We therefore conclude that we must abstrain from issuing an injunction against enforcement of the Texas Abortion Laws.

CONCLUSION

In the absence of any contested issues of fact, we hold that the motions for summary judgment of the plaintiff Roe and plaintiff-intervenor Hallford should be granted as to their request for declaratory judgment. In granting declaratory relief, we find the Texas Abortion Laws unconstitutional for vagueness and overbreadth, though for the reasons herein stated we decline to issue an injunction. We need not here delineate the factors which could qualify the right of a mother to have an abortion. It is sufficient to state that legislation concerning abortion must address itself to more than a bare negation of that right.

17. "[T]he door is not open to all who would test the validity of state statutes or conduct a federally supervised pre-trial of a state prosecution by the simple expedient of alleging that the prosecution somehow affects First Amendment rights." Porter v. Kimzey, 309 F.Supp. 993, 995 (N.D.Ga.1970).

JUDGMENT

This action came on for hearing on motions for summary judgment before a three-judge court composed of Irving L. Goldberg, Circuit Judge, Sarah T. Hughes and W. M. Taylor, Jr., District Judges. The defendant in both cases is Henry Wade, District Attorney of Dallas County, Texas. In one action plaintiffs are John and Mary Doe, husband and wife, and in the other Jane Roe and James Hubert Hallford, M.D., intervenor.

The case having been heard on the merits, the Court, upon consideration of affidavits, briefs and arguments of counsel, finds as follows:

Findings of Fact

(1) Plaintiff Jane Roe, plaintiff-intervenor James Hubert Hallford, M.D., and the members of their respective classes have standing to bring this lawsuit.

(2) Plaintiffs John and Mary Doe failed to allege facts sufficient to create a present controversy and therefore do not have standing.

(3) Articles 1191, 1192, 1193, 1194 and 1196 of the Texas Penal Code, hereinafter referred to as the Texas Abortion Laws, are so written as to deprive single women and married persons of the opportunity to choose whether to have children.

(4) The Texas Abortion Laws are so vaguely worded as to produce grave and manifold uncertainties concerning the circumstances which would produce criminal liability.

Conclusions of Law

(1) This case is a proper one for a three-judge court.

(2) Abstention, concerning plaintiffs' request for a declaratory judgment, is unwarranted.

(3) The fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment.

(4) The Texas Abortion Laws infringe upon this right.

(5) The defendant has not demonstrated that the infringement of plaintiffs' Ninth Amendment rights by the Texas Abortion Laws is necessary to support a compelling state interest.

(6) The Texas Abortion Laws are consequently void on their face because they are unconstitutionally overbroad.

(7) The Texas Abortion Laws are void on their face because they are vague in violation of the Due Process Clause of the Fourteenth Amendment.

(8) Abstention, concerning plaintiffs' request for an injunction against the enforcement of the Texas Abortion Laws, is warranted.

It is therefore ordered, adjudged and decreed that: (1) the complaint of John and Mary Doe be dismissed; (2) the Texas Abortion Laws are declared void on their face for unconstitutional overbreadth and for vagueness; (3) plaintiffs' application for injunction be dismissed.

WEST KEY NUMBER SYSTEM

BLEED THROUGH POOR COPY

juris. postponed to hearing on merits, 401 U.S. ___(May 3, 1971) (No. 971, 1970 Term; renumbered No. 70-40, 1971 Term)

Mary DOE et al.,

v.

Arthur K. BOLTON, as Attorney General of the State of Georgia, Lewis R. Slaton as District Attorney of Fulton County, Georgia and Herbert T. Jenkins, as Chief of Police of the City of Atlanta.

Civ. A. No. 13676.

United States District Court,
N. D. Georgia,
Atlanta Division.
July 31, 1970.
Supplemental Opinion Oct. 14, 1970.

Class action attacking validity of state abortion statute. A Three-Judge District Court held that claims by physicians and nurses that because of state abortion statute they were not free to perform or counsel obtaining of abor-

tions and were therefore unconstitutionally restricted in practice of their professions did not present justiciable controversy and that statute was invalid to extent it limited cases in which abortion could be performed.

Order accordingly.

1. Federal Civil Procedure ⇐9

State Attorney General who was required to represent state in legal proceedings or to give opinion on abortion statute when requested by Governor and who was head of department which was vested with jurisdiction in all matters of law relating to governmental departments, boards and agencies was proper defendant in class action attacking state abortion statute. 28 U.S.C.A. §§ 1343, 2201, 2202; 42 U.S.C.A. § 1983; Code Ga. §§ 26–1201 et seq., 40–1602, 40–1614; Const.Ga. art. 6, § 10, par. 2.

2. Declaratory Judgment ⇐292

Physicians, nurses, ministers and social workers who claimed that because of state statute they were not free to perform or counsel obtaining of abortions and were therefore unconstitutionally restricted in practice of their professions had standing to bring action seeking declaratory judgment as to validity and injunction against enforcement of statute. 28 U.S.C.A. §§ 1343, 2201, 2202; 42 U.S.C.A. § 1983; Code Ga. § 26–1201 et seq.

3. Declaratory Judgment ⇐274

For federal courts to have jurisdiction in declaratory judgment proceeding attacking validity of state statute, there must be actual controversy in which constitutionality of statute is drawn into question in truly adversary context. U.S.C.A.Const. art. 3, § 2.

4. Declaratory Judgment ⇐121

Where plaintiff's request for therapeutic abortion had been denied by hospital committee on ground that her situation did not come within terms of state abortion statute, there was actual interference with claimed constitutional right by decision of body which state had vested with power to grant or deny legal abortions and plaintiff's declaratory judgment action attacking statute presented justiciable controversy. 28 U.S.C.A. §§ 1343, 2201, 2202; 42 U.S.C.A. § 1983; Code Ga. §§ 26–1201, 26–1202, 26–1202(a) (1–3), (b).

5. Declaratory Judgment ⇐123

Claims by physicians and nurses that because of state abortion statute they were not free to perform or counsel obtaining of abortions and were therefore unconstitutionally restricted in practice of their professions did not present justiciable controversy. 28 U.S.C.A. §§ 1343, 2201, 2202; 42 U.S.C.A. § 1983; Code Ga. §§ 26–1201, 26–1202, 26–1202(a) (1–3), (b).

6. Courts ⇐489(1)

There is no requirement that litigant in federal court exhaust state judicial remedies, where he is asserting claim in proceeding other than habeas corpus involving subject over which federal and state courts have concurrent jurisdiction.

7. Abortion ⇐1

State may not unduly limit reasons for which woman may obtain abortion but may legitimately require that decision to terminate her pregnancy be one reached only on consideration of more factors than desires of woman and her ability to find willing physician. U.S.C.A.Const. Amends. 9, 14; Code Ga. § 26–1201 et seq.

8. Constitutional Law ⇐82

Concept of personal liberty embodies right to privacy which apparently is also broad enough to include decision to abort pregnancy. U.S.C.A.Const. Amend. 9.

9. Abortion ⇐1

Once embryo has formed, decision to abort its development cannot be considered purely private one affecting only man and woman and state may assert legitimate area of control short of invasion of personal right of initial decision. U.S.C.A.Const. Amends. 9, 14; Code Ga. § 26–1201 et seq.

10. Constitutional Law ⇐250

Mere fact that physicians and psychiatrists are more accessible to rich people than to poor people, making abortions more available to wealthy than to indigent, is not in itself a violation of equal protection. U.S.C.A.Const. Amend. 14; Code Ga. § 26–1201 et seq.

11. Abortion ⇐1

Reasons for abortion may not be prescribed but quality of decision as well as manner of its execution are properly within realm of state control. U.S.C.A. Const. Amends. 9, 14; Code Ga. § 26–1201 et seq.

12. Abortion ⇐1

Declaratory Judgment ⇐22

State abortion statute to extent it limited cases in which physician could legally perform abortion to cases where continuation of pregnancy would endanger life of woman, fetus would very likely be born with irremediable mental or physical defect or pregnancy resulted from forcible or statutory rape in which case woman must give written statement under oath as to time and place of rape and name of rapist, if known with copy of statement going to law enforcement officials and to extent it provided for declaratory judgment action as to validity of abortion to be performed was unconstitutional. U.S.C.A.Const. Amends. 9, 14; Code Ga. § 26–1202(a) (1–3), (b) (3, 6), (c).

13. Courts ⇐508(7)

Although federal court found that state abortion statute was unconstitutional in certain respects, injunction against state prosecutions which had not been instituted would be denied. 28 U.S.C.A. §§ 1343, 2201, 2202; 42 U.S.C.A. § 1983; Code Ga. § 26–1201 et seq.

Supplemental Opinion

14. Federal Civil Procedure ⇐331

Where hospital which had previously denied application for abortion reconsidered and granted application, motion by party seeking abortion to intervene in class action attacking state abortion statute would be denied.

15. Federal Civil Procedure ⇐331

In absence of showing that pregnant woman who had been denied abortion at one hospital because of state statute could not adequately represent tangential interest of another pregnant woman who had been denied abortion at another hospital, motion by latter woman to intervene in class action attacking state abortion statute would be denied.

16. Abortion ⇐1

Where court declared state abortion statute invalid to extent it limited reasons for granting of abortion but upheld requirement of approval by hospital committee before abortion is performed, any action of committee in adopting same reasons for permitting abortion as had been declared invalid was itself invalid.

Margie Pitts Hames, Tobiane Schwartz, Elizabeth Rindskopf, Bettye Kehrer, Atlanta, Ga., for plaintiffs.

Arthur K. Bolton, Atty. Gen., Tony H. Hight, Asst. Dist. Atty., Atlanta, Ga., for Slaton.

Ralph H. Witt, Atlanta, Ga., for Jenkins.

Ferdinand Buckley, Atlanta, Ga., for unborn child of Mary Doe.

Before MORGAN, Circuit Judge, and SMITH and HENDERSON, District Judges.

PER CURIAM.

This is an action for declaratory and injunctive relief brought pursuant to 28 U.S.C.A. §§ 2201 and 2202, and 42 U.S.C. A. § 1983 and 28 U.S.C.A. § 1343. It is a class action attacking Ga. Code Ann. § 26–1201 et seq. (1969) Georgia's "Abortion Act."

Plaintiffs claim to represent four sub-classes: pregnant women, single or married, wishing legal abortions; licensed physicians who wish to perform or counsel performance of legal abortions; registered nurses who desire to participate in performing or counsel

performance of legal abortions; and ministers and social workers who wish to be free to advise abortion in counselling pregnant women.

Plaintiffs seek an order declaring Georgia's Abortion Statute unconstitutional and enjoining its enforcement on various grounds:

(1) the Statute is unconstitutionally vague and indefinite on its face and as applied, failing to provide sufficient warning of the conduct proscribed, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

(2) Georgia's Abortion Statute unconstitutionally abridges a woman's right to decide to terminate an unwanted pregnancy, in restricting that fundamental liberty without an overriding compelling state interest;

(3) the Statute unconstitutionally restricts the right of the physicians, nurses, ministers and social workers to practice their professions;

(4) Georgia's Abortion Statute produces discrimination against poor and non-white women in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

PENDING MOTIONS

Arthur K. Bolton, sued in his official capacity as Attorney General of Georgia has moved for an order dismissing the claim against him on the ground that no relief could be granted against him since he is not charged generally with the enforcement, application or administration of the Georgia criminal statutes.

[1] As plaintiffs observe, Article VI, § X, Par. II of the Georgia Constitution, Ga. Code Ann. § 2-4502 (1933) requires the Attorney General to represent the State in any civil or criminal case when required by the Governor. Furthermore, he may be required to give the Governor advisory opinions on the abortion statute. Ga. Code Ann. § 40-1602 (1933). Finally, the Attorney General is head of the Department of Law, which is vested with authority and jurisdiction in all matters of law relating to governmental departments, boards and agencies. Ga. Code Ann. § 40-1614 (1943). The Attorney General has sufficient connection with enforcement of the statutes attacked to justify retaining him as a party.[1] See Arneson v. Denny, 25 F.2d 993 (W.D.Wash.1928); Jackson v. Colorado, 294 F.Supp. 1065, 1072 (D.Colo.1968); James v. Almond, 170 F.Supp. 331, 341-342 (E.D.Va.1959); International Longshoremen's & Warehousemen's Union v. Ackerman, 82 F. Supp. 65, 124 (D.Haw.1948), rev'd on other grounds 187 F.2d 860 (9th Cir. 1951); Bevins v. Prindable, 39 F.Supp. 708, 710 (E.D.Ill.1941). Accordingly, that motion is denied.

The Attorney General has also objected to interrogatories which plaintiffs served for answer by a witness, Roger Rochat, M. D. In view of the disposition of this case made below, no ruling on this motion is necessary.

The motion of Ferdinand Buckley, Esquire, for reconsideration of the revocation of his appointment as guardian ad litem will be dealt with in connection with the discussion under MERITS below.

The motion of the National Legal Program on Health Problems of the Poor to submit a brief as *amicus curiae* is granted.

The defendant Lewis R. Slaton, District Attorney of Fulton County, filed motions seeking orders requiring disclosure of plaintiff's identity, granting a continuance for discovery for a reasonable time thereafter, and requiring plaintiff to submit to a physical and mental examination. In view of the reasons for which it is held that the complaint of this plaintiff presented a justi-

1. The Court is also aware that the Attorney General regularly interprets State criminal laws and decisions in published opinions and circulars to State judges and law enforcement officers.

ciable controversy, these motions are directed toward obtaining information which is not relevant to the case. Accordingly, they are denied.

JURISDICTION

A. *Substantial Constitutional Question.*

A three-judge court was convened pursuant to 28 U.S.C.A. §§ 2281 and 2284. Such action is proper where plaintiffs attack the constitutionality of a state statute, raising a substantial constitutional question, and seek equitable relief against its enforcement. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715, 82 S.Ct. 1294, 8 L.Ed.2d 794 (1962).

Plaintiffs here attack the constitutionality of Ga. Code Ann. § 26-1201 et seq. (1969) on the grounds that it infringes rights protected by various Amendments to the United States Constitution. They seek an injunction against enforcement. In light of recent cases on the subject of the Constitutional right to an abortion, this Constitutional question appears substantial. *See* Roe v. Wade, 314 F.Supp. 1217 (N.D.Tex., June 17, 1970); Doe v. Randall, 314 F.Supp. 32 (D.Minn., May 19, 1970); Doe v. Scott, 310 F.Supp. 688 (N.D.Ill., March 27, 1970); Babbitz v. McCann, 310 F.Supp. 293 (E.D. Wis.1970); United States v. Vuitch, 305 F.Supp. 1032 (D.D.C.1969), app. docketed, No. 1155 (February 5, 1970); California v. Belous, 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194 (1969), cert. den. 397 U.S. 915, 90 S.Ct. 920, 25 L. Ed.2d 96 (1970).

B. *Justiciability.*

Standing

By motion to dismiss, Lewis R. Slaton, District Attorney of Fulton County, contends that all plaintiffs other than Mary Doe lack standing to maintain this action. The basis for the claims of these plaintiffs is that because they are not free to perform or counsel the obtaining of abortions, they are unconstitutionally restricted in the practice of their professions.

There are certainly instances in which any of these plaintiffs would have standing to claim a constitutional right to practice his profession, and infringement thereof. For instance, few would dispute that a social worker being prosecuted for conspiracy because he (or she) counselled obtaining an abortion, and referred the client to a physician for the abortion, would have standing to seek a declaratory judgment of his (or her) asserted constitutional right and infringement thereof. *See* Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L. Ed.2d 510 (1965).

But absent prosecution or indictment, that these plaintiffs do have standing is more difficult to see. Whether their claim is otherwise justiciable is irrelevant. Flast v. Cohen, 392 U.S. 83, 100 n. 21, 99 S.Ct. 1942, 20 L.Ed.2d 947 (1968). The sole issue is whether there is a logical link between the status they assert (physician, nurse) and the claim they seek adjudicated, or between their status and both the type of enactment attacked and the nature of the constitutional infringement alleged. 392 U.S. at 102, 88 S.Ct. 1942.

[2] Under either test, all the plaintiffs have standing. As physicians, nurses, ministers or social workers they attack a criminal statute potentially applicable to them, on the grounds that it unconstitutionally restricts their right to practice. Accordingly, the motion to dismiss for lack of standing is denied.

Collision of Interests

[3] Article III of the United States Constitution limits the jurisdiction of the federal courts to cases and controversies. And it is well established that in actions for declaratory judgments, a District Court may not render an advisory opinion on the constitutionality of a state statute. Rather there must be "exigent adversity," an actual controversy in which the constitutionality of the statute is drawn into question in a truly adversary context. *See* Golden v. Zwickler, 394 U.S. 103, 108, 89 S.Ct. 956, 22

L.Ed.2d 113 (1969); Poe v. Ullman, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961); United Public Workers of America v. Mitchell, 330 U.S. 75, 89, 67 S.Ct. 556, 91 L.Ed. 754 (1947).

Most akin to the instant case is Poe v. Ullman, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961). There, a married couple, a married woman and their physician sought a declaratory judgment that Connecticut's statutes prohibiting the use of contraceptive devices and the giving of medical advice in the use of such devices violated plaintiffs' Fourteenth Amendment rights, depriving them of life and liberty without due process of law. None of the plaintiffs had been indicted or prosecuted under the statutes. There had been only one recorded prosecution for violation of the statutes in the seventy-five years since their enactment, and that single instance occurred twenty years before the declaratory judgment action was brought. The Supreme Court suggested that the lack of a pending prosecution or immediate threat of such prosecution against the particular plaintiffs made the claims non-justiciable, citing United Public Workers of America v. Mitchell, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). Poe v. Ullman, 367 U.S. at 501, 81 S.Ct. 1752. But the Justices went on to find that the lack of recorded prosecutions, the unchallenged, open, ubiquitous public sales of contraceptive devices showed a deeply embedded State policy against enforcement, amounting to a tacit agreement not to prosecute violators of the statutes. The majority therefore held:

> "It is clear that the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting." 367 U.S. at 507, 81 S.Ct. at 1758.

However, these three cases seem precedent for the proposition that in the absence of a pending or threatened indictment or prosecution of the particular plaintiffs bringing a declaratory judgment action, a federal court cannot consider the constitutionality of the challenged criminal statute.

However in 1968, the Supreme Court decided Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968), in which a public school teacher argued that the Arkansas statute prohibiting the teaching of evolution was unconstitutional. There was no pending or threatened indictment or prosecution against the teacher. There was no record of any prosecutions under the challenged statute. The teacher's dilemma was solely that (1) the new biology textbooks she was supposed to use in the approaching term contained a chapter on evolution, and (2) her action for a declaratory judgment in state court, granted on the trial level, had been reversed by the Arkansas Supreme Court. The United States Supreme Court majority reached the merits and reversed the decision of the Arkansas Supreme Court in an opinion which summarily brushed aside the question of justiciability. 393 U.S. at 101-102, 89 S.Ct. 266. Apparently, then, the majority felt that the appeal presented a "substantial controversy * * * of sufficient immediacy and reality." Golden v. Zwickler, 394 U.S. 103, 108, 89 S.Ct. 956, 959-960 (1969).

In the instant case, the plaintiff Mary Doe alleges that having properly applied to the Abortion Committee of Grady Memorial Hospital for a legal therapeutic abortion allowed by Ga. Code Ann. § 26-1202 (1969), she was denied an abortion solely on the grounds that her present situation did not come within the terms of Ga. Code Ann. § 26-1202(a) (1) (1969).

Georgia's Abortion Act defines a criminal abortion as the act performed by a person who administers a substance or uses an instrument or other means with intent to produce a miscarriage or abortion. Ga. Code Ann. § 26-1201 (1969). However, Ga. Code Ann. § 26-1202(a) establishes three circumstances

under which an abortion shall not be considered a criminal abortion. And Ga. Code Ann. § 26-1202(b) (1969) prescribes procedure which *must* be followed if an abortion is to be authorized by or performed under 1202(a).

Ga. Code Ann. § 26-1202(b) (1969) provides in relevant part:

"No abortion is authorized or shall be performed under this section unless each of the following conditions is met:

* * * * * *

(5) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose."

[4, 5] Thus, the denial of plaintiff's application for an abortion, on the grounds alleged, was not the decision of a private physician declining to render professional services, occasioned by the mere existence of Georgia's Abortion Act. The statute confers upon the hospital committee power to grant or deny abortions. A decision denying an application for abortion on the ground that the woman's situation does not fall within one of the three enumerated exceptions is an exercise of that power, which allegedly violated plaintiff's constitutional rights. To this extent then, this statute has been invoked against the plaintiff Mary Doe, causing an alleged constitutional deprivation. Here, there has been actual interference with a claimed constitutional right by the decision of a body which the State has vested with power to grant or deny legal abortions. These circumstances put plaintiff and the defendants on opposite sides of a very real and lively controversy, amenable to judicial resolution.

Accordingly, it appears that Mary Doe's complaint, in this context, presents a justiciable controversy. Since the claims of the other plaintiffs do not stand in such a posture, the Attorney General's motion to dismiss must be granted to that extent.

C. *Exhaustion.*

[6] There is no merit to the defendant Slaton's motion to dismiss for failure to exhaust state remedies. It does not appear that there are any administrative remedies for the denial by a hospital committee of an application for an abortion. And however desirable such a requirement might be for orderly judicial administration, there is no requirement that a litigant in federal court exhaust state judicial remedies, where he is asserting a claim in proceedings other than *habeas corpus* involving a subject over which the federal and state courts have concurrent jurisdiction. As will appear below, the instant case does not involve granting injunctive relief.

THE MERITS

[7] Plaintiff asserts that certain cases leading up to and following Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L.Ed.2d 510 (1965) establish a Constitutional right to privacy broad enough to encompass the right of a woman to terminate an unwanted pregnancy in its early stages, by obtaining an abortion. *See* Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); Loving v. Virginia, 388 U. S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (dissenting opinion of Mr. Justice Brandeis); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). While the Court agrees that the breadth

of the right to privacy encompasses the decision to terminate an unwanted pregnancy, we are unwilling to declare that such a right reposes unbounded in any one individual. Rather, we are of the view that although the state may not unduly limit the reasons for which a woman seeks an abortion, it may legitimately require that the decision to terminate her pregnancy be one reached only upon consideration of more factors than the desires of the woman and her ability to find a willing physician.

In Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), the Supreme Court held that the decision to use contraceptive devices is an aspect of a relationship lying within a penumbral zone of privacy created by several fundamental constitutional guarantees, and that a state law forbidding the use of such devices unduly invades that area of protected freedoms with maximum destructive effect upon that relationship. 381 U.S. at 485, 85 S.Ct. 1678. In a concurring opinion, Mr. Justice Goldberg differed with the majority only to the extent stipulating that the right to marital privacy is encompassed in his concept of personal liberty because of the Ninth Amendment, rather than because of penumbral emanations of specific constitutional guarantees.

[8] For whichever reason, the concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy.[2] Like the decision to use contraceptive devices, the decision to terminate an unwanted pregnancy is sheltered from state regulation which seeks broadly to limit the reasons for which an abortion may be legally obtained. However, unlike the decision to use contraceptive devices, the decision to abort a pregnancy affects other interests than those of the woman alone, or even husband and wife alone.

[9] Once conception takes place and an embryo forms, for better or for worse the woman carries a life form with the *potential* of independent human existence.[3] Without positing the existence of a new being with its own identity and federal constitutional rights, we hold that once the embryo has formed, the decision to abort its development cannot be considered a purely private one affecting only husband and wife, man and woman.

A potential human life together with the traditional interests in the health, welfare and morals of its citizenry under the police power grant to the state a legitimate area of control short of an invasion of the personal right of initial decision.

[10] The whole thrust of the present Georgia statute[4] is to treat the problem as a medical one. Such approach is reasonable and seemingly sound inasmuch as medical practitioners are in the best position by virtue of training to judge concurrently the basis as well as the risk inherent in such a decision. In this respect, the state moreover has a legitimate interest in seeing to it that the decisions—personal and medical—is not one

2. We see no connection between this theory and the claimed unlimited right of a woman "to use her body in any way she wishes" read into Griswold by some. There are obvious limitations to the latter such as self abuse, *e. g.* disease, drugs, suicide, etc. and the rights of others in which the state clearly has an interest. Any such theory in its ultimate is flatly rejected.

3. This view of the impact of conception on the decision not to have children implies that the distinction between a quick and unquick fetus, and even that between embryo and fetus is not relevant here. And since the Court does not postulate the existence of a new being with federal constitutional rights at any time during gestation, the motion of Mr. Ferdinand Buckley for reconsideration of the order revoking his appointment as guardian *ad litem* for the embryo (or fetus) is denied. Mr. Buckley's motion to intervene in such capacity is also denied. However, he has the Court's appreciation for his participation in this litigation as *amicus curiae*.

4. Apparently patterned after the American Law Institute, Model Penal Code § 230.3 (Proposed Official Draft, 1962)

undertaken lightly and without careful consideration of all relevant factors, whether they be emotional, economic, psychological, familial or physical. For example, the legislature might require any number of conditions such as consultation with a licensed minister or secular guidance counselor as well as the concurrence of two licensed physicians or any system of approval related to the quality and soundness of the decision in all its aspects. It certainly has a clear right to circumscribe a decision made by a woman alone or by a woman and a single physician and to guard against the establishment of transient "abortion mills" by the occasional opportunistic or unethical practitioner and the concomitant dangers to his patrons and the public. Such controls and requirements, so long as they do not restrict the reasons for the initial decisions and do not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment, are properly within the sphere of legislative discretion. In that respect, where abortions may be obtained only from licensed physicians and surgeons, and only after psychiatric consultation, the mere fact that physicians and psychiatrists are more accessible to rich people than to poor people, making abortions more available to the wealthy than to the indigent, is not in itself a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Cf.* Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); MacQuarrie v. McLaughlin, 294 F.Supp. 176 (D.Mass. 1968), aff'd 394 U.S. 456, 89 S.Ct. 1224, 22 L.Ed.2d 417 (1969).

Moreover, there is an overriding interest in the manner of performance as well as the quality of the final decision to abort. Obvious need for control through licensing, sanitation requirements and proper medical standards in the execution of a legal abortion are examples. Again such decisions address themselves to legislative decision based upon informed judgment.

[11] Having decided that the reasons for an abortion may not be proscribed, but that the quality of the decision as well as the manner of its execution are properly within the realm of state control, the present statute must be examined in such light.

Rather than regulating merely the quality of the decision to have an abortion, and the manner of its performance, the Georgia statute also limits the number of reasons for which an abortion may be sought. This the State may not do, because such action unduly restricts a decision sheltered by the Constitutional right to privacy. *See* Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); California v. Belous, 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194 (1969), cert. den. 397 U.S. 915, 90 S.Ct. 920, 25 L.Ed.2d 96 (1970). The question becomes a matter of statutory overbreadth.

[12] Based upon the above, the court finds the following portions of Georgia Code § 26–1202 to be in violation of the constitutional rights of petitioner:

A. Section (a) beginning with the word "because" on line 5 and through subsection (a) (3) in its entirety.

B. Section (b) subsection (3) beginning with the word "because" on line 6 and through the end of said subsection.

C. Section (b) subsection (6) in its entirety.

D. Section (c) in its entirety.

There being no showing to the contrary, the court further finds the remainder of said Code § 26–1202 to constitute a proper exercise of state power within the context of this opinion.[5]

5. It is not thereby implied that those provisions constitute the only or best means of state control. On the whole, the present system appears unnecessarily cumbersome, a potential hazard under due process and equal protection considerations.

An appropriate formal declaratory judgment may be presented upon request of any party.

ABSTENTION

[13] It is recognized that there is no pending state court proceeding against which the injunction prayed by plaintiff would operate. Nevertheless, the request for injunctive relief is denied, on the same basis as such a prayer would be denied were a state proceeding actually in progress:

> "* * * the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted * * * that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court." City of Greenwood v. Peacock, 384 U.S. 808, 828, 86 S.Ct. 1800, 1812, 16 L.Ed.2d 944 (1968).

However under the authority of Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967), the Court has proceeded to issue the declaratory relief, in spite of its unwillingness to broadly enjoin future prosecutions under the Act. Accordingly, plaintiff's request for a declaratory judgment is hereby granted. Judgment shall issue in the form described above.

It is so ordered.

SUPPLEMENTAL OPINION

Since the Court's opinion of July 31, 1970, several motions have been filed necessitating this opinion and order.

MOTION OF AMICUS CURIAE

Ferdinand Buckley filed a motion on September 3, 1970, to alter or amend the Court's judgment of August 25, 1970, to rule on several of his earlier motions and prayers. Accordingly, that judgment is hereby amended in the following (See FN) respect:

Mr. Buckley's motion for reconsideration of the order revoking his appointment as guardian *ad litem* for the embryo (or fetus), and his motion to intervene in any representative capacity on behalf of the embryo or fetus is denied. This ruling makes it unnecessary, and the Court declines, to rule on the prayers in the answer and counterclaim Mr. Buckley filed before revocation of his appointment as guardian *ad litem*.

MOTIONS OF JANE ROE

Jane Roe petitions for leave to intervene as a plaintiff, moves for a temporary restraining order, and asks that the Court clarify and enforce its opinion of July 31, 1970. Said petition, and accordingly also the motion and the request are denied for two reasons.

[14] First, the Court is informed by counsel for all concerned that Georgia Baptist Hospital has reconsidered its earlier decision and subsequently granted Jane Roe's application for an abortion. Said action renders the petition of Jane Roe moot, there now being no sufficient collision of interests between Jane Roe and the defendants.

[15] Second, Jane Roe's petition to intervene makes it clear that her controversy was with Georgia Baptist Hospital, and only tangentially with the defendants in this case. Under such circumstances there is no showing that Mary Doe—representing the class of pregnant women denied abortions because of the Georgia statute attacked—could not adequately represent the tangential interest of Jane Roe in this action. *See* Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137, 141, 64 S.Ct. 905, 88 L.Ed. 1188 (1944); Durkin v. Pet Milk Co., 14 F.R.D. 374 (W.D.Ark.1953).

In spite of the above, the motion presents an aspect of the case which justifies some amplification of the previous declaratory judgment. The court concludes that this should be done by way of amendment sua sponte. Rule 60(b)(6); Klapprott v. United States, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266 (1948); Bros, Incorporated v. W. E.

Grace Mfg. Co., 320 F.2d 594 (5th Cir. 1963).

The problem relates to the role and function of the "abortion committees" in the several hospitals. Ga. Code § 26-1202b(5). The thrust of the original opinion was to carry out the apparent intent of the Georgia legislature by making the ultimate decision on individual abortions a medical one. However, in line with constitutional principles, the ultimate decision cannot be restricted to the three reasons stated in the statute. This left the abortion committee free to decide whether an abortion was "necessary" on the broader medical basis, namely, the totality of circumstances surrounding each patient.

[16] From the motion it is apparent that those committees who have voluntarily adopted the standards promulgated by the American College of Obstetricians and Gynecologists as controlling have placed themselves in the position of being restricted by the same reasons stated in the statute.[1] What is denied directly cannot be accomplished indirectly. It follows that the abortion committees cannot be limited to the stated reasons as the sole basis for approval of an individual abortion, nor can they so limit themselves by the adoption of such standards. Any such action by a hospital committee is declared to be an unconstitutional exercise of delegated power.

In sum, the statutory processes of approval are left standing. The patient is required to obtain the approval of (1) the certifying physician, (2) the two consulting physicians, and (3) the abortion committee of the admitting hospital. Failure to obtain approval at any level necessarily precludes abortion on that application. A majority of the abortion committee shall control its action, whether for approval or for disapproval.

To the extent stated herein, the original opinion is modified.

It is so ordered.

1. The Georgia statute requires the hospital to apply standards promulgated by the Joint Commission on the Accreditation of Hospitals. No such restrictive reasons for approval of an abortion are contained therein. However, the voluntary standards promulgated by the American College of Obstetricians and Gynecologists in part limit the grounds for abortion to the three stated statutory reasons: injury to health of the mother; danger of grave physical or mental defect to the child; and pregnancy due to rape. Any such limiting restrictions, as seen, must fail. Likewise, lack of consent by the husband, while it may freely be considered by the committee, may not be automatically established as an absolute bar.
By way of additional comment, good faith administration of the statute as now constituted would prohibit a committee from secretly restricting abortions to those statutory reasons, which the court has already deleted. To the contrary, all relevant factors should be considered and an informed medical judgment made.

458 P.2d 194

The PEOPLE, Plaintiff and Respondent,

v.

Leon Phillip BELOUS, Defendant and Appellant.

Cr. 12739.

Supreme Court of California, In Bank.

Sept. 5, 1969.

Rehearing Denied Oct. 1, 1969.

cert. denied, 397 U.S. 915 (1970)

Defendant was convicted in the Superior Court, Los Angeles County, John G. Barnes, J., of abortion and conspiracy to commit an abortion, and he appealed. The Supreme Court, Peters, J., held that statute making a person who performs abortion punishable unless abortion is necessary to preserve mother's life as statute read before amended in 1967 was invalid where term "necessary to preserve" was not susceptible to a construction which, while satisfying legislative intent, was sufficiently certain to satisfy due process requirements without improperly infringing on fundamental constitutional rights of mother to life and to choose whether to bear children, and convictions of abortion and conspiracy to commit abortion could not stand.

Judgment reversed with directions to dismiss indictment.

Burke, McComb, and Sullivan, JJ., dissented.

1. Criminal Law ⇐13

Requirement of certainty in legislation is greater where criminal statute is a limitation on constitutional rights, but mathematical certainty is not required.

2. Constitutional Law ⇐83(1)

A woman has the fundamental right to choose whether to bear children.

3. Constitutional Law ⇐82

That a fundamental right is not enumerated in either Federal or State Constitutions is no impediment to its existence.

4. Constitutional Law ⇐38

Fact that abortion law was valid when first enacted in 1850 would not resolve issue of whether law was presently constitutionally valid. West's Ann.Pen.Code, § 274.

5. Constitutional Law ⇐253

Delegation of decision-making power to a directly involved individual violates Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

6. Abortion ⇐1
Constitutional Law ⇐258

Statute making a person who performs abortion punishable unless abortion is necessary to preserve mother's life as statute read before amended in 1967 was invalid where term "necessary to preserve" was not susceptible to a construction which, while satisfying legislative intent, was sufficiently certain to satisfy due process requirements without improperly infringing on fundamental constitutional rights of mother to life and to choose whether to bear children, and convictions of abortion and conspiracy to commit abortion could not stand. West's Ann.Pen.Code, §§ 182, 274, 276; West's Ann.Health & Safety Code, §§ 25950–25954, 25951(a, b), (c) (1, 2), 25952(c); U.S.C.A.Const. Amend. 14.

A. L. Wirin, Fred Okrand, Zad Leavy and Beilenson & Leavy, Los Angeles, for defendant and appellant.

Thomas C. Lynch, Atty. Gen., William E. James, Asst. Atty. Gen., and Phillip G. Samovar, Deputy Atty. Gen., for plaintiff and respondent.

McCutchen, Doyle, Brown & Enersen, Burnham Enersen, Robert A. Blum, Terry J. Houlihan, San Francisco, Norma G. Zarky, Howard H. Jewel, Oakland, Paul N. Halvonik, San Francisco, William Kelly, Barbara N. Armstrong, Charles E. Beardsley, Los Angeles, George A. Blackstone, A. Stevens Halsted, Jr., Roderick M. Hills, Leonard S. Janofsky, Los Angeles, Herma Hill Kay, Berkeley, Frederick R. McBrien, Charles T. Munger, Stuart T. Peeler, Samuel O. Pruitt, Jr., Charles E. Rickershauser, Jr., Graham L. Sterling, Charles E. Stimson, Jr., Los Angeles, and Francis M. Wheat as amici curiae on behalf of defendant and appellant.

Charles H. Clifford, Walter R. Trinkaus, J. J. Brandlin, Los Angeles, Thomas J. Arata, Santa Rosa, Richard D. Andrews, Fresno, Cyril A. Coyle, Sacramento, Mazzera, Snyder & DeMartini, Stockton, John F. Duff, San Francisco, William R. Kennedy, Richard G. Logan, Oakland, and Curran, Golden, McDevitt & Martin, San Diego, as amici curie on behalf of plaintiff and respondent.

PETERS, Justice.

Dr. Leon Phillip Belous was convicted in January 1967, after a jury trial, of abortion, in violation of section 274 of the Penal Code, and conspiracy to commit an abortion, in violation of section 182 of the Penal Code, both felonies. The court suspended proceedings, imposed a fine of $5,000, and placed Dr. Belous on probation for two years. He appeals from the order granting probation.

Dr. Belous is a physician and surgeon, licensed since 1931 to practice medicine in the State of California, and specializing in obstetrics and gynecology. He has been on the attending staff of the gynecology department of Cedars of Lebanon Hospital in Los Angeles since 1931, is a fellow of the Los Angeles Gynecology and Obstetrical Society, the American College of Obstetrics and Gynecology, the Abdominal Surgical Society, and the Geriatric Society, and a member of the American Board of Obstetrics and Gynecology. He is on the Board of Directors of the California Committee on Therapeutic Abortion, an organization which seeks to liberalize abortion laws. He is considered by his associates to be an eminent physician in his field.

The prosecution's witnesses, a young woman and her husband, Cheryl and Clifton, testified to the following:

In 1966, Cheryl, then unmarried, believed she was pregnant. A family physician had

given her pills which would induce menstruation if she were not pregnant, but the pills did not work. She and Clifton had sometime earlier seen Dr. Belous on television, advocating a change in the California abortion laws. They had never heard of Dr. Belous before. Clifton obtained the doctor's phone number from the television station and phoned Dr. Belous; he explained the problem and that they both were "pretty disturbed," and at their "wits' end" and asked for Dr. Belous' help. Dr. Belous told him there was nothing he could do, but Clifton "continued pleading," and threatened that Cheryl would go to Tijuana for an abortion. Finally the doctor agreed to see them at his office.

Dr. Belous examined Cheryl at his Beverly Hills office and confirmed that she was possibly pregnant. Cheryl was otherwise in good health. The visit lasted about 45 minutes and was very emotional. Both Clifton and Cheryl pleaded for help, cried, insisted they were going to have an abortion "one way or another." The doctor lectured them on the dangers of criminal abortions, and Tijuana abortions in particular, and suggested that they get married. He insisted he did not perform abortions. He refused to recommend anyone in Tijuana. Finally, in response to their pleadings, Dr. Belous gave them a piece of paper with a Chula Vista phone number. He told them an abortion would cost about $500. He gave Cheryl a prescription for some antibiotics and instructed her to return for an examination.

Dr. Belous testified that he was very familiar with the abortion business in Tijuana. He had visited the clinics there to learn about conditions and knew that women who went to Tijuana were taking their lives in their hands. He met Karl Lairtus while in Tijuana and knew from personal observation that Lairtus, licensed to practice in Mexico but not in California, was performing skilled and safe abortions in Mexico. Lairtus wanted to obtain a California license, and sought out Belous' help on a number of occasions. When Lairtus moved from Mexico to Chula Vista, he gave Dr. Belous his address and phone number. When Lairtus moved to Los Angeles, he gave the doctor a Hollywood address, and made it known to the doctor that he was performing abortions. It was Lairtus' number that Belous gave to Cheryl and Clifton. Although he had given out Lairtus' number before, in similar situations, where distraught pregnant women insisted they would do anything, Dr. Belous had no idea how many women actually went to Lairtus.

Cheryl and Clifton made arrangements with Lairtus, and went to the address which Lairtus gave them on the phone. After the abortion was performed, while Cheryl was resting, the police, having been advised by another woman that Lairtus was performing abortions at that address, came to his apartment, followed another couple into the apartment and arrested Lairtus. They found two notebooks containing women's names, ages, dates of last menstruation, and physician's names, including Dr. Belous' name, which the police interpreted as the referring doctor with whom Lairtus was to split his fees. On the basis of this information, Dr. Belous was arrested at his office. Lairtus pleaded guilty. At Dr. Belous' trial, he testified that, although not solicited, he sent Dr. Belous about $100 as a professional courtesy in about half the cases that he had performed abortions on Dr. Belous' patients. Dr. Belous denied receiving any money from Lairtus.

The substance of Dr. Belous' defense was that he gave Lairtus' phone number to Cheryl and Clifton only because he believed that they would, in fact, do anything to terminate the pregnancy, which might involve butchery in Tijuana or self-mutilation; that in face of their pleading and tears, he gave out the phone number of someone whom he knew to be a competent doctor, although unlicensed in this state. The doctor believed that if the young couple carried out their threats, Cheryl's very life was in danger.

Section 274 of the Penal Code, when the conduct herein involved occurred, read: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the State prison not less than two nor more than five years."

The statute was substantially unchanged since it was originally enacted in 1850.[1] In 1967, the statute was amended and sections 25950 through 25954 ("Therapeutic Abortion Act") added to the Health and Safety Code. The act extends the lawful grounds for obtaining an abortion.[2] Section 274 is directed towards the abortionist. Under section 275 of the Penal Code (also amended by the Therapeutic Abortion Act), a woman who solicits or submits to an abortion is punishable by up to five years' imprisonment; similarly, under section 276, any person who solicits a woman to submit to an abortion is punishable by up to five years' imprisonment.

We have concluded that the term "necessary to preserve" in section 274 of the Penal Code is not susceptible of a construction that does not violate legislative intent and that is sufficiently certain to satisfy due process requirements without improperly infringing on fundamental constitutional rights.

"The requirement of a reasonable degree of certainty in legislation, especially in the criminal law, is a well established element of the guarantee of due process of law. 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. * * * "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."' Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888; see also Connally v. General Const. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322. Such also is the law of the State of California. People v. McCaughan, 49 Cal.2d 409, 414, 317 P.2d 974.

[1] "The required meaning, certainty and lack of ambiguity may appear on the face of the questioned statute or from any demonstrably established technical or common law meaning of the language in ques-

1. Stats.1850, ch. 99, § 45, at p. 233: "[E]very person who shall administer or cause to be administered or taken, any medicinal substances, or shall use or cause to be used any instruments whatever, with the intention to procure the miscarriage of any woman then being with child, and shall be thereof duly convicted, shall be punished by imprisonment in the State Prison for a term not less than two years, nor more than five years: *Provided*, that no physician shall be affected by the last clause of this section, who, in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life."

2. Penal Code, section 274, as amended reads: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, * * * *except as provided in the Therapeutic Abortion Act * * * of the Health and Safety Code*, is punishable by imprisonment in the state prison * * *." (Stats.1967, ch. 327, § 3, at p. 1523; italics added.)

The Therapeutic Abortion Act (Health & Saf.Code, §§ 25950–25954) authorizes abortions "only" if the abortion takes place in an accredited hospital (§ 25951, subd. (a)); the abortion is approved by a hospital staff committee consisting of at least three licensed physicians and surgeons (§ 25951, subd. (b)); and there is "substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother" (§ 25951, subd. (c) (1)); the pregnancy resulted from rape or incest (§ 25951, subd. (c) (2)); or the woman is under 15 years of age (§ 25952, subd. (c)).

tion. People v. McCaughan, *supra*, 49 Cal. 2d 409, 414, 317 P.2d 974; Lorenson v. Superior Court, 35 Cal.2d 49, 60, 216 P.2d 859." (In re Newbern, 53 Cal.2d 786, 792, 3 Cal.Rptr. 364, 368, 350 P.2d 116, 120.) The requirement of certainty in legislation is greater where the criminal statute is a limitation on constitutional rights. (See Smith v. California (1959) 361 U.S. 147, 151, 80 S.Ct. 215, 4 L.Ed.2d 205.) On the other hand, mathematical certainty is not required; "some matter of degree" is involved in most penal statutes. (Nash v. United States (1913) 229 U.S. 373, 377, 33 S.Ct. 780, 57 L.Ed. 1232.)

Dictionary definitions and judicial interpretations fail to provide a clear meaning for the words, "necessary" or "preserve." There is, of course, no standard definition of "necessary to preserve," and taking the words separately, no clear meaning emerges. "Necessary" is defined as: "1. Essential to a desirable or projected end or condition; not to be dispensed with without loss, damage, inefficiency, or the like; * * *" (Webster's New International Dictionary (2d ed.), unabridged.) The courts have recognized that "'necessary' has not a fixed meaning, but is flexible and relative." (Westphal v. Westphal, 122 Cal. App. 379, 382, 10 P.2d 119, 120; see also, City of Dayton v. Borchers (Ohio Common Pleas, 1967) 13 Ohio Misc. 273, 232 N.E.2d 437, 441 ["A *necessary* thing may supply a wide range of wants, from mere convenience to logical completeness."].)

The definition of "preserve" is even less enlightening. It is defined as: "1. To keep or save from injury or destruction; to guard or defend from evil; to protect; save. 2. To keep in existence or intact; * * * To save from decomposition, * * * 3. To maintain; to keep up; * * *" (Webster's New International Dictionary, *supra*.) The meanings for "preserve" range from the concept of maintaining the status quo—that is, the woman's condition of life at the time of pregnancy—to maintaining the biological or medical definition of "life"—that is, as opposed to the biological or medical definition of "death".

Since abortion before quickening was not a crime at common law (Perkins, Criminal Law (1957) 101; Means, The Law of New York Concerning Abortion and the Status of the Foetus, 1664–1968: A Case of Cessation of Constitutionality (1968) 14 N.Y.L. F. 411, 419–422; Stern, Abortion: Reform and the Law (1968) 59 J.Crim.L.C. & P.S. 84, 85) we cannot rely on common law meanings or common law referents (see Lorenson v. Superior Court, *supra*, 35 Cal. 2d 49, 60, 216 P.2d 859; People v. Agnello, 259 Cal.App.2d 785, 790–791, 66 Cal.Rptr. 571).[3]

Various possible meanings of "necessary to preserve * * * life" have been suggested. However, none of the proposed definitions will sustain the statute.

Respondent asserts: "If medical science feels the abortion should be performed as it is necessary to preserve her life, then it may be performed; that is, unless it is performed the patient will die."

Our courts, however, have rejected an interpretation of "necessary to preserve" which requires certainty or immediacy of death. (People v. Abarbanel, 239 Cal.App. 2d 31, 32, 35, 48 Cal.Rptr. 336; People v. Ballard, 218 Cal.App.2d 295, 298, 32 Cal. Rptr. 233; People v. Ballard, 167 Cal.App. 2d 803, 807, 335 P.2d 204.) Justice Fourt, in People v. Ballard, *supra*, 167 Cal.App. 2d 803, 814, 335 P.2d 204, 212, stated: "Surely, the abortion statute (Pen.Code, § 274) does not mean by the words 'unless the same is necessary to preserve her life' that the peril to life be imminent. It ought to be enough that the dangerous condition 'be potentially present, even though its full

3. Compare United States v. Harriss (1954) 347 U.S. 612, 634, 74 S.Ct. 808, 820, 98 L.Ed. 989 (dissenting opinion): "Whoever kidnaps, steals, kills, or commits similar acts of violence upon another is bound to know that he is inviting retribution by society, and many of the statutes which define these long-established crimes are traditionally and perhaps necessarily vague."

development might be delayed to a greater or less extent. Nor was it essential that the doctor should believe that the death of the patient would be otherwise *certain* in order to justify him in affording present relief.' [Citations.]" The above language was quoted in People v. Abarbanel, *supra*, 239 Cal.App.2d 31, 34, 48 Cal.Rptr. 336.

In People v. Ballard, *supra*, 167 Cal.App. 2d 803, 813–814, 335 P.2d 204, 211, the evidence established that the woman was "extremely nervous * * * upset, had headaches, was unable to sleep, and thought that she was pregnant. She was agitated, disturbed and had many problems." (Italics omitted.) In People v. Ballard, *supra*, 218 Cal.App.2d 295, 307, 32 Cal.Rptr. 233, it was established that at the time each of the women went to the defendant doctor she was in a "bad state of health" because of self-imposed abortive practices. And in People v. Abarbanel, *supra*, 239 Cal.App.2d 31, 48 Cal.Rptr. 336, the obstetrician performed the abortion after receiving letters from two psychiatrists to the effect that abortion was indicated as necessary to save the woman's life from the "possibility" of suicide. In each of the cases the conviction was reversed.

If the fact of ill health or the mere "possibility" of suicide is sufficient to meet the test of "necessary to preserve her life," it is clear that a showing of immediacy or certainty of death is not essential for a lawful abortion. Two other jurisdictions have also rejected an interpretation of "necessary to preserve" which would require certainty or immediacy of death. (State v. Dunklebarger (1928) 206 Iowa 971, 221 N. W. 592, 596; State v. Hatch (1917), 138 Minn. 317, 164 N.W. 1017.)

After the decision in *Ballard*, the Legislature did not amend the statute to repudiate the rule suggested by that case and to establish a definition requiring certainty of death.[4]

It would be anomalous to uphold a criminal statute against a charge of vagueness by adopting a construction of the statute rejected by the courts of this state as not reflecting legislative intent unless there was a clear showing of a strong public policy or legislative intent requiring adoption of the rejected construction. No such showing has been made with regard to the construction urged by respondent.

Moreover, a definition requiring certainty of death would work an invalid abridgment of the woman's constitutional rights. The rights involved in the instant case are the woman's rights to life and to choose whether to bear children.[5] The woman's right to life is involved because childbirth involves risks of death.[6]

[2, 3] The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a "right of privacy" or "liberty" in matters related to marriage, family, and sex. (See, e. g., Griswold v. Connecticut, *supra*, 381 U.S. 479, 485, 486, 500, 85 S.Ct. 1678, 14 L.Ed.2d 510; Loving v. Virginia (1967) 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 [statute prohibiting interracial marriages, violative of Due Process Clause]; Skinner v. Oklahoma ex rel. Williamson (1942) 316 U.S. 535, 536, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 [sterilization laws; marriage and procreation involve a "basic liberty"]; Pierce v. Society of Sisters (1925) 268 U.S. 510, 534–535, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R.

4. The definitions suggested by the two *Ballard* cases and by *Abarbanel* will be discussed later in this opinion.

5. Dr. Belous' standing to raise this right is unchallenged. (Cf. Griswold v. Connecticut (1965) 381 U.S. 479, 481, 85 S.Ct. 1678, 14 L.Ed.2d 510; Barrows v. Jackson (1953) 346 U.S. 249, 257, 73 S.Ct. 1031, 97 L.Ed. 1586; Parrish v. Civil Service Commission, 66 Cal.2d 260, 264, 57 Cal.Rptr. 623, 425 P.2d 223.)

6. E. g., The maternal death rate in 1966 was 0.5 per 100,000 population and 29.1 per 100,000 births. (Statistical Abstract of the United States (1968) table 73, at p. 58, table 68, at p. 55.) In California in 1966 the maternal death rate was 2.1 per 10,000 live births. (California Statistical Abstract (1968) table E–3, at p. 67.) As to a particular pregnant woman the risk of death may be greater or lesser.

468 [prohibition against nonpublic schools; same]; Meyer v. Nebraska (1923) 262 U.S. 390, 399–400, 43 S.Ct. 625, 67 L.Ed. 1042 [prohibition against teaching children German language; same]; Perez v. Sharp, 32 Cal.2d 711, 715, 198 P.2d 17; see also Custodio v. Bauer, 251 Cal.App.2d 303, 317–318, 59 Cal.Rptr. 463.) That such a right is not enumerated in either the United States or California Constitutions is no impediment to the existence of the right. (See, e. g., Carrington v. Rash (1965) 380 U.S. 89, 96, 85 S.Ct. 775, 13 L.Ed.2d 675 [fundamental but nonenumerated right to vote]; Aptheker v. Secretary of State (1964) 378 U.S. 500, 505–506, 84 S.Ct. 1659, 12 L.Ed.2d 992 and Kent v. Dulles (1958) 357 U.S. 116, 125, 78 S.Ct. 1113, 2 L.Ed.2d 1204 [right to travel]; Bolling v. Sharpe (1954) 347 U.S. 497, 500, 74 S.Ct. 693, 98 L.Ed. 884 [right to attend federal unsegregated schools]; Otsuka v. Hite, 64 Cal.2d 596, 602, 51 Cal.Rptr. 284, 414 P.2d 412 [right to vote]; cf. Finot v. Pasadena City Bd. of Education, 250 Cal. App.2d 189, 199, 58 Cal.Rptr. 520.) It is not surprising that none of the parties who have filed briefs in this case have disputed the existence of this fundamental right.

The critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state (Shapiro v. Thompson (1969), 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600; Sherbert v. Verner (1963) 374 U.S. 398, 403, 83 S.Ct. 1790, 10 L.Ed.2d 965), whether the regulation is "necessary * * * to the accomplishment of a permissible state policy" (McLaughlin v. Florida (1964) 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 L.Ed.2d 222; see also, N.A.A.C.P. v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405; Bates v. City of Little Rock (1960) 361 U.S. 516, 527, 80 S.Ct. 412, 4 L.Ed.2d 480; Huntley v. Public Util. Comm., 69 A.C. 62, 69, 69 Cal.Rptr. 605, 442 P.2d 685; Vogel v. County of Los Angeles, 68 Cal.2d 18, 21, 64 Cal. Rptr. 409, 434 P.2d 961; People v. Woody, 61 Cal.2d 716, 718, 40 Cal.Rptr. 69, 394 P.2d 813), and whether legislation impinging on constitutionally protected areas is narrowly drawn and not of "unlimited and indiscriminate sweep" (Shelton v. Tucker (1960) 364 U.S. 479, 490, 81 S.Ct. 247, 5 L.Ed.2d 231; see also, Cantwell v. Connecticut (1940) 310 U.S. 296, 308, 60 S.Ct. 900, 84 L.Ed. 1213; In re Berry, 68 Cal.2d 137, 151, 65 Cal.Rptr. 273, 436 P.2d 273; In re Hoffman, 67 Cal.2d 845, 853–854, 64 Cal.Rptr. 97, 434 P.2d 353).

It is possible that the definition suggested by respondent, requiring that death be certain, was that intended by the Legislature when the first abortion law was adopted in 1850 and that, in the light of the then existing medical and surgical science, the great and direct interference with a woman's constitutional rights was warranted by considerations of the woman's health. When California's first anti-abortion statute was enacted, any surgical procedure which entered a body cavity was extremely dangerous. Surgeons did not know how to control infection, and mortality was high. (Haagensen & Lloyd, A Hundred Years of Medicine (1943) p. 19.) In 1867, Joseph Lister first published his findings on antiseptic surgery (*id.*, at pp. 241–242), but even in 1883 the techniques he developed were condemned (*id.*, at p. 245), and as late as 1895 were not well understood or properly applied by even leaders of the medical profession. (*Id.*, at p. 246; see also, H. Robb (1895) Aseptic Surgical Technique.)

Although development was slow, techniques of antisepsis and asepsis became major general advances in surgery at and after the turn of the century. In due course safe procedures were developed for specific operations. Curettage, used for abortion in the first trimester, became a safe, accepted and routinely employed medical technique, especially after antibiotics were developed in the early 1940's. (Douglas, Toxic Effects of the Welch Bacillus in Postabortal Infections (1956) 56 N.Y.State J.Med. 3673.) It is now safer for a woman to have

a hospital therapeutic abortion during the first trimester than to bear a child.[7]

Although abortions early in pregnancy and properly performed present minimal danger to the woman, criminal[8] abortions are "the most common single cause of maternal deaths in California." (Fox, Abortion Deaths in California (1967) 98 Am.J.Obst. & Gynec. 645, 650.) In California, it is estimated that 35,000 to 100,000 such abortions occur each year. (Fox, *supra*, at p. 645.)

The incidence of severe infection from criminal abortion is very much greater than the incidence of death. The Los Angeles County Hospital alone, for example, in 1961 admitted over 3,500 patients treated for such abortions. (Kistner, Medical Indications for Contraception: Changing Viewpoints (editorial) (1965) 25 Obst. & Gynec. 285, 286.) Possibly more significant than the mere incidence of infection caused by criminal abortions is the result of such infection. "Induced Illegal Abortion * * * is one of the important causes of subsequent infertility and pelvic disease." (Kleegman & Kaufman, Infertility in Women (1966) p. 301; see also Curtis & Huffman, Gynecology (6th ed. 1950) pp. 564–566.)[9]

Amici for appellant, 178 deans of medical schools, including the deans of all California medical schools, chairmen of medical school departments, and professors of medical schools state: "These recorded facts bring one face-to-face with the hard, shocking—almost brutal—reality that our statute designed in 1850 to protect women from serious risks to life and health has in modern times become a scourge."[10]

7. C. Tietze & H. Lehfeldt, Legal Abortion in Eastern Europe (April 1961) 175 J.A.M.A. 1149, 1152; see also V. Kolblova, Legal Abortion in Czechoslovakia (April 1966) 196 J.A.M.A. 371; K.-H. Mehland, Combatting Illegal Abortion in the Socialist Countries of Europe (1966) 13 World Med.J. 84. There are, of course, no comparable data in the United States. However, in California from November 1967 through September 1968, 3,775 therapeutic abortions were reported without a maternal death. (See Annual Report on the Implementation of the Therapeutic Abortion Act, Department of Public Health, Bureau of Maternal and Child Health (January 1969), table 1.)

The only data contrary to the conclusions above is provided by amicus for respondent, relying on Swedish data showing that maternal mortality from abortion is slightly higher than maternal mortality from giving birth. The Swedish figures are, however, explainable by the fact that abortions in Sweden are often performed during late pregnancy. (See Tietze & Lehfeldt, *supra*, 175 J.A.M.A. 1149, 1152 (e. g., in 1949, 35 percent of Swedish abortions were performed after the first trimester); Hoffmeyer, Medical Aspects of the Danish Legislation on Abortions (1965) 17 W.Res.L.Rev. 529, 544–545.)

8. The phrases "criminal abortion" and "illegal abortion" are used by the medical profession—and by legal commentators—to encompass all abortions obtained other than from a physician in an accepted surgical environment. Any use of the phrase "criminal abortion" or "illegal abortion" in this opinion merely adopts the common phraseology; no legal conclusion is intended.

9. There is considerable literature describing the experience of various hospitals with infected abortion. Hospital experience, however, can be assumed to be only the tip of the iceberg. Many badly infected women will be treated at home or in a doctor's office. (Reid, Assessment and Management of the Seriously Ill Patient Following Abortion (March 1967) 199 J.A.M.A. p. 805.) See, for hospital data, Goodno, Cushner, Molumphey, Management of Infected Abortion (1963) 85 Am.J.Obst. & Gynec. 16 [Baltimore City Hospitals]; Knapp, Platt and Douglas, Septic Abortion (1960) 15 Obst. & Gynec. 344 [The New York Hospital]; Moritz & Thompson, Septic Abortion (1966) 95 Am.J.Obst. & Gynec. 46 [Miami Valley Hospital, Dayton, Ohio]; Stevenson & Yang, Septic Abortion With Shock (1962) 83 Am.J.Obst. & Gynec. 1229 [Detroit Receiving Hospital]; Studdiford & Douglas, Placental Bacteremia: A Significant Finding in Septic Abortion Accompanied by Vascular Collapse (1956) 71 Am.J. Obst. & Gynec. 842 [Bellevue Hospital, New York].)

10. One of the amici in support of respondent agrees: "There is a substantial risk that abortions performed by persons un-

[4] Although we may assume that the law was valid when first enacted, the validity of a law in 1850 does not resolve the issue of whether the law is constitutionally valid today. (Compare, e. g., Gray v. Sanders (1963) 372 U.S. 368, 381, 83 S.Ct. 801, 9 L.Ed.2d 821, with South v. Peters (1950) 339 U.S. 276, 277, 70 S.Ct. 641, 94 L.Ed. 834; Baker v. Carr (1962) 369 U.S. 186, 237, 82 S.Ct. 691, 7 L.Ed.2d 663, with Colegrove v. Green (1946) 328 U.S. 549, 556, 66 S.Ct. 1198, 90 L.Ed. 1432; Brown v. Board of Education (1954) 347 U.S. 483, 495, 74 S.Ct. 686, 98 L.Ed. 873; with Plessy v. Ferguson (1896) 163 U.S. 537, 550–551, 16 S.Ct. 1138, 41 L.Ed. 256.)

Constitutional concepts are not static. Our United States Supreme Court said, regarding the equal protection clause of the Fourteenth Amendment: "We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment 'does not enact Mr. Herbert Spencer's Social Statics.' [Citation.] Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be authorized to practice surgery, carried out the limits of fundamental rights. * * *." (Harper v. Virginia State Bd. of Elections (1966) 383 U.S. 663, 669, 86 S.Ct. 1079, 1082, 16 L.Ed.2d 169; see also, Perez v. Sharp, *supra*, 32 Cal.2d 711, 727, 198 P.2d 17; Galyon v. Municipal Court, 229 Cal. App.2d 667, 671–672, 40 Cal.Rptr. 446, and cases cited therein ["[A] statute valid when enacted may become invalid by change in the conditions to which it is applied."]. See also, Means, *supra*, 14 N.Y.L.F. 411, 514–515.)

In the light of modern medical surgical practice, the great and direct infringement of constitutional rights which would result from a definition requiring certainty of death may not be justified on the basis of considerations of the woman's health where, as here, abortion is sought during the first trimester.

It is next urged that the state has a compelling interest in the protection of the embryo and fetus[11] and that such interest warrants the limitation on the woman's constitutional rights. Reliance is placed upon several statutes and court rules which assertedly show that the embryo or fetus is equivalent to a born child. However, all of the statutes and rules relied upon require a live birth or reflect the interest of the parents.[12]

in unregulated places, will bring injury or even death to the mother."

Authorities recognizing and discussing the tragic health problem created by illegal abortions are legion. (See, e. g., Bates, The Abortion Mill: An Institutional Study (1954) 45 J.Crim.L.C. & P.S. 157; Eastman, Expectant Motherhood (3d ed.1957) 106 et seq.; Gold, Erhardt, Jacobziner & Nelson, Therapeutic Abortions in New York City: A 20-Year Review (1965) 55 Am.J.Pub.Health 964, 970–971; Guttmacher (ed.1967) The Case for Legalized Abortion Now; Lader (1966) Abortion; Leavy & Kummer, Criminal Abortion: Human Hardship and Unyielding Laws (1962) 35 So.Cal.L.Rev. 123; Lucas, Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes (1968) 46 N.C.L.Rev. 730; Niswander, Medical Abortion Practices in the United States (1965) 17 W.Res.L.Rev. 403.)

11. It has been pointed out that "embryo" is more accurately descriptive than "fetus" in the instant case. Webster's New International Dictionary, *supra*, states: "* * * In mammals * * * *embryo* is applied only to early stages passed within the mother's body; later (in human embryology, usually after the third month of development) the young is called a *fetus*. * * *" (Italics in original.)

12. Statutes classifying the unborn child as the same as the born child require that the child be born alive for the provisions to apply. (E.g., Civ.Code, § 29 ["A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth; * * *"]; Prob.Code, § 250 ["A posthumous child

In any event, there are major and decisive areas where the embryo and fetus are not treated as equivalent to the born child. Probably the most important is reflected by the statute before us. The intentional destruction of the born child is murder or manslaughter. The intentional destruction of the embryo or fetus is never treated as murder, and only rarely as manslaughter but rather as the lesser offense of abortion. (Perkins, Criminal Law, *supra*, p. 103; Means, *supra*, 14 N.Y.L.F. at p. 445.)[13]

Furthermore, the law has always recognized that the pregnant woman's right to life takes precedence over any interest the state may have in the unborn. The California abortion statutes, as to the abortion laws of all 51 United States jurisdictions, make an exception in favor of the life of the prospective mother. (See Stern, Abortion: Reform and the Law, *supra*, 59 J. Crim.L.C. & P.S. 84, 86–87; George, Current Abortion Laws: Proposals & Movements for Reform (1965) 17 W.Res.L.Rev. 366, 375.) Although there may be doubts as to whether the state's interest may ever justify requiring a woman to risk death, it is clear that the state could not forbid a woman to procure an abortion where, to a medical certainty, the result of childbirth would be death. We are also satisfied that the state may not require that degree of risk involved in respondent's definition, which would prohibit an abortion, where death from childbirth although not medically certain, would be substantially certain or more likely than not. Accordingly, the definition of the statute suggested by respondent must be rejected as an invalid infringement upon the woman's constitutional rights.

is considered as living at the death of the parent."]; Prob.Code, § 255 [An illegitimate child is the heir of his mother, "whether born or conceived."].)

Similarly, cases holding that a child can recover for injuries caused before his birth require that the child be born alive. The interest protected is that of the child; and the right attaches, not to the embryo or fetus, but to the living child. (Scott v. McPheeters, 33 Cal.App.2d 629, 637, 92 P.2d 678, 93 P.2d 562 [child injured at birth can bring action for injuries]; see also, Carroll v. Skloff (1964), 415 Pa. 47, 202 A.2d 9, 11; Tomlin v. Laws (1922) 301 Ill. 616, 134 N.E. 24, 25; Prosser, Law of Torts (3d ed.1964) at p. 356 ["The child, provided that he is born alive, is permitted to maintain an action * * *."].)

Where the embryo or fetus is allowed to assert rights before birth it is the prospective mother or parents who are bringing the action; thus it is their interest that the law protects. (Kyne v. Kyne, 38 Cal.App.2d 122, 127–128, 100 P.2d 806 [action on behalf of unborn child for support and to establish paternity]; People v. Sianes, 134 Cal.App. 355, 357–358, 25 P.2d 487 [criminal action for nonsupport against father of unborn child]; People v. Yates, 114 Cal. App.Supp. 782, 788, 298 P. 961 [same].) Similarly, in those jurisdictions which recognize a cause of action for the loss of an unborn child, it is the parents' "distressing wrong in the loss of a child" that the law has recognized. (Prosser, *supra*, § 56, at p. 357; Torigian v. Watertown News Co. Inc. (1967) 352 Mass. 446, 448, 225 N.E.2d 926.)

In a case involving a pregnant woman who refused a blood transfusion, in ordering the transfusion the court made clear that it was concerned with the woman, rather than the fetus: "* * * Mrs. Jones wanted to live." (Application of President & Directors of Georgetown Col. (1964) 118 U.S.App.D.C. 90, 331 F.2d 1000, 1009, cert. denied, 377 U.S. 978, 84 S.Ct. 1883, 12 L.Ed.2d 746, but see Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson (1964) 42 N.J. 421, 201 A.2d 537, 538, cert. denied, 377 U.S. 985, 84 S.Ct. 1894, 12 L.Ed.2d 1032, suggesting that an 8-month pregnant woman could be required to have blood transfusions to protect the unborn child.)

Although sections 3705 and 3706 of the Penal Code, which provide for suspending the execution of a pregnant woman, reflect an interest in the unborn child, the sections do not affect any other significant private interests and thus furnish no basis to evaluate the interest protected or to conclude that the embryo or fetus is equivalent to a born child.

13. One case has held that, for purposes of the manslaughter and murder statutes, human life may exist where childbirth has commenced but has not been fully completed. (People v. Chavez, 77 Cal.App.2d 621, 624, 626, 176 P.2d 92.)

Another definition of the term "necessary to preserve" is suggested by People v. Abarbanel, *supra*, 239 Cal.App.2d 31, 32, 34, 48 Cal.Rptr. 336, where the court held that an abortion was not unlawful where the obstetrician performed the abortion based on the "possibility" of suicide. *Abarbanel* might be understood as meaning that "necessary to preserve" refers to a possibility of death different from or greater than the ordinary risk of childbirth. To so interpret "necessary to preserve" would mean that in nearly every case, if not all, a woman who wished an abortion could have one. A woman who is denied a desired lawful abortion and forced to continue an unwanted pregnancy would seem to face a greater risk of death, because of psychological factors, than the average woman, because the average includes all those women who wish to bear the child to term. The psychological factor alone, which under *Abarbanel* is a proper consideration, would seem to be decisive. Such a construction of the statute permitting voluntary abortions would render the statute virtually meaningless. Moreover, to determine the right to an abortion solely on the basis of the dangers of childbirth without regard to the relative dangers of the abortion would be contrary to good medical practice.

Nor can the statute be made certain by reading it as "substantially or reasonably" necessary to preserve the life of the mother. In the present context those terms are not sufficiently precise and would be subject to such different interpretations as to add little or nothing to "necessary." Thus, many people may feel that an abortion is reasonably or substantially necessary to preserve life where the risk of death is double or triple the ordinary risk in childbirth. Others may believe that anything which increases the possibility of death is a substantial risk which is not to be undertaken in the absence of countervailing considerations, so that "reasonably necessary" or "substantially necessary" becomes as destructive of the statute as "possibility of death." On the other hand, there may be those who feel that there is no reasonable or substantial necessity until it is more likely than not that the pregnant woman will not survive childbirth. Although in other contexts the implication of words such as "reasonably" and "substantially" may add certainty and avoid other due process objections, in the instant situation the implication of such words would merely increase the uncertainty.

There is one suggested test which is based on a policy underlying the statute and which would serve to make the statute certain. The test is probably in accord with the legislative intent at the time the statute was adopted. The Legislature may have intended in adopting the statute that abortion was permitted when the risk of death due to the abortion was less than the risk of death in childbirth and that otherwise abortion should be denied. As we have seen, at the time of the adoption of the statute abortion was a highly dangerous procedure, and under the relative safety test abortion would be permissible only where childbirth would be even more dangerous. In light of the test and the then existing medical practice, the question whether abortion should be limited to protect the embryo or fetus may have been immaterial because any such interest would be effectuated by limiting abortions to the rare cases where they were safer than childbirth.

The suggested test would involve an application of medical principles. Medical science may be able to tell us the proper method to treat a patient to minimize the risk of death, but without resort to matters outside medical competence, it cannot tell us the circumstances in which the safest treatment should be rejected and a more dangerous treatment followed in order to protect an embryo or fetus.

The new Therapeutic Abortion Act (Health & Saf.Code, §§ 25950–25954), has adopted a test analogous to the suggested one. Under the new statute, abortion is permissible during the first 20 weeks of pregnancy by a licensed physician in an accredited hospital (Health & Saf.Code, §§

25951, 25953) if it is determined under prescribed procedures either that "There is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother" (Health & Saf.Code, § 25951, subd. (c) (1)), or that "The pregnancy resulted from rape or incest." (Health and Saf.Code, § 25951, subd. (c) (2).) Mental health includes mental illness to the extent that the woman would be dangerous to herself. (Health & Saf.Code, § 25954.) By limiting the abortion to the first 20 weeks, the Legislature has taken into account the danger to the mother of the later abortion and, by requiring the abortion to be performed by a licensed physician in an accredited hospital, has recognized the danger to the mother of other procedures. The further criteria for determining whether an abortion is permissible is the pregnant woman's physical and mental health. Thus, the test established is a medical one, whether the pregnant woman's physical and mental health will be furthered by abortion or by bearing the child to term, and the assessment does not involve considerations beyond medical competence. There is nothing to indicate that in adopting the Therapeutic Abortion Act the Legislature was asserting an interest in the embryo.

Although the suggested construction of former section 274, making abortion lawful where it is safer than childbirth and unlawful where abortion is more dangerous, may have been in accord with legislative intent, the statute may not be upheld against a claim of vagueness on the basis of such a construction. The language of the statute, "unless the same is necessary to preserve her life," does not suggest a relative safety test, and no case interpreting the statute has suggested that the statute be so construed. None of the parties or numerous amici who have filed briefs in the instant case suggest that the statute applies a relative safety test; to the contrary, the position of the parties and amici, including numerous lawyers, doctors, educators, clergymen and laymen, implies that the statute does not apply that standard. Thus, those claiming the statute is invalid urge that the only valid standard would be a relative safety test and that the statute fails to adopt such a test, and those urging the validity of the statute either state or imply that the standard applied is more restrictive. In the circumstances, we are satisfied that the statute may not be construed to adopt the relative safety test as against a claim of vagueness, because the language does not suggest that test and because of the practical evidence before us that men of "common" intelligence, indeed of uncommon intelligence, have not guessed at this meaning.[14]

14. The practical aspects of the need to guess at the meaning of the abortion statute is shown by Packer & Gampell, Therapeutic Abortion: A Problem in Law and Medicine (1959) 11 Stan.L.Rev. 417. A questionnaire survey directed to 29 San Francisco Bay Area and Los Angeles hospitals (*id.*, at p. 423) based on hypothetical cases involving pregnant women seeking abortions yielded the following results (*id.*, at p. 444):

Case No.	Authors' Evaluation of Legality of Abortion	Hospital Would Perform Abortion	
		Yes	No
1	Yes	21	1
2	No	10	12
3	No	6	16
4	No	15	7
5	No	8	13
6	No	8	14
7	Yes	17	4
8	No	5	17
9	Prob. Yes	10	11
10	Maybe	17	4
11	No	1	20

[5] The problem caused by the vagueness of the statute is accentuated because under the statute the doctor is, in effect, delegated the duty to determine whether a pregnant woman has the right to an abortion and the physician acts at his peril if he determines that the woman is entitled to an abortion. He is subject to prosecution for a felony and to deprivation of his right to practice medicine (Bus. & Prof.Code, § 2377) if his decision is wrong. Rather than being impartial, the physician has a "direct, personal, substantial, pecuniary interest in reaching a conclusion" that the woman should not have an abortion. The delegation of decision-making power to a directly involved individual violates the Fourteenth Amendment. (Tumey v. Ohio (1927) 273 U.S. 510, 523, 47 S.Ct. 437, 71 L.Ed. 749; see also State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, 40 Cal.2d 436, 448, 254 P.2d 29 ["[T]he statute assumes to confer legislative authority upon those who are directly interested in the operation of the regulatory rule * * *."]; Blumenthal v. Board of Medical Examiners, 57 Cal.2d 228, 235, 18 Cal.Rptr. 501, 504, 368 P.2d 101, 104.)

The inevitable effect of such delegation may be to deprive a woman of an abortion when under any definition of section 274 of the Penal Code, she would be entitled to such an operation, because the state, in delegating the power to decide when an abortion is necessary, has skewed the penalties in one direction: *no* criminal penalties are imposed where the doctor refuses to perform a necessary operation, even if the woman should in fact die because the operation was not performed.

The pressures on a physician to decide not to perform an absolutely necessary abortion are, under section 274 of the Penal Code, enormous, and because section 274 authorizes—and requires—the doctor to decide, at his peril, whether an abortion is necessary, a woman whose life is at stake may be as effectively condemned to death as if the law flatly prohibited all abortions.

To some extent the Therapeutic Abortion Act reduces these pressures. The act specifically authorizes an abortion by a licensed physician in an accredited hospital where the abortion is approved in advance by a committee of the medical staff of the hospital, applying medical standards. (Health & Saf.Code, § 25951.) At least in cases where there has been adherence to the procedural requirements of the statute, physicians may not be held criminally responsible, and a jury may not subsequently determine that the abortion was not authorized by statute.

[6] We conclude that the validity of section 274 of the Penal Code before amendment cannot be sustained.[15]

Since section 274 is invalid, Dr. Belous' conviction for violation of section 182 of the Penal Code, conspiracy to commit abortion, must likewise fall. The judgment is reversed with directions to the trial court to dismiss the indictment.

TRAYNOR, C. J., TOBRINER, J., and PIERCE,* J. pro tem., concur.

BURKE, Justice (dissenting).
I dissent.

The defendant was found guilty by jury trial of a wilful violation of the abortion statute as it existed at the time of the offense. That he violated the statute is all but conceded in the briefs filed in his behalf. Although he testified that he directed the young couple to a doctor, unlicensed in California, because he believed that if they

15. It has been urged that the Therapeutic Abortion Act is unconstitutional because it contains uncertainties similar to those in the repealed statute, because it infringes on the woman's right to choose whether to bear children, and because the act does not expressly permit an abortion where there is a likelihood that a deformed child will be born. Since the act was adopted after the abortion in the instant case, we do not reach the issue of its validity.

* Assigned by the Chairman of the Judicial Council.

carried out their threats of going to Tijuana to procure an abortion the young woman's life would be in danger, he acknowledged upon cross-examination that her life would not have been endangered if she were not aborted. His assertions that he acted in good faith and out of compassion are tainted somewhat by the evidence which showed that he had referred other women to the same unlicensed physician on a number of occasions and that he had participated on at least one-half of those occasions in the fee paid the abortionist.

Had the doctor truly believed that the young woman's life was in danger he could have done what was the common practice of taking the patient to one of the several hospitals in which therapeutic abortions were being performed. To my knowledge there is not one single instance of a decision of the appellate courts of this state in which a doctor or a hospital has been prosecuted for the performance of an abortion where an independent hospital committee deemed the abortion to be necessary to preserve the woman's life. The plain fact is, as the jury found it to be, that this doctor, whatever his motive, possessed the intent to assist in procuring the miscarriage of the woman for reasons other than to preserve her life. This is the specific intent which the law requires for conviction.

He supplied to the jury the answer an independent hospital committee undoubtedly would have given him had he seen fit to seek its approval for an abortion—the patient could bear the child without endangering her life; therefore, to abort her would violate the law.

The threatened danger to the woman's life arose only from the couple's assertions that they would seek an illegal abortion by an unlicensed person. To assist them in attaining this goal was to flaunt his profession's own standards and to aid in bringing about a direct violation of the law.

The majority would reverse the conviction by declaring the statute unconstitutional because of asserted uncertainty in the phrase, "necessary to preserve [the woman's] life."[1] This phrase has been an integral part of the California law against illegal abortions from the time of its enactment in 1872 until the 1967 amendment to the section, and similar language was in the original statute adopted in 1850.[2] Thus for over a hundred years in this state doctors, hospital committees, judges, lawyers and juries have been called upon to give the phrase the common sense interpretation which the words appear to me to suggest. For this court over a hundred years later to find the language unconstitutionally vague and uncertain is a "negation of experience and common sense." (United States v. Ragen, 314 U.S. 513, 524, 62 S.Ct. 374, 379, 86 L.Ed. 383.)

Not only was the phrase long used in the California statute, it was also employed at common law (see, e. g., Perkins on Criminal Law (2d ed.) p. 145; Clark and Marshall, Crimes 6th ed.) pp. 688-689) and is or has been in the abortion statutes of many states (see, e. g., Am.Jur.2d, Abortion, § 9, p. 192; 153 A.L.R. 1218, 1266; Smith, Abortion and the Law (1967) p. 7). Implicit in the decisions of this court, as well as those of countless other courts, is the view that the phrase does not render such a statute invalid (see, e. g., People v. Davis, 43 Cal.2d 661, 276 P.2d 801; People v. Gallardo, 41 Cal.2d 57, 257 P.2d 29; People v. Powell, 34 Cal.2d 196, 208 P.2d 974; Peo-

1. Section 274 then read: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is *necessary to preserve her life*, is punishable * * *." (Italics added.)

2. The 1850 statute (ch. 99, § 45, p. 233) provided that every person who did any of the enumerated acts with a specified intent shall be punishable "*Provided*, that no physician shall be affected * * * who, in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life."

ple v. Wilson, 25 Cal.2d 341, 153 P.2d 720; People v. Rankin, 10 Cal.2d 198, 74 P.2d 71). In State v. Moretti, 52 N.J. 182, 244 A.2d 499, 504 [cert. den. 393 U.S. 952, 89 S.Ct. 376, 21 L.Ed.2d 363] the court stated that when the phrase "lawful justification," as used in a statute prohibiting abortions done maliciously or without lawful justification, is confined "to the preservation of the mother's life," the statute is not subject to constitutional attack on the ground of vagueness. (See also State v. Elliott, 234 Or. 522, 383 P.2d 382, 384–385.)

The proper test as to certainty was stated by this court in People v. Howard, 70 A.C. 659, 665, 75 Cal.Rptr. 761, 764, 451 P.2d 401, 404, to be: "'A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language. As stated in Pacific Coast Dairy v. Police Court, 214 Cal. 668, at page 676, 8 P.2d 140, 143, 80 A.L.R. 1217, "Mere difficulty in ascertaining its meaning, or the fact that it is susceptible of different interpretations will not render it nugatory. Doubts as to its construction will not justify us in disregarding it." [Citation.]'"

The meaning of the phrase "necessary to preserve [the woman's] life" was considered in People v. Ballard, 167 Cal.App.2d 803, 814–815, 335 P.2d 204, 212, wherein the court stated, "Surely, the abortion statute (Pen.Code, § 274) does not mean by [this phrase] that the peril to life be imminent. It ought to be enough that the dangerous condition 'be potentially present, even though its full development might be delayed to a greater or less extent. Nor was it essential that the doctor should believe that the death of the patient would be otherwise *certain* in order to justify him in affording present relief.' (State v. Dunklebarger, 206 Iowa 971, 221 N.W. 592, 596; see also Rex v. Bourne, 1 K.B. 687 * * *; Commonwealth v. Wheeler, 315 Mass. 394, 53 N.E.2d 4; 23 So. Cal.L.Rev. 523.) In State v. Powers * * 155 Wash. 63, 67, 283 P. 439, 440, the court satisfied itself with an interpretation of 'necessity to save life' by stating, '*If the appellant in performing the operation did something which was recognized and approved by those reasonably skilled in his profession practicing in the same community * * * then it cannot be said that the operation was not necessary to preserve the life of the patient.*'" (Italics added.) (See also People v. Abarbanel, 239 Cal.App. 2d 31, 34, 48 Cal.Rptr. 336; People v. Ballard, 218 Cal.App.2d 295, 307, 32 Cal.Rptr. 233.)

Amici for appellant, 178 deans of medical schools, state that the italicized sentence quoted from People v. Ballard, *supra*, 167 Cal.App.2d 803, 814–815, 335 P.2d 204, is in error because "the medical profession has 'approved' abortions in cases [in which the objective was not to preserve the life of the woman and therefore] clearly outside of Penal Code section 274. Packer & Gampell, Therapeutic Abortion: A Problem in Law and Medicine, 11 Stan.L.Rev. 417, 447. * * *" However, that sentence must be understood to mean recognized and approved by such persons as being required to preserve the life of the patient.

The word "preserve" is defined in the dictionary as "1. To keep or save from injury or destruction; * * * to protect; save. 2. To keep in existence or intact; * * * To save from decomposition * *." (See Webster's New Internat. Dict. (3d ed. 1961).) As used in section 274, the word "preserve" has been regarded as synonymous with "save" (see, e. g., People v. Kutz, 187 Cal.App.2d 431, 436, 9 Cal.Rptr. 626; People v. Malone, 82 Cal.App.2d 54, 59, 185 P.2d 870; Stern v. Superior Court, 78 Cal.App.2d 9, 18, 177 P.2d 308), and to save a life ordinarily is understood as meaning to save from destruction, i. e. dying—not merely from injury. Thus the precipitation of a psychosis in the absence of a genuine threat of suicide is not a threat to life under section 274. (See Packer and Gampell, Therapeutic Abortion: A

Problem in Law and Medicine, 11 Stan. L.Rev. 417, 433, 436.)

That the Legislature used the word "preserve" in the sense of save from destruction also appears from the purpose of the section. The law historically in various contexts has regarded the unborn child as a human being. (See Louisell, Abortion, The Practice of Medicine, and the Due Process of Law, 16 U.C.L.A. L.Rev. 233, 234–244.) Louisell (at p. 244) quotes from Prosser on Torts (3d ed. 1964) that "[M]edical authority has recognized long since that the child is in existence from the moment of conception, and for many purposes its existence is recognized by the law. The criminal law regards it as a separate entity, and the law of property considers it in being for all purposes which are to its benefit, such as taking by will or descent. * * * All writers who have discussed the problem have joined * * in maintaining that the unborn child in the path of an automobile is as much a person in the street as the mother." In Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, 538 [cert. den. 377 U.S. 985, 84 S.Ct. 1894, 12 L.Ed.2d 1032] it was held that an unborn child of a woman who did not wish blood transfusions because they were contrary to her religious convictions was entitled to the law's protection and that an order would be made to insure such transfusions to the mother in the event they are necessary in the opinion of the attending physician.

Several statutes show that the California law has been in accord in regarding the unborn child as a human being for various purposes. (See, e. g., Pen.Code, §§ 3706 and 270; Civ.Code, § 29.)[3] In Scott v. McPheeters, 33 Cal.App.2d 629, 634, 92 P.2d 678, 681, the court declared: "The respondent asserts that the provisions of section 29 of the Civil Code are based on a fiction of law to the effect that an unborn child is a human being separate and distinct from its mother. We think that assumption of our statute is not a fiction, but upon the contrary that it is an established and recognized fact by science and by everyone of understanding."

It is reasonable to believe that section 274, as it read at the time in question, was not an exception to the law's attitude respecting the unborn child as a human being and that it was designed to protect not only the mother's life but also that of the child. In view of that purpose it would appear that the Legislature intended that the child would be deprived of his right to life only if in the absence of an abortion there was a danger of the mother's death—not merely of injury to her.

"'[T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices * * *.' United States v. Petrillo, 332 U.S. 1, 7–8, 67 S.Ct. 1538, 91 L.Ed. 1877." (Roth v. United States, 354 U.S. 476, 491, 77 S.Ct. 1304, 1312, 1 L.Ed.2d 1498.) The phrase in question, when applied according to the standard heretofore stated (namely, whether persons reasonably skilled in their profession practicing in the same community recognized and approved the act as being required to save the patient from dying) clearly gives such warning.

Furthermore, section 274 punishes only those who act with "'* * * the intent to commit a criminal abortion, that is, an abortion for a purpose other than to preserve [i. e. save from destruction] the life of the mother.'" (People v. Abar-

3. Penal Code section 3706 requires that the execution of a death penalty be suspended if the defendant is pregnant and without regard to the stage of pregnancy.
Penal Code section 270 makes punishable a father's wilful failure to provide a minor child with necessary items and provides that "A child conceived but not yet born is to be deemed an existing person in so far as this section is concerned."
Civil Code section 29 provides in part that "A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth * * *."

banel, *supra*, 239 Cal.App.2d 31, 34–35, 48 Cal.Rptr. 336, 339; People v. Ballard, *supra*, 167 Cal.App.2d 803, 817, 335 P.2d 204.) The requirement of such an intent eviscerates much of the majority's claim that the section is impermissibly vague. (See generally Mishkin v. New York, 383 U.S. 502, 507, fn. 5, 86 S.Ct. 958, 16 L.Ed.2d 56; Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 342, 72 S.Ct. 329, 96 L.Ed. 367.) A person who performs an abortion with such an intent has fair warning that his conduct may violate the law even though he may not be certain where the jury will draw the line on the matter of necessity.

The principal cases relied upon by the majority, in which statutes have been declared unconstitutionally vague, do not support such a finding when applied to the abortion statute. In People v. McCaughan, 49 Cal.2d 409, 317 P.2d 974, the statute prohibited, among other conduct, "harsh" or "unkind" treatment of a mentally ill person. These words were held not to have an established meaning either at common law or as a result of adjudication. They were held unconstitutionally vague. On the other hand, the phrase "neglect of duty" and the word "cruel" were upheld because they did have such well established meanings, just as do the words utilized in the phrase under attack here.

Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888, construed a statute defining "gangster" and making it a crime for anyone to be such a person. The phrase "consisting of two or more persons" was all that purported to define "gang," and the word "gang" was held so vague and uncertain as to violate the Fourteenth Amendment.

Connally v. General Const. Co., 269 U.S. 385, 395, 46 S.Ct. 126, 128, 129, 70 L.Ed. 322, involved a statute requiring a contractor to pay his employees "not less than the *current rate of* * * * *wages* in the *locality* where the work is performed," and the court held the italicized words unconstitutionally vague. Unlike the statute involved here, the statute in question was a new statute and the court noted that its application "depends, not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition * * *."

In contrast to these cases, here the challenged statute has a fixed meaning, frequently applied and impliedly interpreted by the courts in the more than one hundred years of its existence. In addition, the statute requires proof of the specific intent to commit a criminal abortion before a person may be successfully prosecuted under it.

There is, of course, a presumption in favor of constitutionality, and the invalidity of a legislative act must be clear before it can be declared unconstitutional. (In re Anderson, 69 Cal.2d 613, 628, 73 Cal.Rptr. 21, 447 P.2d 117.)

The majority cite no authority holding that the term "necessary to preserve [the woman's] life" is impermissibly vague, and I agree with the conclusion as to the constitutionality of the section that is implicit in the multitude of past decisions affirming convictions for illegal abortion, and for murder where death was the result of such an act.

I would affirm the judgment.

McCOMB and SULLIVAN, JJ., concur.

SULLIVAN, Justice (dissenting).

I concur in the views of Justice BURKE. Reading the majority's attack on Penal Code section 274, one would think that the English language which has been the sensitive instrument of our system of law for over 500 years, has lost, by the mere passage of time, all capacity for clarity of expression. The majority strike down the statute solely because they find so vague and uncertain as to offend constitutional standards of due process, a single brief clause of nine words of long and common usage: "unless the same is necessary to preserve her life." There is no mystique enveloping the statute and, as Justice BURKE points

out, the clause now challenged has stood the test of over a hundred years, and presumably of countless human incidents falling within its scope, apparently without evoking a single whimpering cry against it.

The mandate of the section is plain and clear, and simply means this: no one shall intentionally procure the miscarriage of a woman unless it is necessary to save her life. "The criminal intent necessary to support a conviction of illegal abortion must show that it was performed for a purpose other than to save [the abortee's] life." (People v. Abarbanel (1965) 239 Cal.App. 2d 31, 34, 48 Cal.Rptr. 336, 338.) I dare say that the average man in the street, confronted with this law, would have little trouble in extracting its sense (we hold him accountable to much more complicated enactments); and the doctor, with his professional training and expertise would have even less. We have said that "[i]t is a cardinal rule, to be applied to the interpretation of particular words, phrases, or clauses in a statute or a Constitution, that the entire substance of the instrument or of that portion thereof which has relation to the subject under review should be looked to in order to determine the scope and purpose of the particular provision therein of which such words, phrases, or clauses form a part, and in order also to determine the particular intent of the framers of the instrument in that portion thereof wherein such words, phrases, or clauses appear." (Wallace v. Payne (1925) 197 Cal. 539, 544, 241 P. 879, 881). In the case before us, the challenged clause when so examined, is clear in meaning.

Yet the majority, by engaging in a process of elaborate and lavish analysis, transform that which is simple and lucid into something complex and arcane. Actually the analysis is focused on only three words: "necessary to preserve." Their fair equivalent is "necessary to save" (see People v. Abarbanel, *supra*, 239 Cal.App.2d 31, 34, 48 Cal.Rptr. 336; People v. Ballard (1959) 167 Cal.App.2d 803, 814, 817, 335 P.2d 204). Rather than evaluate these words in the light of "the entire substance" (see Wallace v. Payne, *supra*, 197 Cal. 539, 544, 241 P. 879), the majority resort to a dissection: "There is, of course, no standard definition of 'necessary to preserve,' and taking the words separately, no clear meaning emerges." (Majority opn., p. 358.) In support of this thesis, it is asserted that the word "necessary" does not have a "fixed meaning." In general, few words do.[1] It is futher insisted that the definition of "preserve" is "even less enlightening." Accordingly, the majority discard its obvious meaning, that is, "save," as used in the context "to save a life." From such analysis, the opinion concludes "that the term 'necessary to preserve' in section 274 of the Penal Code is not susceptible of a construction that does not violate legislative intent and that is sufficiently certain to satisfy due process requirements without

1. "Words, however, do not have absolute and constant referents. 'A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry, * * *.' (Pearson v. State Social Welfare Board (1960) 54 Cal.2d 184, 195, 5 Cal.Rptr. 553, 559, 353 P.2d 33, 39.) The meaning of particular words or groups of words varies with the '* * * verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). * * * A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning.' (Corbin, The Interpretation of Words and the Parole Evidence Rule (1965) 50 Cornell L.Q. 161, 187.)" (Pacific Gas & E. Co. v. G. W. Thomas Drayage Etc. Co. (1968) 69 Cal.2d 33, 38, 69 Cal.Rptr. 561, 564, 442 P.2d 641, 644.)

"Words are used in an endless variety of contexts. Their meaning is not subsequently attached to them by the reader but is formulated by the writer and can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words." (Universal Sales Corp. v. Cal. etc. Mfg. Co. (1942) 20 Cal.2d 751, 776, 128 P.2d 665, 679, Traynor, J. concurring.)

improperly infringing on fundamental constitutional rights." (Majority opn., p. 357) Actually the gist of this is that the three words "necessary to preserve" are so shrouded in darkness that the average man cannot detect what they mean although average men and men above average have had no trouble with them for a hundred years.

I cannot accept so tortured a conclusion, wrenched from a statute which has had its roots in the law's historic solicitude for the priceless gift of life. The statute plainly prohibits an abortion unless it is necessary to save the mother's life. It strains reason to say that this crystal-clear exception to the law is "so vague that men of common intelligence must necessarily guess at its meaning * * *." (Lanzetta v. New Jersey (1939) 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888—see majority opn., p. 357.) And it strains credulity to assume that this defendant, who under the evidence wilfully violated the statute, had to engage in any such guesswork with respect to the law governing his conduct.

I would affirm the judgment.

McCOMB, J., concurs.

Rehearing denied; McCOMB, BURKE and SULLIVAN, JJ., dissenting.

PIERCE, J., sitting pro tem. in place of MOSK, J., who deemed himself disqualified.

STATE of Kansas, Appellee,

v.

Austin Lyrrell JAMIESON, Appellant.

No. 45800.

Supreme Court of Kansas.

Jan. 23, 1971.

Defendant was convicted of procuring an abortion. The Johnson District Court, Division No. 1, Herbert W. Walton, J., rendered judgment, and defendant appealed. The Supreme Court, Hatcher, C., held that information attempting to charge abortion was fatally defective for failure to negative exception of abortion statute providing that "unless the same shall have been necessary to preserve the life of such woman."

Defendant discharged from judgment and sentenced.

1. Indictment and Information ⇐111(1)

Since there is exception in abortion statute providing that statute will not apply if abortion is necessary to preserve life of woman, information charging abortion must negative exception in order to charge offense. K.S.A. 21-437.

2. Indictment and Information ⇐99

If allegations of information may be true, and defendant still is innocent of of-

fense defined by statute on which information is based, information is jurisdictionally defective.

3. Abortion ⇐2

Manner of performance of abortion may be unlawful and still not constitute offense under abortion statute, if abortion is necessary to save life of mother. K.S.A. 21–437.

4. Indictment and Information ⇐111(1)

Information attempting to charge abortion was fatally defective for failure to negative exception of abortion statute providing that "unless the same shall have been necessary to preserve the life of such woman." K.S.A. 21–437.

Syllabus by the Court

1. Where there is an exception in a statute defining abortion, and the exception forms an integral part of the offense defined, the information must negative the exception in order to charge the offense.

2. A governing rule is that if the allegations of an information may be true and the defendant still be innocent of the offense defined by the statute the information is jurisdictionally defective.

3. An information attempting to charge the offense of abortion as defined by K.S.A. 21–437 is examined and found to be fatally defective for failure to negative the exception—"unless the same shall have been necessary to preserve the life of such woman."

Roy Lucas, New York City, argued the cause, and James C. Thompson and Anthony R. Russo, Kansas City, were with him on the brief for appellant.

David Zook, Asst. County Atty., argued the cause, and Kent Frizzell, Atty. Gen., James W. Bouska, County Atty., and Mark L. Bennett, Jr., Asst. County Atty., were with him on the brief for appellee.

HATCHER, Commissioner.

This is an appeal from a verdict and judgment convicting the defendant of the offense of procuring an abortion contrary to the provisions of K.S.A. 21–437.

Defendant's motion for a new trial was overruled and he was sentenced to confinement in the Johnson County jail for one year. He has appealed.

Although the constitutionality of the Kansas Abortion Act is challenged, we need only to consider appellant's first contention which reads:

"The trial court erred in failing to grant defendant's motion to dismiss because the information under which defendant was charged was jurisdictionally defective in that it failed to negatively aver the statutory exception—that the act charged was not 'necessary to preserve the life of such woman'. Omission of an essential element of the offense renders appellant's conviction void for lack of jurisdiction over the subject matter."

We are inclined to agree with appellant's contention. The information, with formal parts omitted, states:

"I, Hugh H. Kreamer the undersigned, Assistant County Attorney of said County, in the name, and by the authority, and on behalf of the State of Kansas, come now here, and give the Court to understand and be informed that on or about the 15th day of June A.D., 1969, in said County of Johnson, and State of Kansas, one Austin Lyrrell Jamieson did then and there Unlawfully and willfully administer to Susan Thoms, a pregnant woman, certain substance and did use or employ certain instruments, commonly known as a catheter tube and others, the names of which are unknown, with the intent thereby to procure an abortion or miscarriage of said woman.

"Contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Kansas, as he is informed and verily believes."

The abortion act (K.S.A. 21-437) in effect at the time of the offense attempted to be charged reads:

"Every physician or other person who shall willfully administer to any pregnant woman any medicine, drug, or substance whatsoever, or shall use or employ any instrument or means whatsoever, with intent thereby to procure abortion or the miscarriage of any such woman, *unless the same shall have been necessary to preserve the life of such woman*, or shall have been advised by a physician to be necessary for that purpose, shall upon conviction be adjudged guilty of a misdemeanor, and punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment." (Emphasis supplied.)

There have been numerous rules stated in an attempt to determine when an exception in a criminal statute must be stated in the information.

One of the earlier rules relied on by appellant placing emphasis on the location of the exception in the statute, was repudiated by this court in State v. Eary, 121 Kan. 339, 246 P. 989, where it is said:

"The rule that exceptions contained in the clause of a statute creating an offense must be negatived, was adopted by this court at a very early day, from Archbold's Criminal Pleading and Evidence, and regarded form rather than substance:

" 'The law on this point is plain and is well stated in Archbold's Criminal Practice and Pleading, page 118, as follows: "If there be any exception contained in the same clause of the act which creates the offense, the indictment must show negatively that the defendant or the subject of the indictment does not arise within the exception. If, however, the exception or proviso be in a subsequent clause or statute, or although in the same section, yet if it be not incorporated with the enacting clause by any words of reference, it is in that case matter of defense for the other party, and need not be negatived in the pleading." ' State of Kansas v. Thompson, 2 Kan. 432, 436 [1864].

"We now regard substance instead of form, and unless the exception, wherever found, inheres so integrally in the offense that liability would necessarily be precluded unless the exception were expressly negatived, it is a matter of defense. * * *" (P. 343, 246 P. p. 991.)

[1] The well established rule in all jurisdictions is that there must be negative averment of an exception where it constitutes an integral part of the offense defined in the statute.

In State v. Hill, 189 Kan. 403, at page 410, 369 P.2d 365, at page 370, 91 A.L.R.2d 750, we stated:

"* * * The office of an exception in a statute is well understood. It is intended to exempt something from the scope of the general words of a statute or to qualify or restrain the generality of the substantive enactment to which it is attached. The relative position of an exception is unimportant since the act must be construed as a whole. It may, as here, appear in a section by itself, and when that is done it has precisely the same meaning that it would have if the exception were appropriately incorporated in the other section. (50 Am.Jur., Statutes, § 431, p. 451.) *We conclude that 21-956 is not merely defensive as the state contends, but constitutes an integral part of the offense defined.* As thus construed, the burden rests upon the state to allege and prove that the articles sold or exposed to sale on Sunday were of the kind and character included in the statute's prohibition and were not those excepted." (Emphasis supplied.)

The general rule may be found in 1 C.J.S. Abortion § 21, p. 327:

"Following the rules applicable to indictments and informations generally, where there is an exception in the stat-

ute defining abortion, which exception forms a part of the description of the offense so that the ingredients thereof cannot be accurately stated if the exception is omitted, the indictment must negative the exception, otherwise the offense defined by the statute is not charged. This averment should be made in terms which are direct and certain, and it should not be set out parenthetically or in ambiguous terms."

[2] There may sometimes be a dispute as to just when an exception constitutes an integral part of the offense. In State v. Ferron, 122 Kan. 845, 253 P. 402, this court announced in a very concise rule for determining just when an exception is an integral part of the offense charged. We stated:

"* * * A governing rule is that if the allegations of the information may be true and the defendant still be innocent, the information is bad. * * *" (P. 847, 253 P. p. 403.)

The defendant in the present case might be found guilty of the abortion and still be innocent under the language of the statute creating the exception.

The appellee in its brief stresses the use of the word "unlawful," stating:

"* * * The information filed herein alleges that the acts performed were performed in an 'unlawful' manner, which although failing to recite all the details, which utmost certainty might require, still fully apprised the defendant of the crime with which he was charged. * * *"

[3] The manner of the performance of the abortion might be unlawful and still not constitute an offense under the statute if necessary to save the life of the mother. It was stated in State v. Bridges, (Mo.) 412 S.W.2d 455, at page 458:

"* * * It does not follow, however, from the fact that the abortion was unlawful and felonious that the abortion was not necessary to save the mother's life. The necessity might exist and the act yet be unlawful and felonious by reason of the manner in which the defendant performed the act. A charge that the act was done unlawfully and feloniously does not supply the missing required allegation that the abortion was not necessary to preserve her life."

It might also be noted here that the appellee cites cases dealing with the burden of proof. We make no comment other than to say that we are now dealing with the allegations of an information.

The appellee also relies on the case of State v. Perello, 102 Kan. 695, 171 P. 630, where this court held that an exception in the intoxicating liquor law need not be stated in the information. In the *Perello* case this court went to considerable pains to state why the case was an exception to the general rule. It stated at page 697 of the opinion, at page 631 of 171 P.:

"The statute we are considering defines the offense, and in the same clause uses the language, 'except druggists or registered pharmacists as hereinafter provided.' Section 5 of the act enumerates the particular condition under which liquor may be delivered to certain persons engaged in the whole drug business and to registered pharmacists actually and in good faith engaged in the retail drug business, these exceptions being coupled with elaborate provisions designed to prevent evasion of the law. The language in section 1, 'except druggists or registered pharmacists as hereinafter provided,' does not set forth, nor does it purport to state, except in most general terms, the nature of the exceptions in favor of druggists and registered pharmacists. It is a mere parenthetical expression thrown in to show that in another part of the act provisions will be found which except certain classes of persons from the operation of the statute. As held in the Oklahoma case just cited [Smythe v. State, 2 Okl.Cr. 286, 101 P. 611.], we think the rule contended for by the appellant should never apply where the

matter of such exception or proviso does not enter into and become a material part of the description of the offense. * * *"

In 1 Am.Jur.2d, Abortion, § 18, p. 198, we find the general rule stated as follows:

"Under statutes which provide in effect for the punishment of anyone who supplies or administers a medicine, drug, or substance to a pregnant woman, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless such act is necessary to preserve her life, the authorities generally hold that the indictment must allege that production of a miscarriage was not necessary to save her life. * * *"

[4] We are forced to conclude that the exception in KSA 21-437—"unless the same shall have been necessary to preserve the life of such woman"—is an integral part of the definition of the offense of abortion, and the failure to negatively aver the exception in the information constituted a fatal defect.

It necessarily results that the conviction must be set aside and the defendant discharged from the judgment and sentence.

It is so ordered.

Approved by the Court.

appeal docketed sub nom. Hanrahan v. Doe, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (No.1522, 1970 Term: renumbered No. 70-105, 1971 Term), stay issued (Marshall, J. Sup. Ct. Feb. 10, 1971)

Jane DOE and Sally Roe, suing on behalf of themselves and all others similarly situated, and David N. Danforth, M.D., Charles Fields, M.D., Ralph M. Wynn, M.D., and Frederick P. Zuspan, M.D., suing on behalf of themselves and all others similarly situated, Plaintiffs,

Mary Poe, by her mother, Pauline Poe, suing on behalf of herself, and all others similarly situated, Intervening Plaintiff,

v.

William J. SCOTT, Attorney General of the State of Illinois, and Edward V. Hanrahan, State's Attorney of Cook County, Illinois, Defendants,

Dr. Bart Heffernan, Intervening Defendant.

Civ. A. No. 70 C 395.

United States District Court, N. D. Illinois, E. D.

Jan. 29, 1971.

Action for declaratory and injunctive relief challenging constitutionality of Illinois abortion statute. The three-judge District Court, Swygert, Chief Circuit Judge, held that the Illinois abortion statute, by forcing the birth of every fetus, no matter how defective or how intensely unwanted by its future parents, displayed no legitimately compelling state interest in fetal life which would justify intrusion on woman's privacy which is involved in forcing her to bear an unwanted child; consequently, during the early stages of pregnancy—at least during the first trimester—the state may not prohibit, restrict or otherwise limit women's access to abortion procedures performed by licensed physicians operating in licensed facilities.

Plaintiffs' motion for summary judgment granted and defendants' motion denied.

Campbell, Senior District Judge, dissented and filed opinion.

See also, D.C., 310 F.Supp. 688.

1. Declaratory Judgment ⇐303
Injunction ⇐114(3)

The Illinois Attorney General, although not made the chief prosecutor by criminal statutes, was a proper party defendant in action for declaratory and injunctive relief challenging constitutionality of the Illinois abortion statute. S.H.A.Ill. ch. 38, § 23–1; 28 U.S.C.A. §§ 1331, 1343, 2201, 2202, 2281, 2284; 42 U.S.C.A. § 1983.

2. Constitutional Law ⇐42

Female plaintiffs who alleged that operation of Illinois abortion statute deprived them of asserted right to terminate unwanted pregnancies in the state of their residence and who asserted that they had been injured either by having been forced to bear unwanted children or by having to travel to foreign states to obtain abortions had standing to raise claims respecting constitutionality of the abortion statute. S.H.A.Ill. ch. 38, § 23–1; 28 U.S.C.A. § 1331, 1343, 2201, 2202, 2281, 2284; 42 U.S.C.A. § 1983.

3. Constitutional Law ⇐42

Physician plaintiffs had standing to raise claims of their patients with respect to constitutionality of Illinois abortion statute. S.H.A.Ill. ch. 38, § 23–1; 28 U.S.C.A. §§ 1331, 1343, 2201, 2202, 2281, 2284; 42 U.S.C.A. § 1983.

4. Criminal Law ⇐13

Illinois statute prohibiting all abortions except those performed by physician in licensed medical facility because "necessary for the preservation of the woman's life" was unconstitutionally vague. S.H.A.Ill. ch. 38, § 23–1(b).

5. Constitutional Law ⇐82

Matters pertaining to procreation, as well as to marriage, the family, and sex are surrounded by a zone of privacy which protects activities concerning such matters from unjustified governmental intrusion. S.H.A.Ill. ch. 38, § 23–1(b); U.S.C.A.Const. Amend. 14.

6. Abortion ⇐1

Illinois abortion statute, by requiring a woman to risk physical and emotional harm short of death when a therapeutic abortion would remove that risk, did not bear scrutiny as a health measure for the benefit of women. S.H.A.Ill. ch. 38, § 23–1(b).

7. Abortion ⇐1

Illinois abortion statute, by forcing the birth of every fetus, no matter how defective or how intensely unwanted by its future parents, displayed no legitimately compelling state interest in fetal life which would justify intrusion on woman's privacy which is involved in forcing her to bear an unwanted child; consequently, during the early stages of pregnancy—at least during the first trimester—the state may not prohibit, restrict or otherwise limit women's access to abortion procedures performed by licensed physicians operating in licensed facilities. S.H.A.Ill. ch. 38, § 23–1(b); U.S.C.A.Const. Amend. 14.

Sybille Fritzsche, The Roger Baldwin Foundation of ACLU, Inc., Susan Grossman, Chicago, Ill., for plaintiffs; Marshall Patner, Patner & Karaganis, Chicago, Ill., of counsel.

Gordon H. S. Scott, Legal Aid Bureau, Chicago, Ill., for intervening plaintiff Mary Poe.

William J. Scott, Atty. Gen., Bernard Genis, Asst. Atty. Gen., Edward V. Hanrahan, State's Atty., Daniel Coman, James C. Murray, Asst. State's Attys., for defendants.

Dennis J. Horan, Thomas M. Crisham and Jerome A. Frazel, Hinshaw, Culbertson, Moelmann, Hoban & Fuller, Chicago, Ill., for intervening defendant Bart Heffernan.

Before SWYGERT, Chief Circuit Judge, ROBSON, Chief District Judge, and CAMPBELL, Senior District Judge.

MEMORANDUM OPINION

SWYGERT, Chief Circuit Judge.

This is an action for declaratory and injunctive relief brought to declare that the Illinois abortion statute [1] is violative of the United States Constitution for one or more reasons.[2] After a three-judge district court was convened the parties were ordered to restrict their arguments to the allegations that the statute is unconstitutionally vague and unconstitutionally invades the privacy of pregnant women. Oral argument was heard, and the case is now before us on a multiplicity of motions including cross-motions of plaintiffs and defendants for summary judgment.

Plaintiffs Doe and Roe, suing anonymously on behalf of themselves and all other women similarly situated, assert that they were unable to obtain legal, medically safe abortions in Illinois because their physicians reasonably believed that they could not perform such an operation upon the plaintiffs without fear of prosecution by defendant law enforcement officials pursuant to the challenged statute. Plaintiff Doe, a woman of means, subsequently had a successful abortion performed in Great Britain, while plaintiff Roe, who is indigent, was compelled to bear an unwanted child since the option of a foreign abortion was economically foreclosed. Plaintiffs Danforth, Fields, Wynn and Zuspan, all licensed physicians, sue on behalf of themselves, and all other similarly situated physicians, alleging that the existence of the challenged statute interferes with and adversely affects their

1. Ill.Rev.Stat., ch. 38, § 23–1 (1969).

2. Jurisdiction is based upon 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343, 2201, 2202, 2281 and 2284.

ability to conduct their medical practices with proper regard for their patients' best interests. Intervening plaintiff Poe is a high school girl who was pregnant as a result of a forcible rape and sues anonymously by her mother as next friend, asserting the same claims as Doe and Roe.[3]

The principal defendants are William J. Scott, Attorney General of the State of Illinois, and Edward V. Hanrahan, State's Attorney of Cook County, Illinois. Both are law enforcement officials of the State of Illinois who are charged with enforcing its laws, including the challenged statute. Intervening defendant Heffernan is a licensed physician who has been granted leave to appear herein as guardian *ad litem* for those conceived but not yet born.

[1] Defendant Scott asserts that he is not a proper party to this action. Although the Illinois statutes do not make the attorney general the chief prosecutor pursuant to the state's criminal statutes, the leading Illinois case clothes his office with the same authority as attorneys general at the common law. In Fergus v. Russel, 270 Ill. 304, 110 N.E. 130 (1915), the Illinois Supreme Court held that, although the state legislature may confer powers additional to those inherent in the common law office of attorney general, it may not deprive the office of any of its historical powers and duties as chief legal representative of the state.[4] The court further stated, "[A]t common law the Attorney General was the law officer of the crown and its chief representative in the courts."[5] Furthermore, the attorney general has conceded that he is required to represent the people of the state before the supreme court in all matters in which their interests are apparent and to assist in the prosecution of any criminal trial when he believes the people's interest requires it.[6] Indeed, the overlap of the powers and duties of the state's attorneys of the several counties and the attorney general is such that it appears that, where their powers are concurrent, either officer may initiate appropriate proceedings in the name of the state if the other has not acted.[7] We hold, therefore, that the attorney general is a proper party defendant in this action.

[2, 3] Defendants challenge the standing of the plaintiffs to raise the claims which they assert. The female plaintiffs allege that the operation of the statute deprived them of their asserted right to terminate unwanted pregnancies in the state of their residence. They assert that they have been injured either by having been forced to bear unwanted children or by having to travel to foreign states to obtain abortions by qualified medical personnel. We have no doubt that, "On the basis of plaintiffs' substantive contentions, * * * there * * * exists a 'nexus between the status asserted by the [female plaintiffs] and the claim(s) (they present).'"[8] The standing requirements of Flast v. Cohen, 392 U.S. 83, 102, 88 S.Ct. 1942, 20 L.Ed. 2d 947 (1968), are thus satisfied by the litigative posture of the female plaintiffs. Moreover, the physician-plaintiffs have standing to raise the claims of their

3. On March 23, 1970, Poe moved for leave to intervene and for the issuance of a temporary restraining order enjoining the defendants from attempting to enforce the Illinois statute against Poe's physician for terminating her pregnancy. On March 27 Poe was allowed to intervene, but her request for a restraining order was denied. On March 30 the Court of Appeals for the Seventh Circuit issued the temporary restraining order requested by Poe.

4. 270 Ill. at 337-339, 110 N.E. at 143-144.

5. 270 Ill. at 336, 110 N.E. at 143.

6. Ill.Rev.Stat. ch. 14, § 4 (1969).

7. *E. g.*, People ex rel. Kunstman v. Shinsaku Nagano, 389 Ill. 231, 59 N.E.2d 96 (1945); People ex rel. Miller v. Fulbrewider, 329 Ill. 65, 160 N.E. 175 (1928). *But see* People v. Flynn, 375 Ill. 366, 369, 31 N.E.2d 591, 593 (1940).

8. Roe v. Wade, 314 F.Supp. 1217, 1220 (N.D.Tex.1970) (citing Flast v. Cohen, 392 U.S. 83, 102, 88 S.Ct. 1942, 20 L.Ed. 2d 947 (1968)).

patients even if we assume that no independent claim of theirs could withstand a motion for judgment on the pleadings.[9] All plaintiffs thus have standing to raise the claims which they assert.

I

[4] Plaintiffs contend that the Illinois abortion statute must be adjudged unconstitutionally vague. We agree. The statute prohibits all abortions except those "performed by a physician * * * in a licensed hospital or other licensed medical facility because *necessary for the preservation of the woman's life.*" [10] Plaintiffs point to the italicized language as the basis for their assertion that the statute is invalid under the due process clause of the fourteenth amendment because of its imprecision. It is clear that, as the Supreme Court has said:

> No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. * * * "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." [11]

The question thus becomes whether men of ordinary intelligence must guess at the meaning of the words, "necessary for the preservation of the woman's life."

We note at the outset that these words, or substantially identical ones, have convinced some courts that they are incapable of certain interpretation,[12] and other courts have disagreed.[13] If courts cannot agree on what is the essential meaning of "necessary for the preservation of the woman's life" and like words, we fail to see how those who may be subject to the statute's proscriptions can know what it prohibits. On the issue of vagueness, we are in agreement with the reasoning of People v. Belous [14] and Roe v. Wade.[15] One need not inquire in great depth as to the meaning of such words as "necessary" and "preserve" to conclude that the holdings of those cases are correct. "Necessary" has been characterized as vague by the United States Supreme Court [16] and has been similarly described by other courts.[17] It is "a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, proper, or conducive to the end sought." [18]

9. Griswold v. Connecticut, 381 U.S. 479, 481, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Barrows v. Jackson, 346 U.S. 249, 257, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953).

10. Ill.Rev.Stat., ch. 38, § 23-1(b) (1969) (emphasis added).

11. Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939); *accord*, Jordan v. DeGeorge, 341 U.S. 223, 71 S.Ct. 703, 95 L.Ed. 886 (1951); Connally v. General Constr. Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

12. *E. g.*, Roe v. Wade, 314 F.Supp. 1217, 1223 (N.D.Tex.1970); United States v. Vuitch, 305 F.Supp. 1032, 1034 (D.D.C. 1969); People v. Belous, 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194, 197 (1969), cert. denied, 397 U.S. 915, 90 S.Ct. 920, 25 L.Ed.2d 96 (1970).

13. *E. g.*, Babbitz v. McCann, 310 F.Supp. 293, 298 (E.D.Wis.1970); Rosen v. Louisiana State Board of Medical Examiners, 318 F.Supp. 1217, (E.D.La.1970); Steinberg v. Rhodes, 321 F.Supp. 741 (N.D. Ohio, filed Dec. 18, 1970).

14. 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194 (1969), cert. denied, 397 U.S. 915, 90 S.Ct. 920, 25 L.Ed.2d 96 (1970).

15. 314 F.Supp. 1217 (N.D.Tex.1970).

16. Yu Cong Eng v. Trinidad, 271 U.S. 500, 517-518, 46 S.Ct. 619, 70 L.Ed. 1059 (1926).

17. *E. g.*, Phillips v. Borough of Folcroft, 305 F.Supp. 766, 770-771 (E.D.Pa.1969); Westphal v. Westphal, 122 Cal.App. 379, 382, 10 P.2d 119, 120 (1932).

18. Black's Law Dictionary 1181 (4th ed. 1957).

The word "preserve" is similarly susceptible of so broad a range of connotations as to render its meaning in the statute gravely amorphous, since it may mean anything from maintaining something in its status quo to preventing the total destruction of something.[19] The treating physician who believes an abortion is medically or psychiatrically indicated thus finds himself threatened with becoming a felon as well as with the possibility of losing his right to practice his profession if he errs in the legal interpretation of a penal statute, the words of which have not been sufficiently definite for courts to agree on their meaning.[20] This is precisely the kind of situation that the void-for-vagueness doctrine is intended to prevent.

II

[5] Aside from the fact that the statute is vague, its practical effect is to make abortion unavailable to women unless there is a reasonable certainty that death will result from a continuation of pregnancy. This practical effect of the statute constitutes an intrusion on constitutionally protected areas too sweeping to be justified as necessary to accomplish any compelling state interest. These protected areas are women's rights to life, to control over their own bodies, and to freedom and privacy in matters relating to sex and procreation.

The Supreme Court has long recognized that a person possesses a fundamental, constitutionally protected right to privacy and freedom in certain personal and intimate matters, especially those pertaining to the home and family.[21] This right was developed and applied by the Supreme Court to strike down a state's birth control statute in Griswold v. Connecticut.[22] The Court there held that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. * * * Various guarantees create zones of privacy."[23] *Griswold* set out in broad terms the right of married couples to be free from governmental intrusion into their intimate affairs:

> We cannot distinguish the interests asserted by the plaintiffs in this case from those asserted in *Griswold*. In both, "[t]he essence of the interest sought to be protected * * * is the right of choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of individuals."[24] It is as true after conception as before that "there is no topic more closely interwoven with the intimacy of the home and marriage than that which relates to the conception and bearing of progeny."[25] We believe that *Griswold* and related cases establish that matters pertaining to procreation, as

19. Webster's Third New International Dictionary 1794 (1961).

20. The problem faced by a treating physician in Illinois is as described in Roe v. Wade, 314 F.Supp. 1217, 1223 (N.D.Tex. 1970):

> How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How *imminent* must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years? These questions simply cannot be answered.

21. *See, e. g.*, Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 534, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944); Loving v. Virginia, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); and Stanley v. Georgia, 394 U.S. 557, 564, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).

22. 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

23. *Id.* at 484, 85 S.Ct. at 1681.

24. Roe v. Wade, 314 F.Supp. 1217, 1221 (N.D.Tex.1970).

25. Babbitz v. McCann, 310 F.Supp. 293, 299 (E.D.Wis.1970).

well as to marriage, the family, and sex are surrounded by a zone of privacy which protects activities concerning such matters from unjustified governmental intrusion.[26]

We do not agree with the defendants that the choice whether to have a child is protected before conception but is not so protected immediately after conception has occurred.[27] A woman's interest in privacy and in control over her body is just as seriously interfered with by a law which prohibits abortions as it is by a law which prohibits the use of contraceptives. The majority of courts which have considered the question have so held, concluding that a woman has a fundamental interest in choosing to terminate a pregnancy. In People v. Belous, *supra*, the California Supreme Court struck down that state's abortion statute, holding:

> The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a "right of privacy" or "liberty" in matters related to marriage, family, and sex.[28]

In United States v. Vuitch, *supra*, a single district court judge struck down a portion of the District of Columbia abortion statute, saying:

> There has been, moreover, an increasing indication in decisions of the Supreme Court of the United States that as a secular matter a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy. * * * Matters have certainly reached a point where a sound, informed interest of the state must affirmatively appear before the state infringes unduly on such rights.[29]

More recently, in Babbitz v. McCann,[30] and in Roe v. Wade, [31] three-judge courts found that the right to choose whether to bear a child was fundamental and struck down state abortion statutes.

[6] Of course, the determination that women have a fundamental interest in choosing whether to terminate pregnancies does not establish that the Illinois statute is unconstitutional. The critical issue is whether the state has a compelling interest in preventing abortions in the early stages of pregnancy except where the death of the woman is reasonably certain.[32] A stat-

26. As former Supreme Court Justice Tom C. Clark has said:
> The result of [Griswold and its predecessors] is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children, and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution.

Clark, Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola Univ. (L.A.) L.Rev. 1, 8 (1969).

27. Again, Mr. Justice Clark observed:
> [A]bortion falls within that sensitive area of privacy—the marital relation. One of the basic values of this privacy is birth control, as evidenced by the *Griswold* decision. Griswold's act was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent conception, why can he not nullify that conception when prevention has failed?

Id. at 9.

28. 71 Cal.2d 954, 963, 80 Cal.Rptr. 354, 359, 458 P.2d 194, 199 (1969), cert. denied, 397 U.S. 915, 90 S.Ct. 920, 25 L.Ed.2d 96 (1970).

29. 305 F.Supp. 1032, 1035 (D.D.C.1969).

30. 310 F.Supp. 293 (E.D.Wis.1970).

31. 314 F.Supp. 1217 (N.D.Tex.1970).

32. As the court stated in Roe v. Wade, 314 F.Supp. 1217, 1222 (N.D.Tex.1970):
> Since the Texas Abortion Laws infringe upon plaintiffs' fundamental right to choose whether to have children, the burden is on the defendant to demonstrate to the satisfaction of the Court that such infringement is necessary to support a compelling state interest.

ute which requires a woman to risk physical and emotional harm short of death when a therapeutic abortion would remove that risk does not bear scrutiny as a health measure for the benefit of women.

[7] Moreover, a statute which forces the birth of every fetus, no matter how defective or how intensely unwanted by its future parents, displays no legitimately compelling state interest in fetal life, especially when viewed with regard for the countervailing rights of pregnant women. We do not believe that the state has a compelling interest in preserving all fetal life which justifies the gross intrusion on a woman's privacy which is involved in forcing her to bear an unwanted child. We therefore rule that during the early stages of pregnancy—at least during the first trimester—the state may not prohibit, restrict or otherwise limit women's access to abortion procedures performed by licensed physicians operating in licensed facilities.

In holding that the state has not shown sufficient justification to permit us to uphold its abortion statute in its entirety, we are in agreement with the court's statement in Babbitz v. McCann:

> The defendants urge that the state's interest in protecting the embryo is a sufficient basis to sustain the statute. Upon a balancing of the relevant interests, we hold that a woman's right to refuse to carry an embryo during the early months of pregnancy may not be invaded by the state without a more compelling public necessity than is reflected in the statute in question.[33]

Accordingly, the Illinois abortion statute, Illinois Revised Statutes, Chapter 38, Section 23–1, is unconstitutional because it is impermissibly vague and unduly infringes women's right to privacy insofar as it restricts or prohibits the performance of abortions during the first trimester of pregnancy by licensed physicians in a licensed hospital or other licensed medical facility.

ORDER

1. The foregoing opinion shall stand as findings of fact and conclusions of law.

2. The motion of plaintiffs for summary judgment is hereby granted, and the motion of defendants for summary judgment is hereby denied.

3. The motion of defendant Scott to dismiss this action as against him is hereby denied.

4. All other motions presently outstanding are hereby denied to the extent not expressly granted herein or mooted by or subsumed in the foregoing opinion or this order.

It is therefore ordered, adjudged and decreed:

1. That the Illinois abortion statute, Illinois Revised Statutes, Chapter 38, Section 23–1, be and the same is hereby declared to be violative of the Constitution of the United States and is null and void insofar as it restricts or prohibits the performance of abortions during the first trimester of pregnancy by licensed physicians in a licensed hospital or other licensed medical facility.

2. That the defendants, their officers, agents, servants, employees, and attorneys, and those persons who act in active concert or participation with them be and the same are hereby permanently enjoined, without bond, from executing or enforcing, or threatening to execute or enforce, the Illinois abortion statute, Illinois Revised Statutes, Chapter 38, Section 23–1 against physicians licensed to practice medicine and surgery in all its branches performing abortions during the first trimester of pregnancy in a licensed hospital or other licensed medical facility.

See also Bates v. Little Rock, 361 U.S. 516, 524, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960); Griswold v. Connecticut, 381 U.S. 479, 497, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (Goldberg, J., concurring).

33. 310 F.Supp. 293, 301 (E.D.Wis.1970).

CAMPBELL, Senior Judge (dissenting).

The typically erudite opinion of our distinguished Chief Judge Swygert excellently presents some philosophical reasons for amendment to or repeal of the existing abortion statute by the Illinois Legislature. I must respectfully disagree however when these reasons are advanced to support a judicial determination that the statute "is unconstitutional because it is impermissibly vague and unduly infringes women's right to privacy." Neither the wisdom of this statute nor its conformity to the accepted mores of Illinois in 1971 is the issue before us. As a federal court we are concerned only with the limited question of whether in enacting this statute the people of Illinois have exceeded the limitations of the United States Constitution.

By their foregoing decision and order in this case concluding that those limits have been exceeded, my learned brothers strike down a state statute which has been enforced for one hundred years [1] and impose upon the people of Illinois their own views on this most important and controversial issue concerning public health and morals. In my view this unwarranted intrusion by the federal judiciary into the affairs of Illinois in the name of constitutional interpretation is far beyond properly limited federal powers and is not supported by the facts of this case nor the precedents cited by my brethren.

The basis of the majority decision is twofold: (1) the Illinois statute (and particularly the exception found therein) is so vague as to render it unconstitutional; and (2) by prohibiting the destruction of fetal life the statute invades the privacy of the women and the family entities of Illinois.

On the vagueness question I first observe that we have before us no contention by any party that an actual situation exists where a licensed physician acting in good faith is in jeopardy of prosecution for performing an abortion he believed to be "necessary for the preservation of the woman's life." In other words we are presented with no actual circumstance where the vagueness question is in issue. The rather forced game of semantics urged by plaintiffs and adopted by the majority has not presented any *actual* controversy but is merely a convenient vehicle for these plaintiffs to challenge a law which they believe is unwise and which they have thus far despite heroic efforts been unable to repeal or amend by the legislative process.[2]

A perusal of state and federal criminal codes reveals numerous examples of statutes which have been held constitutional and which are not as clear and definite as this one. Indeed Chief Judge Swygert, in writing his court's opinion upholding the constitutionality of the Illinois disorderly conduct statute, found that the language of that statute prohibiting any act done in "such unreasonable manner as to alarm or disturb another" was not unconstitutionally vague. As stated by him in that opinion: "The Constitution does not require impossible standards of specificity in penal statutes. It requires only that the statute convey 'sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'" United States v. Woodard, 376 F.2d 136, 140 (7th Cir. 1967).

His opinion goes on to state, "The statute proscribes conduct that is so unreasonable as to 'alarm or disturb' another and provoke a 'breach of the peace'. The term 'breach of the peace' has never had a precise meaning in relation to specific conduct. Yet from its early common law origin to the present it has received a fairly well defined gloss." (Id. at 141). In our case, how-

1. The present statute is essentially the same as that enacted in 1874. (R.S. 1874, Ch. 38, Div. 1, § 3.)

2. Attempts to amend or repeal the present statute failed in the last (1969) session of the General Assembly. New proposals have already been introduced in the present (1971) session.

ever, the same judge concludes that men and women of ordinary intelligence cannot understand the essential meaning of the words, "necessary for the preservation of the woman's life." I find it difficult to reconcile the reasoning in the *Woodard* case with that set forth in the opinion of the majority herein.

The words of the Illinois Abortion Statute taken in their ordinary meaning sufficiently convey definite warning as to the proscribed conduct and "have over a long period of years proved entirely adequate to inform the public, including both lay and professional people, of what is forbidden." Steinberg v. Rhodes, 321 F.Supp. 741, 745 (N.D.Ohio, 1970); Babbitz v. McCann, 310 F.Supp. 293, 297 (E.D.Wis.1970). The statement of the court in the *Steinberg* opinion is appropriate here:—"The problem of the plaintiffs is not that they do not understand, but that basically they do not accept, its proscription." 321 F.Supp. at p. 745.

I find the second conclusion of the majority, that the statute is not supported by a sufficient legitimate state interest, even more disconcerting. As the majority correctly points out, the determination that women have a fundamental interest in choosing whether to terminate pregnancies does not in and of itself establish that the Illinois statute is unconstitutional. The critical issue is whether the state has a sufficient interest in preventing abortion to justify its prohibition. My brothers conclude that the State of Illinois does not have a sufficient interest in preserving fetal life to support the statute before us, when the same is viewed with regard for countervailing rights to terminate pregnancies. It is at this juncture that I again part company with my brothers.

We, as did the Illinois Legislature, have before us the following undisputed facts relating to fetal life. Seven weeks after conception the fertilized egg develops into a well proportioned small scale baby. It bears all of the familiar external features and all the internal organs of an adult human being. It has muscles; hands with fingers and thumbs; and the legs have recognizable knees, ankles and toes.

The brain is operative and sends out impulses that coordinate the function of the other organs. Brain waves have been noted at 43 days. The heart beats; the stomach produces digestive juices; the liver manufactures blood cells; and the kidneys begin to function by extracting uric acid from the blood.

In the third month it can kick its legs, turn its feet, curl and fan its toes, make a fist, move its thumb, bend its wrist, turn its head, and even open its mouth and swallow and drink the amniotic fluid that surrounds it. Thumb sucking has been noted at this age and the first respiratory motions move fluid in and out of its lungs with inhaling and exhaling respiratory movements.

In the twelfth week it can move its thumb, in opposition to its fingers. It swallows regularly. It has active reflexes. The facial expressions of a fetus in its third month are already similar to the facial expression of its parents. By the end of that first trimester the fetus is a sentient moving being.

In the third month finger nails appear; sexual differentiation is apparent in both internal and external organs; and vocal chords are completed.

From the twelfth to the sixteenth week the child grows to eight or ten inches in height and receives oxygen and food from its mother through the placental attachment. In the fifth month it gains two inches in height and ten ounces in weight. A doctor will soon hear the heart beat with his stethoscope. It sleeps and wakes and may be awakened by external vibrations.

In the sixth month the fetus develops a strong muscular grip with its hands; starts to breathe regularly and can maintain a respiratory response for twenty-four hours if born prematurely. It may even have a slim chance of surviving in an incubator. A child has been known to survive between twenty to twenty-five weeks old. Indeed, as medical science progresses in the field of de-

tection the date of potential viability moves continually closer to earlier stages of gestation.

Dr. Arnold Gesell, in his publication. "*The Embryology of Behavior*,[3] notes:—

"Our own repeated observation of a large group of fetal infants (an individual born and living at any time prior to forty weeks gestation) left us with no doubt that psychologically they were individuals. Just as no two looked alike, so no two behaved precisely alike. One was impassive when another was alert. Even among the youngest there were discernible differences in vividness, reactivity and responsiveness. These were genuine individual differences, already prophetic of the diversity which distinguishes the human family."

Similar facts of fetal life are discussed in detail in a recently published Law Review article, Byrn, Abortion-On-Demand: Whose Morality? 46 N.D. Law. 5 (1970). Professor Byrn concludes:—

"In summary: at eight weeks, after which the great majority of abortions are performed, the fetus is irreversibly organized into a recognizable human-child, is responsive to stimulation, and is possessed of a pumping heart, a functioning circulatory system, an active brain and all other internal organs. From the practical scientific point of view, 'By the eighth week the embryo or fetus, as we now call it, is an unmistakable human being * * *.'"

This author also points out that abortion is a violent procedure regardless of the stage of pregnancy. Byrn, Supra, p. 32.

Professor Byrn also relates (at pp. 8–9) the following experience of Paul E. Rockwell, M.D., Director of Anesthesiology at Leonard Hospital, Troy, New York:

"Eleven years ago while giving an anesthetic for a ruptured ectopic pregnancy (at two months gestation) I was handed what I believe was the smallest living human being ever seen. The embryo sac was intact and transparent. Within the sac was a tiny (approx. 1 cm.) human male swimming extremely vigorously in the amniotic fluid, while attached to the wall by the umbilical cord. This tiny human was perfectly developed, with long, tapering fingers, feet and toes. It was almost transparent, as regards the skin, and the delicate arteries and veins were prominent to the ends of the fingers.

"The baby was extremely alive and swam about the sac approximately one time per second, with a natural swimmer's stroke. This tiny human did not look at all like the photos and drawings and models of 'embryos' which I have seen, nor did it look like a few embryos I have been able to observe since then, obviously because this one was alive!

"* * * When the sac was opened, the tiny human immediately lost its life and took on the appearance of what is accepted as the appearance of an embryo at this age (blunt extremities, etc.)

"It is my opinion that if the lawmakers and people realized that very vigorous life is present, it is possible that abortion would be found much more objectionable than euthanasia."

In my opinion the undisputed medical facts of record herein establish a sufficient state interest in the preservation of life to support the constitutionality of the statute before us.

The majority opinion does not hold that the Illinois Statute is void in its entirety or that every statute that prohibits the destruction of fetal life is unconstitutional. Rather, it seems to hold that the people of this State have a legitimate legislative interest in protecting *some* fetal life, but that the present statute which protects, "every fetus, no matter

3. Harper and Brothers, Publishers (1945), at p. 172.

how defective or how intensely unwanted by its future parents, displays no legitimately compelling state interest." I believe what the majority is suggesting is that if the Illinois Legislature had adopted a statute which, while prohibiting abortions generally, permitted the destruction of the "defective" fetus or one that is "intensely unwanted" it would have displayed a legitimate state interest. It seems to me apparent, however, that if the legislature has the power to decide that a *non defective* fetus may not be destroyed, it can also decide that a *defective* fetus may not be destroyed. How much latitude shall judicially be given the legislature in its determination as to what is and what is not a sufficient "defect" to warrant destruction? How unwanted must a potential child be before its parents can demand destruction under the suggested judicial "intensely unwanted" standard? Merely stating these propositions illustrates the extent to which my brothers have wandered into the legislative domain in reaching their decision in this case.

But the majority does not rest its conclusion of unconstitutionality on such a tenuous base. Instead, the majority states: "We therefore rule that during the early stages of pregnancy—at least during the first trimester—the state may not prohibit, restrict or otherwise limit women's access to abortion procedures * * *" The opinion does not explain or even intimate how it arrived at this constitutional conclusion. It appears to me that my brothers have, by judicial fiat, successfully amended the Illinois statute to permit abortions in the first three months of pregnancy. Ironically, their amendment does not even meet sound legislative standards. No where do they explain how the "first trimester" test was arrived at, or what relationship it might have to the previously discussed notions of defectiveness or unwantedness. What rational basis supports their conclusion that the people of Illinois may have a sufficient interest in protecting the life of a fetus which has matured to the first trimester, but that no legitimate interest exists for protecting a life of a fetus a few days younger? I believe the Illinois Legislature, in adopting the present statute, was less arbitrary even if not as competent as my brothers on these social and moral matters. In my opinion, however, the legislature alone should determine what value society will place on this form of life, regardless of the age of development.

Thus far I have avoided any discussion of the sensitive subject of whether fetal life is "human" life. Admittedly physicians argue as to what point in the fetal development human life commences. As former Supreme Court Justice Tom C. Clark states in the Law Review article quoted by the majority, "Some physicians argue that abortion should be permitted with impunity at any time up to the sixth month of pregnancy since prior to that time the fetus is no more than a growing plant. On the other hand, many eminent physicians believe that the fertilized ovum has human life from the time of conception. In support of this argument they refer to the International Code of Medical Ethics, which states that a physician will maintain the utmost respect for human life, from the time of its conception." Clark, Religion, Morality and Abortion: A Constitutional Appraisal, 2 Loy.U.L.Rev. 1, 5 (1969). Assuming *arguendo* that fetal life is human life, can there be any question but that the State of Illinois has a sufficient legislative interest in its protection? And, in view of the varied opinions in medical science, is not the determination of when human life commences better left to the legislature, rather than the courts? This was the conclusion reached by Mr. Justice Clark in the above quoted article. Significantly, while liberally quoting Justice Clark's article on the subject of abortion (see notes 26 and 27), the majority conveniently ignores its conclusion and admonition as follows:—

"Accommodation of conflicting doctrine is more difficult to achieve in

the judicial than in the legislative process. Courts cannot reach out to reform our society. A problem comes to the Court in the form of a justiciable issue and is narrowly drawn, rendering the Court's ruling contracted and finespun. Legislatures, on the other hand, have such facilities for investigation as hearings and may address themselves to the necessities of broad social needs and the correction of evils, both probable and existing. As Mr. Justice Cardozo said, 'Legislation can eradicate a cancer, right some hoary wrong, correct some definitely established evil, which defies the feebler remedies, the distinctions and the fictions familiar to the judicial process.'

"The courts work on a case-by-case system which deals with the past rather than the future. Society would not have the benefit of the sweeping effect of a statute, nor would the doctor have the protection that he is entitled to receive. The case method would be slow, expensive, and possibly disastrous. It is for the legislature to determine the proper balance, i. e., that point between prevention of conception and viability of the fetus which would give the State the compelling subordinating interest so that it may regulate or prohibit abortion without violating the individual's constitutionally protected rights." (At pp. 10–11).

To support their conclusion that the people of Illinois have exceeded the proper bounds of legislative interest, the majority primarily rely on the rationale of the Supreme Court in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510. But *Griswold* held only that a statute which forbade the use of contraceptives by married couples violated their right to privacy. In writing the opinion of the Court, Mr. Justice Douglas indicated that the Connecticut statute was "unnecessarily broad" and prevented activities which might otherwise be subject to state regulation. (381 U.S. 485, 85 S.Ct. 1678). The more thorough concurring opinion, written by Mr. Justice Goldberg, stressed that there was in that case no showing that the statute was necessary to accomplish a permissible state interest.

In this case, however, there is in my opinion a valid and permissible state interest—the protection of human life or at least the protection of potential human life in the fetus. In my opinion the statute in question is no broader than is necessary to accomplish this valid and permissible state interest even though it does not distinguish or provide exceptions, as my brothers would prefer, for those which are "defective" or "intensely unwanted," or have not matured to "the first trimester of pregnancy."

In citing *Griswold*, the majority concludes: "we cannot distinguish the interests asserted by the plaintiffs in this case from those asserted in *Griswold*." In other words, in their views, there is no distinction that can be made between prohibiting the use of contraceptives and prohibiting the destruction of fetal life, which as explained above may reasonably be construed to be human life. I find this assertion incredible. Contraception prevents the creation of new life. Abortion destroys existing life. Contraception and abortion are as distinguishable as thoughts or dreams are distinguishable from reality.

As for myself I am confronted with and bound by the plain facts before us in this case and I must conclude that the people of Illinois have a legitimate and sufficient interest in protecting fetal life to support the statute here considered. I find nothing in the Court's teachings in *Griswold* to the contrary.

No individual right or freedom is ever advanced in this country through an unwarranted intrusion of the judiciary into the proper province of the legislature. Indeed, in these days of pressure groups regularly seeking from courts that which only legislatures can properly give, constitutional government is weakened each time courts place their personal philosophical views above the law.

I would grant the motion of defendants for summary judgment and leave the plaintiffs' cause where under the Constitution it belongs—in the Illinois Legislature.

Item No. 19

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

JANE DOE, Plaintiff, vs. CALVIN L. RAMPTON, Governor of the State of Utah; and VERNON B. ROMNEY, Attorney General of the State of Utah, Defendants.	TEMPORARY RESTRAINING ORDER No. C-234-70

The above entitled matter having come duly before the above entitled Court, the Honorable Willis W. Ritter presiding, on Monday, the 14th day of September, 1970, upon the plaintiff's Application for a Temporary Restraining Order, and the plaintiff being represented by counsel, David S. Dolowitz, Esq., and the defendants being represented by counsel, Joseph P. McCarthy, Esq., and the Court having considered the records, files, papers and the arguments of counsel in the foregoing matter, this Court enters the following findings of fact:

FINDINGS OF FACT

1. That plaintiff Jane Doe is pregnant, being, upon her doctor's advice, in her tenth to twelfth week of pregnancy.

2. That plaintiff Jane Doe has three children.

3. That plaintiff Jane Doe is currently receiving public welfare assistance from the State of Utah.

4. That plaintiff Jane Doe desires to be aborted from her pregnancy.

5. That the danger in performing an abortion increases substantially after the twelfth week.

6. That plaintiff Jane Doe desires and Dr. X is willing to perform, a therapeutic abortion, aborting and terminating the current pregnancy of the plaintiff.

From the foregoing findings of fact, this Court makes the following conclusions of law:

CONCLUSIONS OF LAW

1. That the plaintiff Jane Doe will suffer immediate and irreparable injury if the defendants are not enjoined and restrained from enforcing the provisions of Sections 76-2-1 and 76-2-2, Utah Code Annotated 1953.

2. That the issues presented in this case are substantial issues of federal constitutional law and it appears from examination of the applicable cases, to wit: ***Griswold v. Connecticut,*** 381 U.S. 479; ***People v. Bellous,*** 80 Cal. Rptr. 354, 458 P.2d 194 (1969), ***cert. den.*** 38 L.W. 3320, 3325; ***Babbitz v. McCann,*** 310 F. Supp. 293 (E.D. Wis. 1970); and ***United States v. Vuitch,*** 305 F. Supp. 1032 (D.D.C. 1969); see ***Doe v. Scott***, 310 F. Supp. 689 (N.D. Ill. 1970), ***reversed*** ___ F.2d ___ (7th Cir. 1970), that the plaintiff is likely to prevail on the merits.

3. That no security should be required of the plaintiff for the issuance of this Order.

Accordingly, IT IS HEREBY ORDERED that the Governor of the State of Utah, the Honorable Calvin L. Rampton, and the Attorney General of the State of Utah, the Honorable Vernon R. Romney, defendants in the above entitled matter, are hereby enjoined and restrained from enforcing the provisions of Sections 76-2-1 and 76-2-2, Utah Code Annotated 1953, to plaintiff Jane Doe for securing and to her physician, Dr. X, from providing a therapeutic abortion, aborting and terminating her current pregnancy. This Order shall run for ten days from the signing hereof.

IT IS FURTHER ORDERED that said Order shall be entered without the requirement of the posting of security.

Dated this 14th day of September, 1970.

BY THE COURT:

/s/ WILLIS W. RITTER
Chief Judge

140

appeal dismissed for want of juris., 400 U.S. 1 (1970) (per curiam)

Sidney G. BABBITZ, M. D., Plaintiff,

v.

E. Michael McCANN, District Attorney of Milwaukee County, F. Ryan Duffy, Jr., Judge of the County Court, Milwaukee County, Defendants.

No. 69-C-548.

United States District Court, E. D. Wisconsin.

March 5, 1970.

A physician brought an action challenging constitutionality of Wisconsin abortion statute and sought injunctive and declaratory judgment relief. A Three-Judge District Court held that Wisconsin statute making it a criminal offense to perform an abortion except a therapeutic abortion which is necessary to save life of mother is not unconstitutionally vague or a denial of equal protection of the laws, but is an unconstitutional invasion of woman's private right to refuse to carry unquickened embryo during the early months of pregnancy.

Declaratory judgment for plaintiff and injunctive relief denied.

1. Courts ⇐101

Three-judge federal district court had jurisdiction of suit by physician, who was charged with violation of Wisconsin abortion statute, challenging the constitutionality of such statute and seeking injunctive and declaratory relief. 28 U.S.C.A. §§ 1343, 2201, 2202; 42 U.S.C.A. § 1983.

2. Courts ⇐280.4, 508(7)

Notwithstanding determination of three-judge federal district court that certain portions of Wisconsin abortion statute are unconstitutional, there were no special circumstances which would entitle plaintiff physician, challenging validity of statute, to enjoin pending Wisconsin prosecution against him for violation of abortion statute and doctrine of abstention was applied. 28 U.S.C.A. § 2283; W.S.A. 940.04.

3. Courts ⇐280.4

Although three-judge federal district court, applying doctrine of abstention declined to enjoin pending criminal proceedings against plaintiff for violation of Wisconsin abortion statute, court was required to decide merits of request that statute be declared unconstitutional irrespective of its conclusion as to propriety of issuance of injunction. 28 U.S.C.A. §§ 2281, 2283; W.S.A. 940.04.

4. Abortion ⇐1
Constitutional Law ⇐83(1), 250
Criminal Law ⇐13

Wisconsin statute making it a criminal offense to perform an abortion except a therapeutic abortion which is necessary to save life of mother is not unconstitutionally vague or a denial of

equal protection of the laws, but is an unconstitutional invasion of woman's private right to refuse to carry an unquickened embryo during the early months of pregnancy. W.S.A. 940.04, U.S.C.A.Const. Amends. 1, 9, 14.

5. Federal Civil Procedure ⇐1164

Court took judicial notice of fact that there are a number of places throughout world where legal abortions are available.

6. Constitutional Law ⇐83(1)

To justify regulation of such fundamental private rights as marriage, home, children and day-to-day living habits, state must show a compelling need. U.S.C.A.Const. Amend. 9.

7. Parent and Child ⇐1

When measured against claimed rights of an embryo of four months or less, mother's right to refuse to carry an embryo during the early months of pregnancy transcends those of the embryo. W.S.A. 940.04; U.S.C.A.Const. Amend. 9.

8. Abortion ⇐1

It is permisaible for state to require that abortions be conducted by qualified physicians. U.S.C.A.Const. Amend. 9.

Nathaniel Rothstein, Milton R. Bordow and Roy O. Conen, Milwaukee, Wis., for plaintiff.

E. Michael McCann, Dist. Atty., Milwaukee, Wis., for defendants.

Before KERNER, Circuit Judge, and REYNOLDS and GORDON, District Judges.

PER CURIAM.

The plaintiff is a physician who challenges the constitutionality of the Wisconsin abortion statute. He seeks an injunction restraining the defendants from enforcing a part of Wis.Stat. § 940.04 and a judgment declaring it unconstitutional.

A temporary restraining order was denied by the order of a single-judge district court, 306 F.Supp. 400, and the instant three-judge district court was convened to consider the other issues presented. We hold that portions of the statute are constitutionally invalid, but we decline to enjoin the pending state prosecution of the plaintiff.

The plaintiff is being prosecuted by the district attorney of Milwaukee county for allegedly having performed an abortion in violation of § 940.04, Wis. Stats. The statute provides in part as follows:

"(1) Any person, other than the mother, who intentionally destroys the life of an unborn child may be fined not more than $5,000 or imprisoned not more than 3 years or both.

"(2) any person, other than the mother, who does either of the following may be imprisoned not more than 15 years:

"(a) Intentionally destroys the life of an unborn quick child; or

* * * * * *

"(5) This section does not apply to a therapeutic abortion which:

"(a) Is performed by a physician; and

"(b) Is necessary, or is advised by 2 other physicians as necessary, to save the life of the mother; and

"(c) Unless an emergency prevents, is performed in a licensed maternity hospital.

"(6) In this section 'unborn child' means a human being from the time of conception until it is born alive."

The state warrant issued against Dr. Babbits reads as follows:

"That the above named Defendant on the 6th day of September, 1969, in the County of Milwaukee, Wisconsin, did feloniously destroy the life of an unborn child of one, [woman], said offense occurring at number 231 West Wisconsin Avenue, Milwaukee, Wisconsin, said abortion not being advised by two other physicians as necessary to save the life of [woman], the mother of said child, said information being obtained by sworn testimo-

ny of [woman] before the Honorable Christ T. Seraphim, County Judge, acting as magistrate."

[1] The complaint asserts that there is jurisdiction in this court pursuant to 28 U.S.C. § 1343, 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2202; we agree with such position.

The complaint charges that the Wisconsin statute is unconstitutional for violating the first and fourteenth amendments of the United States Constitution and for abridging the mother's right of privacy. Dr. Babbitz has not been charged with having destroyed an unborn child which was "quick", and therefore subsections (2) and (2) (a) of the statute quoted above are not applicable in the instant case. There is no allegation that the state officials are acting in bad faith in prosecuting Dr. Babbitz.

I. ABSTENTION

[2] The plaintiff has alleged a deprivation of rights secured by the Constitution, and serious federal questions are raised here concerning the constitutionality of certain portions of the Wisconsin abortion statute. Since the complaint seeks injunctive relief and since the statute in question has state-wide operation, the designation of a three-judge court was appropriate under 28 U.S.C. § 2281.

The request for an injunction raises a threshold problem of abstention. Congress, in 28 U.S.C. § 2283, has stated a strong policy of abstention, as follows:

"Stay of State court proceedings. A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Except for those rather recent cases which have noted exceptions to the scope of § 2283, the federal courts have generally given the statute literal application. In addition, the policy of abstention has found expression in a long history of judge-made rules of federal judicial forebearance. Mr. Justice Frankfurter's expressions in Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 500–501, 61 S.Ct. 643, 645, 85 L.Ed. 971 (1941), typify these court-fashioned rules of abstention:

"Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, Fenner v. Boykin, 271 U.S. 240, 46 S.Ct. 492, 70 L.Ed. 927; Spielman Motor Co. v. Dodge, 295 U.S. 89, 55 S.Ct. 678, 79 L.Ed. 1322; or the administration of a specialized scheme for liquidating embarrassed business enterprises, Pennsylvania v. Williams, 294 U.S. 176, 55 S.Ct. 380, 79 L.Ed. 841, 96 A.L.R. 1166; or the final authority of a state court to interpret doubtful regulatory laws of the state, Gilchrist v. Interborough Co., 279 U.S. 159, 49 S.Ct. 282, 73 L.Ed. 652; cf. Hawks v. Hamill, 288 U.S. 52, 61, 53 S.Ct. 240, 77 L.Ed. 690. These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion', restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary."

The abstention policy has also played a role in the development of the law of removal of pending state cases to the federal courts. In City of Greenwood, Miss. v. Peacock, 384 U.S. 808, 828, 86 S.Ct. 1800, 1812, 16 L.Ed.2d 944 (1966), the Supreme Court observed:

"* * * the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court."

The approach to abstention which this policy requires has been followed by many federal courts without any general exception being recognized for cases arising under 42 U.S.C. § 1983. Boyle v. Landry, 422 F.2d 631 (7th Cir. February 5, 1970); Goss v. Illinois, 312 F.2d 257, 259 (7th Cir. 1963); Smith v. Village of Lansing, 241 F.2d 856 (7th Cir. 1957); Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964); Vick v. Schiro, 296 F.Supp. 173 (E.D.La.1969). Cf. Cooper v. Hutchinson, 184 F.2d 119 (3rd Cir. 1950).

One of the reasons underlying this practice of refusing to enjoin pending state prosecutions is particularly apposite to the case at bar. In Stefanelli v. Minard, 342 U.S. 117, 72 S.Ct. 118, 96 L.Ed. 138 (1951), a federal court was petitioned to enjoin the use of illegally seized evidence in a state criminal trial. Denying relief, the Supreme Court said, at page 123, 72 S.Ct. at page 121–122:

> "The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts."

Notwithstanding the impressive authority which would bar our enjoining the prosecution of Dr. Babbitz, he presses us to issue such an injunction. Perhaps he draws comfort from the fact that the United States Supreme Court has on two separate occasions expressly reserved ruling on the question whether the Civil Rights Act suspends the anti-injunction provisions of § 2283. Cameron v. Johnson, 390 U.S. 611, 614, n. 3, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968); Dombrowski v. Pfister, 380 U.S. 479, 484, n. 2, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965).

Also, the plaintiff may arguably find support for his position from expressions by several of the justices of the United States Supreme Court. For example, in Gorun v. Fall, 393 U.S. 398, 399, 89 S.Ct. 678, 679, 21 L.Ed.2d 628 (1969), four members of the Court referred to "our recent decisions saying over and over again that a federal claim in a federal court should be decided by the federal court and not relegated to a state tribunal".

Finally, it may seem somewhat anomalous that a court may find a state statute unconstitutional and yet deny an injunction against its enforcement by the state. In effect, such a ruling might protect all persons from prosecution except the very man who has persuaded us of the statute's unconstitutionality.

Notwithstanding these arguments, we do not believe that the circumstances of this case justify an exception to the oft-repeated and strong policy of federal abstention, especially in a criminal case. The forebearance required under § 2283 is not lifted in the case at bar by the teachings of Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). We have already noted that the case at bar does not involve a bad faith enforcement of the abortion statute. In addition, we doubt that the prosecution of Dr. Babbitz has resulted in a chilling of his first amendment rights. A first amendment right is more than a personal right; it is also a public right. When such a right is impinged, the general public is hurt, and the effective functioning of our free society is encum-

bered. This may explain why § 2283 is not strictly applied in first amendment cases. We do not accept the plaintiff's claim that his prosecution under the state abortion statute dampened his first amendment rights.

Although the subject of abortion is fraught with highly emotional pressures, we do not find here any "special circumstances" as discussed in Cameron v. Johnson, 390 U.S. 611, 618, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968), which would entitle Dr. Babbitz to injunctive action. Cf. Machesky v. Bizzell, 414 F.2d 283 (5th Cir. 1969); Romero v. Weakley, 226 F.2d 399 (9th Cir. 1955); 80 Harv.L.Rev. 604, 608–9 (1967).

We believe we must apply the standard established in Douglas v. City of Jeanette, 319 U.S. 157, 163, 63 S.Ct. 877, 87 L.Ed. 1324 (1943); there the Supreme Court observed that it was Congressional policy to leave to the state courts the trial of state criminal cases, and that such proceedings should be enjoined only in exceptional circumstances. We do not regard this as an exceptional case, and Dr. Babbitz is not entitled to injunctive relief. In the event that the state persists in the prosecution of Dr. Babbitz, we have no reason to doubt that the state courts of Wisconsin will fully vindicate his federal constitutional rights. See Zwicker v. Boll, 270 F.Supp. 131 (W.D.Wis.1967), aff'd 391 U.S. 353, 88 S.Ct. 1666, 20 L.Ed.2d 642 (1968); Soglin v. Kauffman, 286 F.Supp. 851 (W.D.Wis.1968).

[3] Notwithstanding our denial of injunctive relief, a federal court is obliged to weigh separately the issue of declaratory relief. In Zwickler v. Koota, 389 U.S. 241, 254, 88 S.Ct. 391, 399, 19 L.Ed.2d 444 (1967), the Supreme Court held that the federal district court must decide the "merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction". Although it was the application for an injunction which triggered the appointment of this three-judge court under § 2281, we do not understand that the denial of injunctive relief precludes us from resolving the declaratory judgment application.

II. VAGUENESS

[4] The plaintiff urges that § 940.04(5), Wis.Stats., is vague and nebulous upon its face. That subsection, quoted above, excepts a therapeutic abortion when it is performed under specified terms. We have examined the challenged phraseology and are persuaded that it is not indefinite or vague. In our opinion, the word "necessary" and the expression "to save the life of the mother" are both reasonably comprehensible in their meaning.

The United States Supreme Court has ruled that a criminal statute must be definite enough to acquaint those who are subject to it with the conduct which will render them liable to its penalties. Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888 (1939); Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). See also Unconstitutional Uncertainty—An Appraisal, 40 Cornell Law Quarterly, 195, 196 (1955).

We believe that § 940.04(5) sets forth with reasonable clarity and sufficient particularity the kind of conduct which will constitute a violation. Jordan v. De George, 341 U.S. 223, 71 S.Ct. 703, 95 L.Ed. 886 (1951); United States v. Ragen, 314 U.S. 513, 62 S.Ct. 374, 86 L.Ed. 383 (1942). In United States v. Wurzbach, 280 U.S. 396, 399, 50 S.Ct. 167, 169, 74 L.Ed. 508 (1930), Mr. Justice Holmes stated:

> "Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so, it is familiar to the criminal law to make him take the risk."

In People v. Belous, 80 Cal.Rptr. 354, 458 P.2d 194 (1969), the California court found that the words "necessary to preserve her life" in that state's abortion statute were unconstitutionally

vague. While the Wisconsin statute uses slightly different language ("necessary to save"), we doubt that the distinction between the words used in the two statutes is significant. However, we do not share the view of the majority in *Belous* that such language is so vague that one must guess at its meaning.

Slightly different language was before the court in United States v. Vuitch, 305 F.Supp. 1032 (D.D.C.1969), which invalidated an abortion law. That statute contained the following expression: "necessary for the preservation of the mother's life or health". The court concluded that the word "health" was vague both in interpretation and in practice. That precise problem is not presented under the terms of the Wisconsin statute.

Our reading of the Wisconsin statute persuades us that it meets the test set forth by the United States Supreme Court in *Connally*, cited above, 269 U.S. at page 391, 46 S.Ct. at page 127:

> "And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

The plaintiff also charges that there is confusion in subsection (6), which provides that the words "unborn child" mean "a human being from the time of conception until it is born alive". The plaintiff may have medical or even practical justification for his disagreement with the correctness of this statutory definition of an unborn child, but he fails in his effort to convince us that the Wisconsin legislature was vague or indefinite in its choice of language.

III. EQUAL PROTECTION OF THE LAWS

The plaintiff contends that the statute denies to him equal protection of the laws as guaranteed by the fourteenth amendment. It is urged that medical facilities are not constant throughout the state and that a doctor in a rural area in Wisconsin might be justified in performing a "necessary" abortion, whereas a doctor treating the same patient in Milwaukee would be unwarranted in performing the abortion because of the availability in Milwaukee of superior medical facilities.

[5] We find more cogency in the argument that a wealthy woman, but not a poor one, is able, upon demand, to secure a safe and legal abortion in Japan or some other locale in which abortion is permitted. We take judicial notice of the fact that there are a number of places throughout the world where legal abortions are available. We have also considered the argument that an affluent woman, unlike the poor one, may enjoy a long-standing, personal relationship with a well-paid physician, who might more likely be willing or able to persuade his fellow doctors to authorize a therapeutic abortion. We are reluctant to equate these types of inequality with a denial of a protected right under the fourteenth amendment. We know of no analogous situation which goes as far as the plaintiff would have us go in applying the fourteenth amendment to the case at bar.

There is presently pending in the United States Supreme Court a challenge to the practice of imposing a jail term upon a defendant who is unable to pay an assessed fine. Williams v. Illinois, 396 U.S. 1036, 90 S.Ct. 689, 24 L.Ed. 2d 680, probable jurisdiction noted January 19, 1969, being an appeal from People v. Williams, 41 Ill.2d 511, 244 N.E.2d 197 (1969). We cannot anticipate that the decision in the *Williams* case will buttress the plaintiff's contention that there is a denial of equal protection of the laws implicit within the Wisconsin abortion statute.

IV. INVASION OF PRIVATE RIGHTS

The ninth amendment to the United States Constitution provides:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

An examination of recent Supreme Court pronouncements regarding the ninth amendment compels our conclusion that the state of Wisconsin may not, in the manner set forth in § 940.04(1) and (5), Wis.Stats., deprive a woman of her private decision whether to bear her unquickened child.

In terms of the Wisconsin statute, we do not purport to decide the question of a woman's aborting a fetus which has already quickened. We received into evidence the view of a gynecologist that a fetus normally becomes quick at about four and a half months after conception. Dorland's Illustrated Medical Dictionary (24th ed. 1965) defines "quick" as "Pregnant and able to feel the fetal movements." "Quickening" is defined as "The first recognizable movements of the fetus in utero, appearing usually from the sixteenth to the eighteenth week of pregnancy." The plaintiff is being prosecuted under § 940.04(1) and (5); he is not being prosecuted under those portions of § 940.04 which relate to the abortion of a quickened child; therefore, the validity of such provisions are beyond the scope of this opinion.

While problems of over-population, ecology and pollution have been brought to our attention, we deem them secondary as decisional factors in a judicial resolution of the issues at hand. So, too, we find it necessary to set aside arguments involving theological and ecclesiastical considerations.

Obviously, there is no topic more closely interwoven with the intimacy of the home and marriage than that which relates to the conception and bearing of progeny. Recent court cases have considered the sanctity of the right to privacy in home, sex and marriage; however, the concept of private rights, with which the state may not interfere in the absence of a compelling state interest, is one of long standing.

As long ago as 1891, in Union Pacific Railway Co. v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891), the court said:

> "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right to one's person may be said to be a right of complete immunity: to be let alone.'"

In Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923), the United States Supreme Court held that the private right "to marry, establish a home and bring up children" was protected under the fourteenth amendment as an essential liberty. In Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944), the court spoke of the "private realm of family life which the state cannot enter".

In Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), there was a challenge to the constitutionality of a state statute which purported to restrict marriages solely on the basis of race. While the Supreme Court observed, at page 7, 87 S.Ct. at page 1821, that "marriage is a social relation subject to the State's police power," the court held, at page 12, 87 S.Ct. at page 1824:

> "The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State."

See also Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); Farrington v. T. Tokushige, 273 U.S. 284, 47 S.Ct. 406, 71 L.Ed. 646 (1927); Pierce v. Society of the Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). See, generally, Warren and Brandeis, "The Right to Privacy," 4 Harv.L.Rev. 193 (1890).

Recent decisions have asserted a judicial application of the ninth amendment

to the matter of privacy in marital relations and contraception. In Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), the court struck down the Connecticut statute which forbade the use of contraceptives. In so doing, the Court noted that the Bill of Rights contains both specific and penumbral guarantees which protect an individual from governmental invasion of the sanctity of his home and the privacies of his life. In the words of the Court, at page 485, 85 S.Ct. at page 1682, many decisions by the Supreme Court "bear witness that the right of privacy which presses for recognition here is a legitimate one." Three of the justices in a concurring opinion stated, at page 491, 85 S.Ct. at page 1685:

> "To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever."

In People v. Belous, 80 Cal.Rptr. 354, 458 P.2d 194 (1969), the California supreme court invalidated a state statute which made it illegal to perform an abortion on a woman unless it was necessary to preserve her life. The court said, 80 Cal.Rptr. at page 359, 458 P.2d at page 199:

> "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex."

The *Belous* court pointed out, 80 Cal. Rptr. at page 360, 458 P.2d at page 200, that although this protected area of privacy is not explicitly stated in the Constitution, it is a fundamental liberty that is implicit in the penumbrae of the Bill of Rights, and is supported, by analogy, in many past decisions.

In United States v. Vuitch, 305 F. Supp. 1032, 1035 (D.D.C.1969), the court further observed:

> "There has been, moreover, an increasing indication in decisions of the Supreme Court of the United States that as a secular matter a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy."

Although no final decision has as yet been rendered, a three-judge court has been convened in New York in a case involving the same issues under consideration here. Hall v. Lefkowitz, 305 F. Supp. 1030 (S.D.N.Y.1969).

In 2 Loyola University Law Review 1, 8 (April, 1969), former Supreme Court Justice Tom C. Clark concluded from a study of *Griswold* and its predecessor cases:

> "The result of these decisions is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution."

[6] It is clear that in order to justify the regulation of such fundamental private rights, the state must show a compelling need. In Bates v. City of Little Rock, 361 U.S. 516, 524, 80 S.Ct. 412, 417, 4 L.Ed.2d 480 (1960), the Court stated:

> "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."

The Supreme Court, in *Griswold*, said, 381 U.S. at page 485, 85 S.Ct. at 1682:

> "The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than

regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' NAACP v. Alabama, 377 U.S. 288, 307, 84 S.Ct. 1302, 1314, 12 L.Ed.2d 325."

A comparable viewpoint was set forth by the California supreme court in *Belous*, 80 Cal.Rptr. at page 360, 458 P.2d at page 200, where that court said:

"The critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state * * *."

Similarly, in the case at bar, we must decide whether the state of Wisconsin has a sufficiently compelling interest to justify the broad restriction on a woman's inherently personal right that is contained in § 940.04(1) and (5), Wis. Stats.

[7] The defendants urge that the state's interest in protecting the embryo is a sufficient basis to sustain the statute. Upon a balancing of the relevant interests, we hold that a woman's right to refuse to carry an embryo during the early months of pregnancy may not be invaded by the state without a more compelling public necessity than is reflected in the statute in question. When measured against the claimed "rights" of an embryo of four months or less, we hold that the mother's right transcends that of such an embryo.

We also find no compelling state interest in a need to protect the mother's life. At common law, abortion was not a crime unless the mother was quick with child. People v. Belous, supra, 80 Cal.Rptr. at 358, 458 P.2d at 198. This position was reflected in the original Wisconsin abortion statute, Wis.R.S. 1849, c. 133, §§ 10 and 11, enacted in 1849, which made abortion a punishable offense only if performed upon an unborn quick child. However, in 1858 the abortion statute was revised by elimination of the word "quick," thereby making it an offense to perform an abortion at any time during pregnancy. This change reflected an interest in protecting the life of the mother, for in 1858 any surgical procedure done inside the body was extremely dangerous. Today, many types of surgery, including abortion in the first trimester, are safe and routinely employed medical techniques. People v. Belous, supra, 80 Cal.Rptr. at 360, 458 P.2d at 200. Thus, the result of this court's decision that a mother has the right to determine whether to carry or reject an embryo that has not quickened is a return to the common law definition of abortion; this is not a position without well-established precedent in the common law.

We are persuaded that a medical abortion during early pregnancy is not inherently dangerous to the mother. Nor do we find a compelling state interest in connection with the discouragement of non-marital sexual intercourse. The statute involved does not purport to distinguish between married and unmarried women.

We are invited to resolve the philosophical question, raised in some of the amicus curiae briefs, as to when an embryo becomes a child. For the purposes of this decision, we think it is sufficient to conclude that the mother's interests are superior to that of an unquickened embryo, whether the embryo is mere protoplasm, as the plaintiff contends, or a human being, as the Wisconsin statute declares.

There are a number of situations in which there are especially forceful reasons to support a woman's desire to reject an embryo. These include a rubella or thalidomide pregnancy and one stemming from either rape or incest. The instant statute does not distinguish these special cases, but in our opinion, the state does not have a compelling in-

terest even in the normal situation to require a woman to remain pregnant during the early months following her conception.

[8] Under its police power, the state can regulate certain aspects of abortion. Thus, it is permissible for the state to require that abortions be conducted by qualified physicians. The police power of the state does not, however, entitle it to deny to a woman the basic right reserved to her under the ninth amendment to decide whether she should carry or reject an embryo which has not yet quickened. The challenged sections of the present Wisconsin statute suffer from an infirmity of fatal overbreadth.

V. CONCLUSION

The plaintiff is entitled to a declaratory judgment declaring § 940.04(1) and (5) violative of the United States Constitution. The plaintiff is not entitled to an injunction enjoining the defendants or their successors in office from prosecuting the plaintiff under § 940.-04(1) and (5).

It is so ordered.

vacated, 402 U.S.___ (1971)

Sidney G. BABBITZ, M.D., Plaintiff,

v.

E. Michael McCANN, District Attorney of Milwaukee County, F. Ryan Duffy, Jr., Judge of the County Court, Milwaukee County, Defendants.

No. 69-C-548.

United States District Court, E. D. Wisconsin.

Nov. 18, 1970.

Proceeding upon order, issued by a three-judge District Court on its own motion, to show cause why prosecutions under a state abortion statute should not be enjoined. Previously the court had adjudged portions of the statute unconstitutional. The Court held that where the court in declaring the abortion statute unconstitutional had hoped that state would forebear from further prosecution thereunder, but the state prosecutor publicly announced in effect that the court's judgment would not deter the state from prosecuting others under the statute and the state even declined to postpone trial of the doctor in question until a possible appeal to the Court of Appeals was determined, "special circumstances" required issuance of an injunction previously denied.

Judgment in accordance with opinion.

1. Courts ⇐405(15)

While motions were pending in Court of Appeals regarding propriety of docketing appeal from three-judge district court, three-judge district court had jurisdiction to grant interlocutory judgment pending such appeal and also to issue permanent injunction, against state court proceedings, to protect and effectuate court's judgment, under statute prohibiting federal court's stay of state court proceedings except where necessary in aid of federal court's jurisdiction or to protect or effectuate its judgments. 28 U.S.C.A. §§ 1253, 2283; Fed.Rules Civ.Proc. rule 62(c), 28 U.S.C.A.

2. Judgment ⇐829(1)

Although decision of three-judge district court declaring state abortion statute unconstitutional was perhaps not literally binding on state, fair application of comity doctrine required state authorities to desist from prosecuting doctor pending appeals which were taken from such declaratory judgment and also to desist from threatening prosecutions of others until such appeals could be resolved.

3. Courts ⇐508(1)

Where protected interests involve freedom of speech or assembly, three-

judge district court is empowered to enjoin any chilling impact upon such First Amendment rights, and Ninth Amendment rights are equally deserving of federal protection. Fed.Rules Civ.Proc. rule 62(c), 28 U.S.C.A.; U.S.C.A.Const. Amends. 1, 9.

4. Courts ⇐508(7)

Where three-judge district court in declaring abortion statute unconstitutional had hoped that state would forebear from further prosecution thereunder, but state prosecutor publicly announced in effect that court's judgment would not deter state from prosecuting others under statute and state even declined to postpone trial of doctor in question until possible appeal to Court of Appeals was determined, "special circumstances" required issuance of injunction previously denied. Fed.Rules Civ. Proc. rule 62(c), 28 U.S.C.A.; 28 U.S. C.A. § 2283; W.S.A.Wis. 940.04(1, 5).

Nathaniel D. Rothstein, Milton R. Bordow and Roy O. Conen, Milwaukee, Wis., Joseph L. Nellis, Washington, D.C., for plaintiff.

Michael Ash, Asst. Dist. Atty., Milwaukee, Wis., for defendants.

Before KERNER, Circuit Judge, and REYNOLDS and GORDON, District Judges.

PER CURIAM.

On October 28, 1970, a hearing was held pursuant to an order to show cause issued by this court on its own motion. At such hearing, arguments were heard on the question of our enjoining the defendants from prosecuting under §§ 940.04(1) and (5), Wis.Stats. Previously, this court had adjudged those portions of the Wisconsin statute unconstitutional. Our decision was filed on March 5, 1970 and is reported in 310 F. Supp. 293 (E.D.Wis.1970). An amended judgment, filed a few days later, on March 11, 1970, provided that the "injunctive relief sought by the plaintiff be and hereby is denied".

Subsequently, the plaintiff commenced another action in this federal district seeking an order restraining the prosecution. On May 11, 1970, as reported in 312 F.Supp. 725 (E.D.Wis.1970), a single-judge district court denied such relief, relying upon the prior analysis of the recent opinion and judgment of this three-judge court.

A direct appeal was taken from the judgment of the three-judge court to the United States Supreme Court, under 28 U.S.C. § 1253, which provides, in part, that "*any party* may appeal to the Supreme Court from an order granting *or denying*" (emphasis added) an injunction by a three-judge district court. That appeal was dismissed by the United States Supreme Court on October 12, 1970, and a few days thereafter this court issued the instant order to show cause.

[1] At the time of the hearing on this order to show cause, an appeal which had been taken from this court's judgment to the court of appeals for the seventh circuit had not as yet been docketed by the latter court; motions regarding the propriety of such docketing were then pending before the court of appeals. The defendants urge that this court does not have jurisdiction to amend its judgment of March 11, 1970, but they concede that we can temporarily restrain the prosecution of Dr. Babbitz under Rule 62(c), Federal Rules of Civil Procedure.

In our opinion, this court not only has jurisdiction to grant an interlocutory judgment pending such appeal, but also has jurisdiction to issue a permanent injunction in order to protect and effectuate the court's judgment under 28 U. S.C. § 2283, which provides:

"§ *2283. Stay of State court proceedings*

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its juris-

diction, or *to protect or effectuate its judgments.*" (emphasis added)

In American Insurance Company v. Lucas, 38 F.Supp. 926, 932 (W.D.Mo. 1941), it was held that a three-judge court has the power to protect its judgments from imposition. Indeed, we believe that the competence of the court to reconsider its previous order, in the absence of a stay or supersedeas, is one that is inherent in a court. In Illinois Printing Co. v. Electric Shovel Coal Corp., 20 F.Supp. 181, 184 (E.D.Ill. 1937), the court said:

"Every court has power to control, vacate, or correct its own decrees in the interests of justice. It may do so in the furtherance of justice and its power does not depend upon statute but is inherent. Freeman on Judgments, §§ 200 and 220."

We also find authority to re-examine the question of an injunction under 28 U.S.C. § 2202, which provides:

"§ *2202. Further relief*

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

In Vermont Structural Slate Co. v. Tatko Bros. Slate Co., 253 F.2d 29, 30 (2d Cir. 1958), the court ruled that although the original declaratory decree did not contain a permanent injunction, such provision could be added later under the court's "residual power".

In our decision of March 5, 1970, we discussed the "impressive authority" which favored forebearance from enjoining pending state prosecutions; with reference to Dr. Babbitz, we indicated our expectation that the state courts would "fully vindicate his federal constitutional rights".

At the hearing in this case held prior to the time that the court filed its decision of March 5, 1970, one of the defendants, Mr. McCann, the district attorney of Milwaukee county, urged us not to issue an injunction. Thereupon, a member of this three-judge court asked him, from the bench, what difference it would make "whether we enjoin you from proceeding or enter a declaratory judgment that the law is unconstitutional? Does it have any practical difference?" The district attorney then responded, in part:

"*Probably not a great deal*, except I would urge upon the Court in a declaratory judgment action, even more than otherwise, the principles of comity and abstention should be considered. * * *" (emphasis added)

The record now before this court demonstrates that our previous forecast regarding the state's response to our judgment has not been met; we find that our declaration and judgment have been completely disregarded by the state authorities. For example, shortly after our decision, the state attorney general issued a statement in a publication entitled "The Prosecutors' Bulletin" in which he asserted that our declaratory judgment "legally affected only the rights of Dr. Babbitz". In effect, this is a public announcement that the judgment of this court will not deter the state from prosecuting others under the statute.

The record before this court also discloses that in a press release dated April 7, 1970, the attorney general stated that the case had been appealed to the United States Supreme Court and that "doctors performing abortions in reliance on *Babbitz* run the risk of prosecution in the event the decision is reversed." The chilling impact of this statement is patently clear.

At the hearing on the present order to show cause, defendants' counsel candidly acknowledged that the district attorney of Milwaukee county and the attorney general of the state of Wisconsin, not only believe that the statute in question is fully constitutional but that they intend to take no other stance until there is a contrary decision by the United States Supreme Court. It thus is unmistakably clear, both from the defend-

ants' conduct and from their counsels' statements, that the Wisconsin prosecutors will steadfastly ignore a declaration of unconstitutionality emanating from either this three-judge district court or from the federal court of appeals.

Because of the state's tacit threats of prosecution, it follows that the general citizenry of Wisconsin will be obliged to disregard our judgment of unconstitutionality. In this sense, we regretfully observe that our hope that the state would "vindicate" the constitutional rights of Dr. Babbitz and others in his position has not been realized. Indeed, the state even declined to postpone the trial of Dr. Babbitz until a possible appeal to the court of appeals was determined. Unless we enjoin this prosecution, the trial of Dr. Babbitz in the state court will commence on November 30, 1970 under a statute which we have declared unconstitutional.

The state's insistence on going forward with the trial of Dr. Babbitz and the prosecutors' tacit threats to the medical profession completely change the context of this case with reference to injunctive relief. We are now in precisely the converse situation to that described in Dombrowski v. Pfister, 380 U.S. 479, 485, 85 S.Ct. 1116, 1120, 14 L.Ed.2d 22 (1965), where the court discussed Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943):

> "Since injunctive relief looks to the future, and it was not alleged that Pennsylvania courts and prosecutors would fail to respect the *Murdock* ruling, the Court found nothing to justify an injunction."

We now find that there are "special circumstances" as discussed in Cameron v. Johnson, 390 U.S. 611, 618, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968), and Dombrowski v. Pfister, 380 U.S. 479, 485, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965), requiring the issuance of an injunction. Upon the present posture of this case, the state authorities have no reasonable expectation of securing a *valid* conviction of Dr. Babbitz.

[2] We are fully aware that our judgment could be reversed upon appeal. We are also mindful that it is arguable that our judgment may not be literally "binding" on the state. See United State ex rel. Lawrence v. Woods, 432 F.2d 1072 (7th Cir. 1970). Nevertheless, we believe that a fair application of the doctrine of comity required the state authorities to desist from prosecuting Dr. Babbitz pending the appeals which were taken in this case and also to desist from threatening prosecutions of others until such appeals could be resolved. In the case at bar, comity has proved to be a one-way street. The continued prosecution of Dr. Babbitz and the admonishments by the state officers meet the language of Cameron v. Johnson, 390 U.S. 611, 621, 88 S.Ct. 1335, 1341, 20 L.Ed2d 182 (1968), where the court said:

> "* * * the statute was enforced against them with no expectation of convictions but only to discourage exercise of protected rights."

[3] It is clear from *Dombrowski* that if the protected interests involve freedom of speech or assembly, this court is empowered to enjoin any chilling impact upon such first amendment rights. We believe that the ninth amendment rights of those involved are equally deserving of federal protection. See Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). Indeed, it is arguable that the right to privacy of one's person is of even greater stature and magnitude than the meritorious rights included within the first amendment. As noted in *Griswold* (381 U.S. p. 491, 85 S.Ct. 1678), ninth amendment rights are fundamental ones, "deep-rooted in our society".

[4] In enforcing the statute in question, the state authorities are impinging not only on Dr. Babbitz' ninth amendment rights but upon those of the general public.

Unfortunately, it is apparent that the state judiciary has failed to discourage the prosecutors from trespassing on the federal rights in question. The reaction of the state authorities to our judgment relegates our ruling to nothing more than a gratuitous, advisory opinion. Zwickler v. Koota, 389 U.S. 241, 254, 88 S.Ct. 391, 399, 19 L.Ed.2d 444 (1967), places an affirmative duty on this court to weigh a request for a declaratory judgment that a state statute is unconstitutional:

> "We hold that a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction."

In Romero v. Weakley, 226 F.2d 399, 401 (9th Cir. 1955), the court quoted from Willcox v. Consolidated Gas Co., 212 U.S. 19, 40, 29 S.Ct. 192, 53 L.Ed. 382 (1909), as follows:

> " 'When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction * * *. The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.' "

The United States Supreme Court does not automatically review the judgments of lower tribunals as a matter of course; the case at bar appears to be a good example of that situation. Nevertheless, the state authorities have taken the position that they will refuse to respect our judgment of unconstitutionality or even that of the court of appeals and will be bound only by a ruling of the United States Supreme Court. Did the United States Supreme Court contemplate on the one hand that a federal three-judge district court *must* declare the constitutionality or unconstitutionality of a state statute and, on the other hand, that the state authorities may wholly dishonor such judgment?

Under all the circumstances of the instant case, we conclude that the only effective way to protect or effectuate our judgment is forthwith to issue an injunction permanently enjoining the pending prosecution of Dr. Babbitz and also permanently enjoining the defendants from henceforth prosecuting others under §§ 940.04(1) and (5), Wis.Stats.

It is ordered that the clerk enter an appropriate judgment.

Amanda HARLING, Petitioner,
v.
DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Respondent.
No. 69-C-560.

United States District Court,
E. D. Wisconsin.
March 11, 1971.

Habeas corpus case by Wisconsin parolee. The District Court, Myron L. Gordon, J., held that a nonphysician's conviction for abortion could not stand in light of federal three-judge District Court ruling declaring Wisconsin abortion statute under which she was convicted to be unconstitutional.

Petition for writ of habeas corpus granted.

1. Habeas Corpus ⇐29

A petition for writ of habeas corpus is a proper means to attack constitutionality of a statute under which a petitioner had been convicted.

2. Abortion ⇐1

A nonphysician's conviction for abortion could not stand in light of federal three-judge district court ruling declaring that Wisconsin abortion statute under which she was convicted is unconstitutional. W.S.A. 940.04(1, 5).

Shellow & Shellow, Milwaukee, Wis., for petitioner.

Robert P. Warren, Atty. Gen. of Wis., by William A. Platz, Asst. Atty. Gen., Madison, for respondent.

DECISION and ORDER

MYRON L. GORDON, District Judge.

The petitioner was convicted by a state court on November 14, 1968, of the commission of an abortion in violation of § 940.04(1), Wis.Stats. (1967). She was sentenced on the same day to a term of three years in the Wisconsin Home for Women at Taycheedah. Her conviction was affirmed by the state supreme court in State v. Harling, 44 Wis.2d 266, 170 N.W.2d 720 (1969). After the present petition for a writ of habeas corpus was filed, Mrs. Harling was released from confinement and now is on parole.

Mrs. Harling's petition initially set forth two rather broad bases which she argued warranted the granting of her application. However, after her petition was filed, and while it still was pending, the case of Babbitz v. McCann, 310 F. Supp. 293 (E.D.Wis.1970), was decided. In *Babbitz*, upon the application of a physician who was undergoing prosecution for the commission of an allegedly illegal abortion, a three-judge district court declared that § 940.04(1) and (5) are unconstitutional.

On the basis of the *Babbitz* ruling, Mrs. Harling submitted a petition for a writ of habeas corpus to the Wisconsin supreme court; such petition was denied on April 13, 1970. Her petition to the federal court for a writ of habeas corpus subsequently was amended and the petitioner now contends that her state conviction on November 14, 1968, is void. It is this contention which will be considered in the present decision.

In an earlier time, it was generally held that a statute which was declared to be unconstitutional was void ab initio. Norton v. Shelby County, 118 U.S. 425, 6 S.Ct. 1121, 30 L.Ed. 178 (1886); Ex parte Siebold, 100 U.S. (10 Otto) 371, 376, 25 L.Ed. 717 (1880). In the latter case, at pages 376–377, the court said:

> "An unconstitutional law is void and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that, as we have seen, the question of the court's authority to try and imprison the party may be reviewed on *habeas corpus*, by a superior court or judge having authority to award the writ. We are satisfied that the present is one of the cases in which this court is authorized to take such jurisdiction. We think so, because, if the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes. Its authority to indict and try the petitioners arose solely upon these laws."

The breadth of this rule was questioned in several subsequent decisions. See, e. g., Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 374, 60 S.Ct. 317, 84 L.Ed. 329 (1940). Cf. Butts v. Merchants & Miners Transportation Co., 230 U.S. 126, 33 S.Ct. 964, 57 L.Ed. 1422 (1913); Campbell v. Sherman, 35 Wis. 103 (1874); Annot., 167 A.L.R. 517 (1947); Crawford, The Legislative Status of an Unconstitutional Statute, 49 Mich.L.Rev. 645, 650 (1951).

This latter group of cases, however, generally does not deal with statutes in-

volving penal liability, and, in my opinion, they do not obviate the problem of whether Mrs. Harling's conviction can stand in light of a ruling declaring the statute under which she was convicted to be unconstitutional.

At no point prior to the time of the *Babbitz* decision did the petitioner raise the question of the constitutionality of § 940.04(1). In addition, it is to be noted that Mrs. Harling is not a physician, unlike the plaintiff in *Babbitz*. These two factors must be considered in resolving the present petition. However, it is clear that Mrs. Harling has exhausted her state remedies, for the supreme court denied her post-*Babbitz* petition for a writ of habeas corpus, concluding that *Babbitz* was not "binding upon this court or controlling."

It is arguable that the doctrine of the *Chicot County* case might preclude the granting of the relief sought in the case at bar. See Note, The Effect of the Unconstitutionality of a Statute, 37 Geo.L.J. 574, 584 (1949), in which the author suggests that Gayes v. New York, 332 U.S. 145, 67 S.Ct. 1711, 91 L.Ed. 1962 (1947), supports the view that if a petitioner has not raised the issue of the unconstitutionality of a statute at his trial, the court can refuse to consider his petition for a writ of habeas corpus. However, the precise scope of *Gayes* has been the subject of some discussion, and I have difficulty in applying it to the present action. Cf. Farnsworth v. United States, 98 U.S.App.D.C. 59, 232 F.2d 59 (1956), and United States v. Moore, 166 F.2d 102 (7th Cir. 1948).

[1, 2] A petition for a writ of habeas corpus is a proper means to attack the constitutionality of a statute under which a petitioner had been convicted. Furthermore, the few cases involving a petitioner who had been convicted under a statute later held to be unconstitutional in another case have generally granted relief by way of discharge upon a writ of habeas corpus. See, e. g., Ex parte Rose, 122 N.J.L. 507, 6 A.2d 389 (Sup.Ct.1939); Ex parte Downing, 7 Cal.App.2d 731, 47 P.2d 322 (Cal.App. 1935); Ex parte Barrett, 25 Okl.Cr. 431, 221 P. 124 (Okla.Crim.App.1923); cf. Desist v. United States, 394 U.S. 244, 261 n. 2, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969) (dissenting opinion); but see Dowd v. Grazer, 233 Ind. 68, 116 N.E.2d 108 (Ind.1953).

In 1 Sutherland, Statutes and Statutory Construction (Supp.1971 § 111, at 6), the author states:

> "[The] tenderness with which our system regards individual liberty has caused an exception to the rule of estoppel to be made for criminal statutes. Where a statute which declares conduct to be a crime is held unconstitutional, a person who was previously convicted under it may procure his release by habeas corpus."

Babbitz is clear that the state legislature may impose reasonable restrictions on the right of a woman to abort an unquickened fetus. Thus, in 310 F.Supp. at 302, the court stated:

> "Under its police power, the state can regulate certain aspects of abortion. Thus, it is permissible for the state to require that abortions be conducted by qualified physicians."

The declaration in *Babbitz* that § 940.04(1) and (5) are unconstitutional was based upon the premise that the statute is overbroad. On the other hand, rules of severability preclude "saving" a portion of the statute in question so as to accommodate the fact that Mrs. Harling is not a physician or to accommodate a construction that the declaration of unconstitutionality was meant only to extend to Dr. Babbitz or others in his precise position. This conclusion is buttressed by the rules of strict construction generally applied to penal statutes, and they are generally found to be void in their entirety whenever one portion is clearly unconstitutional.

Now, therefore, it is ordered that the petition for a writ of habeas corpus be and hereby is granted. The execution of the writ will be stayed for thirty days to allow the respondent an opportunity to seek appellate court review.

Item No. 23

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

ALFRED L. KENNAN, M.D., ADRIENNE H. CAMPBELL, RITA W. SMIRNOFF, and ANN W. BASHORE, Plaintiffs v. GERALD C. NICHOL, Individually and as District Attorney, Dane County, State of Wisconsin; his agents, assistants, and all those acting in concert or cooperation with him to enforce Wisconsin Statutes 940.04(1) and (5); Defendants	OPINION AND TEMPORARY RESTRAINING ORDER 71-C-118

Plaintiffs attack Sections 940.04(1) and (5) of the Wisconsin Statutes, contending that they violate the Constitution of the United States. Section 940.04(1) provides that any person, other than the mother, who intentionally destroys the life of an unborn child may be punished by fine or imprisonment or both. Section 940.04(5) excepts from the prohibition a "therapeutic abortion," which it defines. For the purposes of subsections (1) and (5), an unborn child is defined as "a human being from the time of conception until it is born alive."

In verified pleadings filed April 26, 1971, plaintiffs Kennan, Smirnoff, and Bashore, allege that on April 19, 1971, at the direction of the defendant district attorney and pursuant to a search warrant issued by a judge of a state court of Wisconsin, police entered the medical offices occupied by plaintiff Kennan in connection with his specialized practice in the performance of abortions, in which office plaintiffs Smirnoff and Bashore were employed as social workers, and that the police seized a number of pieces of equipment and files and records. They allege that on April 19 and 20, the defendant made public statements threatening their imminent arrest under Section 940.04(1). They allege that on April 21, 1971, the defendant caused a criminal prosecution to be in-

itiated against them by causing to be filed in a state court criminal complaints against them alleging violations of Section 940.04(1).

A complaint was filed in this court by the plaintiff Kennan on April 20, 1971, alleging that he was threatened with a criminal prosecution in the state court under the anti-abortion statute and asserting its unconstitutionality under the United States Constitution. On April 20, I entered an order to the defendant district attorney to show cause on April 26 why he should not be restrained from enforcing Section 940.04(1) against Kennan. On April 26, 1971, an amended complaint was filed by plaintiff Kennan, and another plaintiff Campbell, and on April 26, 1971, plaintiffs Smirnoff and Bashore moved for leave to intervene, were granted leave in the absence of objection, and filed a complaint.

In her verified complaint, plaintiff Campbell alleges that she is a married woman living in this district and bearing an unquickened child by her husband, that she and her husband do not wish to have the child, that she was scheduled to have an abortion on May 3, 1971, at the offices of the plaintiff Kennan in the city of Madison in this district, that she cannot afford to go to New York or elsewhere out of state where abortions can be performed legally, and that the criminal prosecution against plaintiff Kennan and the seizure of the medical equipment are preventing her from obtaining the abortion in this district. She undertakes to sue on behalf of a class consisting of members similarly situated.

By affidavit, plaintiff Kennan alleges that the effect of the seizure of the records and equipment in his office is to prevent him from continuing to perform abortions, and that there are over 300 females for whom appointments for the performance of abortions are presently scheduled.

For the purpose of deciding the motion for a temporary restraining order, and for no other purpose, I find the facts to be as I have summarized them above.

In *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970), a three-judge court consisting of Circuit Judge Kerner and District Judges Reynolds and Gordon, entered judgment declaring that Sections 940.04(1) and (5) violate the Constitution of the United States. My understanding is that this declaratory judgment has not been reversed or modified by any appellate court. In the same

action, the same three-judge court later in 1970 enjoined the district attorney of Milwaukee County and a judge of a county court of Milwaukee County from continuing or initiating prosecutions under Secs. 940.04(1) and (5). 320 F. Supp. 219. On April 19, 1971, the Supreme Court of the United States vacated this injunctive judgment and remanded the case to the three-judge court in the Eastern District of Wisconsin for reconsideration in light of *Younger v. Harris*, 401 U.S. 37 (1971); and *Samuels v. Mackell* and *Fernandez v. Mackell*, 401 U.S. 66 (1971).

In view of the declaratory judgment by the three-judge court in *Babbitz*, and also in view of a similar decision with respect to a similar Illinois statute by a three-judge United States District Court in *Doe v. Scott*, 321 F. Supp. 1385, 1390 (N.D. Ill. 1971), appeal pending, Supreme Court Docket No. 1522, 1523, I conclude that plaintiffs here enjoy a reasonable good chance for ultimate success in this lawsuit on the merits, if it eventuates that a federal three-judge court is free to pass, and does pass, upon the federal constitutional contention.

I find that jurisdiction in this court is present. 28 U.S.C. § 1343(3); 42 U.S.C. § 1983.

The principal question, with respect to the availability of temporary injunctive relief, is whether the plaintiffs have a reasonably good chance ultimately to persuade a federal three-judge court that it should not abstain from acting on the merits of their constitutional claim, and from granting appropriate relief if they prevail on the merits. This question of abstention is rendered unusually difficult by reason of the opinions and orders entered by the Supreme Court of the United States on February 23, 1971, in *Younger v. Harris*, No. 2; *Boyle v. Landry*, No. 4; *Samuels v. Mackell*, Nos. 7 and 9; *Perez v. Ledesma*, No. 60; *Dyson v. Stein*, No. 41; and *Byrne v. Karalexis*, No. 83.

The complaint by plaintiff Kennan was filed in this court on April 20, when he was clearly threatened with a criminal prosecution in the state court but before that prosecution had been commenced. Thus this case presents a situation which was expressly excluded from consideration by the Supreme Court of the United States in its February 23, 1971, decisions. See *Younger v. Harris*, slip opinion at pp. 3-4 and, the concurring opinion by Mr. Justice Brennan in *Perez v. Ledesma*, slip opinion at

p. 25, n. 9. It is contended here by the defendant that this chronological sequence of the commencement of the federal suit and the state court prosecution is too artificial to serve as a basis for determining whether a federal court should abstain. However, from the point of view of those who had sought a federal forum in the cases decided by the Supreme Court of the United States on February 23, 1971, the chronological sequence also appeared to be artificial, but a majority of the Supreme Court was prepared to regard it as decisive in those cases.

Of course, even if a federal court is not otherwise bound to abstain, in order to obtain temporary injunctive relief, a plaintiff must demonstrate that irreparable injury will occur if the relief is denied. Assuming that there is a federal constitutional right vested in a physician to perform abortions upon an unquickened embryo and a federal constitutional right vested in a pregnant woman to decide whether she should carry or reject an unquickened embryo (and I have concluded above that the plaintiffs enjoy a reasonably good chance to prevail in these contentions if the merits are reached by a three-judge federal court), then it clearly follows that to withhold a temporary restraining order is to permit this constitutional right to be lost irreparably with respect to the physician and those women for whom he could otherwise perform the operation in the meantime. For the present, I need not decide, finally, whether the interests of pregnant women can be considered in a suit to which only the physician is a party (only plaintiff Kennan's complaint was filed prior to the commencement of the criminal prosecution in the state court), but should this become a critical issue in this suit, *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965), causes me to conclude that plaintiffs enjoy a reasonable good chance ultimately to prevail in the contention that the physician does enjoy standing to raise the constitutional rights of his patients and potential patients.

For the reasons stated, I conclude that the plaintiffs enjoy a reasonably good chance to prevail in their contention that a three-judge federal court should not abstain in this action,[1] and in their contention that Sections 940.04(1) and (5) violate the Constitution of the United States, and that injunctive relief is necessary to avoid irreparable injury.

Upon the entire record herein, and pursuant to 28 U.S.C. § 2284(3), it is hereby ordered that, until further order of the court:

(1) the defendant, and any and all persons acting in concert with him or at his direction or under his control, are hereby restrained from further enforcement, against the plaintiffs herein, of Sections 940.04(1) and (5), Wisconsin Statutes, in any case involving "an embryo of four months or less" (*Babbitz v. McCann*, 310 F. Supp. 293, 301); and

(2) the defendant, and any and all persons acting in concert with him or at his direction or under his control, are hereby ordered to deliver to the plaintiff Kennan, on or before April 30, 1971, either the originals, or true and complete copies, of all of the documents seized April 19, 1971, which relate to persons who are or may be candidates for abortions on and after that date, and also the two Gomco vacuum pump machines seized April 19, 1971; and

(3) the plaintiffs, and each of them, and all persons acting in concert or cooperation with them, or at their direction, or under their control, are to refrain from destroying or mutilating any of the items, documentary or otherwise, covered by (2), above, unless authorized to do so by further order of the court; and

(4) if the defendant believes that he is unable to comply with the provisions of subparagraph (2), above, he may show cause, on or before April 30, 1971, why he should be relieved of the duty to comply therewith.

ENTERED this 27th day of April, 1971.

BY THE COURT:

/s/ JAMES E. DOYLE
JAMES E. DOYLE
District Judge

---

1 I would be strengthened in this view if it appeared that the Supreme Court of Wisconsin had already had the chance to pass upon the federal constitutionality of Section 940.04 (1) and had rejected the challenge. From the incomplete information available to me, it appears that the Supreme Court of Wisconsin has had such an opportunity, *State ex rel. Harling v. Superintendent*, April 13, 1970, but its opinion in that case leaves me uncertain whether the Court intended to reject the constitutional challenge on its merits.

Item No. 24

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

ALFRED L. KENNAN, M.D., Plaintiff v. ROBERT WARREN, Attorney General for the State of Wisconsin; and WISCONSIN STATE MEDICAL EXAMINING BOARD, Defendants	OPINION AND TEMPORARY RESTRAINING ORDER 71-C-132

This action (commenced April 28, 1971) relates to certain facets of a controversy centering upon the alleged operation by the plaintiff and his staff of a medical center in the City of Madison in this district, in which, it is alleged, abortions have been performed in violation of Sections 940.04(1) and (5), and 448.18(1)(a), Wis. Stat.

It appears that there are at least three legal facets of this controversy: (1) a criminal prosecution against Dr. Kennan and certain members of his staff which was commenced on April 21 or April 22, 1971, by the District Attorney of Dane County, Wisconsin, in the County Court for Dane County, charging violations of Sections 940.04(1) and (5); (2) a civil action commenced by the Attorney General of Wisconsin (by the service of a summons and complaint on April 21, 1971) in the Circuit Court for Dane County, Wisconsin, in which the State of Wisconsin is the plaintiff and Dr. Kennan is the defendant (No. 133151 in that court), which action purports to have been brought pursuant to Section 448.19, Wis. Stat., in which it is alleged that Dr. Kennan has repeatedly violated Sections 940.04(1) and 448.18(1)(a), Wis. Stat., and in which judgment is sought permanently enjoining Dr. Kennan and his staff from activity relating to the performance of other than "therapeutic" abortions as defined in Section 940.04(5), Wis. Stat.; and (3) a written warning by the Medical Examining Board of the State of Wisconsin, addressed to Dr. Kennan by the Board on April 27, 1971, that the Board will immediately suspend his license, pursuant to Section 448.18(7), Wis. Stat., unless he ceases to perform abortions "except in strict conformity to the exception to the criminal abortion law

as stated in sec. 940.04(5), Stats., and in strict conformity with accepted medical and surgical standards." I will refer to these three facets herein as "the state court criminal action," "the state court civil injunction action," and "the Medical Board proceeding."

(1) The state court criminal action.

In an action initiated by Dr. Kennan in this court on April 20, 1971, under 42 U.S.C. § 1983 (*Kennan et al., v. Nichol*, W. D. Wis., No. 71-C-118), I entered a temporary restraining order April 27, 1971, pursuant to 28 U.S.C. § 2284(3). I initiated the convening of a three-judge court by the Chief Judge of the Circuit. A three-judge court has been convened by the Chief Judge of the Circuit. It consists of Circuit Judge Kerner, and District Judges Reynolds and Gordon. I have withdrawn from the action, and Judge Gordon is acting as the single United States District Judge for the Western District of Wisconsin in the action, as well as acting as a member of the three-judge court.

The temporary restraining order entered April 27, 1971, enjoined the defendant District Attorney of Dane County, "and any and all persons acting in concert with him or at his direction or under his control" from further enforcement of Sections 940.04(1) and (5), Wis. Stat., against Dr. Kennan and his staff, in any case involving an embryo of four months or less.

At a hearing in this court on May 4, 1971, in the present case (71-C-132), counsel for Dr. Kennan contended that by pursuing the state court civil injunction action, the Attorney General of Wisconsin is "acting in concert" with the District Attorney of Dane County, in violation of the temporary restraining order entered April 27, 1971, in 71-C-118. I permitted counsel for Dr. Kennan to state the contention, and I provided the opportunity for the Assistant Attorney General to respond. However, it is clear that I have no authority to deal with such a contention. If there is a desire to pursue it, it must be directed to the three-judge court which has been convened in 71-C-118, the action in which the temporary restraining order of April 27, 1971, was entered.

(2) The state court civil injunction action.

The complaint by Dr. Kennan against the Attorney General and the Medical Board in this present action, 71-C-132, alleges, among other things, that the Attorney

General, acting as counsel for the Board, has commenced an action in state court to enjoin the operation of Dr. Kennan's clinic. The verified complaint prays for a temporary restraining order restraining the Attorney General and the Board from suspending, revoking or otherwise interfering with Dr. Kennan's license, "or from any other method of further enforcement against [Dr. Kennan] of Sections 940.04(1) and (5) and 448.18, Wis. Stat., in any case involving an embryo of four months or less," and prays for such other relief as the court deems just and proper. I entered an order to show cause on April 28, 1971, in the form submitted by counsel for Dr. Kennan, returnable May 4, 1971, requiring the Attorney General and the Board to show cause why they should not be restrained temporarily from interfering with Dr. Kennan's license, and temporarily "suspending and restraining the operation, enforcement, or execution of Chapter 448 of the Wisconsin Statutes...."

On May 3, 1971, there was filed in this action in this court a verified "amended complaint" in which the defendants (the Attorney General and the Board) remained as they were in the original complaint, but in which a second plaintiff, Adrienne H. Campbell, is shown. Parties may be added to an action only by order of the court. Rule 21, Federal Rules of Civil Procedure. No such order has been sought or entered. Dr. Kennan was free to amend his complaint, without leave of court, since no responsive pleading had been served. Rule 15(a), Federal Rules of Civil Procedure. I treat the amended complaint as an amended complaint by Dr. Kennan, verified by him, and since it is also verified by Adrienne Campbell, I treat it as an affidavit by her, in support of Dr. Kennan's motion for a temporary restraining order. However, Mrs. Campbell is not presently a party to this action.

The amended complaint includes more detailed allegations concerning the history of the state court civil injunction suit, and I will turn to them in a moment. The relief prayed for includes: a temporary restraining order preventing the defendants from interfering with Dr. Kennan's license or from any other method of further enforcement of Sections 940.04(1) and (5) and 448.18(1)(a) against Dr. Kennan, whether civil or criminal, in cases involving an embryo of four months or less; a temporary restraining order preventing the Attorney General from pursuing the state court civil injunction action and from seeking to enforce an order entered by the state court in that action April 30, 1971; the convening of a three-judge court; consolidation in this court of this action (71-C-132) with the earlier action (71-C-118); and permanent declaratory and injunctive judgments.

At the May 4 hearing in this action in this court on the order to show cause with respect to the motion for a temporary restraining order, counsel for the Attorney General and the Board objected to consideration of any temporary relief other than that specifically described in the order to show cause. That is, they contended that the hearing was limited to the Board's warning that Dr. Kennan's license may be suspended, and that it could not reach the matter of the state court civil injunction action. At the time of the hearing I expressed the view that there was merit to this contention, but I permitted argument on the matter of the state court civil injunction action, and provided an opportunity for the Attorney General to present evidence on the point if he so elected. Subsequently, I have concluded that the Attorney General's contention concerning the scope of the May 4 hearing was without merit. This is because I have since ascertained clearly that the state court civil injunction action was commenced pursuant to Section 448.19, Wis. Stat. The temporary relief sought, as stated in the order to show cause, included an order "suspending and restraining the operation, enforcement, or execution of Chapter 448 of the Wisconsin Statutes." The Attorney General and the Board were thus fairly warned that the May 4 hearing would reach the subject of the state court civil injunction action.

From the entire record herein, and by the exercise of judicial notice of the proceedings in the state court civil injunction action and in the earlier action in this court (71-C-118), I make the following findings of fact, for the purpose of acting upon Dr. Kennan's motion for a temporary restraining order, and for no other purpose.

I find that on April 19, 1971, pursuant to a search warrant issued by a judge of a state trial court, and at the direction of the District Attorney of Dane County, police entered the medical offices occupied by Dr. Kennan and his staff, in the city of Madison in this district, in connection with his specialized practice in the performance of abortions, that the police seized equipment and records, and that the practical effect of the seizure was to prevent the continuation of Dr. Kennan's abortion practice for some period of time. On April 19 and 20 the District Attorney made public statements threatening the imminent arrest of Dr. Kennan under Section 940.04(1), Wis. Stat. On April 21 or 22, 1971, the District Attorney commenced a criminal action against Dr. Kennan, alleging violations of Section 940.04(1).

An action (71-C-118) was commenced in this court by Dr. Kennan on April 20, 1971, seeking to enjoin the District Attorney from enforcing Sections 940.04(1) and (5).

On April 21, 1971, expressly pursuant to Section 448.19, Wis. Stat., the Board and the Attorney General commenced, in the name of the state, the state court civil injunction action against Dr. Kennan. No order was entered by the court in that action prior to April 30, 1971.

On April 27, 1971, this court entered a temporary restraining order, pursuant to 28 U.S.C. § 2284(3), preventing the District Attorney and those acting in concert with him, from further enforcement of Sections 940.04(1) and (5) against Dr. Kennan in any case involving an embryo of four months or less. The order was not limited to criminal prosecutions.

Following the issuance of the April 27, 1971, temporary restraining order in this court, in the action commenced here on April 20 by Dr. Kennan against the District Attorney, the Attorney General renewed his application to the court in the state court civil injunction action for an order to show cause and for an ex parte restraining order. On April 30, 1971, the state court entered an order to show cause returnable May 5, 1971, at 3:00 p.m., on the question whether Dr. Kennan should be enjoined from his abortion practice pending the final outcome of the state court action, and an order enjoining Dr. Kennan during the period from April 30, 1971, to May 5.

For reasons stated in some fullness in the opinion I entered in 71-C-118 on April 27, 1971, I conclude that in this present action, 71-C-132, Dr. Kennan enjoys a reasonably good chance of ultimate success in this lawsuit on the merits, if it eventuates that a federal three-judge court is free to pass, and does pass, upon the federal constitutional contention. My April 27 opinion related strictly to Sections 940.04(1) and (5), Wis. Stat. However, I conclude that Sections 448.18(1)(a) and 448.19 depend wholly upon Sections 940.04(1) and (5), since Section 448.18(1)(a) proscribes as "immoral or unprofessional conduct," "procuring, aiding or abetting a criminal abortion" (emphasis added).

With respect to the relief sought in this action in this court concerning the state court civil injunction action, I find that jurisdiction here is present. 28 U.S.C. § 1343(3); 42 U.S.C. § 1983.

Assuming that there is a federal constitutional right vested in a physician to perform abortions upon an unquickened embryo and a federal constitutional right vested in a pregnant woman to decide whether she should carry or reject an unquickened embryo (and I have concluded above that the plaintiff enjoys a reasonably good chance to prevail in these contentions if the merits are reached by a three-judge federal court), then it clearly follows that to withhold a temporary restraining order against state court interference with these rights is to permit them to be lost irreparably with respect to the physician and those women for whom he could otherwise perform the operation in the meantime. For the present, I need not decide, finally, whether the interests of pregnant women can be considered in a suit to which only the physician is a party, but should this become a critical issue in this suit, *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965), causes me to conclude that plaintiffs enjoy a reasonably good chance to prevail in the contention that the physician does enjoy standing to raise the constitutional rights of his patients and potential patients. In accordance with 28 U.S.C. § 2284(3), I specifically find that irreparable damage will result if a state court restraint continues to prevent Dr. Kennan from performing any abortions except in compliance with Sections 940.04(1) and (5), in that time is of the essence for those women for whom Dr. Kennan would otherwise be free to perform abortions and for whom alternative opportunities for this procedure are unavailable, and that the support for this finding and conclusion is to be found in the verified amended complaint.

The principal question with respect to the availability of temporary injunctive relief affecting the state court civil injunction action, is whether the plaintiff has a reasonably good chance ultimately to persuade a federal three-judge court that it should not abstain from acting on the merits of his constitutional claim, and from granting appropriate relief if he prevails on the merits. On this question of abstention, I consider particularly the opinions and orders entered by the Supreme Court of the United States on February 23, 1971, in *Younger v. Harris*, No. 2; *Boyle v. Landry*, No. 4; *Samuels v. Mackell*, Nos. 7 and 9; *Perez v. Ledesma*, No. 60; *Dyson v. Stein*, No. 41; and *Byrne v. Karalexis*, No. 83.

The *Younger* group of cases involved state court prosecutions for alleged violations of criminal statutes and municipal ordinances. Whether the *Younger* doctrine is applicable to a state court civil injunctive action under Section 448.19, Wis. Stat., is a difficult question. However, under the view I take of this situation, this distinction is not critical.

The *Younger* doctrine places heavy emphasis upon whether a state action has actually been commenced prior to the time that the aggrieved party commences an action in the federal district court to vindicate his asserted federal constitutional rights. In the present situation, Dr. Kennan sought a forum here on April 20 (71-C-118). The state court criminal prosecution by the District Attorney was commenced on April 21 or 22, and the state court civil injunction action under Section 448.19 was commenced on April 21. However, in the action commenced by Dr. Kennan in this court on April 20 (71-C-118), only the District Attorney was named as a defendant. Dr. Kennan's present action (71-C-132) against the Attorney General and the Board was not commenced until April 28. The question, in terms of abstention, appears to require an evaluation of this time sequence.

I believe that the specific provisions of Section 448.18(1)(a) and 448.19 are critical to this evaluation. Section 448.18(1)(a) defines "immoral or unprofessional conduct" to include "procuring, aiding or abetting a criminal abortion." Section 448.19 provides that if it appears to the Board upon complaint, or if it is known to the Board, that any person is violating Section 448.18(1)(a) -- or other provisions of Chapter 448 -- the Board or "the district attorney of the proper county may investigate and may, in addition to any other remedies, bring action in the name and on behalf of the state against any such person to enjoin such person from such violation. . . ." Had the District Attorney commenced the state court civil injunctive action against Dr. Kennan on April 21, the *Younger* doctrine would have been inapplicable since Dr. Kennan's action against him (71-C-118) had been filed here April 20. Thus, it must be determined whether *Younger's* heavy emphasis upon the time sequence can be escaped by having the Board, with the Attorney General as its attorney, initiate an action to enjoin Dr. Kennan from "procuring, aiding or abetting a criminal abortion." As I have observed above in another connection, the contention that Dr. Kennan has violated Section 448.18(1)(a) turns on whether the abortions he has performed have been "criminal," and this in turn depends upon whether they were in violation of Sections 940.04(1) and (5), the enforcement of which against Dr. Kennan had been prohibited by the April 27 order.[1]

---

[1] I am aware that the complaint in the state court civil injunction action recites that the State Assembly by resolution "authorized" the Attorney

I believe that the *Younger* doctrine should not be amplified to deny a federal forum to an otherwise qualified plaintiff, to assert a federal constitutional challenge to Sections 940.04(1) and (5), solely because his action in the federal court, filed April 20, failed to anticipate every means by which some state or local governmental officer or agency might subsequently attempt to enforce those very statutory provisions against him. I conclude that Dr. Kennan enjoys a reasonably good chance ultimately to persuade a federal three-judge court not to abstain for this reason.

(3) The Medical Board proceeding

With respect to this branch of the present case, I incorporate and reaffirm all of those findings of fact and conclusions of law set forth in part (2) of this opinion, and I add the following findings of fact, solely for the purpose of deciding the motion for a temporary restraining order.

I find that on or about March 29, 1971, the Board decided to initiate an investigative hearing under Section 448.17, at its next regularly scheduled meeting on April 23, 1971, concerning whether Dr. Kennan's activities in operating an abortion clinic were inimical to public health; that such an investigative hearing was held on April 23; that the testimony presented at said hearing persuaded the Board to continue the investigative hearing, and that the Board voted to warn Dr. Kennan; that by letter dated April 27, 1971, the Board did warn Dr. Kennan that it would immediately suspend his license, pursuant to Section 448.18(7), Wis. Stat., unless he ceased "performing abortions except in strict conformity to the exception to the criminal abortion law as stated in 940.04(5), Stats., and in strict conformity with accepted medical and surgical standards"; and that on April 30, 1971, the Board decided that the April 27 warning would continue to stand as issued.

---

[1] continued

General to commence it, and that the action was brought pursuant to Section 165.25(1), Wis. Stat., as well as Section 448.19. I note that the resolution "requests" him to "institute proceedings in the appropriate court to obtain an injunction." I note that under Section 165.25(1), when requested by a branch of the legislature, the Attorney General

In accordance with 28 U.S.C. § 2284(3), I specifically find that if the Board is not temporarily restrained from suspending Dr. Kennan's license for a period of not to exceed three months, and a possible like period thereafter, pursuant to Sec. 448.18(7), irreparable injury will result. I find that this irreparable injury consists of that described in part (2) of this opinion, as well as in an inability to practice any kind of medicine during the suspension or suspensions, as well as the damage to Dr. Kennan's reputation and standing. I find support for these findings in the verified amended complaint. I conclude that there is no basis for abstention by a federal district court with respect to the Medical Board proceeding. The *Younger* doctrine is unrelated to state administrative proceedings, as distinguished from state court proceedings. In an action under 42 U.S.C. § 1983, a plaintiff is not required to exhaust either state administrative remedies or state judicial remedies. *Monroe v. Pape*, 365 U.S. 167 (1961); *McNeese v. Board of Education*, 373 U.S. 668 (1963); *Damico v. California*, 389 U.S. 416 (1967).

---

[1] continued

shall "appear for the state and prosecute . . . in any court . . . any cause or matter, civil or criminal, in which the state or the people thereof may be in anywise interested." I find nothing in Section 165.25(1) to create any cause of action. Therefore, I consider that the state court civil injunction action must rest solely on Section 448.19. In any event, whether the state court civil injunction action is viewed as having been brought by the Board or independently by the Attorney General, it is an action to enforce Sections 940.04 (1) and (5).

ORDER

Like the temporary restraining order entered April 27, 1971 in 71-C-118, this order is intended to be a temporary restraining order entered pursuant to 28 U.S.C. § 2284(3), and it is to remain in force only until the hearing by a full three-judge court if the Chief Judge of the Circut convenes such a court in response to my notification to him under 28 U.S.C. § 2284(1).

Upon the entire record herein, and pursuant to 28 U.S.C. §2284(3), IT IS HEREBY ORDERED that:

(1) the defendant Attorney General and the defendant Board and the defendant members of said Board, and any and all persons acting in concert with any of them or at the direction of any of them, are restrained from:

(a) further proceedings under Sections 165.25(1), 448.19, 940.04(1), or 940.04(5), Wis. Stat., whether civil or criminal, to enforce against the plaintiff Alfred L. Kennan, the provisions of Sections 940.04(1) and (5) and Section 448.18(1)(a) in any case involving "an embryo of four months or less" *Babbitz v. McCann*, 310 F. Supp. 293, 301 (E.D. Wis. 1970)); and

(b) further proceedings under Sections 448.18 (I)(a) and 448.18(7), Wis. Stat., and any other provision of any statute and Board regulation, to suspend or to revoke the license of plaintiff Kennan to practice medicine and surgery under Section 448.06, Wis. Stat., for the sole reason that he has performed abortions, or intends or threatens to perform abortions, otherwise than in conformity with Section 940.04(5), Wis. Stat., in any case involving "an embryo of four months or less."

IT IS FURTHER ORDERED that at any time prior to the convening of a three-judge court in this action by the Chief Judge of the Circuit, any party hereto may apply to the single judge of this district for an order modifying or amending the terms of this order.

ENTERED this 5th day of May, 1971.

BY THE COURT:

/s/ JAMES E. DOYLE
JAMES E. DOYLE
District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

ALFRED L. KENNAN, M. D., Plaintiff v. ROBERT WARREN, Attorney General for the State of Wisconsin; and WISCONSIN STATE MEDICAL EXAMINING BOARD, Defendants	SUPPLEMENTAL OPINION 71-C-132

This opinion is intended to supplement the opinion I entered herein on May 5, 1971, in conjunction with the entry of a temporary restraining order. It supplements that portion of the May 5 opinion which dealt with the state court civil injunction action by the State of Wisconsin against Dr. Kennan in the Circuit Court for Dane County.

(1)

In *Goss v. State of Illinois*, 321 F.2d 257 (7th Cir. 1963), and *Smith v. Village of Lansing*, 241 F.2d 856(7th Cir. 1957), the Seventh Circuit Court of Appeals held that 42 U.S.C. § 1983 is not an exception to 28 U.S.C. § 2283, a provision which generally prevents a federal court from staying state court proceedings. In my dissent from the majority opinion in *Zwicker v. Boll*, 270 F. Supp. 131 (W.D. Wis. 1967), I expressed the view that intervening decisions of the United States Supreme Court were inconsistent with the earlier Seventh Circuit opinions. This view also has been expressed by the United States District Court of the Northern District of Illinois in *Landry v. Daley*, 288 F. Supp. 200 (N.D. Ill. 1968).

The Court of Appeals for the Seventh Circuit, in one portion of its opinion in *Boyle v. Landry*, 422 F.2d 631 (7th Cir. 1970), appears to reaffirm its holdings in *Goss* and *Smith*, that injunctions to stay proceedings in a state court have not been "expressly authorized" by 42

U.S.C. § 1983. However, if this were the holding in *Boule*, it would follow that in a § 1983 action, 28 U.S.C. § 2283 would constitute an absolute bar to an injunction against proceedings in a state court. I am obliged to conclude that this was not the intended holding in *Boule* because the bulk of the opinion was devoted to a discussion of whether the district court's injunction was "an abuse of discretion" (422 F.2d at 634); whether the district court had made a finding that the state court prosecution was in "bad faith" (*id.*); whether the state court "prosecutions are so great and extensive as to result in a chilling effect on First Amendment rights" "sufficient to justify federal intervention" (*id.*); and whether there had been a showing that any federal question arising in the state court trial would not be adequately disposed of in the state courts or ultimately on review in the United States Supreme Court. *Boule*, therefore, appears to mean that in an appropriate case under § 1983, an injunction against state court proceedings is permissible.

The Supreme Court of the United States has expressly refrained from passing on this question on at least three separate occasions. *Dombrowski v. Pfister*, 380 U.S. 479, 484, n.2 (1965); *Cameron v. Johnson*, 390 U.S. 611, 613, n.3 (1968); *Younger v. Harris* (No. 2, October Term, 1970, February 23, 1971), pp. 16-17 of slip opinion.

For these reasons, as well as those expressed in *Lardru v. Daley*, 288 F. Supp. 200, 224 (N.D. Ill. 1968) and my dissent in *Zwicker v. Boll*, 270 F. Supp. 131, 144-146 (W.D. Wis. 1967), I conclude that a temporary restraining order is permissible in some circumstances, and I conclude further that the circumstances of the present case render such an order appropriate.

(2)

My principal purpose in entering the opinion and order in *Kennan v. Nichol*, 71-C-118, on April 27, 1971, and the opinion and order in *Kennan v. Warren*, 71-C-132, on May 5, 1971, is to prepare the way for a federal three-judge court to consider all of the implications of the state court criminal prosecution of Dr. Kennan, the state court civil injunction action against him, and the Medical Board proceedings in his case, all of which are grounded in the state's criminal statutes on abortion, Sections 940.04(1) and (5). It will be for the three-judge court to determine whether jurisdiction is present; if so, whether it should nevertheless abstain; if it should not abstain, whether plaintiff is entitled to the relief sought.

It is wholly understandable and proper in a situation of this kind that state and local prosecutors and opposing parties and counsel should bring what they consider to be appropriate proceedings in what they consider to be the appropriate judicial forums, and that when such a proceeding is commenced in a state court, the state court should respond as it may feel obliged to respond under the law as it has been determined, or, if the law has not yet been determined, then under the law as the state court believes it should be. I suggest that when a party commences a proceeding in a federal court, it is equally understandable and proper that the federal court should respond as it may feel obliged to respond under the law as it has been determined, or, if the law has not yet been determined, then under the law as the federal court believes it should be.

These questions of the relationships between the state and federal courts have a long and significant history which was most recently the subject of extended and discrepant discussion by various members of the United States Supreme Court in opinions filed February 23, 1971, in *Younger v. Harris*, No. 2, and several related cases. They are profound questions, and their resolution requires a weighing of many competing values.

For the present I undertake to say only that the question of when and under what circumstances the doors of the federal district courts will be open to plaintiffs seeking to vindicate rights claimed to be secured by the federal constitution is a *national* question. When the question is finally answered, the doors of the federal courts will be open or closed, not only to a physician or a pregnant married woman in Madison, Wisconsin, but to blacks in Mississippi, slum dwellers in Harlem, and grape pickers in California. A federal court must not be headstrong. But amenity among state and federal judicial officers must never cause a federal court to close its door to those to whom the door should open.

ENTERED this 6th day of May, 1971.

BY THE COURT:

/s/ James E. Doyle
JAMES E. DOYLE
District Judge

Circuit Judge, held that North Carolina statute, which, with certain statutory exceptions, assigned right to be born to human organism in its early prenatal development as embryo and fetus, did not place unconstitutional burden on fundamental liberty, but that four months' residency requirement for obtaining therapeutic abortion unconstitutionally limited right to travel.

Judgment entered accordingly.

1. Courts ⇐260.4

Class action seeking to have state abortion statute declared unconstitutional and its enforcement enjoined was not proper case in which to apply doctrine of abstention, absent state court interpretation of statute that would alter statute's constitutional impact. G. S.N.C. §§ 14–44 to 14–45.1.

2. Declaratory Judgment ⇐292, 305

County family planning clinic medical director, who was medical expert in obstetrics and contraception and former medical missionary, chairmen of departments of obstetrics and gynecology at teaching hospitals at various universities, and state General Assembly member, who was largely responsible for passage of amendment to state abortion statute, all had standing to bring action seeking to have such statute declared unconstitutional and its enforcement enjoined and could sufficiently represent rights of class whose members they sought to protect. G.S.N.C. §§ 14–44 to 14–45.1.

3. Abortion ⇐1

North Carolina abortion statute, which, with certain statutory exceptions, assigns right to be born to human organism in its early prenatal development as embryo and fetus, does not place unconstitutional burden on fundamental liberty. G.S.N.C. §§ 14–44 to 14–45.1.

4. Constitutional Law ⇐82

Generally women possess fundamental right under Constitution to determine whether they shall bear children before they have become pregnant and state

Elizabeth CORKEY, Charles Hendricks, Roy Parker, Richard Burt and Arthur Jones, Plaintiffs,

v.

Dan K. EDWARDS, Thomas D. Cooper, Jr., Thomas W. Moore, Jr. and Jerry W. Whitley, Defendants.

Civ. No. 2685.

United States District Court, W. D. North Carolina, Charlotte Division.

Argued Nov. 5, 1970.

Decided Feb. 1, 1971.

Class action seeking to have state abortion statute declared unconstitutional and its enforcement enjoined. The Three Judge District Court, Craven,

can interfere with such right of choice only in special circumstances, and may not forbid practice of contraception.

5. Abortion ⇐1
Constitutional Law ⇐83(1)

Four months' residency requirement as condition precedent to obtaining therapeutic abortion under North Carolina abortion statute unconstitutionally limited right to travel. G.S.N.C. § 14-45.1.

6. Abortion ⇐8

Burden of proof, in prosecution for violation of North Carolina abortion statute, is on state to show that abortion did not come within statutory exemptions. G.S.N.C. §§ 14-44 to 14-45.1.

George S. Daly, Jr., Charlotte, N. C., Michael Katz, Evanston, Ill., and Roy Lucas, New York City, for plaintiffs.

James L. Blackburn, Raleigh, N. C., Staff Atty. for Attorney General's Office, and Arnold H. Loewy, Chapel Hill, N. C., for defendants.

Before CRAVEN, Circuit Judge, and JONES and McMILLAN, District Judges.

CRAVEN, Circuit Judge:

This is a class action brought before a three-judge court, 28 U.S.C. § 2281, to have the North Carolina Abortion Statute,[1] G.S. §§ 14-44 to 14-45.1, de-

1. The statute reads:

§ 14-44. Using drugs or instruments to destroy unborn child.—If any person shall wilfully administer to any woman, either pregnant or quick with child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or other substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy such child, he shall be guilty of a felony, and shall be imprisoned in the State's prison for not less than one year nor more than ten years, and be fined at the discretion of the court.

§ 14-45. Using drugs or instruments to produce miscarriage or injure pregnant woman.—If any person shall administer to any pregnant woman, or prescribe for any such woman, or advise and procure such woman to take any medicine, drug or anything whatsoever, with intent thereby to procure the miscarriage of such woman, or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes, he shall be guilty of a felony, and shall be imprisoned in the jail or State's prison for not less than one year nor more than five years and shall be fined, at the discretion of the court.

§ 14-45.1. When abortion not unlawful.—Notwithstanding any of the provisions of G.S. 14-44 and 14-45, it shall not be unlawful to advise, procure, or cause the miscarriage of a pregnant woman or an abortion when the same is performed by a doctor of medicine licensed to practice medicine in North Carolina, if he can reasonably establish that:

There is substantial risk that continuance of the pregnancy would threaten the life or gravely impair the health of the said woman, or

There is substantial risk that the child would be born with grave physical or mental defect, or

The pregnancy resulted from rape or incest and the said alleged rape was reported to a law-enforcement agency or court official within seven days after the alleged rape, and

Only after the said woman has given her written consent for said abortion to be performed, and if the said woman shall be a minor or incompetent as adjudicated by any court of competent jurisdiction then only after permission is given in writing by the parents, or if married, her husband, guardian or person or persons standing in loco parentis to said minor or incompetent, and

Only when the said woman shall have resided in the State of North Carolina for a period of at least four months immediately preceding the operation being performed except in the case of emergency where the life of the said woman is in danger, and

Only if the abortion is performed in a hospital licensed by the North Carolina Medical Care Commission, and

Only after three doctors of medicine not engaged jointly in private practice, one of whom shall be the person performing the abortion, shall have examined said woman and certified in writing the circumstances which they believe to justify the abortion, and

Only when such certificate shall have been submitted before the abortion to the hospital where it is to be performed; provided, however, that where an emergency exists, and the certificate so states, such certificate may be submitted within twenty-four hours after the abortion.

clared unconstitutional and its enforcement enjoined.

Although the law is no respecter of persons, plaintiffs' very occupations lend credence to their contention that the state may not constitutionally prevent or circumscribe the fundamental right of a woman to choose whether or not to bear children and to prevent it by abortion if she and her physician should decide to do so.

Dr. Elizabeth Corkey is the Medical Director of the Mecklenburg County Family Planning Clinic, a medical expert in obstetrics and contraception, and formerly a medical missionary. Plaintiffs Hendrix, Parker and Burt are also doctors of medicine and respectively the Chairmen of the Departments of Obstetrics and Gynecology at the teaching hospitals of the University of North Carolina, Duke University and Wake Forest University. Each is a registered and licensed physician and surgeon under North Carolina law and each is certified as a specialist in the field of obstetrics and gynecology. Plaintiff Jones is a member of the North Carolina General Assembly and was largely responsible for the passage of the 1967 amendment to the statutes challenged in this law suit. For many years he has been an interested student of contraception, abortion and family planning. It is interesting that he asks the court to invalidate a statute for which he is largely responsible. His position is that it is the least restrictive legislation he could get enacted but that even so it is an unconstitutional burden on fundamental liberty.

Unquestionably, every one of the five plaintiffs is a qualified and informed expert on the problem of abortion in North Carolina. Indeed, each of them is doubtless qualified to testify as an expert witness in this very case. Although we deeply respect their informed opinions that the state has no justifiable interest in interfering with a woman's fundamental right to choose whether or not to bear children and implementing that right by choosing to abort, we think such a conclusion necessarily involves a value judgment we may not properly make. It seems to us the legislature may not unreasonably conclude that there is a sufficient public interest in protecting the embryo to permit limited statutory intrusion into what would otherwise be a protected zone of privacy. In only one minor respect do we hold the statute unconstitutional: the residency requirement as a condition precedent to obtaining a therapeutic abortion unconstitutionally, we think, limits the right to travel.

We avoid another serious constitutional problem by interpretation. We think the legislature did not intend to reverse the presumption of innocence, and that the burden of proof in a prosecution is on the state to show that an abortion did not come within the exemptions of G.S. § 14-45.1.

[1, 2] Despite the several assertions made by the state concerning matters of jurisdiction, we decline to dismiss on these grounds. The issues have been exhausted in other actions considering abortion laws, and we therefore deal with them summarily. First, we find that this is not a proper case in which to apply the doctrine of abstention, there being no state court interpretation of the statute that would alter the statute's constitutional impact. Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); Doe v. Randall, 314 F.Supp. 32 (D.Minn.1970). Nor do we accept the argument that justiciability fails for lack of standing. Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968); Roe v. Wade, 314 F.Supp. 1217, 1220 (N.D.Tex.1970); see Berger, Standing to Sue in Public Actions, Is It a Constitutional Requirement? 78 Yale L.J. 816 (1969). Finally, we agree that the plaintiffs are able to represent the rights of the class whose members they seek to protect. See Griswold v. Connecticut, 381 U.S. 479, 481, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Roe v. Wade, *supra*, 314 F.Supp. at 1219-1220.

I.

[3, 4] There is nothing in the United States Constitution about birth, contraception or abortion. But in Griswold v. Connecticut, *supra*, the Supreme Court derived from the several amendments to the Constitution a right of privacy. We are urged to extend Griswold v. Connecticut, *supra*, and its zone of privacy to insulate abortion from legislative control. In *Griswold* the Supreme Court recognized a zone of marital privacy into which the state may not constitutionally intrude where its only interest in doing so was said to be the discouragement of extramarital sexual relations. Thus, the court struck down Connecticut's law forbidding the giving of information and instruction and advice to married persons as to the means of preventing conception.

We agree with plaintiffs that there is no more precious aspect of the concept of liberty than the right to be left alone. As Mr. Justice Brandeis said dissenting in Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928):

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Even earlier, in Union Pacific Railway Company v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 36 L.Ed. 734 (1891), the Court said:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint and interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right to one's person may be said to be a right of complete immunity: to be let alone'.

We also agree with plaintiffs that whether or not to bear a child is ordinarily and up to a point within the zone of privacy of a woman and that she has the right to be let alone in making that determination. In short, it is none of the state's business whether a woman chooses to become pregnant, and beyond its province to forbid the practice of contraception. Griswold v. Connecticut, *supra*.

But that is not quite the question in this case. We think it is this: Can the State of North Carolina constitutionally assign to the human organism in its early prenatal development as embryo and fetus the right to be born (with certain exceptions as set out in the statute)? We think the answer must be "yes".

For the purposes of this case we assume, if we are not required to recognize, *e. g.*, Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678 (1965); Baird v. Eisenstadt, 1 Cir., 1970, 429 F.2d 1398, that as a general matter women possess under our Constitution a "fundamental right" to determine whether they shall bear children before they have become pregnant. A state may interfere with this right of choice only in special circumstances. *E. g.*, Buck v. Bell, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927). We deal in this case, however, not merely with whether a woman has a generalized right to choose whether to bear children, but instead with the more complicated question whether a pregnant woman has the right to cause the abortion of the embryo or fetus she carries in her womb. We do not find that an equation of the generalized right of the woman to determine whether she shall bear children with the asserted right to abort an embryo or fetus is compelled by fact or logic. Exercise of the right to an abortion on request is not essential to

an effective exercise of the right not to bear a child, if a child for whatever reason is not wanted. Abstinence, rhythm, contraception and sterilization are alternative means to this end. The first is, of course, infallible; the latter three are reliable to varying degrees approaching certainty. Before the "moment" of conception has occurred, *see generally* Ziff, Recent Abortion Law Reforms (Or Much Ado About Nothing), 60 J.Crim. L.C. & P.S. 3, 20–21 (1969), the choice whether or not to bear children is made in circumstances quite different from those in which such a choice might be made after conception. Apart, the sperm and the unfertilized egg will die; neither has the capacity to grow and develop, independently as does the fertilized egg. During fertilization, sperm and egg pool their nucleii and chromosomes. Biologically, a living organism belonging to the species homo sapiens is created out of this organization. Genetically, the adult man was from such a beginning all that he essentially has become in every cell and human attribute. *See generally* Gray, Anatomy of the Human Body 21–60 (Goss 27th ed. 1959); 5 Lawyers' Medical Cyclopedia § 37.1 (1960). The basic distinction between a decision whether to bear children which is made before conception and one which is made after conception is that the first contemplates the creation of a new human organism, but the latter contemplates the destruction of such an organism already created. To some engaged in the controversy over abortion, this distinction is one without a difference. These men of intelligence and good will do not perceive the human organism in the early part of its life cycle as a human "being" or "person". In their view, the granting to such an organism of the right to survive on a basis of equality with human beings generally should be delayed until a later stage in its development. To others, however, the "moment" of conception or some stage of development very close to this "moment" is the point at which distinctively human life begins. In their view, the difference between the decision not to conceive and the decision to abort is of fundamental, determinative importance. Thus the root problem in the controversy over abortion is the one of assigning value to embryonic and fetal life. *See* Giannella, The Difficult Quest for a Truly Humane Abortion Law, 13 Vill.L.Rev. 257 (1968).

"In considering the problem of valuing prenatal life, we heed the words of Mr. Justice Holmes:

> 'It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong * * *.'

Holmes, Collected Legal Papers 295 (1920). When distinctively human life begins is a matter about which reasonable, fair-minded men are in basic disagreement. Thus this case does not concern simply whether the pregnant woman has a fundamental right to be let alone in the control of her body processes, *cf.* Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 11 S.Ct. 1000, 35 L. Ed. 734 (1891) (submission to surgical examination), for it is unresolved whether, in the common understanding of the society in which she lives, choice of the destiny of the human organism developing within her is a matter directly affecting only her individual rights." Rosen v. Louisiana State Board of Medical Examiners, 318 F.Supp. 1217, 1224 (E.D.La.1970) (footnotes omitted).

Our inquiry must focus on the nature and extent of the state interest necessary to justify an invasion of the fundamental right of privacy. We are mindful of Holmes' admonition in his now vindicated[2] dissent in Lochner v. State

2. *See, e. g.*, Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955); Giboney v. Empire Storage and Ice Company, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834 (1949); Lincoln Federal Labor Union

of New York, 198 U.S. 45, 74, 25 S.Ct. 539, 49 L.Ed. 937 (1905), that the Constitution "is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." 198 U.S. at 76, 25 S.Ct. at 547.

The concept of state interest is one that has evaded specific definition.[3]

> An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determination addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.
>
> * * * * * *
>
> Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.

Berman v. Parker, 348 U.S. 26, 32, 75 S.Ct. 98, 99 L.Ed. 27 (1954).

To determine the state interest we shall not attempt to choose between extreme positions. Whether possessing a soul from the moment of conception or mere protoplasm, the fertilized egg is, we think, "unique as a physical entity," Lucas, Federal Constitutional Limitations of the Enforcement and Administration of State Abortion Statutes, 46 N.C.L.Rev. 730, 744 (1968), with the potential to become a person. Whatever that entity is, the state has chosen to protect its very existence. The state's power to protect children is a well established constitutional maxim. See, Shelton v. Tucker, 364 U.S. 479, 485, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); Prince v. Massachusetts, 321 U.S. 158, at 166–168, 64 S.Ct. 438, 88 L.Ed. 645. That this power should be used to protect a fertilized egg or embryo or fetus during the period of gestation embodies no logical infirmity, but would seemingly fall within the "plenary power of government." Poe v. Ullman, 367 U.S. 497, at 539, 81 S.Ct. 1752, 6 L.Ed.2d 989 (Harlan, J., dissenting). That there is a state interest has until recently been taken for granted. History sides with the state.[4]

In Babbitz v. McCann, 310 F.Supp. 293 (E.D.Wis.1970), a three-judge court sitting in judgment of Wisconsin's abortion law recognized the interest of the unborn child as well as that of the mother. That court chose to weigh the two: "For the purposes of this decision, we think it is sufficient to conclude that the mother's interests [before quickening] are superior to that of an unquickened embryo, * * *" *Id.* at 301. See also, Roe v. Wade, 314 F.Supp. 1217 (N.D.Tex.1970). Striking such a balance is not unreasonable. It may, indeed, be wide, humane and enlightened, but we

No. 19129 A.F. of L. v. Northwestern Iron & Metal Company, 335 U.S. 525, 69 S.Ct. 251, 93 L.Ed. 212 (1949); Olsen v. Nebraska, 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305 (1941); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937).

3. *See, e. g.*, United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

4. Under the common law in England, and in the early periods of this country's existence, it was a crime to commit acts leading to an abortion only after "quickening", but the scope of the prohibited period was extended to cover the entire time from conception to natural birth by statute in this country beginning in the latter part of the nineteenth century. Lucas, Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes, 46 N.C.L.Rev. 730, 731–35 (1968). The North Carolina statute in question was enacted in its original form in 1881 and thereafter not amended until 1967.

submit it is a value judgment not committed to the discretion of judges but reposing instead in the representative branch of government. Although there is a difference between social due process and the discredited economic due process of *Lochner*, *supra*, there is, we think, no real distinction. Both involve values. As Mr. Justice Frankfurter wrote:

> Courts can fulfill their responsibility in a democratic society only to the extent that they succeed in shaping their judgments by rational standards, and rational standards are both impersonal and communicable. Matters of policy, however, are by definition matters which demand the resolution of conflicts of value, and the elements of conflicting values are largely imponderable. Assessment of their competing worth involves differences of feeling; it is also an exercise in prophesy. Obviously the proper forum for mediating a clash of feelings and rendering a prophetic judgment is the body chosen for those purposes by the people.

American Federation of Labor v. American Sash & Door Co., 335 U.S. 538, 557, 69 S.Ct. 258, 267, 93 L.Ed. 222 (1949).

Persuasive, therefore, as the host of statistics, facts and opinions plaintiffs urge upon us appear to be, and as commendable as the efforts plaintiffs have shown in their attempt to right what is considered by many a social wrong are, we must decline what we consider to be an invitation to decide what is best for North Carolina.[5] The legislature is the proper arena for the resolution of "fundamentally differing views." [6]

II.

[5] The plaintiffs also challenge the constitutionality of the residency requirement contained in G.S. § 14–45.1 limiting the availability of therapeutic abortions to those women who have "resided in the State of North Carolina for a period of at least four months immediately preceding the operation being performed except in the case of emergency where the life of the said woman is in danger." The basis of the attack on the constitutionality of this provision is that it unduly infringes upon the fundamental right to travel guaranteed to all citizens. Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1968); United States v. Guest, 383 U.S. 745, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966). See also, Keenan v. Board of Law Examiners of State of North Carolina, 317 F.Supp. 1350 (E.D.N.C.1970).

The state expresses a fear that has not materialized; taxation of our hospital facilities by an influx of out of state patients seeking abortions. We think our law is not so liberal. But if any protection is needed, the sweep of the provisions in 14–45.1 far exceeds the scope of the interest by penalizing those who enter North Carolina with the bona fide intent of making the state their permanent residence. "[T]he effect of the waiting-period requirement * * * is to create two classes * * * indistinguishable from each other except that one is composed of residents * * *." Shapiro v. Thompson, *supra*, at 627, 89 S.Ct. at 1327.

We conclude that the requirement is overbroad. The interest of the state in maintenance of quality medical treatment for its citizens can be effected without such unnecessary discrimination against other citizens of the United States. In the unlikely event medical facilities should become overtaxed, some fair system of priority, short of flat

5. Since the state's interest in the protection of the embryo is sufficient to support the legislation, we need not consider the interest in protecting the mother's health except to say we think that interest is exhausted with the sensible requirement that no unlicensed practitioner may perform an abortion. Apparently, abortions by competent medical doctors within the first three months are no more dangerous to life and health than live births. *See*, People v. Belous, 80 Cal.Rptr. 354, 362, 458 P.2d 194, 200–201 (1969).

6. Holmes, J., dissenting in Lochner, *supra*, at 74, 25 S.Ct. 539.

exclusion of non-residents, may be devised.

III.

[6] G.S. § 14–44 makes it a felony to willfully administer to any woman who is pregnant or quick with child any substance whatever with intent to destroy *such child*. G.S. § 14–45 is virtually identical but the evil intent proscribed is to procure a miscarriage or injure or destroy *the woman*. The thrust of 14–44 is to protect the unborn child and the thrust of 14–45 to protect the pregnant woman.

G.S. § 14–45.1, enacted in 1967, provides that G.S. §§ 14–44 and 14–45 do not apply when an abortion is performed by a doctor of medicine, licensed in North Carolina, "if he can reasonably establish that":

(1) There is substantial risk that continuation of the pregnancy would threaten the life or gravely impair the health of the woman or;

(2) substantial risk the child would be born with grave physical or mental defect or;

(3) the pregnancy resulted from rape or incest.

The foregoing are the three reasons that will suffice under North Carolina law to make abortion lawful. The rest of 14–45.1 establishes certain procedures that must be followed:

(1) the woman, or if she is a minor or incompetent, someone acting for her, must give her written consent to the abortion;

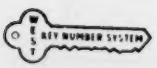
(2) the abortion must be performed in a hospital licensed by the North Carolina Medical Care Commission;

(3) three doctors must have certified in writing the circumstances they believe to justify the abortion and the certificate furnished to the hospital. There is a provision that in an emergency the certificate may be submitted to the hospital within 24 hours after the abortion.

Although we may not interpret a state statute with finality, for that is the province of North Carolina's highest court, we think the words in G.S. § 14–45.1 authorizing abortion by a medical doctor "* * * if he can reasonably establish that * * *" simply means that the doctor must establish *to his own satisfaction* that one of the three statutory reasons for abortion exists before he may lawfully proceed. We would not lightly assume that the legislature meant to make all abortions unlawful unless in a criminal prosecution the medical doctor could reasonably establish his innocence. The presumption of innocence is deeply rooted in our fundamental law. To read the statute so as to place the burden of proof upon the defendant in a criminal prosecution would offend a maxim implicit in due process—that the accused is presumed innocent until proven guilty. Coffin v. United States, 156 U.S. 432, 453–460, 15 S.Ct. 394, 39 L.Ed. 481 (1895). See also, United States v. Vuitch, 305 F. Supp. 1032, 1034 (D.D.C.1969). The burden of proof must be upon the state to show that the conditions for performing therapeutic abortions, a substantial risk to the life or the health of the mother, or a substantial risk that the child would be born with grave physical or mental defect, or rape or incest, were not present. Due process forbids that the accused be required to establish to the court and jury that the abortion performed came within the exemptions of the statute.

We think this was unquestionably the legislative intent, and since the statute can be saved only by such an interpretation, we do not hesitate to put that construction upon it.

An appropriate judgment will be entered declaring the statutes constitutional except for the residency requirement.



A. H. STEINBERG, M.D. and R. Vance Fitzgerald, M.D. and Sandra Frank and Waldemar Agrow and Mary Doe, for and on behalf of all persons similarly situated, Plaintiffs,

v.

Paul BROWN, Att'y General of Ohio, Defendants, and Harry Friberg, Prosecuting Att'y of Lucas County, Ohio, and Anthony Bosch, Chief of Police, Toledo, and Intervening Defendant Homer Schroeder, M.D.

No. C 70-289.

United States District Court,
N. D. Ohio, W. D.
Dec. 18, 1970.

Action for injunctive and declaratory relief, attacking validity of Ohio abortion statute. The three-judge Dis-

trict Court, Don J. Young, J., held that the statute is not unconstitutionally vague and does not violate protected right of privacy, the equal protection clause, or the cruel and unusual punishment prohibition.

Judgment for defendants.

Ben C. Green, J., dissented and filed opinion.

1. Constitutional Law ⇐42

Plaintiffs, including physicians, social worker, clergyman, and mother who had been pregnant at time of commencement of action, had standing to challenge constitutionality of Ohio abortion statute. R.C.Ohio § 2901.16.

2. Courts ⇐508(7)

Plaintiffs attacking constitutionality of Ohio abortion statute were not entitled to injunction against enforcement of statute where it did not appear that prosecution of any plaintiff was commenced or even threatened.

3. Criminal Law ⇐13

Ohio abortion statute is not unconstitutionally vague. R.C.Ohio § 2901.16.

4. Abortion ⇐1
Constitutional Law ⇐82

Ohio abortion statute does not deprive persons of privacy protected by Federal Constitution. R.C.Ohio § 2901.16; U.S.C.A.Const. Amends. 1, 5, 14.

5. Abortion ⇐1

State has legitimate interest to legislate for purpose of affording embryonic or fetal organism an opportunity to survive, and this interest is superior to claimed right of pregnant woman or anyone else to destroy fetus except when necessary to preserve her own life. R.C.Ohio § 2901.16.

6. Constitutional Law ⇐82

Right and power of man or woman to determine whether or not to participate in process of creation is private and personal one with which law cannot and should not interfere.

7. Abortion ⇐1
Constitutional Law ⇐250

Ohio abortion statute does not violate equal protection clause, despite claim that under it wealthy persons are better able to procure abortions than the poor. R.C.Ohio § 2901.16; U.S.C.A. Const. Amend. 14.

8. Constitutional Law ⇐211

Equal protection clause is not designed to prevent that inequality which is often found in life and nature. U.S.C.A.Const. Amend. 14.

9. Criminal Law ⇐1213

Ohio abortion statute does not violate Eighth Amendment proscription of cruel and unusual punishment. R.C.Ohio § 2901.16; U.S.C.A.Const. Amend. 8.

Gerald B. Lackey, Harland M. Britz, Louise Jacobson, Toledo, Ohio, for plaintiffs.

Wm. J. Lee, Asst. Atty. Gen., Columbus, Ohio, for Paul Brown.

John Hayward, Toledo, Ohio, for Harry Friberg.

Frank Pizza, Toledo, Ohio, for Anthony Bosch.

David J. Young, Columbus, Ohio, for Homer Schroeder.

Before WEICK, Circuit Judge, GREEN and YOUNG, District Judges.

OPINION

DON J. YOUNG, District Judge.

This is another in a series of cases which have been and are being filed in various courts throughout the United States attacking the constitutionality of state statutes forbidding abortions. This particular action was brought under Title 28 U.S.C. §§ 1331-1343, Title 28 U.S.C. §§ 2201 and 2202, Title 28 U.S.C. §§ 2281 and 2284, and Title 42 U.S.C. § 1983. The plaintiffs seek a declaratory judgment that Ohio's abortion statute, Section 2901.16 Ohio Rev.

Code,[1] is unconstitutional under the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the Constitution of the United States. They also seek injunctive relief against the enforcement of the statute. Hence a three judge court was convened to hear and determine the matter.

The plaintiffs claim that each of them represents a class of persons who are affected by the Ohio statute complained of. One plaintiff is a physician specializing in obstetrics and gynecology; one is a psychiatrist; one is a social worker; one is a minister of religion; and the final one is a young woman, married but separated from her husband, the mother of one child born in wedlock, and at the time of commencement of the action early in September, 1970, eight to ten weeks pregnant with another child conceived in wedlock.

The defendants named in the amended complaint are the Governor and Attorney General of the State of Ohio, the Prosecuting Attorney of Lucas County, Ohio, wherein this Division of the District Court sits, and the Chief of Police of the City of Toledo, the county seat of Lucas County.

The amended complaint seeks a declaratory judgment that Section 2901.16 Ohio Rev.Code is in violation of the rights of the plaintiffs under the six amendments to the Constitution listed above and for injunctive relief.

A motion for a temporary restraining order was heard and overruled by the single judge of the Western Division of the Northern District of Ohio, and a motion to intervene as a party defendant on behalf of the unborn child of the plaintiff Mary Doe, and the class of unborn children of the women of the class represented by Mary Doe, filed by Homer Schroeder, M. D. was granted by this single judge.

Dr. Schroeder also filed a motion to be appointed as Guardian ad Litem for the unborn child, and motions for leave to file briefs *amicus curiae* were filed by a group of some forty organizations and individuals supporting the plaintiffs, and by the Ohio Right to Life Society, Inc. supporting the defendants. Various other motions were filed, including motions by all of the defendants except the intervening defendant Schroeder to dismiss the complaint, and a motion of the plaintiff to dismiss the intervening defendant Schroeder.

The motions to dismiss were overruled, as were the motion to appoint a guardian ad litem for the unborn child and children, and the other technical motions. The two principal motions for leave to file briefs *amicus curiae* were granted.

The case was submitted upon the evidence offered at the hearing on the motion for a temporary restraining order, certain stipulations, the deposition of John F. Hillabrand, M. D., the briefs, and arguments of counsel.

The evidence indicated that the plaintiffs Steinberg and Fitzgerald had been consulted by the plaintiff Mary Doe. When Dr. Steinberg examined her on October second, she appeared to be eight to ten weeks pregnant, but he testified that another doctor might think she was twelve to fourteen weeks pregnant. He also testified that she was in normal physical condition, and that her previ-

1. Ohio's abortion statute provides:

> No person shall prescribe or administer a medicine, drug, or substance, or use an instrument or other means with intent to procure the miscarriage of a woman, unless such miscarriage is necessary to preserve her life, or is advised by two physicians to be necessary for that purpose.
>
> Whoever violates this section, if the woman either miscarries or dies in consequence thereof, shall be imprisoned not less than one nor more than seven years.

This statute or one very similar to it has been in effect since at least 1834. Section 1 of the Act of February 7, 1834, S & C Stat. 440. Wilson v. State, 2 Ohio St. 319 (1853). There have been many prosecutions under it but until the present case, so far as we have been able to ascertain, no one has ever challenged its constitutionality.

ous pregnancy had been normal, with no complications. He further testified that at that stage of her pregnancy, abortion would present less hazard to life than to carry the child to term, but this situation would not continue, as the hazards of abortion increase later in pregnancy.

The plaintiff psychiatrist, Dr. Fitzgerald, testified that Mary Doe had a serious defect in her ability to make judgments about people and situations; that her daydreams influenced her more than the actual facts; that she was moderately depressed and withdrawn; that she was seriously disturbed, and presented gross or serious defects in her ego-functioning; that she could become a child-battering mother; and that she irrationally rejected the alternative to abortion of carrying the child to term and then consenting to adoptive placement. However, he did not predict that she would either die or kill herself if this pregnancy were carried to term, although it would do her grave psychological harm. He stated that the likelihood of great damage coming to the infant from neglect or abuse were high indeed. It was his conclusion that in such states as California or Colorado, Mary Doe could receive therapeutic approval for abortion on psychiatric and medical grounds.

The evidence revealed that Mary Doe was a welfare recipient in Wood County, Ohio, adjacent to Lucas County. She is twenty-one years old.

Both of the plaintiff doctors testified that they believed they would be violating the Ohio abortion statute if they advised the plaintiff Mary Doe to seek an abortion outside the State of Ohio, although it was stipulated in evidence that no physician had ever been prosecuted in Lucas County for a violation of Section 2901.16 Ohio Rev.Code as an aider and abettor on the ground that he counselled or procured an abortion, nor had any minister or social worker. It was also stipulated that no such prosecutions had ever been threatened, nor had any of the plaintiffs ever been warned by any law enforcement authorities.

The only other evidence in the case was the deposition of Dr. Hillabrand offered by the defendants. This concerned the development of unborn children from conception to birth. It also offered statistical evidence that the risk of maternal mortality was far higher from abortions performed even under clinical conditions than from carrying the child until natural childbirth. This testimony is, of course, in square conflict with that of the plaintiff Steinberg, but it is unnecessary for the purposes of this opinion to resolve this conflict, since it involves policy considerations which are properly legislative, rather than judicial, concerns.

This case presents threshold questions of the right to injunctive relief, standing of the plaintiffs to maintain the action, and the doctrine of abstention. These problems have been considered in other similar cases.

[1] The question of standing is considered in Roe v. Wade, 314 F.Supp. 1217 (N.D.Texas 1970), and Doe v. Bolton, 319 F.Supp. 1048 (N.D.Georgia 1970). Both cases resolved the question favorably to parties who stood in the positions of the plaintiffs here. We accept the conclusions in these cases, and hold that the plaintiffs herein have proper standing to maintain this action. *Cf.* Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

[2] The problem of abstention was considered and abstention denied in the case of Babbitz v. McCann, 310 F.Supp. 293 (E.D.Wis.1970) app. dis. 400 U.S. 1, 91 S.Ct. 12, 27 L.Ed.2d 1 (1970). See also, Doe v. Bolton, *supra*. There was no proof that prosecution of any of the plaintiffs was commenced or even threatened. Plaintiffs are therefore not entitled to injunctive relief. The prayer for injunction restraining the enforcement of the statute is therefore denied.

This then requires a resolution of the merits of the plaintiffs' request for

declaratory relief, to which we now address ourselves.

The plaintiffs' first contention is that Section 2901.16 Ohio Rev.Code is unconstitutionally vague and indefinite. This same contention has been raised in a number of cases, involving statutes of different states. There are differences in language among all of the various statutes that have been brought before the courts, and by using the same sort of hair-splitting semanticism that the plaintiffs have employed in argument, it would be possible to distinguish the Ohio statute from the others. It does not appear to us, however, that there is sufficient difference in substance among the various statutes involved in other cases to make it desirable to use so narrow and limited an approach to the problem. It seems preferable to take a stand with one group or the other of the divided authorities.

Abortion statutes have been held unconstitutionally vague in the cases of California v. Belous, (1969) 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194, cert. denied, 397 U.S. 915, 90 S.Ct. 920, 25 L.Ed.2d 96 (1970); United States v. Vuitch, 305 F.Supp. 1032 (D.D.C.1969), prob. juris. noted, 397 U.S. 1061, 90 S.Ct. 1497, 25 L.Ed.2d 683 (1970); and Roe v. Wade, 314 F.Supp. 1217 (N.D. Texas 1970). Contrary holdings are found in Babbitz v. McCann, *supra* and Rosen v. Louisiana State Board of Medical Examiners, 318 F.Supp. 1217 (E.D. La. New Orleans Div. 1970). The question was raised, but not decided, in Doe v. Bolton, *supra*.

[3] We believe that the better reasoning is found in those cases which hold that there is no unconstitutional vagueness in the abortion statutes which they consider. It appears to us that the vagueness which disturbs the plaintiffs herein results from their own strained construction of the language used, coupled with the modern notion among law review writers that anything that is not couched in numerous paragraphs of fine-spun legal terminology is too imprecise to support a criminal conviction. See Davis v. Toledo Metropolitan Housing Authority, 311 F.Supp. 795, 797 (N.D.Ohio W.D.1970). The words of the Ohio statute, taken in their ordinary meaning, have over a long period of years proved entirely adequate to inform the public, including both lay and professional people, of what is forbidden. The problem of the plaintiffs is not that they do not understand, but that basically they do not accept, its proscription.

The second contention of the plaintiffs and those *amicus curiae* who support their position is that the Ohio abortion statute deprives them of the right of privacy which is supposedly protected by several amendments to the Constitution of the United States. The arguments and authorities cited go on at inordinate length, but when the meringue is sluiced away, they come down to the contention that the decision of the Supreme Court in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), which recognized the right of marital privacy by voiding a statute preventing dissemination of contraceptive information and devices, must by extension protect the right to destroy the product of conception after it has taken place.

[4] Again the authorities are divided, some courts accepting the plaintiffs' view, and others refusing to do so. The majority of this Court do not accept the plaintiffs' contentions as constitutionally valid, but believes that the cases which do accept them have not been based on a proper legal or factual understanding. The plaintiffs' contentions seek to extend far beyond the holding in the *Griswold* case this "right of privacy", which is nowhere expressly mentioned in the Constitution or its amendments, but is only found in the "penumbra" of those articles. Rights, the provision of which is only implied or deduced, must inevitably fall in conflict with the express provisions of the Fifth and Fourteenth Amend-

ments that no person shall be deprived of life without due process of law. The difference between this case and *Griswold* is clearly apparent, for here there is an embryo or fetus incapable of protecting itself. There, the only lives were those of two competent adults.

[5] Without going into all of the myriad of cases and texts that deal with various aspects of this problem, the question resolves itself into whether or not the state has a legitimate interest to legislate for the purpose of affording an embryonic or fetal organism an opportunity to survive. We think it has and on balance it is superior to the claimed right of a pregnant woman or anyone else to destroy the fetus except when necessary to preserve her own life.

One of the great puzzles of the law is why its practitioners blithely argue their cases and make their decision in total disregard, if not ignorance, of the laws of nature. Automobile collision cases, for example, are often decided on the basis of facts which are completely impossible under the physical laws of motion and mechanics. So in this area, those decisions which strike down state abortion statutes by equating contraception and abortion pay no attention to the facts of biology.

The evidence offered by the defendants in this case shows clearly, conclusively, and in detail that neither the human ovum or spermatozoon are alive, or capable of independent life, in the accepted meaning of that word. One dictionary definition of the word "life" is

> that quality or character [that] distinguishes an animal or a plant from inorganic or dead organic bodies and which is especially manifested by metabolism, growth, reproduction and internal powers of adaptation to the environment. Webster's New International Dictionary of the English Language (2nd ed. 1934).

Biologically, when the spermatozoon penetrates and fertilizes the ovum, the result is the creation of a new organism which conforms to the definition of life just given. Although this is a definite beginning, there is no assurance in any particular case as to how long the life thus begun will continue. It may endure only a few hours or days, or it may continue in excess of a century, so far as human life is concerned. In other life forms it may continue for many measurable centuries, or even for an immeasurable and endless period. Thus when a new life comes into being with the union of human egg and sperm cells, it may terminate, or be terminated, at any moment after it commences, and before, at, or after the particular developmental process called "birth" takes place. Such terms as "quick" or "viable", which are frequently encountered in legal discussion, are scientifically imprecise and without recognized medical meaning, and hence irrelevant to the problem here presented. As scientific knowledge of prenatal physiological processes increases, medical intervention will have a greater chance of avoiding premature termination of lives of children, both before and after birth.

[6] Thus contraception, which is dealt with in *Griswold*, is concerned with preventing the creation of a new and independent life. The right and power of a man or a woman to determine whether or not to participate in this process of creation is clearly a private and personal one with which the law cannot and should not interfere.

It seems clear, however, that the legal conclusions in *Griswold* as to the rights of individuals to determine without governmental interference whether or not to enter into the processes of procreation cannot be extended to cover those situations wherein, voluntarily or involuntarily, the preliminaries have ended, and a new life has begun. Once human life has commenced, the consti-

tutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it.

Obviously, of course, there are limits to the protection which the state can and must extend to human life, but these are clear and well-marked in the law, and have been for centuries, essentially on the basis that "self-preservation is the first law of nature". Thus throughout the development of our law, self-defense has always been recognized as a justification for homicide. Hence the provision in the statute here in question that abortion is noncriminal when it is necessary, or declared by two physicians to be necessary, to preserve the life of the mother. One human life may legally be terminated when doing so is necessary to preserve or protect another or others.

There is authority for the proposition that human life commences at the moment of conception.

> Biologically speaking, the life of a human being begins at the moment of conception in the mother's womb. 42 Am.Jur.2d, Infants § 2 at p. 9 (1968).
>
> From the viewpoint of the civil law and the law of property, a child *en ventre sa mere* is not only regarded as human being, but as such from the moment of conception * * * which it is in fact. Bonbrest v. Kotz, 65 F.Supp. 138, 140 (D.D.C.1946).
>
> medical authority has recognized long since that the child is in existence from the moment of conception * * W. Prosser, The Law of Torts, § 56 at 355 (3rd ed. 1964).

In this connection it should be noted that Ohio never did follow Mr. Justice Holmes's opinion in Dietrich v. Inhabitants Northampton, 138 Mass. 14, 52 Am.Rep. 242 (1884), which for more than half a century fouled up the tort law with respect to pre-natal injuries, but is now pretty well abandoned by all courts except those which, once having made a mistake, cannot admit it, but expect the legislature to rescue the public from the consequences of their error. The courts of Ohio have never hesitated to protect a child merely because it was unborn at the time of injury.

If the law is in accord with science for the purpose of protecting property rights, how can it possibly not be in accord with science for the purpose of protecting life itself, without which no property right has any worth or value whatsoever?

It should perhaps be mentioned that the implication, or sometimes the express statement, found in arguments of persons in the position of the plaintiffs in this case, which equates the necessity of giving birth to a child with the necessity of rearing the child, has no foundation in law or fact. The law may take permanently from its natural parents a child who is neglected by them, and the frequent pusillanimity of courts and social agencies in this regard does not change the legal situation. The statutes of practically all states provide for the voluntary surrender of children. When the statutes are complied with, the child is legally and practically as dead to its natural parents as if it had been aborted, stillborn, or had died in infancy. The validity and effectiveness of surrender statutes have been upheld in every case in which they have been questioned. There is no need for parents to terminate an undesired pregnancy by killing the unborn child physically, when with less risk to themselves its legal death can so easily be procured.

It is our conclusion that Section 2901.16 Ohio Rev.Code is a valid and proper exercise of the power of the state.

[7] The plaintiffs' contention that the abortion statute is in violation of the equal protection clause of the Fourteenth Amendment requires little consideration. This statute, § 2901.16 Ohio Rev.Code is clearly non-discriminatory upon its face. There is nothing in the evidence before the Court to

show any official discrimination in the application of the statute, or in commencing prosecutions under it.

[8] Assuming, *arguendo*, that the contentions of the plaintiffs that wealthy persons can shop for more complaisant physicians, or can travel to remote places where abortion is legal, while poor people cannot, have a sound basis in fact, the situation is not inherent in the language of the statute. Neither is it caused, nor could it be cured, by either action or inaction on the part of the government, either state or national. The equal protection clause is not designed to prevent that inequality which is often found in life and in nature, nor could any law be framed to do so. So far as this case is concerned, on the evidence adduced, the social and economic conditions alleged by plaintiffs as a basis for their equal protection argument, do not affect any of the actual parties, and hence the classes they represent. In seeking a temporary restraining order the plaintiffs appeared to contend that only the force of the law stood in the way of plaintiff Mary Doe undergoing the abortion she desired, and the other plaintiffs desired her, to have. It was not claimed that her economic or social situation would prevent her from getting an abortion.

We do not find that § 2901.16 Ohio Rev.Code is in any way violative of the equal protection clause of the Fourteenth Amendment.

[9] The contention that the Ohio abortion statute contravenes the Eighth Amendment proscription of cruel and unusual punishment is unworthy of serious consideration. It may seem cruel to a hedonist society that "those who dance must pay the piper", but it is hardly unusual, and the language of the amendment is in the conjunctive, not the disjunctive. In the complexities of human life it is not always possible to foretell with exactitude the entire consequences of even the simplest or most innocent action. But if it is known generally that an act has possible consequences that the actor does not desire to incur, he has always the choice between refraining from the act, or taking his chance of incurring the undesirable consequences. There are no other alternatives. This is peculiarly true with respect to the bearing of children. If one gambles and loses, it is neither statute nor constitution that determines the price, or how it shall be paid. The result is not punishment, but merely the *quid pro quo*.

The controversial problems of the plaintiffs should be addressed to the state's legislature and not the courts for solution. The courts ought not to be expected to provide a remedy for all of the ailments afflicting society.

For the foregoing reasons, the plaintiffs are not entitled to a declaratory judgment invalidating Ohio's abortion statute, Section 2901.16 Ohio Rev.Code.

This opinion is adopted as findings of fact and conclusions of law. Judgment will be entered in favor of the defendants dismissing the amended complaint.

BEN C. GREEN, District Judge (dissenting):

I concur in the determination of the majority that plaintiffs herein have proper standing to maintain this action and that this Court should not abstain from the exercise of jurisdiction. However, I cannot agree with the decision on the merits of the declaratory judgment proceeding.

In its present form, the Ohio statute on abortion which emanates from legislation first enacted 136 years ago, provides as follows:

> *Ohio Revised Code* § 2901.16 *Attempt to procure abortion*
>
> No person shall prescribe or administer a medicine, drug, or substance, or use an instrument or other means with intent to procure the miscarriage of a woman, unless such miscarriage is necessary to preserve her life, or is advised by two physicians to be necessary for that purpose.

> Whoever violates this section, if the woman either miscarries or dies in consequence thereof, shall be imprisoned not less than one nor more than seven years.

Plaintiffs contend that this statute is unconstitutionally vague and indefinite. One of the criteria against which the validity of a criminal statute, such as O.R.C. § 2901.16, must be measured is reflected in the holding of the Supreme Court in Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926), that:

> * * * a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *Id.*, p. 391, 46 S.Ct. p. 127.

The majority opinion passes off the question of vagueness of this statute with the statement that:

> It appears to us that the vagueness which disturbs the plaintiffs herein results from their own strained construction of the language used, coupled with the modern notion among law review writers that anything that is not couched in numerous paragraphs of fine-spun legal terminology is too imprecise to support a criminal conviction.
>
> * * * The words of the Ohio statute, taken in their ordinary meaning, have over a long period of years proved entirely adequate to inform the public, including both lay and professional people, of what is forbidden. The problem of the plaintiffs is not that they do not understand, but that basically they do not accept, its proscription.

It is my opinion that the difficulty with the statute in question is not its failure to be phrased in "numerous paragraphs of fine-spun legal terminology", but rather its attempt to define a medical problem in terms that are not understandable by the medical profession. A continuing complaint of the medical profession is that the laws in general, and judicial decisions, are not responsive to the realities of medical science. It is interesting to note that while the body of the statute condemns the attempt to procure a "miscarriage", the statute is captioned "Attempt to procure abortion." This failure of this statute, and others like it, to observe the medical distinction between abortion and miscarriage has been noted (1 O.Jur.2d, Abortion, § 2; 1 Am.Jur.2d, Abortion, § 1), and it is said that the two terms are used indiscriminately by the courts. 1 O.Jur.2d, Abortion, § 2.

An excellent discussion of the vagueness of the phrase "necessary to preserve" is found in People v. Belous, 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194 (1969), cert. den. 397 U.S. 915, 90 S.Ct. 920, 25 L.Ed.2d 96 (1970), wherein an abortion statute similar to that of Ohio was held unconstitutional. Reiteration of all the considerations reviewed therein which led the court to find the statute unconstitutionally vague is not necessary. However, I should like to set forth what I believe to be a primary example of the vagueness of the Ohio statute: the suicidal patient.

A pregnant woman informs her physician that if her pregnancy goes to term she will take her own life. Is an abortion *necessary to preserve* the life of that patient? The patient will not die from any physiological condition related to her pregnancy. Suicide is an intentional act (although, perhaps, not truly a volitional one), and the patient may not, in fact, carry out her threat. Assuming that the physician has strong and valid reasons to believe that his patient will take her own life, does this statute tell him whether he may legally terminate the pregnancy?

There are other questions created by this statute. How imminent must the threat of death be to warrant an abortion "to preserve life?" If permitting a pregnancy to go to term would clearly shorten the mother's life by a substantial number of years, would a physician be justified in performing an abortion in

accordance with the term "necessary to preserve her life?"

An Ohio court has recently defined a "necessary thing" as follows:

> A necessary thing may supply a wide range of wants, from mere convenience to logical completeness. City of Dayton v. Borchers, 13 Ohio Misc. 273, 232 N.E.2d 437, 441, 42 O.O.2d 193, 197 (Ohio Com.Pl.1967)

Such a definition certainly does not advise what is permitted and what is forbidden.

With regard to the assertion that the lessons of time have compensated for the deficiencies of the statute, I do not find that to be the case. I have endeavored to examine all recorded Ohio decisions construing O.R.C. § 2901.16 and the predecessor thereto, and find that not one of the cases I have reviewed construes the statutory phrase "necessary to preserve her life", or the language of similar import in the earlier statutes. (A listing of the said decisions in appended hereto). A study of the Ohio case histories offers little guidance to the physician searching for the meaning of the language "necessary to preserve her life."

No person may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids. Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888 (1939). It is my opinion that O.R.C. § 2901.16 is unconstitutionally vague. Cf. Roe v. Wade, 314 F. Supp. 1217 (D.C.N.D.Tex., 1970); United States v. Vuitch, 305 F.Supp. 1032 (D.C.D.C.1969); People v. Belous, supra.

I am also of the opinion that the statute suffers from the constitutional vices of over-breadth and violation of equal protection of the law. Roe v. Wade, supra; People v. Belous, supra. In reaching this conclusion, I find the applicable law to be well stated in People v. Belous, supra, 80 Cal.Rptr. 354, 362, 458 P.2d 194, 202:

> Although we may assume that the law was valid when first enacted, the validity of a law in 1850 does not resolve the issue of whether the law is constitutionally valid today. [Citations omitted]
>
> Constitutional concepts are not static. Our United States Supreme Court said, regarding the equal protection clause of the Fourteenth Amendment: "We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment 'does not enact Mr. Herbert Spencer's Social Statics.' [Citation] Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be authorized to practice surgery, carried out the limits of fundamental rights. * * *" (Harper v. Virginia State Bd. of Elections (1966) 383 U.S. 663, 669, 86 S. Ct. 1079, 1082, 16 L.Ed.2d 169; see also, Perez v. Sharp, *supra*, 32 Cal.2d 711, 727, 198 P.2d 17; Galyon v. Municipal Court, 229 Cal.App.2d 667, 671–672, 40 Cal.Rptr. 446, and cases cited therein ["[A] statute valid when enacted may become invalid by change in the conditions to which it is applied:"]. See also, Means, *supra*, 14 N.Y.L.F. 411, 514–515.)

Virtually all the cases which have considered this question recognize that when the abortion statutes were enacted the surgical procedure required in an abortion presented a substantial risk of death to the woman involved. It is also recognized that this situation no longer exists with today's medical advances. Protection of the mother from unsafe surgical procedures may well have been in the legislators' minds when they enacted the Ohio statute in 1834. Modern day medicine, however, makes induced miscar-

riage in the first trimester of pregnancy a safer procedure than delivery at full term. See, People v. Belous, supra, 80 Cal.Rptr. 360–361, 458 P.2d 200–201. In many areas the mortality rate from therapeutic abortion is less than that occasioned by childbirth. Note, Abortion Reform: History, Status and Prognosis, 21 Case W.Res.L.Rev. 521, 522–523 (1970).

Under each of the statutes enacted by the Ohio Legislature regulating the right to abortion there was exempted therefrom a classification of pregnant women whose interests were deemed superior to those of the child she was carrying. Having thus recognized that there are pregnant women whose interests rise above all others, the state may not unreasonably restrict the right of pregnant women to be included in such classification.

Viewed in its historical perspective, the Ohio statute could well have been considered as a reasonable measure when it was adopted 136 years ago. At that time the risk of death on the operating table for any surgical procedure was extremely serious, and the state, to protect the interests of its citizens, could reasonably restrict the availability of abortion to those women who faced an equally serious risk of death if the operation was not performed.

When this statute was first enacted, the discipline of psychiatry was unknown in the medical profession. Today, it is recognized that mental illness is, at least, as great a threat to human well-being as is physical illness. We also know that many factors can precipitate a permanent and incurable mental disorder, among them the strain of childbirth or the inability of the mother to cope with the responsibilities of caring for an infant.

In my opinion, the continuance of the sole exception to the abortion statute of the necessity to save life is a refusal to recognize the advance of medical science in its understanding of the mind, and can no longer be considered as representing a reasonable classification. In effect, this statute says that a woman whose continued physical life is threatened by pregnancy may secure appropriate medical help, but that a woman whose sanity is equally threatened must be condemned to a continuing existence without the human attributes of intellect and reason. I do not believe that our society can condone such a classification as reasonable when, with minimal risk to the physical well-being of the woman, the dire potential psychiatric consequences can be avoided.

Similarly, I have serious reservations regarding the exclusion from the right to abortion of the victims of forcible rape or the minor who is pregnant as the result of an uninvited incestuous relationship. The innocent victim of such a crime did not have the opportunity to refrain from the act which resulted in pregnancy. To suggest that, in the case of such an unfortunate circumstance, pregnancy is a *quid pro quo* or that "those who dance must pay the piper" strikes me an inhumane. I believe that the interests of such women in being relieved from the consequences of the violations of their body should, in a civilized society, be deemed superior to the interests of the unborn child conceived in violence or lust.

I now turn to the contention of plaintiffs' covering the question of the invasion of the right of privacy, and the relationship of the decision of the United States Supreme Court in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), to the validity of the Ohio abortion statute, O.R.C. § 2901.16.

Regarding the application of *Griswold* to the instant case, the majority distinguishes *Griswold* on the basis that the decision, which struck down a state ban on the dissemination of contraceptive information and devices, involved only the interests of two competent adults, whereas in this case "there is an embryo or fetus incapable of protecting itself." In my opinion, such an approach to *Griswold* totally disregards the constitutional doctrine enunciated therein, and looks

merely to the narrow fact issue before the Supreme Court.

The majority opinion states:

> Without going into all of the myriad of cases and texts that deal with various aspects of this problem, the question resolves itself into whether or not the state has a legitimate interest to legislate for the purpose of affording an embryonic or fetal organism an opportunity to survive. We think it has and on balance it is superior to the claimed right of a pregnant woman or anyone else to destroy the fetus except when necessary to preserve her own life.

It appears from a further reading of the majority opinion that the basis for their conclusion is a finding that human life exists from the time of conception.

I will not debate the biological or philosophical conclusion of the majority that, from the moment of conception a human life has commenced, although retired United States Supreme Court Justice Tom C. Clark does appear to take issue therewith, Clark, Religion, Morality and Abortion: A Constitutional Appraisal, 2 Loyola Univ. (L.A.) L.Rev. 1, 9–10 (1969). I am, however, more inclined to the view expressed in Doe v. Bolton, 319 F.Supp. 1048, 1055 (D.C.N.D.Ga., filed July 31, 1970) that "once conception takes place and an embryo forms, for better or for worse the woman carries a life form with the potential of independent human existence."

In my opinion, the question of whether once conception occurs life is present is not controlling on the right to abort such existence. I believe that the *Griswold* decision stands for the proposition that the interests of the embryo or foetus must be balanced against the interests of the pregnant woman, and the resolution of the ultimate question of the right to abortion hinges on the balancing of such interests. Under the principles of constitutional law enunciated in *Griswold*, the state bears the burden of demonstrating a compelling interest in restricting the rights of the pregnant woman by the enforcement of statutes limiting the availability of abortion. Accord, Doe v. Bolton, supra; Roe v. Wade, 314 F.Supp. 1217, 1222 (D.C.N.D.Tex., 1970); Babbitz v. McCann, 310 F.Supp. 293, 301 (D.C.E.D.Wis., 1970); United States v. Vuitch, 305 F.Supp. 1032, 1035 (D.C.D.C.1969). Justice Clark, in his analysis of the *Griswold* doctrine, states:

> The result of these decisions is the evolution of the concept that there is a zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children, and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution. No one will deny that a State has a valid interest in regulating the well-being of its inhabitants, especially when it is dealing with children, who are more susceptible to undesirable influences. We have also seen that a State may not unreasonably interfere with the intimate relations of its inhabitants. When deciding on the constitutional restraints imposed on a State's interference with individual rights, the vital question becomes one of balancing. It must be determined at what point the State is interfering with individuals and at what point it is exercising valid authority by regulating the well-being of children. 2 Loyola Univ. (L.A.) L. Rev. 1, 8.

As previously indicated herein, I do not consider the protection of an embryo in its early stages of existence as a compelling state interest sufficient to justify the sweeping scope of the statute in this modern era. In reaching the conclusion that "once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it", the majority opinion does not consider the countervailing consideration of the rights of the pregnant wom-

an which are impinged upon by such legislation.

Further, I do not find that the history of this statute, its interpretation by the Ohio courts, and the recognition of rights of unborn children by the Ohio courts, supports the argument that the state has evidenced a compelling interest in the *total* protection of fetal life.

When the Ohio abortion legislation was first enacted, it was part of a six-section statute, 32 v Stat. 20. The first section declared it to be a misdemeanor to administer drugs or use an instrument with the intent to procure the miscarriage of any pregnant woman. The second part of the statute declared it to be a high misdemeanor, subject to imprisonment for seven years, to do the same acts with regard "to any woman, pregnant with *a quick child*", in the case of the death of such child or mother. The third section made it an offense for a physician, or other person, while in a state of intoxication to prescribe any poison, drug or medicine to another person, so as to endanger such latter person's life. The fourth section made it an offense for any physician, or person, to prescribe a drug or composition, the true nature and composition of which was unknown, on the representation that the same was a secret medicine. The fifth and sixth sections were venue and the effective date of the legislation.

It thus seems that the first Ohio abortion law was part of a package intended to regulate the proper practice of the medical profession. It is plain that the more serious offense thereunder was restricted to those instances where the condemned practices were practiced upon a woman pregnant with a *quick child*, that is, a child whose uterine movements could be felt by the mother, and did not apply prior thereto. Wilson v. State, 2 Ohio St. 319 (1853).

The 1834 statute was amended effective April 13, 1867, by the repeal of section two of the original Act and enactment of a substitute therefor, 64 v Stat. 135. That amended statute, in pertinent part, provided:

> * * * that any physican or other person who shall administer, or advise to be administered, to any woman *pregnant with a vitalized embryo, or foetus, at any stage of utero-gestation*, any medicine, drug, or substance whatever, or who shall use or employ * * any instrument or other means with intent thereby to destroy such *vitalized embryo, or foetus*, unless the same shall have been necessary to preserve the life of the mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case of the death of such *vitalized embryo, or foetus*, or mother in consequence thereof, be deemed guilty of a high misdemeanor * * * (emphasis added)

It is argued that this change from the phrase "any woman, pregnant with a quick child" to the phrase "any woman pregnant with a vitalized embryo, or foetus, at any stage of utero-gestation" was:

> * * * in recognition of medical science findings that there was a live developing organism even before the mother was able to feel movement of the child [and that] the Ohio General Assembly [thereby] recognized that the child was alive prior to quickening and that an embryo became "vitalized" at the earliest stage of utero-gestation. Intervenor's brief, pp. 32–33.

In my opinion, the above argument is only partially correct.

The statute of 1867 speaks of a "vitalized embryo or foetus at any stage of utero-gestation." To accept the argument that this language applies to an embryo or foetus from the time of conception would render the word "vitalized" as used in the statute, surplusage. There is an embryo or foetus present from the earliest stage of utero-gestation, and, therefore, there would be no need to add the modifier of "vitalized" if the intent of the statute was to signify

fetal existence from the time of conception.

Webster's Third New International Dictionary (unabridged) sets forth the following definition of the word "vitalized":

> VITALIZE 1: to endow with vitality: give life or animation to: make vigorous or active * * *
>
> VITALIZE signifies to arouse, usually something more or less inert or lifeless, to vital activity * * *

The word "vital" is stated by Webster's to be "akin to Latin vivere to live—more at QUICK", and, in part, is defined as:

> * * * existing as a manifestation of life * * * having or characterized by life * * * full of life and vigor * * * characteristic of life or living beings: inhering in the living or organic.

Taking the usual meanings of the foregoing words into account, I would consider a "vitalized embryo or foetus" as one that, in the course of prenatal development, had reached the point of being capable of sustaining its own life form. The use of the term "vitalized" in the statute would then have some rational meaning, signifying the distinction between the embryo or foetus totally dependent on the mother for life support and that which had developed to the stage of capability of independent life. That state of existence is commonly referred to as viability, a viable unborn child being one that would be capable of sustaining life if removed from the womb. Such a construction fully comports with the contention that the statute was amended in light of advances of medical knowledge, for the old standard of quickening was based on the mother's totally subjective ability to feel life, whereas the new standard, so interpreted, would represent a more objective approach to the question of fetal development.

A further indication that the amendment of 1867 was not meant to cover all stages of pregnancy is the fact that only section two of the Act of 1834 was repealed. Section one, which had been construed as making it an offense to do like acts with regard to a pregnant woman at any stage of pregnancy, remained. The operative terms of the two statutes, however, were not the same. To assume that the legislature intended them to have the same reach would require one to ignore the plain differences in their language.

The abortion statute was again amended at the time of its incorporation into the Revised Statutes of Ohio, R.S. § 6815. In that enactment the reference to "vitalized embryo or foetus at any stage of utero-gestation" was dropped, and the statute read:

> Whoever, with intent to procure the miscarriage of any woman prescribes or administers to her any medicine, drug, or substance whatever, or, with like intent, uses any instrument or means whatever, unless such miscarriage is necessary to preserve her life, or is advised by two physicians to be necessary for that purpose shall, if the woman miscarries or dies in consequence thereof, be imprisoned in the penitentiary not more than seven years nor less than one year.

It is interesting to note that this statute, substantially the same as O.R.C. § 2901.16, was preceded in the Revised Statutes, Sections 6813 and 6814, by those portions of the original Act of 1834 concerning intoxicated physicians and the use of secret drugs, and was followed by the statute defining the offense of rape, R.S. § 6816.

There is no legislative history available which can enlighten us as to the intent of the Ohio Legislature in the adoption of the various versions of the abortion law. I find it difficult to accept the argument that such law historically represents the interest of the state in protecting fetal life from the time of conception when, as I believe to be true, the law originated as part of regulatory measures governing the practice of medicine and as a high misdemeanor was applicable only to the case of a woman pregnant with a quick child, and in its

first reenactment did not proscribe an offense prior to the time the embryo or foetus was "vitalized."

An indication that the State of Ohio's interest in the subject of abortion is as a matter of protection of public morality, rather than for protection of fetal life, is found in another section of the Ohio statutes. Chapter 2905 of the Ohio Revised Code is entitled "Offenses Against Chastity." Therein, matters relating to the subject of abortion are made the subject of three additional criminal offenses. It is a crime to sell or give away drugs for procuring abortion or miscarriage, O.R.C. § 2905.32, or to advertise the same, O.R.C. § 2905.33. Under O.R.C. § 2905.34, which is entitled "Selling, exhibiting, and possessing obscene literature or drugs for criminal purposes", included among the several offenses defined therein it is made a felony to:

> * * * knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away, * * * or have in his possession or under his control * * * *a drug, medicine, article or thing intended for causing an abortion*, or write, print, or cause to be written or printed a * * * notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained * * *. (emphasis added)

Prior to the 1965 decision of the United States Supreme Court in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), declaring unconstitutional a state ban on the dissemination of information on contraception, the specific references in Sections 2905.32, 2905.33 and 2905.34 of the Ohio Revised Code to the subject of abortion were each coupled with a similar proscription with regard to the prevention of conception. Thus, prior to *Griswold*, the language of O.R.C. § 2905.34 emphasized in the preceding paragraph read:

> * * * a drug, medicine, article, or thing intended for the prevention of conception or for causing an abortion.

Subsequent to the *Griswold* ruling each of the statutes was amended to delete the reference to contraceptive practices. The concomitant ban on abortion remains.

The most compelling evidence that the present Ohio statute is not aimed primarily at the protection of fetal life comes from the Ohio Supreme Court itself, State v. Tippie, 89 Ohio St. 35, 105 N.E. 75 (1913). The *Tippie* case involved the conviction of a physician under Section 12412 of the General Code, which was a recodification of Section 6815 of the Revised Statutes and the predecessor of O.R.C. § 2901.16.

In *Tippie*, the facts were that the woman had attempted to abort herself by the most primitive of methods, and when the resultant infection occurred, she sought medical assistance. Following three external examinations, Dr. Tippie had reason to believe that the foetus was dead. He then determined to make an internal examination and contemplated the possibility of performing an abortion. Chloroform was administered as an anesthetic, and the examination proceeded. Dr. Tippie then discovered that the foetus was not dead, and decided "to let the woman alone and give her the benefit of the doubt." As he was completing his procedures the patient died from the effects of the chloroform.

In the Court of Appeals it was urged that error had been committed by the trial court's refusal to instruct the jury that the doctor was entitled to an acquittal if he had undertaken the fatal procedure with an honest belief, based on his prior examinations, that the foetus was dead. The court agreed with that contention, Tippie v. State, 1 Ohio App. 13 (1913), stating:

> We think, therefore, that the removal of a dead foetus was not, in contemplation of the statute, producing a miscarriage.
>
> If done unlawfully, by unprofessional hands, or without reasonable grounds to believe the foetus to be dead, and death to the patient results, the opera-

> tor would be guilty of manslaughter, but not of the crime charged.
>
> * * * * * *
>
> Intent is of the essence of the crime, and defendant should be allowed to show an innocent intent and have the jury instructed that the evidence with reference thereto may be considered. *Id.* p. 19

However, in the Ohio Supreme Court that holding was reversed. The Supreme Court postulated the question as:

> Is the administering of chloroform (which is not an abortive drug) with the intent to produce anesthesia, as a preliminary step to carrying out the intent of removing the fetus, if it be found to be dead, administering a drug with intent to procure miscarriage? 89 Ohio St. 35, 39–40, 105 N.E. 75, 77.

The answer was in the affirmative. Without specifically considering the history of the statute, as had been done by the Court of Appeals, the Supreme Court held:

> We remark, first, that the evolution of this statute of Ohio seems to show that it was enacted in its present form to cover any case of procuring the premature removal or expulsion of the fetus, *living or dead*, with other intent than to preserve the mother's life.
>
> Second, the object of the statute is to prevent any operation, or use of drugs, for the purpose of producing an abortion upon a woman deemed to be pregnant, except to save her life. ***The reason and policy of the statute is to protect women and unborn babes from dangerous criminal practice, and to discourage secret immorality between the sexes, and a vicious and craven custom amongst married pairs who wish to evade the responsibilities and burdens of rearing offspring.*** *Id.* p. 40, 105 N.E. p. 77. (emphasis added)

It is inconceivable to me to accept the premise that the Ohio statute is primarily for the protection of *all* fetal life when the Ohio Supreme Court has declared that the existence of a live foetus is immaterial to a conviction under such statute. In my opinion, from the overall tenor of the Ohio Supreme Court's opinion, the protection of "unborn babes", enumerated as but one of the underlying objects of the statute, was secondary to the morality considerations inherent in the statute which were enunciated by that court.

It is also said that under the Ohio statute it is apparent that the offense defined by O.R.C. § 2901.16 may be committed although the woman was not actually pregnant, if the parties acted under a mistaken opinion to the contrary, and death resulted. 1 O.Jur.2d, Abortion, § 8. Such a view would indicate that the statute was intended to protect the woman involved, and certainly militates against the contention that the intent of the statute is to protect fetal life.

In the majority opinion certain rights accorded unborn children are reviewed, and it is then asserted that:

> If the law is in accord with science for the purpose of protecting property rights, how can it possibly not be in accord with science for the purpose of protecting life itself, without which no property right has any worth or value whatsoever?

I do not find that the law of Ohio recognizes property rights of unborn children to such an extent that the reasonable corollary would be to recognize superior rights of such child, at all times subsequent to conception, to those of the mother.

While it is correct that Ohio law recognizes an unborn child as having a right of inheritance, and thus such child is, in law, considered in esse from the date of its conception, ***the unborn child must be born alive*** in order for the expectancy to fully vest. 56 O.Jur.2d, Wills, § 615.

The Ohio courts do not appear to have yet passed upon the question of the right of a child who sustained a prenatal injury to recover for such injury follow-

ing a live birth. There appears to be a split of authority on this question, some jurisdictions denying any recovery for injuries arising from prenatal negligence, others granting an unqualified right of action, while still others condition the right to recovery upon a showing that the injury was inflicted at a time when the unborn child was viable. Annot. 27 A.L.R.2d 1256.

The Ohio courts have, on the other hand, considered the civil responsibility of a person negligently causing the death of an unborn child. While recognizing a right of action under the Ohio wrongful death statute, O.R.C. § 2125.01, the Supreme Court expressly conditioned such right to the instance of a *viable* child. Peterson v. Nationwide Mutual Ins. Co., 175 Ohio St. 551, 197 N.E.2d 194 (1964); Jasinsky v. Potts, 153 Ohio St. 529, 92 N.E.2d 809 (1950); Williams, an Infant v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949). Such a limitation is in accord with the overwhelming weight of authority. Mace v. Jung, 210 F.Supp. 706 (D.C.Ala., 1962); Annot. 15 A.L.R.3d 992.

At common law it was held that no crime was committed by the causing of the death of a stillborn child, and that rule appears to prevail in the majority of jurisdictions in the United States, 40 Am.Jur.2d, Homicide, § 9. There is one Ohio Common Pleas decision to the contrary, State v. Dickinson, 18 Ohio Misc. 151, 248 N.E.2d 458 (1969). Therein, the court held, on the authority of the Ohio Supreme Court rulings on the civil question of wrongful death, that a *viable* unborn child was a "person" within the contemplation of the vehicular homicide statute, O.R.C. § 4511.18.1. It is clear from the court's opinion that such decision was controlled by the question of viability.

I therefore find that, under the law of Ohio, the property rights of unborn children, which the majority consider to be of great importance, either do not vest until viability occurs, or, if vested prior thereto, fail if the unborn child does not survive childbirth. Such a state of the law, in my opinion, affords little support for the Ohio abortion statute on the basis that, from the moment of conception, an unborn child is a person entitled to assert constitutional rights paramount to those of the mother. I cannot believe that under our system of constitutional law, a person who, in Ohio, maliciously or negligently terminates the existence of a non-viable foetus can do so without fear of criminal or civil sanctions, but that a physician who, exercising his best medical judgment, performs an abortion when the foetus has not yet reached viability can only do so facing the real possibility of criminal conviction if a lay jury disagrees with his opinion.

It has been suggested that the Ohio statute affords a safeguard to the individual doctor from being "second-guessed" by a jury, in that it provides that an abortion may be performed if such action "is advised by two physicians to be necessary" to save the mother's life, O.R.C. 2901.16. It was contended at oral argument that the "two physicians" rule is a complete defense to prosecution under the statute.

Disregarding the practical considerations of the economic burden that consultation with other doctors would impose upon the patient and the possibility that, under emergency conditions, such consultation might not be medically feasible, I do not find that argument to be sound. No Ohio case has been cited or found, nor has any been cited from any other jurisdiction having a similar statutory provision, which would vindicate that contention.

The "necessity" clause of the Ohio abortion law has been considered but once by the Ohio Supreme Court, in passing upon the issue of whether the prosecution had the burden of proving that the operation was not necessary, or whether the defendant had the burden of proving necessity as a matter of defense. Moody v. State, 17 Ohio St. 110 (1866). Therein, the court stated:

* * * The statute does not declare every procurement of an abortion to

be an offense, but does so only when it is not done for the purpose of saving the life of the mother * * *

* * * * * *

It is the absence of the necessity of saving life, that is the essential part of the negative clauses, which enters into the statutory description of the offense; and in the contemplation of the statute, the advice of two physicians is *sufficient evidence* of the existence of such necessity.

Since, then, such advice is *only evidence* of the necessity that forms the essential negative description of the crime in both negative clauses, and as it may usually be readily shown by the accused, and must ordinarily be so difficult, if not impossible, to be shown on the part of the prosecution, it might well be held, upon reason as well as authority, that it is unnecessary for the state to prove that the producing the abortion was not advised by two physicians further than such negative fact may be implied from the proof that it was not necessary to preserve the life of the mother. *Id.* pp. 112–113 (emphasis added)

As I read the *Moody* decision, the Ohio Supreme Court, by its use of the phrases "sufficient evidence" and "only evidence", has said that the defendant in an abortion prosecution bears the burden of proving necessity to save life, and proof that such abortion was advised by two physicians would be prima facie evidence of such fact. If proof that the abortion was advised by two physicians is only prima facie evidence of the necessity to save life, it necessarily follows that such evidence would be subject to rebuttal by the prosecution. Hence, the "two physicians" rule is not a complete defense to prosecution under the statute.

There is one other aspect to this litigation, not considered in the majority opinion, to which I wish to address myself: the impact of this statute on the medical profession, and to a lesser degree the rights of those other plaintiffs herein who contend that they are hampered in their professions by its existence. Plaintiffs Steinberg, Fitzgerald, Frank and Argow contend that this statute prevents them from the proper discharge of their professional responsibilities in the respective fields of obstetrics and gynecology, psychiatry, social work, and the ministry.

Defendants and intervenor contend that as to those persons who claim that they are prevented from orally disseminating information about abortion the statute imposes no restraints, in that it only reaches the actual attempt to procure an abortion. That position is plainly incorrect.

If an attempt to procure an abortion were made pursuant to such advice, the party not actually performing the operation would, under Ohio law, be deemed culpable as an aider and abettor. 1 O.Jur.2d, Abortion, § 3. Such a conviction of a physician has, in fact, been affirmed by the Ohio courts, State v. Smith, appeal dismissed 165 Ohio St. 247, 135 N.E.2d 63 (1956), and was the factual predicate from which the landmark case of People v. Belous, supra, arose.

Assuming for the sake of argument that the contention of defendants and intervenor was correct, this would place the physician in the position of saying to his patient that, in the exercise of his best medical judgment, an abortion was advisable but that the law prevented him from performing the same. I cannot conceive of placing a professional man in a more frustrating position.

The duty and judgment of the physician, the necessity and welfare of the patient, and the rights of both, cannot be subjected to arbitrary and unreasonable legislative interference, dictation and infringement. United States v. Freund, 290 F. 411, 414 (D.C.Mont., 1923); see also 70 C.J.S. Physicians and Surgeons § 3, p. 820 et seq. It is my belief that Section 2901.16 of the Ohio Revised Code, by virtue of its vagueness and lack of responsiveness to the realities of modern medicine, can no longer be considered as a reasonable regulatory

measure as it affects the practice of medicine.

In Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 126, 87 N.E.2d 334, 339 (1929), the Ohio Supreme Court expressed the hope that "the law will keep pace with science." In my opinion, continued enforcement of O.R.C. § 2901.16 keeps the law many years behind the medical profession.

The "chilling" effect of legislation of this scope upon the medical profession has been recognized. In Judge Neville's concurring opinion in Doe v. Randall, 314 F.Supp. 32 (D.C.Minn., 1970), he states:

> I subscribe to the view that the entire medical profession and innumerable pregnant women live under the sword of Damocles. The exercise of their best medical judgment, the giving of advice and the pregnants' freedom of choice is "chilled" by the cloud of a statute which renders their actions illegal and puts them in jeopardy of criminal prosecution with the resultant publicity, possible public disgrace, loss of hospital privileges, threat of license revocation, etc. *Id.* p. 36

In Babbitz v. McCann, 310 F.Supp. 293 (D.C.E.D.Wis., 1970) the court entered a declaratory judgment holding the Wisconsin abortion statute unconstitutional, but declined to enter an order enjoining the operation of said statute. That decision on the injunctive side of the suit has now been withdrawn, and a permanent injunction entered restraining further prosecutions under the abortion law (order of November 18, 1970). The Wisconsin authorities had announced that they would not abide by the declaratory judgment in pursuing further criminal actions under the challenged statute. It appears that a substantial factor influencing the court's decision to reverse its prior holding was the "chilling" effect it believed the state's determination to continue to enforce the abortion law would have upon the medical profession.

My dissent herein should not be construed as indicating a belief that the state has no right to adopt legislation controlling on the subject of abortion. I wish to make it quite clear that I recognize the right of the state to adopt and enforce reasonable regulations in this area. Such legislation, however, must be couched in precise and relevant terms, and must accord proper recognition to the interests of all persons concerned therewith. A number of states have adopted therapeutic abortion laws which, in my opinion, are a step in the right direction. Note, Abortion Reform: History, Status and Prognosis, 21 Case W.Res.L.Rev. 521–522 (1970).

It is suggested in the majority opinion that this problem is one for the legislature and not for the courts. Serious efforts to achieve legislative reform have been undertaken in recent years, have been subject to intensive lobbying by those interests opposing any liberalization of the abortion laws, and have failed. While the courts are not a panacea for all of society's ills, they cannot refuse to act simply because the legislature fails to do so. It took a decision of the United States Supreme Court to motivate the Ohio Legislature to remove from the Ohio statutes the archaic ban on the dissemination of information with regard to contraception.

The fatal flaw which I find in O.R.C. § 2901.16 is that it carries forward the constitutional standards of Nineteenth Century America into the complex and advanced structure of our Twentieth Century society. Such standards cannot withstand the changes created by the transition from the primitive frontier life of 1834 to the onmoving urban existence of 1970.

I am of the opinion that a woman has the private right to control her own person, which necessarily encompasses the fundamental right to choose whether to bear children.

I am also of the opinion that a physician has the right and duty to practice his chosen profession to the best of his ability, which necessarily includes the

discretion to perform those procedures which, in his expert medical judgment, he deems to be in his patient's best interests.

The question of producing a miscarriage during the early stages of a woman's pregnancy, and certainly prior to viability, should be a private matter between the woman and her physician. A woman who seeks therapeutic abortion and a physician who concurs in such course of treatment, or who in the first instance recommends the same, should not be subject to a virtually absolute threat of criminal prosecution and punishment unless the state has a compelling interest in regulating such conduct. I do not believe that this record, or those matters of which the court could take judicial notice, establish any compelling state interest which would justify the enforcement of legislation interfering with a woman's right to secure, and a physician's right to perform, a therapeutic abortion during the early stages of pregnancy.

I must respectfully enter my dissent from the opinion of the majority herein, as I believe the Ohio abortion statute, O.R.C. § 2901.16, to be unconstitutionally vague, overly broad, violative of equal protection of the law, and in conflict with the principles set forth by the Supreme Court in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). I would enter a declaratory judgment finding the said statute to be invalid for the reasons set forth herein.

APPENDIX

Ohio decisions under O.R.C. § 2901.16 and the predecessors thereto:

Ohio Supreme Court

Wilson v. State, 2 Ohio St. 319 (1853)

Robbins v. State, 8 Ohio St. 131 (1857)

Moody v. State, 17 Ohio St. 110 (1866)

Ohio v. Barker, 28 Ohio St. 583 (1876)

Tabler v. Ohio, 34 Ohio St. 127 (1877)

Benedict v. State, 44 Ohio St. 679, 11 N.E. 125 (1887)

State v. McCoy, 52 Ohio St. 157, 39 N.E. 316 (1894)

State v. Tippie, 89 Ohio St. 35, 105 N.E. 75 (1913)

Ohio v. Lehr, 97 Ohio St. 280, 281, 119 N.E. 730 (1918)

Ohio v. Karcher, 155 Ohio St. 253, 98 N.E.2d 308 (1951)

Ohio v. Smith, 165 Ohio St. 247, 135 N.E.2d 63 (1956)

Ohio Appellate

Florien v. Ohio, 18 Ohio Civ.Ct.R. 596 (1897)

Waite v. Ohio, 4 Ohio App. 451 (1915)

Jones v. State, 11 Ohio App. 441 (1919)

Schneider v. State, 1 Ohio Law Abst. 75 (1922)

Vargo v. State, 1 Ohio Law Abst. 830 (1923)

Schunn v. State, 2 Ohio Law Abst. 186 (1923)

Emery v. State, 3 Ohio Law Abst. 62 (1924)

Shellenberger v. Ohio, 26 Ohio Law Rep. 619 (1928)

Clyne v. Ohio, 32 Ohio Law Rep. 477 (1930)

Novaksky v. State, 18 Ohio Law Abst. 313 (1934)

State v. Hollos, 76 Ohio App. 521, 65 N.E.2d 144 (1944)

Ohio v. Jones, 80 Ohio App. 269, 70 N.E. 2d 913 (1946)

State v. Taylor, 83 Ohio App. 76, 77 N.E. 2d 279 (1947)

State v. Coran, 87 Ohio App. 238, 94 N.E.2d 562 (1948)

State v. McDaniel, 85 Ohio App. 529, 89 N.E.2d 664 (1949)

State v. Roche, Ohio App. 135 N.E.2d 789, 72 Ohio L.A. 462 (1955)

State v. Brown, Ohio App., 137 N.E.2d 609, 73 Ohio L.A. 349 (1955)

State v. Allgood, 84 Ohio L.A. 367 (1959)

Ohio v. Ball, 1 Ohio App.2d 297, 204 N.E.2d 557 (1964)

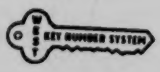
Common Pleas Court

State v. Springer, 4 Ohio Dec. 169

Geer v. Ohio, 16 Ohio Cir.Ct.R.,N.S., 151 (1909)

Bridge v. Ohio, 20 Ohio Cir.Ct.R.,N.S., 231 (1912)

Ohio v. Holden, 20 Ohio N.P.,N.S., 200 (1917)



I. I. ROSEN, M.D., Plaintiff,
v.
The LOUISIANA STATE BOARD OF MEDICAL EXAMINERS, Defendant.
Civ. A. No. 70-1304.

United States District Court,
E. D. Louisiana,
New Orleans Division.
Aug. 7, 1970.

Suit by physician seeking injunction restraining Louisiana State Board of Medical Examiners from enforcing, in proceedings being brought against him, statute authorizing removal of physician's certification for procuring, aiding, or abetting in procuring an abortion, unless done for the relief of woman whose life appears in peril, after due consultation with another licensed physician, and seeking judgment declaring such statute unconstitutional. The three-judge District Court, Ainsworth, Circuit Judge, held that it is the policy of the Louisiana abortion statutes that whatever interests the pregnant woman or others may have in terminating pregnancy must, except where life of the woman is threatened, be subordinated to afford embryo or fetus opportunity to develop toward natural birth, that Louisiana was empowered to place such value upon prenatal life, and that the statute in question is necessary to accomplishment of such permissible state policy and does not offend due-process clause of the Fourteenth Amendment.

Suit dismissed.

Cassibry, District Judge, dissented and filed opinion.

1. Courts ⇐268.4

Abstention was not warranted in suit wherein physician, against whom charges had been brought before Medical Board with respect to alleged illegal abortions, was seeking declaration that statute authorizing suspension or revocation of physician's certificate, when he has committed or participated in commission of abortion that is unnecessary to relief of woman whose life appears in peril, was unconstitutional. LSA-R.S. 37-1285(6).

2. Statutes ⇐47

Louisiana statute authorizing suspension or revocation of medical doctor's certificate when doctor has committed or participated in commission of abortion "unless done for the relief of a woman whose life appears in peril" is not unconstitutionally vague or indefinite. LSA-R.S. 37:1285(6).

3. Abortion ⇐2

Louisiana law does not suffer performance of all medically indicated abortions, but permits induced abortion of embryo or fetus only when the physician, after due consultation with another licensed physician, determines in good faith that continuation of the pregnancy will itself directly and proximately result in the death of the woman. LSA-R.S. 37:1285(6).

4. Constitutional Law ⇐82

Right of women to determine, before they have become pregnant, whether they shall bear children, may be interfered with by state only in special circumstances, but such right does not compel conclusion that woman has right to cause abortion of embryo or fetus carried by her.

5. Physicians and Surgeons ⇐4, 11(2)

In Louisiana, conviction of crime, including crime of abortion as proscribed in the criminal laws, and procuring, aiding or abetting in procuring abortion unless done to save the life of the mother are separate grounds upon which Medical Board may properly refuse to issue or may suspend or institute proceedings to revoke certificate to practice medicine to which physician would otherwise be entitled. LSA-R.S. 14:87, 37:1285(1, 6).

6. Abortion ⇐1

Louisiana law prohibits performance of certain acts if made with intent to destroy embryo or fetus before nat-

ural birth, without regard to viability, unless the actor is a physician and the acts are performed for the relief of a woman whose life appears in peril. LSA-R.S. 14:87, 37:1285(6).

7. Abortion ⇐1

As used in Louisiana statute proscribing abortion terms "embryo" and "fetus" refer to separate stages in prenatal development. LSA-R.S. 14:87.

8. Abortion ⇐3

In Louisiana, woman who procures abortion for herself is not criminally responsible. LSA-R.S. 14:87.

9. Abortion ⇐1

Though Louisiana has demonstrated greater concern for life after birth than for life before birth, it is the policy of the Louisiana abortion statute that whatever interests the pregnant woman or others may have in terminating pregnancy must be subordinated, except where the life of the woman is threatened, to afford the embryo or fetus the opportunity to develop toward natural birth. LSA-R.S. 14:87, 37:1285(6).

10. Abortion ⇐1

Louisiana has sufficiently manifested its interest in protecting the embryo or nonviable fetus that statute penalizing physician for procuring abortion except where woman's life appears to be in peril cannot be voided on the ground that the only legitimate purpose for which it was enacted was to protect lives and health of pregnant women and that, in view of advances in medical knowledge and surgical techniques, it is no longer wise legislation. LSA-R.S. 37:1285(6).

11. Constitutional Law ⇐38

Constitutional validity of statutes does not turn upon whether legislators have manifested their intent that the inevitable effect of such statutes, as viewed on their face, was meant to occur.

12. Constitutional Law ⇐70(3)

Federal courts will not strike down otherwise constitutional statute on basis of alleged wrongful legislative motive.

13. Constitutional Law ⇐70(3)

Federal courts will not void legislation which state had power to enact on more than one ground because the alleged dominant motive behind the statute is no longer served by its application.

14. Abortion ⇐1
Courts ⇐262.4(6)

Louisiana was empowered to place value upon prenatal human life, and such valuation, as manifested by its abortion statutes, could not be struck down by federal court. LSA-R.S. 14:87, 37:1285(6).

15. Courts ⇐262.4(5)

Review of state legislation by federal courts, whether such legislation is in exercise of state's police power or in provision for health, safety morals, or welfare of its people, concerns powers of government inherent in every sovereignty.

16. Constitutional Law ⇐81

Term "police power" connotes time tested conceptual limit of public encroachment upon private interests, and the definition thereof is essentially the product of legislative determination addressed to the purposes of government, which are themselves not capable of complete definition.

See publication Words and Phrases for other judicial constructions and definitions.

17. Courts ⇐262.4(5)

Federal courts may interfere with exercise of the plenary power of state governments in enactment of legislation only to the extent that the Constitution so requires.

18. Courts ⇐89

Principles of a judicial decision, while tending to expand themselves to the limits of their logic, must be contained by the historical frame of reference of their purpose.

19. Constitutional Law ⇐70(3)

Even where social undesirability of law is not disputed, invalidation of that

law by a court debilitates popular democratic government.

20. Constitutional Law ⇐82

Conclusion that pregnant woman's interests are superior to that of an unquickened embryo is not mandated by the Constitution.

21. Abortion ⇐1

The Louisiana abortion laws do not infringe any fundamental principle as understood by the traditions of our people. LSA-R.S. 14:87, 37:1285(6).

22. Constitutional Law ⇐81

Mere assertion that action of state finds justification in the realm of morals cannot justify any and every restriction it imposes.

23. Constitutional Law ⇐82

Asserted right of woman to choose to destroy embryo or fetus she carries is not so rooted in the traditions and collective conscience of our people that it must be ranked as fundamental.

24. Constitutional Law ⇐287
Physicians and Surgeons ⇐2

Louisiana statute providing that Medical Board may refuse to issue and may suspend or institute proceedings to revoke certificate to practice medicine if physician procures, aids, or abets in procuring an abortion, unless done for relief of woman whose life appears in peril after due consultation with another licensed physician, is necessary to the accomplishment of permissible state policy, and does not offend the due-process clause of the Fourteenth Amendment. LSA-R.S. 37:1285(6); U.S.C.A.Const. Amend. 14.

Roy Lucas, New York City, Benjamin E. Smith, Smith & Scheuermann, New Orleans, La., for plaintiff.

Sam A. LeBlanc III, Adams & Reese, New Orleans, La., for defendant.

Before AINSWORTH, Circuit Judge, and CASSIBRY and BOYLE, District Judges.

AINSWORTH, Circuit Judge:

Isadore I. Rosen, a physician licensed to practice medicine under the laws of Louisiana, challenges the constitutionality of the Louisiana statute authorizing the suspension or revocation of a medical doctor's certificate when the doctor has committed or participated in the commission of an abortion that is unnecessary to the relief of a woman whose life appears in peril. He seeks an injunction restraining the Louisiana State Board of Medical Examiners (Medical Board) from enforcing La.Rev.Stat.Ann. § 37:1285 in proceedings being brought against him and a judgment declaring section 37:1285(6) unconstitutional.

This three-judge district court was convened to consider the issues raised by Dr. Rosen's complaint, 28 U.S.C. § 2281, and a hearing was held on the merits of the case. We hold that section 37:1285(6) is constitutional and deny plaintiff's request for declaratory and injunctive relief.

I.

The Louisiana Medical Practice Act, La.Rev.Stat.Ann. § 37:1261 *et seq.*, authorizes the Medical Board to suspend or institute court proceedings to revoke a doctor's certificate to practice medicine in the State when the doctor has procured or aided or abetted in the procuring of an abortion, "unless done for the relief of a woman whose life appears in peril after due consultation with another licensed physician." La.Rev.Stat. Ann. § 37:1285(6). On November 12, 1969, the Medical Board informed Dr. Rosen of its intent to conduct a hearing on charges that Dr. Rosen has on several occasions committed or aided in the commission of abortions without legal justification for so doing. A hearing was originally scheduled for December 12, 1969. This lawsuit followed. We have jurisdiction to decide the case. *E. g.*, Roe v. Wade, N.D.Tex., 1970, 314 F. Supp. 1217; Babbitz v. McCann, E.D. Wis., 1970, 310 F.Supp. 293.

[1] The complaint charges that section 37:1285(6) of the Louisiana Revised Statutes is unconstitutional for violating the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution and for invading the pregnant woman's right of privacy. The Medical Board argues initially that this Court should abstain from making a decision on the merits of plaintiff's request for a declaratory judgment. Under the circumstances of this case, we conclude that abstention would not be warranted. *See, e. g.*, Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); Roe v. Wade, N.D. Tex., 1970, 314 F.Supp. 1217; Babbitz v. McCann, E.D.Wis., 1970, 310 F. Supp. 293. We therefore reach the merits of Dr. Rosen's argument. For reasons that follow, we conclude that the doctor's attack upon the constitutionality of section 37:1285(6) must fail.

II.

The doctor urges that section 37:1285 (6) of the Louisiana Revised Statutes is unconstitutionally vague and indefinite because it fails to provide both fair warning to doctors and sufficient precision to guide the Medical Board, judges, and juries regarding the physical or mental conditions that justify an induced abortion under Louisiana law. This section provides for the removal of a physician's certification for "[p]rocuring, aiding, or abetting in procuring an abortion unless done for the relief of a woman whose life appears in peril after due consultation with another licensed physician." Rosen argues that the words "relief of a woman whose life appears in peril" do not provide meaningful guidance to the ordinary physician since the statute forbids abortions in terms "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926); *accord*, Lanzetta v. State of New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939). He also argues that uncertainty in the medical profession regarding the legality of certain medically indicated abortions is a constitutional defect in the statute as applied.

[2, 3] We have examined the challenged language and are persuaded that it is neither vague nor indefinite, but is instead reasonably comprehensible in its meaning, with its reach delineated in words of common understanding. *See* Babbitz v. McCann, E.D.Wis., 1970, 310 F.Supp. 293, 297–298; *cf.* Cameron v. Johnson, 390 U.S. 611, 616, 88 S.Ct. 1335, 1338, 20 L.Ed.2d 182 (1968). The clause "unless done for the relief of a woman whose life appears in peril" requires no guessing at its meaning. Rosen focuses upon the words "relief," "appears," and "life." These are widely used and well understood words, particularly when read in the context of section 37:1285(6). We conclude that the statute was intended to permit an induced abortion of an embryo or fetus only when the physician, after due consultation with another licensed physician, determines in good faith that continuation of the pregnancy will directly and proximately result in the death of the woman. In our opinion, the statute so read provides fair warning that Louisiana does not suffer the performance of all medically indicated abortions, however wise in the physician's estimation such an operation might be in a particular case, but rather allows the induced abortion of an embryo or fetus to be performed without sanction only when the life of the mother is directly endangered by the condition of pregnancy itself.

Four recent cases dealing with the constitutionality of abortion statutes have considered the sort of void-for-vagueness argument that Rosen makes against the Louisiana statute. In People v. Belous, 71 Cal.2d 996, 80 Cal.Rptr. 354, 458 P.2d 194 (1969), the California Supreme Court found that the words "necessary to preserve her life" in the California abortion statute then in effect were unconstitutionally vague. The

words "for the purpose of saving the life of the mother" in the Texas abortion statute were declared to be similarly defective by a three-judge district court in Roe v. Wade, N.D.Tex., 1970, 314 F. Supp. 1217. The District of Columbia abortion statute was held invalid in United States v. Vuitch, D.D.C., 1969, 305 F.Supp. 1032, on the ground that the word "health" in the phrase "as necessary for the preservation of the mother's life or health" was vague both in interpretation and practice. The words "necessary to save the life of the mother" in the Wisconsin abortion statute, on the other hand, were held not to be vague or indefinite as to their meaning in Babbitz v. McCann, E.D.Wis., 1970, 310 F.Supp. 293.

Like the *Babbitz* court, we do not share the view of the majority in *Belous* that language such as "necessary to preserve [or save] life" is so vague that one must guess at its meaning. *See generally* Comment, To Be or Not to Be: The Constitutional Question of the California Abortion Law, 118 U.Pa.L.Rev. 643, 644–649 (1970). Consequently, *Belous* is not persuasive on the issue of vagueness presented in this case. We also do not share the view of the court in *Roe* that a statute worded similarly to either the Texas or Louisiana acts is unconstitutionally vague because of the difficulty encountered in applying it to particular cases. As the Supreme Court has stated,

> "Wherever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so, it is familiar to the criminal law to make him take the risk."

United States v. Wurzbach, 280 U.S. 396, 399, 50 S.Ct. 167, 169, 74 L.Ed. 508 (1930); *see* United States v. Petrillo, 332 U.S. 1, 7, 67 S.Ct. 1538, 1541–1542, 91 L.Ed. 1877 (1947). Moreover, the Louisiana statute makes express what is perhaps only implied in the Texas statute—that the abortion need only *appear* necessary, rather than actually be necessary to be permissible. *Vuitch* is readily distinguishable from the present case, since the court there concluded that the word "health," as distinct from the word "life," made the District of Columbia statute impermissibly vague. Thus the precise problem considered in *Vuitch* is not presented under the terms of the Louisiana statute.

In short, we conclude that although Rosen may have medical or even practical justification for his belief that the Louisiana statute too narrowly restricts the circumstances under which an abortion may be induced without sanction, he fails to convince this Court that the Louisiana Legislature was vague or indefinite in its choice of language.

III.

The doctor next contends that the Louisiana statute, even if assumed not to be lacking in either clarity or precision, is void for "overbreadth," that is, section 37:1285(6) offends the constitutional principle that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." Zwickler v. Koota, 389 U.S. 241, 250, 88 S.Ct. 391, 396, 19 L.Ed.2d 444 (1967), *citing* NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 307, 84 S.Ct. 1302, 1314, 12 L.Ed.2d 325 (1964). Rosen argues that the statute unnecessarily and impermissibly invades his right as a physician to prescribe for his patients in accordance with his best professional knowledge. Specifically, he contends that the statute makes removal of his license a likelihood if, in the course of performing his duties as a physician, he assists a pregnant woman —who has had contraceptive failure or did not utilize contraceptives—in the exercise of what he asserts to be her fundamental, constitutionally protected right to choose whether to bear children. In substance, his argument is that: (1) a woman has a fundamental right, ex-

cept in very limited circumstances, to be free from unwanted governmental interferences in matters that, by their character and consequences, bear in a basic way upon her privacy, that is, she has a right to be let alone in matters involving her individual privacy; (2) included within her right to be let alone is her right to choose whether to bear children; (3) since the Louisiana statute infringes upon her right of choice in this matter and operates directly upon the physician's role in the effective exercise of that choice, the statute may be upheld by this Court only upon a showing by the State that such infringement is necessary to support a subordinating state interest which is compelling; and (4) the Louisiana statute sweeps far beyond any areas of compelling, subordinating state interests and is, therefore, invalid. Thus the doctor would have us first determine whether the right to choose to bear or not to bear, children is a fundamental one and then determine whether, if this is a fundamental right, the State has demonstrated a compelling need to infringe upon its exercise.

In our opinion, the issues in dispute here do not resolve themselves neatly into the questions posed by Dr. Rosen. The issues presented are much more complex, for the current controversy over the wisdom and constitutional validity of existing abortion laws centers upon a problem in which attitudes toward life, being, and sexual activity are in tumultuous disagreement. The specifics of the conflict in courts, legislative halls, and journals have often been the details of statutory language. The root disagreement, however, among men of intelligence and good will on all sides of the controversy has arisen over the evaluation of competing interests affected by abortion and the manner in which these interests are to be protected by law in a democratic society. *See generally* George, Current Abortion Laws: Proposals and Movements for Reform, in Abortion and the Law 1 (Smith ed. 1967); Ziff, Recent Abortion Law Reforms (Or Much Ado About Nothing), 60 J.Crim.L.C. & P.S. 3 (1969). Nature alone is responsible for the spontaneous abortion, and she needs no justification. But there remains for the determination by society, by whatever means it has chosen for the making of such momentous decisions, the conditions, if any, under which the embryo or fetus of the species homo sapiens may be destroyed within the womb.

The most recent attacks on abortion legislation, like Dr. Rosen's, have focused upon the interests of the pregnant woman as being of primary importance. The interests of the family unit, if any, of which the pregnant woman is a part and the needs of the community have also been advanced as reasons for the relaxation or abolition of laws prohibiting abortions. Little or no importance has been attached by these arguments to whatever interests may be possessed by the embryo or fetus the pregnant woman carries. In at least four instances, arguments such as these have been urged successfully. Roe v. Wade, N.D.Tex., 1970, 314 F.Supp. 1217; Babbitz v. McCann, E.D.Wis., 1970, 310 F.Supp. 293; People v. Belous, 71 Cal.2d 996, 80 Cal.Rptr. 354, 458 P.2d 194 (1969); State v. Munson (S.D.Cir.Ct., Pennington County, April 6, 1970). *See also* United States v. Vuitch, D.D.C., 1969, 305 F.Supp. 1032. In all these cases, the right asserted by plaintiffs to be free from unwanted governmental interference—freedom of choice in the matter of abortions—was equated by the court with the "fundamental right to choose whether to have children."

[4] For the purposes of this case we assume, if we are not required to recognize, *e. g.*, Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Baird v. Eisenstadt, 1 Cir., 1970, 429 F.2d 1398, that as a general matter women possess under our Constitution a "fundamental right" to determine whether they shall bear children before they have become pregnant. A state may interfere with this right of choice only in special circumstances. *E.*

g., Buck v. Bell, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927). We deal in this case, however, not merely with whether a woman has a generalized right to choose whether to bear children, but instead with the more complicated question whether a pregnant woman has the right to cause the abortion of the embryo or fetus she carries in her womb. We do not find that an equation of the generalized right of the woman to determine whether she shall bear children with the asserted right to abort an embryo or fetus is compelled by fact or logic. Exercise of the right to an abortion on request is not essential to an effective exercise of the right not to bear a child, if a child for whatever reason is not wanted. Abstinence, rhythm, contraception, and sterilization are alternative means to this end. The first is, of course, infallible; the latter three are reliable to varying degrees approaching certainty. Before the "moment" of conception has occurred, *see generally* Ziff, Recent Abortion Law Reforms (Or Much Ado About Nothing), 60 J.Crim.L.C. & P.S. 3, 20–21 (1969), the choice whether or not to bear children is made in circumstances quite different from those in which such a choice might be made after conception. Apart, the sperm and the unfertilized egg will die; neither has the capacity to grow and develop independently as does the fertilized egg. During fertilization, sperm and egg pool their nucleii and chromosomes. Biologically, a living organism belonging to the species homo sapiens is created out of this organization. Genetically, the adult man was from such a beginning all that he essentially has become in every cell and human attribute. *See generally* Gray, Anatomy of the Human Body 21–60 (Goss 27th ed. 1959); 5 Lawyers' Medical Cyclopedia § 37.1 (1960). The basic distinction between a decision whether to bear children which is made before conception and one which is made after conception is that the first contemplates the creation of a new human organism, but the latter contemplates the destruction of such an organism already created. To some engaged in the controversy over abortion, this distinction is one without a difference. These men of intelligence and good will do not perceive the human organism in the early part of its life cycle as a human "being" or "person." [1] In their view, the granting to such an organism of the right to survive on a basis of equality with human beings generally should be delayed until a later stage in its development. To others, however, the "moment" of conception or some stage of development very close to this "moment" is the point at which distinctively human life begins.[2] In their view the difference be-

1. The views following are illustrative:
"My feeling is that the fetus, particularly during its early intra-uterine life, is simply a group of specialized cells that do not differ materially from other cells. * * * And I feel that if it is going to be for the welfare of the adult individual, and for society in certain instances, we are justified in eliminating those cells. I do not think that I could be catalogued as a murderer. I just feel that under certain conditions the elimination of life of this type is justified. If one can justify shooting a burglar who enters your room, or going to war and shooting an enemy, one can certainly justify the elimination of some cells, which, from my point of view, have not yet become a human being, but simply have the potentialities of life. * * *"
Statement of Dr. Alan F. Guttmacher, in Symposium—Law, Morality, and Abortion, 22 Rutgers L.Rev. 415, 436 (1968);
"* * * Physicians as a whole do not believe that a human being begins at conception. I know of no non-Catholic scientist who does. I know of no scientist at all, no scientist in any field of biological science, who would say that an acorn, the second that that acorn has been fertilized, is an oak. It is a potential oak; it is not an oak. And a fertilized ovum is not a human being. * * *"
Statement of Dr. Harold Rosen, in *id.* at 426.

2. For example, this is the official Roman Catholic position. E. g., Drinan, The Inviolability of the Right To Be Born, in Abortion and the Law 107 (Smith ed.

tween the decision not to conceive and the decision to abort is of fundamental, determinative importance. Thus the root problem in the controversy over abortion is the one of assigning value to embryonic and fetal life. *See* Giannella, The Difficult Quest for a Truly Humane Abortion Law, 13 Vill.L.Rev. 257 (1968).

In considering the problem of valuing prenatal life, we heed the words of Mr. Justice Holmes:

> "It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong * * *."

Holmes, Collected Legal Papers 295 (1920). When distinctively human life begins is a matter about which reasonable, fair-minded men are in basic disagreement. Thus this case does not concern simply whether the pregnant woman has a fundamental right to be let alone in the control of her body processes, *cf.* Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 11 S.Ct. 1000, 35 L.Ed. 734 (1891) (submission to surgical examination), for it is unresolved whether, in the common understanding of the society in which she lives, choice of the destiny of the human organism developing within her is a matter directly affecting only her individual rights. We phrase the question for decision as follows: Can the State of Louisiana, consistent with the Fourteenth Amendment, assign to the human organism in its early prenatal development as embryo and fetus a right to be "born"[3] unless the condition of pregnancy directly and proximately threatens the mother's life? Our inquiry extends to (1) whether, and the extent to which, the State has assigned value to prenatal life, (2) whether the State is empowered to make such an assignment, and (3) whether the State's valuation is to be recognized for the purposes of this case.

We consider first the pattern of the Louisiana statutes pertaining to abortion. In Louisiana, "abortion" has been a crime since 1870. The 1870 statute, as amended, La.Acts, 1888, No. 24, provided:

> "Whoever shall feloniously administer, or cause to be administered, any drug, potion, or any other thing, to any woman for the purpose of procuring a premature delivery, or whoever shall administer, or cause to be administered, to any woman pregnant with child, any drug, potion, or any other thing, for the purpose of procuring abortion or a premature delivery, or whoever by any means whatsoever shall feloniously procure abortion or premature delivery, shall be imprisoned at hard labor for not less than one nor more than ten years."

We have not been cited to or found any legislative history on this statute. As we read it, the statute made unlawful the described acts if performed with the specific intent to destroy a "child" before its natural birth, regardless of whether the woman was in fact pregnant; that is, attempts to perform the impossible were equated with and treated the same as actual performance. Reworded in 1942 and later amended, the statute reads today:

> "Abortion is the performance of any of the following acts, with the intent of procuring premature delivery of the embryo or fetus;
>
> (1) Administration of any drug, potion, or any other substance to a female; or
>
> (2) Use of any instrument or any other means whatsoever on a female.
>
> "Whoever commits the crime of abortion shall be imprisoned at hard labor for not less than one nor more than ten years."

1967); Statement of Thomas J. O'Donnell, S. J., in Symposium—Law, Morality, and Abortion, 22 Rutgers L.Rev. 415, 431–432 (1968).

3. As used here, the term "born" refers to delivery from the womb after the developing human organism is capable of sustaining life outside the womb. *See* La. Rev.Stat.Ann. § 40:142.

La.Rev.Stat.Ann. § 14:87 (Supp.1970). In substance, the Louisiana criminal law on abortion has been unchanged for one hundred years.[4]

[5–7] In Louisiana, conviction of a crime such as the crime of "abortion" proscribed by section 14:87, and procuring, aiding or abetting in procuring an "abortion" unless done to save the life of the mother are separate grounds upon which the Medical Board may properly refuse to issue, suspend, or institute court proceedings to revoke a certificate to practice medicine to which a physician would otherwise be entitled. La.Acts, 1914, No. 56, § 16, as amended, La.Acts, 1918, No. 54, § 10, codified, La.Rev.Stat. Ann. § 37:1285(1), (6). *See also* La. Rev.Stat.Ann. § 1271 (qualifications of applicants for certificates). Since sections 14:87 and 37:1285(6) deal with the same subject matter, we construe them together. So doing, we conclude that Louisiana prohibits the performance of certain acts if made with the intent to destroy an "embryo" or "fetus" before natural "birth," unless (1) the actor is a physician and (2) the acts are performed for the relief of a woman whose life appears in peril. As used in section 14:87, the terms "embryo" and "fetus" refer to separate stages in prenatal development. State v. Dore, 227 La. 282, 79 So.2d 309 (1955). In medical terminology, "embryo" refers to the developing human organism from one week after conception to approximately the end of the second month. "Fetus" refers to the organism from that point until termination of prenatal development. Dorland, Illustrated Medical Dictionary 439, 500 (23d ed. 1957).[5] From conception until the twentieth week of development, expulsion of the embryo or fetus from the womb is not considered by the State to be a "birth." La.Rev.Stat.Ann. § 40:-142(5).

[8, 9] From a reading of the Louisiana statutes, it is plain that the State has attempted to provide embryonic and fetal organisms with protection against destruction by other than natural causes in at least the second and succeeding weeks of prenatal development, without regard to whether the organism is capable of sustaining life outside the womb. This protection is qualified. The embryo or fetus may legally be destroyed by a physician if the condition of pregnancy, after due consultation with another licensed physician, appears directly and proximately to threaten the woman's life. Also, section 14:87, as construed, does not make the woman criminally responsible for the destruction of the embryo or fetus she once carried. *E. g.*, Simmons v. Victory Industrial Life Ins. Co. of Louisiana, 18 La.App. 660, 139 So. 68 (1932). With these qualifications, a principal effect of the Louisiana statutes has been a conferment upon the embryonic or fetal organism of a right to survive to a natural termination of prenatal development. Necessarily implicit in this conferment is a valuation of embryonic and fetal life in relation to the life of the infant, the child, and the adult. Regardless of whatever interests the pregnant woman or others may have in ending the life of the embryo or

4. Section 14:87 was amended in 1964 to provide, as did the 1870 statute, that commission of the crime of abortion does not depend upon whether the woman is actually pregnant, so long as the requisite unlawful intent is present. From 1942 until 1964, an attempt to perform an abortion on a woman who was not pregnant apparently was punishable as an "attempt," rather than as a crime of abortion.

5. Although Louisiana law is clear to the effect that "embryo" and "fetus" refer to separate stages of prenatal development, there is no Louisiana law on the question whether "embryo," as used in section 14:87, refers to the "zygote" as well as to the "embryo," as used in medical terminology. If the statute uses "embryo" in its technical medical sense, the induced expulsion of the "zygote" from the womb in the first week of development would not be an "abortion" under section 14:87, because the section deals with the "embryo" and the "fetus." We note this question without comment since its resolution is unnecessary to the disposition of this case.

fetus she carries, application of the Louisiana statutes, subject to the above qualifications, results in the subordination of such interests to the policy of the State that prenatal life must be afforded the opportunity to develop toward a natural birth.

[10] In medical terminology, "abortion" generally refers to the premature expulsion from the womb of the embryo or of the nonviable fetus. Dorland, Illustrated Medical Dictionary 4 (23d ed. 1957). As indicated, the Louisiana statutes make no distinction based upon viability in defining "abortion," that is, upon whether the fetal organism has developed to the stage in which it can sustain life outside the womb or, in the terminology adopted by the State, be "born." *See* La.Rev.Stat.Ann. § 40:142(5). Dr. Rosen argues that Louisiana has not expressed a policy of preferring the interests of an embryo or nonviable fetus as a "human being" over those of the pregnant woman, family unit, or community. To the contrary, he claims, Louisiana has expressed no interest in the embryo or nonviable fetus. Also, he urges that section 37:1285(6) is unconstitutional because the only "legitimate" purpose for which it, like the 1870 criminal statute and its successors, could have been enacted—protection of the lives and health of pregnant women—is no longer served by its application. Not persuaded by these arguments, we conclude that Louisiana has sufficiently manifested its interest in protecting the embryo or nonviable fetus and that section 37:1285(6) cannot be voided essentially on the ground that it is no longer wise legislation.

The inevitable effect of the Louisiana statutes in question is to accord embryonic and fetal human life qualified protection against premeditated destruction by persons other than the mother. As we have said, implicit in this affording of protection is the assignment of value to the embryonic or fetal organism as a form of human life. "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms wellnigh conclusive."[6] Berman v. Parker, 348 U.S. 26, 32, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954). In our opinion, the State of Louisiana values embryonic or fetal human organisms to the extent that such organisms—forms of human life—are entitled to enjoy in at least some basic respects the right to survive on a basis of equality with human beings generally.

As we have indicated, the protection afforded by Louisiana to the embryo or fetus is not coextensive with the protection afforded to the infant, the child,

6. The abortion statutes are not the only laws in which Louisiana has manifested its concern with the problem of valuing prenatal life. In Louisiana, "Children in the mother's womb are considered, in whatever relates to themselves, as if they were already born; thus the inheritances which devolve to them before their birth, and which may belong to them, are kept for them, and curators are assigned to take care of their estates for their benefit." La.Civ.Code Ann. art. 29. In the matter of successions, for example, the "child in its mother's womb is considered as born for all purposes of its own interest; it takes all successions opened in its favor since its conception, provided it be capable of succeeding at the moment of its birth." La.Civ.Code Ann. art. 954. It is true, as Dr. Rosen points out, that the right to inherit vests only in children born alive, regardless of the mode of birth and the length of life after birth. La.Civ. Code Ann. arts. 956, 957, and "Children born dead are considered as if they had never been born or conceived." La.Civ. Code Ann. art. 28. From this the doctor argues that the abortion of an embryo or nonviable fetus would do no violence to the existing Louisiana law of successions. *See* Comment, Abortion and the Law: A Proposal for Reform in Louisiana, 43 Tul.L.Rev. 834, 850–851 (1969). Whether this argument is correct or not is beside the point. Read together, the abortion and succession statutes manifest a coherent policy: The "child in its mother's womb" (embryo or fetus) is afforded certain rights by the State, the enjoyment of which vests upon live birth; the abortion statutes afford the embryo or fetus a qualified opportunity to be born alive in order to enjoy rights such as that of inheritance.

and the adult. Historically and today, the State has demonstrated a greater concern for life after birth than for life before birth. For example, although Louisiana early adopted the common law as to the definition of crimes, La.Acts, 1805, No. 50, § 33, and abortions were not permitted at common law after fetal "quickening," *see, e. g.*, Stern, Abortion: Reform and the Law, 59 J.Crim.L. C. & P.S. 84, 85 (1968),[7] the principle that all crimes in Louisiana are statutory, *e. g.*, State v. Williams, 7 Rob. 252 (La.1844), meant that abortion was not a crime in this State until the 1870 statute was enacted. In terms of punishment and criminal responsibility also, the State has not equated the destruction of an embryo or fetus with the destruction of an infant, a child, or an adult. For example, the pregnant woman who causes the abortion of the "child" in her womb is not made criminally responsible, and those to whom she turns for an abortion may be imprisoned for no more than ten years for the offense. The mother who causes the death of her infant child, on the other hand, may be convicted of murder, manslaughter, or negligent homicide, as the case may be, with death as the ultimate penalty. La.Rev.Stat.Ann. §§ 14:30–32. These facts suggest, for example, that Louisiana does not equate the equality of the offense of "murder," La.Rev.Stat.Ann. § 14:30, with the quality of an act of abortion. In no meaningful way, however, do they rebut the Medical Board's contention that, for the past century, the State in its abortion laws has manifested a policy of protecting human life in its embryonic and fetal forms.[8]

Dr. Rosen argues that the purpose of the Louisiana abortion statutes—other than to compel adherence to specified moral norms[9]—is to protect the lives and health of women who believe themselves to be pregnant rather than to protect the embryo or fetus from destruction. Notwithstanding that these laws, when obeyed, do protect the embryo or fetus, it is suggested that, in light of the pattern of the Louisiana statutes and the history of abortion and the law generally, the Louisiana laws are, at best, health measures that no longer promote good health.[10]

[11–14] We decline to void section 37:1285(6) essentially on the ground that advances in medical knowledge and surgical techniques have made unwise

7. *See also* 3 Coke, Third Inst. 50 (1797); 1 Blackstone, Commentaries Comm. 1, 129–130 (4th ed. 1771); Perkins, Criminal Law 101 (1957).

8. In Louisiana, "homicide" is the killing of a "human being," and criminal homicide is either murder, manslaughter, or negligent homicide. La.Rev.Stat.Ann. § 14:29. Since the destruction of an embryo or fetus is not a homicide under Louisiana law, it has been argued that the State does not consider embryonic and fetal life forms as "human beings." Though destruction of an embryo or fetus under Louisiana law is not considered a homicide so that the perpetrator of its destruction is punishable as a "murderer," it does not follow from the principle that "murder" and "abortion" are distinct crimes under state law that the Louisiana Legislature did not consider embryo and fetus as forms of human life. We may not ascribe to the legislature ignorance of biological realities, nor should we, at the same time, require its express manifestation that it was aware of these realities.

9. The enactment of abortion legislation in the last century has been attributed to the influences of "comstockery." 5 Harv. Civ.Rights-Civ.Lib.L.Rev. 133, 144 (1970). Anthony Comstock, who inspired the use of the opprobrious word "comstockery," was, of course, a man to whom obscenity was "poison to soul and body, and anything remotely touching upon sex was * * * obscene." Broun & Leech, Anthony Comstock 265–266 (1927), *in* Poe v. Ullman, 367 U.S. 497, 520 n. 10, 81 S.Ct. 1752, 1764–1765 n. 10, 6 L.Ed. 2d 989 (1961) (Brennan, J., concurring).

10. *See, e. g.*, Tietze, Mortality With Contraception and Induced Abortion, 45 Studies in Family Planning 6 (1969); Tietze, Abortion Laws and Abortion Practices in Europe, Excerpta Medica International Congress Series No. 207 (1969); People v. Belous, 71 Cal.2d 954, 965, 80 Cal.Rptr. 354, 361, 458 P.2d 194, 201 (1969).

legislation which the State of Louisiana had the power to enact, and we do not believe that the constitutional validity of statutes turns upon whether legislators make speeches or otherwise manifest their intent that the inevitable effect of statutes, viewed on their face alone, was indeed meant to occur. It is a familiar principle of constitutional law that the federal courts will not strike down an otherwise constitutional statute on the basis of an alleged wrongful legislative motive. *E. g.*, United States v. O'Brien, 391 U.S. 367, 383, 88 S.Ct. 1673, 1682, 20 L.Ed.2d 672 (1968); McCray v. United States, 195 U.S. 27, 56, 24 S.Ct. 769, 776, 49 L.Ed. 78 (1904). Similarly, the federal courts will not void legislation which a State had the power to enact on more than one ground because the alleged dominant motive behind the statute is no longer served by its application. In this case, we hold that the State of Louisiana was empowered to place a value upon prenatal human life and that the valuation manifested by the Louisiana abortion statutes may not be struck down by this Court.

At issue here is whether the Louisiana abortion statutes, in assigning a value to prenatal life relative to the interests of the pregnant woman, her family unit, if any, and the community, have invaded a realm of private morality which is not the State's business. *Compare* Committee on Homosexual Offenses & Prostitution (Wolfenden Committee), Report, CMD. No. 247, ¶ 62 (1957).[11] The crime of abortion in Louisiana is classified together with carnal knowledge of, or indecent behavior with, juveniles, prostitution, and the "crime against nature" as "offenses affecting sexual morality."[12] To many in Louisiana, as in other states, a woman who voluntarily causes an abortion of the embryo or fetus she carries "is guilty of a detestible and revolting offense against the laws of nature, which is universally condemned." Payne v. Louisiana Industrial Life Ins. Co., 33 So.2d 444, 445 (La.Ct.App.1948). *See also, e. g.*, Mills v. Commonwealth, 13 Pa. 631, 632 (1850). To others like Dr. Rosen, on the other hand, the failure to limit procreation by abortion is itself unconscionable and immoral if, for example, offspring are destined to be physically or mentally deformed in some fundamental way, to be undernourished, maleducated misfits or rebels against society, or to be unwanted or not cared for because of the economic, physical, and psychological dislocations their births and rearing cause in their parents' lives. We must ask whether abortion, a problem in which attitudes toward life, being, and sexual activity are in such turmoil, is the business of government and the law.

[15–17] The review of state legislation by the federal courts, whether such legislation is considered to be in the exercise of the State's police power or in provision for the health, safety, morals, or welfare of its people, concerns the "powers of government inherent in every sovereignty." The License Cases, 46 U.S. (5 How.) 504, 583, 12 L.Ed. 256, 291 (1847); Poe v. Ullman, 367 U.S. 497, 539, 81 S.Ct. 1752, 1775, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting). The definition of a State's police power is "essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition." Berman v. Parker, 348 U.S. 26, 32, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954). The term "police power" connotes the "time-tested conceptual limit of public encroachment upon private interests." Goldblatt v. Town of Hempstead, N.Y., 369 U.S. 590, 594, 82 S.Ct. 987, 990, 8 L.Ed.2d 130 (1962). The federal courts may interfere with

11. *See also* Devlin, The Enforcement of Morals 1–25 (1965); Sutherland, Constitutionalism in America 527–536 (1965); Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Colum.L.Rev. 391 (1963); Schwartz, Morals Offenses and the Model Penal Code, 63 Colum.L.Rev. 669 (1963).

12. La.Rev.Stat.Ann. §§ 14:80–89.

the exercise of this plenary power of government by the States only to the extent that the Constitution so requires. Barron, for Use of Tiernan v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243, 8 L.Ed. 672 (1833).

The abortion problem concerns the circumstances, if any, that justify the termination of the process of procreation after human life, genetically and biologically, has been conceived. This problem involves the condition of pregnancy and its likely consequence, the first entrance of a new player, "mewling and puking," onto the world stage. Shakespeare, As You Like It, Act ii, sc. 7, l. 139. In specific cases, the condition of pregnancy, if not terminated, may affect the essential welfare of the woman involved; it may cause her to die before her time, to suffer a serious impairment of her health, to waste her life, to be deeply unhappy, or to be happy in a way that society considers to be less than human.[13] Similarly affected may be the essential welfare of the unwanted player once born and the family into which it is born. If the healthy society is viewed as one that not only maintains itself as a going concern, but also, through its free and democratic character, moves in the direction of giving greater scope and expression to those wholesome attributes that set man above the lower species, it may be seen that the abortion problem, if not wisely handled, may in the end impair the good health of the society. But federal judges are not inevitably the source of the wise solution. Under our Constitution, federal judges play a limited role in reviewing the legislation of Congress and the States. We believe that if the passage of a law or a failure to effect its repeal "has ruined a state, there was a general cause at work that made the state ready to perish by a single * * * law." Holmes, Collected Legal Papers 295 (1920). Thus we view the Louisiana abortion laws.

At least with respect to abortion, as medically defined, in the early, nonviable stages of development, proponents of the abolition or "liberalization" of abortion laws have in the main taken as their premise that distinctively human life, that is, valued life, does not commence at conception or at some point near it, but instead at some later stage of prenatal development, such as the point of viability, or at birth itself. Opponents of abolition or "liberalization" have argued from quite different premises. On balance, when "distinctively human" life begins is a matter of contest not so much between those persons and groups who see an embryo or fetus as a human being and those who do not, although this too is involved, but rather is a matter of contest between conflicting views regarding the importance of mere existence in relation to a high quality or excellence of existence.[14] In other words, proponents of abolition or "liberalization" have tended to stress the quality of life after birth rather than the mere existence of life, while their opponents have argued for the transcendence of any life, born or unborn, over the health or happiness of an older or more powerful life. Thus abortion, involving as it does the destruction of, biologically and genetically speaking, a form of human life, raises a basic issue of public interest concerning the value of the human embryo or fetus.

[18] In Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), the Supreme Court struck down a state statute forbidding the use of contraceptives because the law was found to operate unjustifiably upon one aspect of the intimate relation of husband and wife. From this is largely drawn by

13. The concepts of "essential welfare" and of the "healthy society" mentioned here are taken from Banfield, The Unheavenly City, 10–11 (1968).

14. *See generally* Drinan, The Morality of Abortion Laws, in Symposium—Abortion Law Reform, 14 Catholic Lawyer 180 (1968); Jakobovits, Jewish Views on Abortion, in Abortion and the Law 142 (Smith ed. 1967).

Dr. Rosen the argument that a fundamental right of women to choose whether to bear children, after as well as before conception has occurred, must be recognized. In *Griswold*, however, the Court was not required to sit as a super-legislature or rove at large in light of personal and private notions to conclude that choice in the matter of contraceptives was part of the rights associated with home, family, and marriage, which rights were supported by precedent, history, and common understanding.[15] The decision thus operates within a narrow sphere, *see* Kauper, Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case, 64 Mich.L.Rev. 235 (1965); its principles, while tending to expand themselves to the limit of their logic, Cardozo, The Nature of the Judicial Process 51 (1921), must be contained by the historical frame of reference of their purpose. Walz v. Tax Commission of City of New York, 397 U.S. 664, 678–679, 90 S.Ct. 1409, 1416, 25 L.Ed.2d 697 (1970). In our opinion, whether the problem of abortion is a private one of personal or family morality requires first a resolution of the issue of public concern, that is, whether embryonic and fetal organisms should be afforded an opportunity to survive in at least some basic respects on a basis of equality with human beings generally.

[19, 20] Dr. Rosen has strenuously urged before this Court the social undesirability of the Louisiana abortion laws. We may not, however, while professing to act in the service of humane ends, confound private notions with constitutional imperatives. Even where the social undesirability of a law is not disputed, and this is by no means such a case,[16] invalidation of that law by a court debilitates popular democratic government. American Fed. of Labor v. American Sash & Door Co., 335 U.S. 538, 553, 69 S.Ct. 258, 265, 93 L.Ed. 222 (1949) (Frankfurter, J., concurring). We do not share the views of the Courts in Babbitz v. McCann, E.D.Wis., 1970, 310 F.Supp. 293, and Roe v. Wade, N.D.Tex., 1970, 314 F.Supp. 1217, regarding the criteria to be used in testing the constitutionality of abortion legislation. In *Babbitz*, for example, the Court, holding that the State of Wisconsin had not

15. For example, the Court had previously held that the liberty entitled to protection under the Fourteenth Amendment includes the right "to marry, establish a home and bring up children," Meyer v. State of Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923), and the "liberty of parents and guardians to direct the upbringing and education of children under their control." Pierce v. Society of the Sisters of the Holy Names, etc., 268 U.S. 510, 534–535, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925). In Skinner v. State of Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942), the Court struck down an Oklahoma statute providing for the compulsory sterilization of "habitual criminals" on the ground that the statute invidiously discriminated between persons who had committed intrinsically the same quality of offense by sterilizing the one and not the other. To emphasize its view that "strict scrutiny of the classification which a State makes in a sterilization law is essential," the Court noted that it dealt "with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. * * *" 316 U.S. at 541, 62 S.Ct. at 1113. Finally, in Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944), the Court stated:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. Pierce v. Society of Sisters, supra. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter."

16. Considerations of geopolitics, economy, tinkering with natural ecology, genocide, and sociology have been advanced in arguments against the broadening of circumstances under which abortion is permissible. *See generally, e. g.*, Callahan, Abortion: Law, Choice and Morality (1970).

shown a compelling public necessity for invading a woman's "right to refuse to carry an embryo during the early months of pregnancy," concluded: "* * * [T]he mother's interests are superior to that of an unquickened embryo whether the embryo is mere protoplasm, as the plaintiff contends, or a human being, as the Wisconsin statute declares." 310 F.Supp. at 301. This conclusion, we believe, is not mandated by the Constitution.

[21, 22] A reading of current and historical writings on the abortion problem convinces us that *Babbitz* and *Roe* were decided upon theories of life and being which a large part of this country does not entertain.[17] "[T]he word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." Lochner v. New York, 198 U.S. 45, 76, 25 S.Ct. 539, 547, 49 L.Ed. 937 (1905) (Holmes, J., dissenting). We are not persuaded that the Louisiana abortion laws infringe any fundamental principle as understood by the traditions of our people. As an ethical, moral, or religious matter, a woman's refusal to carry an embryo or fetus to term, both historically and today, has been condemned as wrong by a substantial, if not a dominant, body of opinion, except in very limited circumstances.[18] Common science of our people that it must be

17. The attitudes of a society are reflected, at least to some extent, by the statutes it enacts. In 1965, the abortion legislation of the several States might have been roughly classified as those that, in form, prohibited all abortions and those that permitted abortions under carefully limited circumstances. George, Abortion Laws: Proposals and Movements for Reform, in Abortion and the Law 1 (Smith ed. 1967). A review of state legislation today suggests that attitudes toward abortion are in a state of transition, and discussion of the abortion problem is certainly no longer taboo. *See* Clark, Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola U.L.A.L.Rev. 1 (1969).

18. Views from the ranks of organized religion reflect that abortion has been considered morally wrong, except in very limited circumstances. The circumstances that justify abortion vary from religion to religion and denomination to denomination, and it appears that, on balance, attitudes toward abortion are in a state of transition. The official Roman Catholic position is well known. One Roman Catholic commentator has stated that "* * * Catholic moral theology and philosophy have retained, more than the teaching of most other religious denominations, the traditional, and until recently, unchallenged view that abortion is the taking of the life of an unborn but, nevertheless, a real human being." Drinan, The Inviolability of the Right To Be Born, in Abortion and the Law 107-108 (Smith ed. 1967). The Lutheran Church apparently opposes abortion for any reason, while the Presbyterian Church, at least until recently, has favored abortion only to save the mother's life. Reliance is placed upon the individual conscience by the Unitarian and Episcopal Churches, and the Southern Baptist Church has not taken an official position. Rosen, Abortion in America 154-161 (2d ed. 1967). The Orthodox Jewish position will permit abortion if necessary to save the mother's life, and even a remote risk of life invokes "all the life-saving concessions of Jewish law, provided the fear of such a risk is genuine and confirmed by the most competent medical opinions." Jakobovits, Jewish Views on Abortion, in Abortion and the Law 124, 143 (Smith ed. 1967). For example, the "Jewish concern for the mother is so great that a gravid woman sentenced to death must not be subjected to the ordeal of suspense to await the delivery of her child." *Id.* at 142-143. In contrast, the common law has long known the writ *de ventre inspiciendo* authorizing matrons or "discreet women" to inspect the body of a woman to determine if she is pregnant. This writ was issued, for example, to determine before a hanging whether a convicted female was pregnant. If a child was found to be "alive in the womb," that is, "quick," execution was stayed generally until the child was born or by the course of nature it proved that the woman was not pregnant at all. 4 Blackstone, Commentaries Comm. 1, 395 (4th ed. 1771). Conservative and Reform Jews apparently regard abortion far

convictions and attitudes are subject to change, of course, and the valuation of embryonic and fetal life urged by Dr. Rosen may prove ultimately to be supported by common understanding, but we do not find that his valuation is so supported today.

[23, 24] Section 37:1285(6) of the Louisiana Revised Statutes, we conclude, does not offend the due-process clause of the Fourteenth Amendment. We do not recognize the asserted right of a woman to choose to destroy the embryo or fetus she carries as being so rooted in the traditions and collective conranked as "fundamental." The valuation of embryonic and fetal organisms made by the State of Louisiana is supported by scientific fact. Because we further find that section 37:1285(6) is necessary to the accomplishment of a permissible state policy, we must decline plaintiff's invitation to void this law.[19]

Judgment will be entered in favor of defendant, dismissing plaintiff's suit.

Before AINSWORTH, Circuit Judge, and BOYLE and CASSIBRY, District Judges.

CASSIBRY, District Judge (dissenting):*

"* * * One of the basic values of [the right to] privacy is birth control, as evidenced by the *Griswold* decision. Griswold's act was to prevent forma-

more liberally than do Orthodox Jews. Hall, Commentary, in Abortion and the Law 224, 232 (Smith ed. 1967).

The mere assertion, of course, that the action of the State finds justification in the controversial realm of morals "cannot justify alone any and every restriction it imposes. See Alberts v. State of California, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498. * * *

"Yet the very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilised times has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as the laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis. * * *"

Poe v. Ullman, 367 U.S. 497, 545-546, 81 S.Ct. 1752, 1778, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting); *cf.* Walz v. Tax Commission of City of New York, 397 U.S. 664, 677-678, 90 S.Ct. 1409, 1415-1416, 25 L.Ed.2d 697 (1970).

19. As Mr. Justice Clark has said,

"It is for the legislature to determine the proper balance, *i. e.*, that point between prevention of conception and viability of fetus which would give the State the compelling subordinating interest so that it may regulate or prohibit abortion without violating the individual's constitutionally protected rights."

Clark, Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola U. L.A.L.Rev. 1, 11 (1969). Whether the State of Louisiana, as defendant suggests, has a constitutional duty under the Fourteenth Amendment to protect embryonic or fetal life from destruction by induced abortion is a question we do not consider in the disposition of this case, and we intimate no opinion on its merits.

We have carefully considered Dr. Rosen's contention that section 37:1285(6) denies to him, as well as certain classes of pregnant women, and poor pregnant women generally, equal protection of the laws, which is guaranteed by the Fourteenth Amendment. In particular, we have considered the argument that an affluent woman, whether by legal or illegal means, has a better opportunity than a poor one to obtain an abortion at little risk to her life or health. We are, however, unwilling to equate the types of inequality suggested by Dr. Rosen with a denial of a protected right under the Fourteenth Amendment. Therefore, we reject plaintiff's equal protection argument.

* I concur in those portions of the Court's opinion which hold that we should not abstain and that the abortion laws are not unconstitutionally vague.

tion of the fetus. This, the court found, was constitutionally protected. If an individual may prevent conception, why can he not nullify that conception when prevention has failed?" Mr. Justice Clark, Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola Law Review of L. A. 1, 8 (1969)

Because, answer the majority of this Court, a "human life" comes into existence at conception, and the State's interest in protecting that life overrides the fundamental human rights of the mother to the control of her own body and to choose whether to bear a child. But in my view the history and operation of the Louisiana abortion law belie the majority's construction of a purpose to protect human life. If the purpose is to protect life, this law is "the very mirror image"[1] of what one would suppose such a law to be. The law rather seems to be an effort to enforce certain views of private morality against those not sharing those views, see note 25, *supra*. Far from protecting human life it tends in practice to destroy it. And not the least of the evils of this law is that it operates as an invidious discrimination against the poor.

I

Fundamental Nature of the Mother's Rights

In Part I of this opinion I pass over the interests of the fetus, and, for purposes of analysis, focus solely on the impact of the abortion law on the *mother*. In this Part I set up an artificial assumption, that the fetus is no more than a collection of living cells, a part of the mother's own body that, when separated, dies. In the next two Parts of the opinion I consider the exact nature of the State's interest in the fetus.

In a series of cases, culminating in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1964), the Supreme Court of the United States has established an area of fundamental human liberty in matters relating to marriage, the family and children. This development is summarized by Mr. Justice White in his concurring opinion in *Griswold* (at 502, 85 S.Ct. at 1691): "It would be unduly repetitious, and belaboring the obvious, to expand on the impact of this [Connecticut anticontraceptive law] on the liberty guaranteed by the Fourteenth Amendment against arbitrary and capricious denials or on the nature of this liberty. Suffice it to say that this is not the first time this Court has had occasion to articulate that the liberty entitled to protection under the Fourteenth Amendment includes the right 'to marry, establish a home and bring up children,' Meyer v. State of Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 and 'the liberty * * * to direct the upbringing and education of children,' Pierce v. Society of Sisters, 268 U.S. 510, 534–535, 45 S. Ct. 571, 573, 69 L.Ed. 1070, and that these are among 'the basic civil liberties of man.' Skinner v. State of Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 [compulsory sterilization of habitual criminals]. These decisions affirm *that there is a 'realm of family life which the State cannot enter without substantial justification.* Prince v. Com. of Massachusetts [321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645]' * * *." (emphasis added).

Griswold reaffirmed and extended these principles. In the most sweeping terms the Court struck down a criminal law which infringed on the rights of Connecticut couples to practice contraception. Although Mr. Justice Douglas's opinion for the Court focused upon the right of "marital privacy," there is no question that the right to prevent unwanted birth of children was involved as well.[2] Mr. Justice Goldberg (joined

1. Baird v. Eisenadtadt (1 Cir. 1970), 429 F.2d 1398.

2. The United States Court of Appeals for the First Circuit has interpreted *Griswold* as establishing a fundamental right of birth control. *Baird*, note 1, *supra*. In

by Mr. Chief Justice Warren and Mr. Justice Brennan) spoke of "The marital *right to bear children and raise a family*," 381 U.S. at 497, 85 S.Ct. at 1688 and found that the Constitution protected "against * * * *totalitarian limitation of family size*, which is at complete variance with our constitutional concepts." *Id.* (emphasis added); and Mr. Justice White stressed the fact that "The Connecticut anti-contraceptive statute * * * forbids all married persons to use birth control devices *regardless of whether their use is dictated by considerations of family planning, health, or even life itself* * * * [and that the] clear effect of these statutes, as enforced, is to deny disadvantaged citizens * * access to medical assistance and up-to-date information in respect to proper methods of *birth control*." 381 U.S. at 503, 85 S.Ct. at 1691, 1692 (emphasis added)

It is true that the *Griswold* Court did not pass upon the precise question presented here: *Griswold* involved contraception; this case involves abortion. Nevertheless *Griswold* is critically relevant to the present case. For unlike a procedural holding which may be narrowly confined to its particular facts, the *Griswold* decision rested upon the broadest and most sweeping principles of substantive constitutional law. The various opinions may have disagreed as to the methodology by which, or the particular Amendments from which, the right of family privacy is derived. But on one point the seven majority Justices agreed: The "right," be it derived from the First or Fourth, the Ninth or Fourteenth, Amendments, or all of them, was a right "so rooted in the traditions and conscience of our people as to be ranked as fundamental." 381 U.S. at 487, 85 S.Ct. at 1683.

The language of the *Griswold* opinions is strong and unequivocal. Mr. Justice Harlan found that "For reasons stated at length in my dissenting opinion in Poe v. Ullman * * * [the Connecticut] enactment violates basic values 'implicit in the concept of ordered liberty,' Palko v. Connecticut [citation omitted]." 381 U.S. at 500, 85 S.Ct. at 1690. In Mr. Justice White's view "[the] decisions affirm that there is 'a realm of family life which the State cannot enter' without substantial justification [citation omitted]." And Mr. Justice Goldberg, Mr. Chief Justice Warren, and Mr. Justice Brennan considered that "the integrity of that [family] life is fundamental," Griswold v. Connecticut, *supra*, 381 U.S. at 495, 85 S.Ct. at 1687, that it is one of "the requirements of a free society," *Id.* at 493, 85 S.Ct. at 1687 (quoting from Poe v. Ullman, dissenting opinion of Mr. Justice Douglas), and that it "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' * * *." *Id.* at 493, 85 S.Ct. at 1686.

For me, then, the *Griswold* case contains a broad command. It says, to this and other courts: You must protect the

a case involving the application of the Massachusetts anti-contraceptive law to single persons the Court said:

"[W]e consider that [the law] conflicts with fundamental human rights. In the absence of demonstrated harm, we hold that it is beyond the competency of the state. See the various opinions in Griswold v. Connecticut, *supra*, particularly those of Mr. Justice Harlan and Mr. Justice White, concurring. See also Richards v. Thurston, 1 Cir., 4/28/70, 424 F.2d 1281." (Aldrich, C. J.).

Several other courts have held that *Griswold's* right of privacy extends to single persons, and, in the "absence of demonstrated harm," to abortion as well as contraception: People v. Belous, 71 Cal.2d 996, 80 Cal.Rptr. 354, 458 P.2d 194 (1969); Babbitz v. McCann, 310 F.Supp. 293 (E.D.Wis., 1970); see particularly State v. Munson (Cir.Ct., Pennington County, S. Dakota, April 6, 1970); Roe v. Wade, 314 F.Supp. 1217 (N.D.Texas, Civ. Nos. 3-3690-B & 3-3691-C, June 17, 1970). See also United States v. Vuitch, 305 F.Supp. 1032 (D.D.C., 1969).

I agree with these courts that *Griswold* establishes a right of birth control, and I see no reason to limit the right to married persons (see note 25, *supra*).

privacy and intimacy of family life, for such relationships lie at the very core of a free society. And laying aside for the moment the interest of the State, I have no doubt that the Louisiana abortion statute falls within this sensitive area.

Indeed in some ways the right to have an abortion is even more compelling than the rights involved in *Griswold*. Contraception involves the first line of defense against an unwanted birth; abortion the last. At the point contraceptives are used birth is only a possibility; there are a number of forces tending to prevent it apart from contraception. When a mother seeks an abortion, however, she has already conceived. Unless a spontaneous abortion or miscarriage occurs, she is faced with the *immediate* reality of carrying and bearing a child against her will. At least two fundamental human rights are thus involved: The mother's autonomy over her own body, and her right to choose whether to bring a child into the world.[3]

It is difficult to overstate the importance of what the mother has at stake. In physical terms alone the thought of making a mother carry and bear a child against her will is not a pleasant one.[4] But the matter cuts much deeper than mere physical pain. Carrying and bearing a child may involve anxiety and trauma and great psychic pain. See Aarons (M.D.), "Therapeutic Abortion and The Psychiatrist," American J. Psychiat. 124:6, December 1967. Infrequently it results in suicide. *Id.* In some cases the child may be born deformed, or the birth may in this or other respects impair the physical and mental health of the mother. Poor families, with little ability to take advantage of means of self-protection that are of easy access to the rich, see, e. g., Griswold v. Connecticut, 381 U.S. 479, 503, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1964) (concurring opinion of Mr. Justice White), often suffer physical, and therefore possibly other kinds of deprivation by the constant birth of children. But perhaps most important, the birth of a child unalterably affects the emotional lives of both mother and child. At its best, it makes possible a relationship of love; at its worst, it creates an unwanted child. When the State seeks to touch the very core of a person's being in such a fashion, and to thrust upon mother and (potential) child such a relationship *by force*, it violates "those 'fundamental principles of liberty and justice which lie at the base of all our civil and political in-

3. The majority argue that the right to abortion cannot be equated with the general right to choose whether or not to bear a child since alternative means are available to prevent conception. This argument is unrealistic. More than a million women found it necessary to have abortions last year (Life Magazine, Feb. 27, 1970). Kinsey found that 22% of the married women interviewed had had one or more abortions by age 45. Abortion in the United States, 50, 54 (Calderon ed. 1958). Between 88 and 95% of the premarital pregnancies in his sample resulted in abortion. Obviously there are great numbers of women who, for one reason or another, are not able to utilise alternative methods. See Griswold v. Connecticut, 381 U.S. 479, 503, 85 S.Ct. 1678, 1692, 14 L.Ed.2d 510 (1964) (concurring opinion of Mr. Justice White).

4. The authority for the idea that the Constitution extends significant protection to a person's sovereignty over his own body extends back as early as 1891, when the Supreme Court stated:

"No right is held more sacred, [n] or is more carefully guarded * * * than the right of every individual to the possession and control of his own person, free from all restraints or interference of others unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right to one's person may be said to be a right of complete immunity: to be let alone.'" Union Pacific Railroad v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 35 L.Ed. 734 (1891).

Of course the right has limits. In Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1904), for example, the Supreme Court upheld a compulsory vaccination law. The lengths to which the Court went, however, to justify a shot in the arm point up the degree to which personal autonomy is entitled to protection.

stitutions * * *.' [citation omitted]." *Griswold, supra*, 381 U.S. at 493, 85 S.Ct. at 1687 (concurring opinion of Mr. Justice Goldberg). As Mr. Justice Brandeis said, dissenting in Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928):

> "The protection guaranteed by the [Fourth and Fifth] amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." [5]

That the State in these circumstances bears a heavy burden of proof to justify the law is beyond doubt.[6] Louisiana urges upon us the protection of human life, a claim which bears examining. Meanwhile, however, both parties have confused the matter by their use of the science of biology.

II

The Relevance of Biology

The biological evidence presented in this case suggests that some sort of human organism exists from the time of conception.[7] The parties, however, would go further and make biology conclusive, for both court and legislature, as to the existence or non-existence of a "human being" at the time of conception. These efforts seem misplaced.

The meaning of the term "human being" is a relative one which depends on the purpose for which the term is being defined. To the scientist a "human being" may be no more than union of sperm and egg; to the poet or to society as a whole the term may connote something else.[8] Science at best marks the

5. This passage is quoted in Mr. Justice Goldberg's concurring opinion in *Griswold, supra* at 550, 85 S.Ct. 1678 and by Mr. Justice Harlan in his dissent in Poe v. Ullman, 367 U.S. 497, 550, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961).

6. See Part III of this opinion.

7. Compare the following excerpt from the cross-examination of Dr. Christopher Tietze, an expert witness in the field of medicine (TR. 14, 2):

> "Q. Dr. Tietze, I do not mean to keep quarreling with you, but you keep referring to a human person and under your definition of a human person, you may well be right. I have asked you in my question with regard to a human being, is the embryo a human being in an earlier state of development of the fetus?"
>
> "A. If you will define, if you are referring, apparently to a human being as something begotten by man and potentially to become man, yes, it would be an early stage of a human being. But this is a very special definition and I think an essential one to the discourse between you and me."
>
> * * * * *
>
> "Q. It is also fair to say that this zygote is an organism of the same gene structure of a fully-grown, highly complex adult?"
>
> "A. It has the same, yes * * *."

8. Cross-examination of Dr. Christopher Tietze, TR. 4–5:

> "Q. Now, with regard to this zygote which is an early embryo, which is an early fetus, in biological terms, would it be not a fair statement to say that this is a human being?"
>
> "A. I think we are getting ourselves, now, into a philosophical question. I would say as a close approximation to my own reaction to this thing—and that is what we all must do, is face philosophical conceptions—that it is a potential human being and I would not refer to the zygote as an early embryo, I would refer to the zygote as a potential embryo."
>
> * * * * *
>
> "Q. You injected the word philosophical, philosophy, and I ask you from a biological standpoint, isn't this zygote, this embryo, this fetus a human being?"
>
> "A. I think the term human being, with all of its connotations, extends far beyond biology and is a philosophical con-

outermost limits of life; it cannot tell us nearly so well what a human being *is* as it can what a human being definitely *is not*. The Romans, for example, practiced infanticide with indifference.[9] No doubt the science of the Romans regarded the infant as a human being; but can one say the Romans did?

Present practice as well shows the futility of attempting to frame the question in terms of absolutes.[10] In Louisiana, for example, a mother who intentionally destroys her own fetus is guilty of no criminal offense, see, e. g., Simmons v. Victory Indus. Life Ins. Co., 18 La.App. 660, 139 So. 68 (Orleans Ct.App.1932); however, the moment the infant is born, the same act is punishable by the penalty "which the law exacts in all such cases, which penalty is death." State of Louisiana v. Burks, 202 La. 167, 11 So.2d 518, 520 (Sup.Ct.La.1942); La.Rev.Stat. Ann. 14:30 (1950).

The question in this case, then, is not the abstract one of whether a fetus is a "human being," but the more concrete one of the extent to which human value has been assigned to the fetus by *Louisiana*.

We must analyze the precise nature of the State's interest in the fetus to determine whether, a part from the "label" it carries, it is in *substance* the kind of interest which is "compelling" and which "subordinates" the rights of the mother. Griswold v. Connecticut, 381 U.S. 479, 496, 504, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).[11]

cept. If you ask me whether the zygote normally in the course of circumstances, with exceptions, will develop into a human being, obviously the answer is yes. Whether this human being meets all of the other qualifications that we attach to this important term, I submit, is not a question of biology * * *."

* * * * *

"A. * * * To be a human person in any society is something conferred to an individual by his fellow citizens. In some societies, a child was not a human person, in the sense that his parents could do away with him at will * * * I think what we call a human person is an imputed quality, a quality conferred by the society * * *."

Compare the following statement of Mr. Justice Clark:

"To say that life is present at conception is to give recognition to the potential, rather than the actual. The unfertilized egg has life, and if fertilized, it takes on human proportions. But the law deals in reality, not obscurity—the known rather than the unknown. When sperm meets egg life may eventually form, but quite often it does not. The law does not deal in speculation. The phenomenon of life takes time to develop, and until it is actually present, it cannot be destroyed. Its interruption prior to formation would hardly be homicide, and as we have seen, society does not regard it as such. The rites of Baptism are not performed and death certificates are not required when a miscarriage occurs. No prosecutor has ever returned a murder indictment charging the taking of the life of the fetus. This would not be the case if the fetus constituted human life." Loyola of L.A.Rev., vol. 2 (1969).

9. Comment, To Be Or Not To Be: The Constitutional Question of the California Abortion Law, 118 U.Pa.L.Rev. 643, 653, n. 60 (1970) (citing J. Noonan, Contraception, 85–87 (1965).

10. "* * * In the ultimate analysis Catholics do not differ from advocates of easy abortion because Catholics hold that a human life is present in the fetus from the earliest moment of its existence. Catholics differ with their opponents rather over the nature and quality of the reasons which can justify an abortion. Utilizing the traditional principles of moral theology Catholic thought justifies at least the termination of an ecoptic pregnancy and the unintended destruction of a fetus when the removal of a uterus is medically required. Catholics therefore should move away from any line of reasoning or species of rhetoric which suggests that the proponents of abortion are advocating homicide. Catholics should delimit the question to the more precise issue involved, namely, the nature of the reasons which can furnish a moral justification for the termination of the existence of the fetus."
Robert F. Drinan, The Morality of Abortion Laws, Association for the Study of Abortion, Inc., Reprint 1 (1968). (Father Drinan was the Dean of the Boston College Law School, and has just been elected to Congress).

11. Concurring opinions of Mr. Justice Goldberg and Mr. Justice White.

III

The Louisiana Abortion Statute

The opinion of the majority reads very much as though this were a case involving the validity of an ordinary police measure. Every doubt is resolved in favor of the law. Normally, of course, this is as it should be when the serious question of the constitutionality of legislation is raised. But "Surely the right involved in this case * * * 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive from shifting economic arrangements.' Kovacs v. Cooper * * * (opinion of Frankfurter, J.)." Griswold v. Connecticut, 381 U.S. 479, 502, 85 S.Ct. 1678, 1691, 14 L.Ed.2d 510 (1965) (concurring opinion of Mr. Justice White).

"Where there is a significant encroachment upon personal liberty," the presumption of constitutionality is reversed, and "the *State* may prevail only upon *showing* a subordinating interest which is compelling." *Griswold, supra*, at 504, 85 S.Ct. at 1692 (concurring opinion of Mr. Justice White) (emphasis added). I take it then that the State has the burden of proof, see, e. g., Shapiro v. Thompson, 394 U.S. 618, 634–638, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969);[12] Sherbert v. Verner, 374 U.S. 398, 406–407, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963);[13] Bates v. City of Little Rock, 361 U.S. 516, 525–527, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960);[14] Skinner v. State of Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942),[15] or that, at the very least, the fundamental rights at stake here

> "require particularly careful scrutiny of the State needs asserted to justify their abridgment." Mr. Justice Harlan, dissenting in Poe v. Ullman, 367 U.S. 497, 543, 81 S.Ct. 1752, 1777, 6 L.Ed.2d 989 (1961)

I turn to the statute [La.Rev.Stat.Ann. § 14:87 (Supp.1970)]:

> "87. ABORTION
>
> Abortion is the performance of any of the following acts, with the intent of procuring premature delivery of the embryo or fetus:
>
> (1) Administration of any drug, potion, or any other substance to a female; or
>
> (2) Use of any instrument or any other means whatsoever on a female.
>
> Whoever commits the crime of abortion shall be imprisoned at hard labor for not less than one nor more than ten years." As amended, Acts 1964, No. 167.

12. At pp. 634–637, 89 S.Ct. at pp. 1331–1333 the Court analyzes the State's asserted justifications for the residency requirement for welfare and finds that they are "plainly belied" by the facts (p. 635, 89 S.Ct. p. 1332) and will not "withstand strict scrutiny." (p. 636, 89 S.Ct. p. 1332)

13. "It is basic that no showing merely of a rational relationship to some colorable State interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation' * * *." (p. 406, 83 S.Ct. p. 1795).
At p. 407, 83 S.Ct. at p. 1795 the Court referred to the "asserted state interest" and concluded that "*Nor * * * would the record appear to sustain it.*" (emphasis added)

14. "It cannot be questioned that the governmental purpose upon which the municipalities rely is a fundamental one. No power is more basic to the ultimate purpose and function of a government than is the power to tax. * * * But governmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion in the preamble of the ordinance. When it is shown that state action threatens significantly to impinge upon constitutionally protected freedom it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification." (p. 524, 80 S.Ct. p. 417)

15. "Strict scrutiny [of state sterilization law] is essential * * *."

Defendants urge again and again in their brief, and the majority of this court accept, the proposition that we are here dealing with a statute whose purpose is the protection of "human life." If this is true it is certainly not apparent from the statute itself. Unlike, for example, the Wisconsin statute,[16] which specifically refers to the "life" of an unborn "child," and defines "unborn child" as "a human being from the time of conception until it is born alive," the Louisiana statute makes no reference to "human life;" it refers only to the "embryo or fetus."[17] In Wisconsin the crime of abortion consists of "intentionally *destroy[ing]* the life of an unborn child." (emphasis added) In Louisiana, on the other hand, the crime consists of performing various acts on a "female" for the "*purpose* of procuring *premature delivery*." (emphasis added). Thus in Wisconsin no crime is committed unless the life of the fetus is actually terminated. In Louisiana, "[The abortion statute] does not use the word 'attempt,' but penalizes the felonious administration of any drug, potion, or anything to any woman, for the purpose of procuring abortion or premature delivery, and prescribes *only one penalty*.. Hence Section 807 makes no distinction between the attempt and the actual procurement of abortion or premature delivery." State of Louisiana v. Mauvezin, 136 La. 746, 67 So. 816 (1915) (emphasis added). So far as I have been able to determine, abortion is the only crime in Louisiana in which there is no distinction between an attempt and commission of the substantive crime.[18] (Indeed the "attempt" in Louisiana *is* the substantive crime). In past versions of the statute the subject of an abortion was a "pregnant"[19] female; in 1964 the legislature decided that any "female" would do. Finally, it is not even certain whether an intent to terminate fetal life is necessary for a conviction under the Louisiana statute. The 1870 statute, as

16. Wis.Stat. § 940.04:
"(1) Any person, other than the mother, who intentionally *destroys* the *life* of an unborn *child* may be fined not more than $5,000 or imprisoned not more than 3 years or both.
(2) Any person, other than the mother, who does either of the following may be imprisoned not more than 15 years:
(a) intentionally destroys the *life* of an unborn quick child; or * * *
(6) In this section 'unborn child' means a *human being* from the time of conception until it is born alive." (emphasis added)

17. Compare La.Rev.Stat.Ann. § 14:29, entitled "Homicide," which provides in part:
"Homicide is the killing of a *human being* * * *." (emphasis added)
and La.Rev.Stat.Ann. § 14:30, entitled "Murder," which reads in part:
"Murder is the killing of a *human being* * * * [with specific intent to kill] * * * whoever commits the crime of murder shall be punished by death."

18. Compare La.Rev.Stat.Ann. § 14:27, entitled "Attempt," which provides in part:
"Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of or tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; * * *
Whoever attempts to commit any crime shall be punished as follows:
(1) If the offense so attempted is punishable by death or life imprisonment he shall be imprisoned at hard labor for not more than twenty years;
(2) If the offense so attempted is theft or receiving stolen things, he shall be fined not more than two hundred dollars, or imprisoned for not more than one year, or both;
(3) In all other cases he shall be fined or imprisoned, or both, in the same manner as for the offense attempted; but such fine or imprisonment shall not exceed one-half of the largest fine, or one-half of the longest term or imprisonment prescribed for the offense so attempted, or both."

19. The 1942 version of the statute, La.Rev.Stat.Ann. § 14:87, read in pertinent part:
"* * * (1) Administration of any drug [etc.] * * * to a *pregnant* female; or
(2) Use of any instrument [etc] * * * on a *pregnant* female, * * *" (emphasis added)

amended, La.Acts, 1888, No. 24,[20] prohibited certain acts with intent to procure an "abortion" *or "premature delivery"*. (emphasis added). Today the statute does not even use the word "abortion" but simply the broader term "premature delivery."

Thus the Wisconsin statute at least purports to emphasize the life of the fetus; the Louisiana statute focuses more on an intent to interfere with nature irrespective of the fate of the fetus (or indeed of whether there even is a fetus). Along with "prostitution," "crimes against nature," etc. the crime of abortion in Louisiana is an "Offense Affecting Sexual Immorality"[21] rather than an "Offense Against The Person."[22] The provision of the Criminal Code immediately following Abortion, entitled "Distribution of Abortifacients,"[23] provides *one penalty* for distribution of abortifacients *or contraceptives*[24] (Cf. Baird v. Eisenstadt, 1 Cir., 1970, 429 F.2d 1398: "We are led inevitably to the conclusion that * * * it is contraceptives *per se* that are considered immoral * * *.")[25]

20. "Whoever shall feloniously administer, or cause to be administered, any drug, potion, or any other thing, to any woman for the purpose of procuring a *premature delivery*, or whoever shall administer, or cause to be administered, to any woman pregnant with child, any drug, potion, or any other thing, for the purpose of procuring *abortion* or a premature delivery, or whoever by any means whatsoever shall feloniously procure abortion or premature delivery, shall be imprisoned at hard labor for not less than one nor more than ten years." (emphasis added)

21. La.Rev.Stat.Ann. § 14:80–89.

22. La.Rev.Stat.Ann. § 14:29–50.

23. La.Rev.Stat.Ann. § 14:88.

24. "We call your attention to Act 95 of 1920, [the predecessor of the present Abortifacient Statute, note 19 *supra*] which is an Act to prohibit the printing or publishing of an advertisement of any secret drug for the use of females for the procurement of abortion or prevention of conception * * * We are therefore of the opinion that birth control in any form would fall within the criminal statutes now in force in this state."
Op.Atty.Gen. of La. 128, 129 (1932–1934). See also Ops.Atty.Gen. of La. 73 (1934–1936); Comment, 23 La.L.Rev. 773, 775 (1963).
The framers of the 1942 Criminal Code were aware of this interpretation of the law at the time they re-enacted it, see Morrow, The Louisiana Criminal Code of 1942—Opportunities Lost and Challenges Yet Unanswered, 17 Tul.L.Rev. 1, 22 (1942) (Morrow was one of the principal reporters of the Code).

25. H. L. A. Hart has distinguished between "public" and "private" morality in the criminal law. "Public" morality involves actions that are harmful independent of their repercussion on the general moral code. Rape is an example. "Private" morality involves actions that are not harmful to others but offensive to prevailing (or sometimes not so prevailing) moral feelings. Examples are fornication or consenting homosexuality. As Hart puts it, a particular practice violates private morality "if the thought of it makes the man on the Clapham omnibus sick." 62 Listener 162, 163 (July 30, 1959).

In John Stuart Mill's view government has no business enacting *private* morality into the criminal law:

"The only purpose for which power can be rightfully exercised over any member of a civilised community against his will is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant."

On Liberty.

The British government has adopted Mill's position. See Report of the Committee on Homosexual Offenses and Prostitution (Wolfenden Report) 9–10, 20–21, 24, 79–80 (1957). So has the American Model Penal Code, see Tentative Draft No. 4, Comments to Article 207, Sexual Offenses. In the United States, however, courts often affirm—almost always in dictum—the propriety of statutes against fornication, etc. See e. g., Griswold v. Connecticut, 381 U.S. 479, 498–499, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (concurring opinion of Mr. Justice Goldberg). But where fundamental rights are involved, as they are in this case, private morality alone cannot justify their abridgment:

"The mere assertion that the action of the State finds justification in the controversial realm of morals cannot justify alone any and every restriction it im-

Concern for the protection of human life, then, is hardly manifest from the face of the statute.[26] In actual operation the statute fares even worse. Since 1870, when the abortion law was first enacted, there have been no more than four reported decisions of prosecutions.[27] There are only two reported prosecutions subsequent to 1955. All of these prosecutions are against the "criminal" abortionist; as against the *physician* there are no reported decisions of prosecutions.[28]

Perhaps even more revealing, however, is the fact that the *woman* who submits to abortion is guilty of no criminal offense:

> "It is true that a female who voluntarily becomes the subject of an abortion, without justifiable medical reason, is guilty of a detestible and revolting offense against the laws of nature, which is universally condemned, but notwithstanding this, such woman is not guilty of any criminal offense known to the laws of this state." Payne v. Louisiana Ind. Life Ins. Co., 33 So.2d 444 (Orleans Ct. App.1948)

This is true even in the case where the woman intentionally aborts herself. Simmons v. Victory Indus. Life Ins. Co., *supra*. It may be argued that the reason for exempting the mother is to encourage her to testify against the "abortionist." But surely this puts the cart before the horse. Suppose, for example, that A hires B to kill C; would the State

poses." Poe v. Ullman, 367 U.S. 497, 545, 81 S.Ct. 1752, 1778, 6 L.Ed.2d 989 (1961) (dissenting opinion of Mr. Justice Harlan). See also Baird v. Eisenstadt, *supra*.

26. Both parties seek to show the State's interest or lack of it in the fetus by pointing to various succession laws. One statute, for example, says that children in the womb are considered as already born and that an inheritance may "devolve" to them before their birth. La.Civ.Code Ann. Art. 29. See also La.Civ.Code Ann. Art. 954. But the right to inherit does not vest unless or until the child is "born alive," La.Civ.Code Ann. Arts. 956–957, and "children born dead are considered as if they had never been born or conceived." La.Civ.Code Ann. Art. 28.

In my view the succession laws are of doubtful relevancy to the abortion statute; at any rate they are too contradictory to support the argument of either party.

27. State of Louisiana v. Sharp, 248 La. 865, 182 So.2d 517 (1966); State of Louisiana v. Pailet, 246 La. 483, 165 So. 2d 294 (1964); State of Louisiana v. Dore, 227 La. 282, 79 So.2d 309 (1955); State of Louisiana v. Mauvesin, 136 La. 746, 67 So. 816 (1915).

Compare the "Gambling" statute, La. Rev.Stat.Ann. § 14:90, under which there have been at least 50 reported prosecutions. "Sodomy" (Abortion's bedmate in the Code) has even resulted in a greater number of reported prosecutions.

28. The absence of reported cases is not the only evidence of failure to prosecute the physician:

> "The lack of enforcement was noted in 1868, H. Storer & F. Heard, Criminal Abortion 136–147 (1868), and has continued to the present, *see* L. Lader, Abortion 70–73 (1966); Ziff, Recent Abortion Law Reforms (Or Much Ado About Nothing) 60 J.Crim.L.C. & P.S. 3, 8 (1969)." 118 U.Pa.L.Rev. 647, 657, n. 87 (1969).

Speaking of the considerations that Dr. Belous might have weighed in deciding whether or not to perform an abortion in California one writer could blithely conclude "Considering the fact that the possibility of criminal prosecution and loss of practice is rarely realized. * * *" *Id.*

And here in Louisiana Professor C. J. Morrow, to whom defendants refer in their brief as "one of the principal redactors of the Criminal Code," has observed as a fact what the lack of reported prosecutions reflect:

> *"It is common knowledge that abortions of all types are performed every day, and that there are no criminal prosecutions. This is true because there is obviously common popular acceptance of the practice, in spite of the theoretical disapproval in some quarters. However the tremendously unfortunate aspect of the situation is that under the present state of the law doctors are forced into either open defiance of the positive law in what they deem to be justifiable cases, or into clandestine practice under substandard conditions."* Morrow, The Louisiana Criminal Code of 1942—Opportunities Lost and Challenges Yet Unanswered, 17 Tul.L.Rev. 1, 22 (1942) (emphasis added).

grant A immunity in exchange for his testimony against B? If abortion is truly regarded as the destruction of human life, the mother is the principal criminal; the "abortionist" is merely her paid executioner. If the State really means to protect the life of the fetus why does it fail to deter the person most directly responsible for taking it? Save for the instigation of the mother the "criminal abortionist" would not exist. Finally, why is the woman who aborts herself immune? Perhaps it will be argued that otherwise she may be afraid to seek medical help if injury results; but this proves only that the health of the mother is considered more important than the preservation of the fetus.[29]

See *conclusion "2", infra.*

The conclusions I draw from the foregoing facts are as follows:

(1) In practice the efforts of the State on behalf of the fetus belie the claim of a compelling state interest. Abortion actually occurs on a massive scale in the United States—estimates run between one and three million per year. Yet there is no significant attempt at deterrence. "Lamented" by some, "decried" by others, the fact remains that the phenomenon of abortion is ignored by most. The fetus in Louisiana is shielded neither from mother nor physician by the criminal law; rather the mother is shielded (rather imperfectly) from the quack. Abortion is thus a singular "crime" in our law; it is a crime without a criminal. A poor person who may steal for the most pressing human needs is branded as a "thief" and punished by the criminal law—often severely. This comes as no surprise: Our society holds the institution of private property in high regard; he who tampers with it does so at his peril. A mother, however, may take the life of her fetus at pleasure so far as the criminal law is concerned. In practice, so may a licensed physician. Surely the remarks of Mr. Justice Frankfurter in the Connecticut Birth Control case are relevant here:

"* * * The undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis. * * * Deeply embedded traditional ways of carrying out state policy * * *—or not carrying it out—are often tougher and truer law than the dead words of the written text." Poe v. Ullman, 367 U.S. 497, 502, 81 S.Ct. 1752, 1755, 6 L.Ed.2d 989 (1961)

(2) The statute is irrational and self-contradictory, a menace to public health without serving any compensating public need. As previously noted prosecution seems to be almost exclusively against the quack and not the physician. Since the crime, *qua fetus*, is equally great when committed by a physician *the enforcement* of the statute manifests little or no concern for the fetus but rather an overriding concern for the protection of the safety and health of the mother. Yet the menace to public health is clearly the product of the statute itself. The statute's primary effect is not to prevent or deter abortion, see "Conclusion (1)," *supra*, but simply to make it unsafe. Can it be said that there is a "reasonable relation between the prohibition * * * and the protection of the public health, education and welfare"? Sperry & Hutchinson Co. v. Director, 307 Mass. 408, 418, 30 N.E.2d 269, 275 (1940), or that the statute "bears a reasonable relation to a proper legislative purpose * * *." Nebbia v. New York, 291 U.S. 502, 537, 54 S.Ct. 505, 516, 78 L.Ed 940 (1934); Meyer v. Nebraska, 262 U.S. 390, 399–400, 43 S.Ct. 625, 67 L.Ed. 1042 (1923)?

29. Compare the child battering cases. One of the reasons heavy penalties sometimes are not imposed is to encourage the child batterer to seek medical help for the child. Thus low penalties are no indication that the crime is taken lightly but rather that the need to protect the welfare of the child is balanced against the need to punish the child batterer. In the situation where the mother aborts herself, however, if any balance is struck it is struck in favor of the mother, not the child.

(3) The statute inflicts cruel and unusual punishment on the mother and violates equal protection of the law. As pointed out, the State does not attempt to deter abortion by imposition of criminal sanctions directly on the principal actor—the mother. At the same time, however, it makes it illegal for anyone else to perform an abortion. This of course has the effect of raising the price of abortion at all levels of skill. Thus to the extent that the statute deters the mother, it does so only by putting safe abortion beyond her means or by making her risk serious bodily injury at the hands of a relatively low-priced unskilled abortionist.

In Baird v. Eisenstadt, *supra*., the Court of Appeals for the First Circuit held that it was impermissible for Massachusetts, through its anti-contraceptive law, to pursue a policy of deterring fornication "by making the penalty a personally, and socially, undesired pregnancy." The present case is probably distinguishable from *Baird*. I do not think the legislature *intended*[30] to encourage women to risk their health and lives; but because the statute makes abortion illegal for everyone but the mother it works precisely that result.

This purposeless suffering which the statute brings about is made all the more intolerable by the fact that its victims are primarily the poor:

> "The present law places an unfair discrimination on the poor in that persons with money may obtain safe abortions either by travelling to other jurisdictions, by going to high priced competent though illegal abortionists, or by obtaining legal abortions here based on 'sophisticated indications.'" Report of the Governor's Commission Appointed to Review New York State's Abortion Laws, 17 (Mar.1968)

Deaths and maiming from abortion by nonmedical means such as soaps, chemicals, knitting needles, coathangers, etc., appear to be the basic if not the exclusive property of the non-white poor. Gold,[31] for example, shows that between 1960–62 in New York City abortion accounted for 55.5%, 49.4% and 25.2% respectively of the Puerto Rican, nonwhite and white puerperal death rates. Gold does not report figures for injury short of death, but one can imagine the toll they must take in the ghetto.

30. But see defendant's brief: "Plaintiff also argues that the statute prohibiting abortions forces women to take 'coat hangers and knitting needles' * * * and that this could be corrected by repealing or holding the statute unconstitutional. It is argued that forcing women to go to unskilled abortionists is more of a danger to their health. This is a specious argument. *It is neither necessary nor proper for society to remove obstacles that are in the way of the criminal in order to make it easier to commit the crime.*" (emphasis added)

31. Gold, Erhardt, Jacobziner & Nelson, Therapeutic Abortions in New York City: A Twenty Year Review, 55 Am.J.Pub. Health 964 (1965); see also Note, Abortion and the Law: A Proposal for Reform in Louisiana, 43 Tul.L.Rev. 834, 836–837 (1969):

> "Because the demand for abortion cannot be met within the existing legal framework, illegal means are increasingly employed. For an affluent woman, able to pay a fee of $300 to $600, skilled physicians willing to work outside the law are available. [Citing Time, vol. 90, Oct. 13, 1967 at 33] Indeed in Miami alone abortionists collected $20,000,000 for their services in 1967 * * * [citing Time, *supra*].
>
> Since hospital abortions are generally unavailable to precisely those persons who are unable to afford the expensive and illegal private abortions the less affluent are forced to resort to the unskilled. [citing L. Lader, *Abortion* (1967)] Obviously the greater proportion of the more than 1,000 deaths annually due to abortions [citing Time, *supra*] occur among these expectant mothers. However, the annual death toll is only a small part of the social cost of such a system. To the death toll must be added thousands of women crippled by infection, thousands whose sexual organs are damaged so that they are unable to achieve normal sexual satisfaction, and thousands rendered irreversibly barren [citing Time, *supra*]. These, then, are the results of the prevailing American solution to the problems posed by abortion."

If the penalty is built-into the statute, so is the discrimination. *Cf.* Griswold v. Connecticut, 381 U.S. 479, 503, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965);[32] Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942).[33] See also note 31, *supra*. By making abortion legal for the mother, but illegal for anyone else, the statute's *sole* effect on the mother is to raise the price of abortion. Abortion becomes less available to the degree to which one is not able to afford the "tax." For some the higher price is not an obstacle; for others it is either prohibitive, or, to the extent to which forces them to go to the less skilled practitioners (or to abort themselves), highly dangerous. If criminal sanctions were applied to well-off and poor women alike (not just in theory but in practice), as well as to the "abortionist," the increased price of abortion would be an *additional* (as well as unavoidable) deterrent, *but not the only one*. But the Louisiana statute does not deter rich and poor alike by equal application of the criminal law; it simply makes safe abortion less available to the poor than it would otherwise be. The person with means remains perfectly free to procure a high-priced safe abortion without fear of criminal sanction. This discrimination is therefore far more than an unequal side-effect of an otherwise equal law. The law itself is unequal. It is a *direct* discrimination against the poor, a gross violation of this country's "pledge of the protection of equal laws." Yick Wo v. Hopkins, 118 U.S. 356, 369, 68 S.Ct. 1064, 1070, 30 L.Ed. 220 (1886). Moreover, since the discrimination affects the most fundamental human rights —either by denying abortion to the poor altogether or by subjecting them unequally to risks of life and limb—"*strict* scrutiny * * * is essential, lest *unwittingly, or otherwise* invidious discriminations are made against groups or types of individuals in violation of the constitutional guarantee of just and equal laws." Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (compulsory sterilization law) (emphasis added). See also note 32, *supra*. Many women lose the use of their sexual organs as a result of the abortion laws, see note 31, *supra*, just as did the habitual criminals in *Skinner*. I would hold the statute invalid on the ground of equal protection alone.

(4) The abortion statute neither has a clear purpose to protect fetal life, nor is there good reason to believe it significantly does so in fact. (except, perhaps, where the poor are concerned). See "Conclusions (1) and (3)," *supra*, text at notes 26–29, *supra*, Abortion and the Law 23 (Smith ed. 1967); *Cf.* Griswold v. Connecticut, *supra*, 381 U.S. at 498, 85 S.Ct. at 1689.[34]

These, then, are the weighty State "interests" for which the mother must suffer and, in an estimated 8,000 cases last year, die. I must dissent.[35]

32. "And the clear *effect* of these statutes, *as enforced*, is to deny disadvantaged citizens of Connecticut, those without either knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control * * *. In my view, a *statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment.* Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 * * * Skinner v. State of Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, [86 L.Ed. 1655] * * *." (emphasis added) (concurring opinion of Justice White)

33. "* * * strict scrutiny * * * is essential, lest *unwittingly or otherwise* invidious discriminations are made against groups or types of individuals in violation of the constitutional guarantee of just and equal laws. * * *" (emphasis added).

34. "[The State] says that preventing the use of birth-control devices by married persons helps prevent the indulgence by some in such extra-marital relations. The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth control devices * * *." (concurring opinion of Justice Goldberg).

35. "But, as might be expected, we are not presented simply with this moral judg-

I attach as an appendix portions of the excellent opinion of Judge Clarence P. Cooper, which is otherwise not reported.

APPENDIX

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH DAKOTA, WITHIN AND FOR PENNINGTON COUNTY

STATE OF SOUTH DAKOTA,
Plaintiff,
vs.
H. BENJAMIN MUNSON,
Defendant

MEMORANDUM DECISION

April 6, 1970

CLARENCE P. COOPER, Circuit Judge:

"* * * most of the abortion laws were passed in the so called 'Victorian' era, a time when moral and religious fervor against anything regarded as sinful, resulted in many laws governing morals and personal conduct. The South Dakota statute dates back to 1877. Most of these laws governing personal or private conduct, like the 'blue laws' have either been repealed or have not been enforced. The laws prohibiting abortion represented a change from the common law which permitted abortion in the initial stages of pregnancy, before quickening of the fetus. * * *

"According to reliable estimates, more than a million American women had abortions last year. Of these about 350,000 needed hospital care when they attempted to abort themselves, and more than 8000 of these self-help cases died. (Life Magazine, Feb. 27, 1970) Enforcement of the abortion laws has been chiefly against quacks and charlatans who have botched the job, and the woman lived to complain. Where death ensues, the prosecution has been for homicide. It is a rare case when a licensed physician has been prosecuted. In no instances has the woman been prosecuted, although the abortion laws are directed equally against the woman seeking an abortion.

"With such massive disregard for the abortion law, reflecting a radical change in public attitude, it is in order to determine whether the exercise of the police power in prohibiting abortion is 'sanctioned by usage, held by prevailing morality to be necessary to public welfare, or endangers the vital interests of society', criteria which over the years have been used to measure the right of the State to regulate personal and private conduct. * * *"

ment to be passed on as an abstract proposition. The secular state is not the examiner of consciences: it must operate in the realm of behavior of overt actions, and where it does so operate, not only the underlying moral purpose of its operations, but also the *choice of means* becomes relevant to any Constitutional judgment on what is done. The moral presupposition on which appellants ask us to pass judgment could form the basis of a variety of legal rules and administrative choices, each presenting a different issue for adjudication." Mr. Justice Harlan, dissenting, Poe v. Ullman, 367 U.S. 497, 547, 81 S.Ct. 1752, 1779, 6 L.Ed.2d 989 (1961).

Item No. 28

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS

STATE OF MISSOURI

SAMUEL U. RODGERS, M.D.; DAVID ROTHMAN, M.D.; DAVID HALL, M.D.; DAN L. BERGER, M.D.; RAYMOND B. BRAGG; ALVAN D. RUBIN; ROBERT H. CRAFT; GWYNDOLYN HARVEY; SUSAN HALVERSTADT; and SALLY STEINBACH, Plaintiffs, vs. JOHN C. DANFORTH, Attorney General of the State of Missouri; and GENE McNARY, Prosecuting Attorney of St. Louis County, Missouri, Defendants, and INFANT DOE; and M. H. BACKER, JR., M.D., Guardian Ad Litem, Defendant Intervenors.	Cause No. 315512 Equity Division

ORDER AND DECREE

Plaintiffs' Motion for Summary Judgment sustained.

I The Court finds and declares:

Section 559.100 of Missouri Revised Statutes unconstitutionally vague and indefinite, on its face and as applied; the statute as applied and interpreted does not give sufficient warning or guidance to plaintiffs, to Judges and to juries in answer to the question when may a pregnancy be terminated or interrupted - "unless the same be necessary to preserve her life".

A statute which is stated in terms so vague that men of ordinary intelligence must guess at its meaning and differ as to its application, violates "Due Process of Law".

II Section 559.100, Missouri Revised Statutes, is in deprivation of rights protected by the First, Fourth, Fifth, Ninth and Fourteenth Amendments of the United States Constitution, specifically:

(a) The right to give and to receive medical advice and treatment.

(b) The right to privacy.

(c) The right to choose whether and when to bear and rear children.

III Missouri Revised Statutes, Section 559.100, denies to plaintiffs the equal protection of the laws.

III Patients and physicians are treated differently, depending upon the local composition of the enforcing authorities and the interpretation of the phrase "unless the same is necessary to preserve her life", i.e., a pregnancy resulting from rape, incest, deformity, or one which may endanger the mental or physical health of the mother.

There is no overriding or compelling State interest to justify the differences.

The statute deprives women of their rights to determine, with their physicians, whether or not to carry a pregnancy to term.

IV Section 559.100 of the Missouri Revised Statutes is in conflict with the "Due Process of Law" under the Fourteenth Amendment of the United States Constitution in that it does not provide an official method by which a physician, patient, or hospital Theraputic Abortion Committee can obtain a timely or adequate review of a decision on the legality of an abortion.

V The moral, religious, and philosophical aspects of the law of abortion are not possible of solution or agreement. Those whose moral, religious, or philosophical convictions do not allow or provide for abortion under any circumstances may follow the dictates of their own beliefs and conscience; and those whose philosophical, moral, or religious beliefs provide otherwise may do so without fear of criminal prosecution - there being no overriding or compelling public or State interest. A different solution in my judgment would impose the will or one moral, religious and philosophical conclusion upon another in violation of the First Amendment of the United States Constitution.

WHEREFORE, the Court sustains plaintiffs' Motion for Summary Judgment.

June 7, 1971

/s/ Herbert Lasky
Herbert Lasky, Judge
Division 4

Item No. 29

IN THE MUNICIPAL COURT OF THE CENTRAL ORANGE COUNTY JUDICIAL DISTRICT

COUNTY OF ORANGE, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff vs. Dr. John Shriver Gwynne Deborah T. Dwyer Defendants	CASE 173309 OPINION June 16, 1970

Defendants, one of them a licensed practicing medical doctor, have been charged with two counts of violation of Section 274 of the Penal Code, by intentionally procuring miscarriages not in compliance with Chapter 11 of Division 20 of the Health and Safety Code.

Defendants and both of them have demurred to the complaint on the grounds that the complaint fails to state a cause of action or crime, in that Section 274 of the Penal Code and Sections 25950 and following sections of the Health and Safety Code are in violation of the Constitution of the United States and of California.

For purposes of the demurrer, the court presumes the charges in the complaint to be true.

There have as yet been no appellate decisions with respect to these sections, so the court must take up one by one the general objections raised in defendants' briefs.

To satisfy the First Amendment establishment clause, the Constitution requires a secular legislative purpose and a primary effect that neither advances nor inhibits religion. ***Everson v Board of Education; McGowan v Maryland.***

The stated purpose of the combination of sections in question is a medical one, purely secular. In construing legislation in California, one may look to the title, etc. Here the primary sections are placed in the Health & Safety Code and are entitled "Therapeutic" and

the primary effect is upon the health of the mother, which neither advances nor inhibits her religious faith.

The Court would have handled this issue out of hand except for the fact that the greater part of argument was had in this area.

I think it appropriate, here, to say a word regarding the blatant attack made by the defense upon the Supreme Court.

A casual reading of the ***Belous*** case would satisfy even the most prejudiced man that both the opinion of Justice Peters and the dissents of J. Burke and J. Sullivan are directed entirely to the legal questions involved, particularly vagueness, and I for one can find not one scintilla of evidence to substantiate the claim of defense counsel.

I consequently believe that defense argument shows a bigotry unworthy of a court of law.

It is urged that there is no such thing as a "Right of Privacy" in a woman either under the Ninth Amendment or the Fourteenth Amendment, with regard to the bearing of children, etc.

Whatever the merits of this contention, the California Supreme Court has said,

> "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'Right of Privacy' or 'liberty' in matters related to marriage, family, and sex." ***People v Belous***

This court is bound by that statement of law.

Therefore, to regulate in this area the State must have a compelling or overriding interest in the regulation of the subject which is within its police powers.

It has been urged in other states and cases that the State has such an interest in an unborn fetus. None has been found in California prior to viability. (***Keeler v Superior Court*** and ***People v Belous)*** The recent Supreme Court opinion in the ***Keeler*** case may even cast doubt on the interest after viability.

However, we are not here concerned with such an interest, if any there is, because the Legislature has clearly framed the interest upon which it relies; (to-wit: the health of the mother.) The Legislature showed no interest in the unborn fetus prior to twenty weeks by permitting abortion in cases of rape and incest, etc. As Judge Mast stated in the *Robb* case: "If life were present at conception, abortions would not be permitted in cases of rape or incest any more than it would be permitted to terminate the life of a one-year old whose life had come as the result of rape or incest."

Regarding, then, the health of the mother as the only interest of the State involved in these statutes; the statement in *People v Belous* that "abortions are 'the most common single cause of maternal deaths in California,'" and "abortions early in pregnancy and properly performed present minimal danger to the woman;" along with the explanatory material cited therein, gives the State a sufficient and compelling interest in the regulation of abortion to allow the Legislature to proscribe that abortion only be done by a physician, in an accredited hospital, prior to twenty weeks and after consultation or approval of a number of staff doctors. These regulations appear to the court to be reasonable in view of the compelling interest of the State in the life and health of its women residents. To say otherwise would be to merely substitute the court's opinion for that of the Legislature and I cannot do that.

Health & Safety Code Section 25951 and subsections a and b satisfies Constitutional requirements and are valid regulations.

Sub-section c, however, prohibits abortion unless certain conditions are found to exist. Sub-section c(2) attempts to distinguish pregnancy resulting from rape and incest from other pregnancy and in doing so violates the equal protection clause of the Fourteenth Amendment.

"A Statute makes an improper and unlawful discrimination if it confers particular privileges upon a class arbitrarily selected from a larger number of persons, all of whom stand in the same relation to the privilege granted and between whom and persons not so favored, no reasonable distinction or substantial difference can be found justifying the inclusion of one and the exclusion of the others." *Franchise Motor Freight Association v Seavey.*

Classes excluded from the statute include those whose potential offspring are likely to bear grave disabilities, either mental or physical, as a result of the condition of the mother early in the pregnancy, and which are at least as compelling when viewed from the standpoint of the health and welfare of the mother as those following rape or incest. Such discrimination is improper and cannot stand. Likewise, Section 25952, which sets forth procedures to follow in cases of rape and incest, is rendered unnecessary.

I disagree with Judge Mast with regard to his application of the Fifth Amendment right against self-incrimination to Section 25952, in view of the immunities granted therein; however, a decision in that area is not necessary in view of the basic ruling hereinbefore stated.

We come, then, to the most basic question presented. Sub-section c(1) of Section 25951 limits abortion to those cases which "gravely impair the physical or mental health of the mother" or at least where there is a "substantial risk" thereof.

The Court here must balance the risks between the State interest in health and the Right of Life and Liberty in the Fourteenth Amendment.

A hospital abortion performed under clinical conditions during the first semester of pregnancy is a safe and simple procedure. In fact, it is now actually safer for a woman to have a hospital abortion than to bear a child. A woman has a compelling interest in her own health and indeed in her life, as well as does the State.

This statute goes beyond protecting women from unsafe procedures and unlicensed practitioners and into the area of impermissible overbreadth.

Under police power, the state can regulate abortion, as the Court has earlier stated; however, it may not deny to a woman the basic right reserved to her under the Fourteenth Amendment to decide whether she should carry or reject an embryo which has not yet reached the twentieth week. Sub-section c(1) of Section 25951 of the Health & Safety Code suffers from fatal overbreadth.

The Court believes that Section 25951 of the Health & Safety Code, Sub-sections a and b are severable from Sub-section c and may stand alone along with Section 25953.

The Court, therefore, sustains the demurrer and grants the People ten days leave to amend their complaints to set forth sufficient particularities so as to give notice to defendants regarding against what they must defend themselves.

/s/ William W. Thomson
Judge

Dated: June 16, 1970

Item No. 30

IN THE MUNICIPAL COURT OF THE CENTRAL ORANGE COUNTY JUDICIAL DISTRICT

COUNTY OF ORANGE, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA)		
Plaintiff)	CASE 149005 CASE 159061	
v.)		
ROBERT CUMMING ROBB,)	OPINION OF THE COURT	
Defendant)		

The defendant, Robert Cumming Robb, a medical doctor licensed to practice medicine in the State of California, stands before the Court charged with felonies in four counts. The People of the State of California charge in Count I of Complaint 149005, filed September 4, 1969, that Dr. Robb violated on the twenty-sixth day of November, 1968, Section 274 of the Penal Code of the State of California in that in Orange County, California, he wilfully, unlawfully and feloniously provided, supplied and administered to Susan Klambara and procured said Susan Klambara to take medicine, drugs and substances, and use and employ an instrument and other means with intent thereby to procure a miscarriage of Susan Klambara, which was not in compliance with the Therapeutic Abortion Act, Chapter 11 of Division 20 of the Health and Safety Code of the State of California.

The People charge in Count II of said complaint a violation of the same statute on the twelfth day of August, 1969, in relation to the intentional miscarriage of Teri Ann Alesandro.

The People charge in Count I of Complaint 159061, filed December 22, 1969, violation of the same statute on the thirtieth day of October, 1969, in relation to the intentional miscarriage of Linda P. Muschetto; and in Count II of said complaint the violation of the same statute on the twenty-ninth day of November, 1969, in relation to the intentional miscarriage of Darice Lombard.

By these two complaints, which have been consolidated, the People charge Dr. Robb with four counts of abortion in violation of what is commonly referred to as the "Therapeutic Abortion Act of 1967."

The defendant, Dr. Robb, has demurred to the complaint and seeks to have the complaint dismissed on the grounds that the complaint fails to state a crime in that Penal Code Section 274 (The Therapeutic Abortion Act of 1967) is in violation of the Constitution of the United States.

In considering this demurrer we must, and we do, assume that the charges alleged in the complaints are true.

The "Therapeutic Abortion Act of 1967," Section 274 of the Penal Code states:

> Every person who provides, supplies or administers to any woman, or procures any woman to take any medicine, drug or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, except as provided in the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code, is punishable by imprisonment in the state prison not less than two nor more than five years."

Chapter 11 of the Health and Safety Code stated in general that a licensed doctor may perform an abortion if:

First, the operation takes place in a hospital which is accredited by the Joint Commission on Accreditation of Hospitals:

Second, the abortion is approved in advance by a committee of the medical staff of the hospital, which committee is established and maintained in accordance with standards promulgated by the Joint Commission on Accreditation of Hospitals; and

Third, the Committee of the Medical Staff finds that either there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother, or the pregnancy resulted from rape or incest.

Mental health is defined as mental illness to the extent that the woman is dangerous to herself or to the person or property of others or is in need of supervision or restraint.

Further, the Act provides that upon the receipt of an application for an abortion on grounds that the pregnancy resulted from rape or incest, the Committee

shall immediately notify the district attorney of the county in which the alleged rape or incest occurred, and transmit to said district attorney the affidavit of the applicant attesting to the facts establishing the rape or incest.

This is a case of first impression. There has not been any trial or appellate court in the State of California which has considered the constitutionality of the "Therapeutic Abortion Act of 1967." Nor has there been any prior consideration in any of the American jurisdictions of any law similar to the present California law.

The court is mindful of the cases of People of the State of California v. Leon Phillip Belous, 71 A.C. 996, and United States of America v. Milan Vuitch, United States District Court for the District of Columbia Nos. 1043-68 and 1044-68. These two cases considered the law prior to 1967 in California, and a similar law in the District of Columbia.

People v. Belous held that the term "necessary to preserve" (the life of the woman) used in the law as it existed prior to 1967 was not sufficiently certain to satisfy the due process requirements of fundamental constitutional rights. The Court pointed out that no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes, and that all are entitled to be informed as to what the State commands and forbids.

The Court further states that a woman has a right to life and to choose whether to bear children. The woman's right to life is involved because childbirth involves risks of death.

The right of the woman to choose whether to bear children follows from the United States and California Supreme Courts' acknowledgment of a right of privacy or liberty in matters related to marriage, family and sex.

The Court points out that the critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state.

The case of United States v. Vuitch considers a statute in which the phrase "as necessary for the preservation of the mother's life or health." The Court adopts the opinion of People v. Belous so far

as the same language is considered and in addition holds the word "health" is uncertain.

Thus we see that both People v. Belous and United States v. Vuitch were decided upon the narrow grounds of ambiguity and uncertainty of the language of the statute. As such they have sidestepped and avoided the primary constitutional issues leading to the ultimate question of whether a legislature may in 1970 enact any law prohibiting the performance of an abortion by a medical doctor. The Court believes that this Court, as well as other courts, in view of the thousands and perhaps millions of lives profoundly affected by such laws, can no longer avoid, but must now face this ultimate question, as well as the specific questions relating to this particular statute. The Court will do so now.

The Act provides, among others, that a woman may obtain an abortion if her pregnancy resulted from incest. Incest is a crime punishable by imprisonment in the State Penitentiary for from one to fifty years (Penal Code Section 285). In order to qualify for an abortion under this section of the Act, a woman must admit that she has committed incest to her physician. In addition, pursuant to the statute, she must sign an affidavit that she has in fact committed incest, and naming the date the act occurred and the man with whom the act occurred. Further, the form in general use, pursuant to the Act, calls for "a true description of the events, complete with time, date and location."

The information submitted is required to be submitted to the District Attorney's Office. Of what possible use can this information be put to except for prosecution? Clearly none.

This Court will not hear the People claim that although it appears to be incriminatory on its face it in fact is not because they do not prosecute women for this offense. To do so would force the courts to declare the incest statute unconstitutional in that although apparently constitutional on its face, the practice of enforcement would be a clear violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution inasmuch as an arbitrary classification is made in practice; that is, men are treated differently than women. Both the man and the woman involved in an incestuous relationship must be treated equally.

The Court concludes, therefore, that this section violates the privilege against self-incrimination and is in violation of the Fifth Amendment of the United States Constitution.

In order for the defendant to assert as a defense this ground of unconstitutionality, must it be shown that the alleged victims in these cases became pregnant as a result of incestuous relationships? Clearly not. To require the defendant to inquire at all would be to require the violation of the Fifth Amendment protection. Thus the entire statute must fall.

Even though it is not the defendant's Fifth Amendment privilege which is being violated, he is clearly a proper person to assert the privilege in this case, in accordance with numerous recent decisions of the United States and California Supreme Courts.

The next question is whether the authority delegated by the Legislature to the Joint Commission of Accreditation of Hospitals and to the Committee of the Medical Staff of individual hospitals is a proper delegation of legislative authority. In order to be proper, definite and certain guidelines must be set forth so that the person exercising the authority knows exactly what the legislature intended, and so that the courts can review the exercise of authority.

In this statute there are virtually no established standards to limit the authority. What words of the statute there are which it might be argued set standards are so vague as to be completely meaningless. (This will be discussed further in considering the problem of vagueness.)

Improper delegation of legislative authority in the case of this statute leads to a far greater fault in the statute: The violation of the Equal Protection Clause of the Fourteenth Amendment.

The cases are now clear that in considering the Equal Protection Clause we look to the practice and effect of the statute not the mere face of the statute. What is the practice and effect here? It is that there is a distinct disparity of treatment and operation of the law in different geographic areas of the state.

This can only be the result of improper delegation of legislative authority. We see that in an area which accounts for 16 per cent of the live births, 50 per cent of the abortions are performed, whereas in an area of the state which accounts for 50 per cent of the live births, 23 per cent of the abortions are performed. Such unequal treatment cannot be tolerated.

The Court finds also that there is a pronounced disparity of treatment between the rich and the poor, which is an improper, arbitrary classification, clearly violative of the Equal Protection Clause. The percentage of rejected applicants is far greater in "charity" or indigent hospitals than it is in private hospitals. The rich can "purchase," by consultation fees, letters from the necessary psychiatrists to support their applications -- the poor cannot. The result is that the rich can arrange for abortions under the present law almost at will. The poor cannot.

The Constitution of the United States does not, and the People of the United States will no longer countenance nor permit the unequal treatment of individuals based on their economic positions. All persons, regardless of their financial standing, must be treated equally, and any law not so treating them cannot stand. The time is past when this community - The United States - can or will tolerate arbitrary discrimination or unequal application of the laws.

The next issue I wish to consider is whether the statute is in any way vague or uncertain. A criminal statute must be definite and certain enough to apprise the public as to what acts are prohibited. Failing this, the statute is in violation of the Due Process Clause of the Fourteenth Amendment. For the most part, the statute is definite and certain. However, that part which refers to mental illness "to the extent that the woman is dangerous to herself or to the person or property of others or is in need of supervision or restraint," is completely without meaning and offers no guide whatsoever by which a person can determine what is permitted and what is prohibited. Does supervision mean in an institution, by a psychiatrist, at home? What does dangerous to herself mean? What does restraint mean? They have no meaning certain enough to apprise a person what conduct is prohibited. In addition the Court notes that these words are in the disjunctive, which compounds the vagueness.

This brings us to the primary underlying problem. Does a woman have a constitutional right to make a free choice whether or not to bear children, i.e., whether or not to have an abortion? The Constitution of the United States is strong and lasting because it was written, intentionally, in such a way as to guarantee certain basic freedoms yet to be able to expand and develop to meet changing times, attitudes and approaches. The framers of the Constitution recognized that a constitution stiff and unbending could not long endure. They, therefore, framed, and Thomas Jefferson most clearly pointed out, a Constitution which would be able to develop to protect societies of which they could not dream. We are, therefore, faced with an area which might have been proper for legislation at the inception of the laws regulating abortions in 1850, but is no longer permissible in 1970, People v. Belous, supra.

Griswold v. Connecticut, 38 U.S. 479, states quite correctly that the People of the United States have certain non-enumerated fundamental rights. That among these are a right of privacy and a right to conduct interpersonal relationships between individuals in such a manner as the individuals choose.

This Court rules, that unless the State has a compelling state interest which permits it to interfere in this area, that the total freedom of choice as to whether or not to bear children, including the unrestricted right to have an abortion, is such a fundamental right, see also People v. Belous, supra.

At the inception of the old abortion law in 1850, the State had a compelling state interest in the preservation of the health of women involved. Abortion operations were dangerous with a high incidence of infection and death resulting. Due to the advance of medical science, this is no longer true. An abortion, properly done, is one of the safest operations with virtually no incidence of fatality. There is less danger to a woman from an abortion than from carrying the pregnancy to birth. Thus this state interest is no longer present.

It has been suggested that there is a state interest in preserving the morals of the state and controlling promiscuity. Besides the obvious fact that laws such as this have no effect whatsoever on sexual attitudes of the community, the Griswold case makes it clear that private sexual relations are beyond the purview of the state. The state has no compelling interest in controlling promiscuity.

The state no longer has, if it ever had, a compelling interest in increasing the population of the state. We need not consider this argument further, as the decision is abundantly clear.

Item No. 31

IN THE MUNICIPAL COURT FOR THE SAN LEANDRO-HAYWARD
JUDICIAL DISTRICT, COUNTY OF ALAMEDA
STATE OF CALIFORNIA
BEFORE THE HONORABLE T.L. FOLEY

The People of the State of California,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Decision on Demurrer
	)	
Robert W. Barksdale,	)	
	)	
Defendant	)	
	)	

- - -

In the Barksdale matter, in view of the fact that either side might take an appeal, regardless of which way the Judge might rule, I think that the decision should be read into the record.

The defense Counsel on behalf of Dr. Barksdale filed a very thorough brief of 38 pages and went into the constitutional questions very thoroughly. He did a masterful job on the law of this case.

I was very disappointed that yesterday afternoon the District Attorney's office didn't even file a brief but handed me a copy of the brief that the Attorney General filed in People of the State of California versus Leon Phillip Belous, which doesn't pertain at all to the problem before the Court. The Belous case happened prior to the Amendments of the 1967 Abortion Act. There are many things in the Belous case that applies to the present case, but there was no brief filed on behalf of the District Attorney. Regardless of that, the Court is of the same opinion stated in the decision of Paul G. Mast, Presiding Judge of the Orange County Municipal Court, on January 9, 1970. I would like to write my own written opinion; however, in view of the time emergency in the matter of not getting the brief until yesterday afternoon I was unable to do it, but I want this in the record.

The defendant, Robert W. Barksdale, is charged with a violation of The Therapeutic Abortion Act of 1967. He has demurred to the Complaint and seeks to have the Complaint dismissed on the grounds the Complaint

fails to state a crime in that Penal Code Section 274 (The Therapeutic Abortion Act of 1967) is in violation of the Constitution of the United States.

In considering this demurrer I must, and I do, assume that the charges alleged in the Complaint are true.

The "Therapeutic Abortion Act of 1967" Section 274 of the Penal Code states:

> Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, except as provided in the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code, is punishable by imprisonment in the state prison not less than two nor more than five years.

Chapter 11 of the Health and Safety Code stated in general that a licensed doctor may perform an abortion if:

First, the operation takes place in a hospital which is accredited by the Joint Commission on Accreditation of Hospitals;

Second, the abortion is approved in advance by a committee of the medical staff of the hospital, which committee is established and maintained in accordance with standards promulgated by the Joint Commission on Accreditation of Hospitals; and

Third, the Committee of the Medical Staff finds that either there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother, or the pregnancy resulted from rape or incest.

Mental health is defined as mental illness to the extent that the woman is dangerous to herself or to the person or property of others or is in need of supervision or restraint.

Further, the Act provides that upon the receipt of an application for an abortion on grounds that the pregnancy resulted from rape or incest, the Committee shall immediately notify the district attorney of the

county in which the alleged rape or incest occurred, and transmit to said district attorney the affidavit of the applicant attesting to the facts establishing the rape or incest.

This is a case of first impression. There has not been any trial or appellate court in the State of California which has considered the constitutionality of the "Therapeutic Abortion Act of 1967." Nor has there been any prior consideration in any of the American jurisdictions of any law similar to the present California law.

The court is mindful of the cases of People of the State of California vs. Leon Phillip Belous, 71 A.C. 996, and United States of America vs. Milan Vuitch, United States District Court for the District of Columbia Nos. 1043-68 and 1044-68. These two cases considered the law prior to 1967 in California, and a similar law in the District of Columbia.

People vs. Belous held that the term "necessary to preserve" (the life of the woman) used in the law as it existed prior to 1967 was not sufficiently certain to satisfy the due process requirements of fundamental constitutional rights. The Court pointed out that no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes, and that all are entitled to be informed as to what the State commands and forbids.

The Court further states that a woman has a right to life and to choose whether to bear children. The woman's right to live is involved because childbirth involves risks of death.

The right of the woman to choose whether to bear children follows from the United States and California Supreme Court acknowledgment of a right of privacy or liberty in matters related to marriage, family and sex.

The Court points out that the critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the State.

The case of United States vs. Vuitch considers a statute in which the phrase "as necessary for the preservation of the mother's life or health." The Court adopts the opinion of People vs. Belous so far as the same language is considered and in addition holds the word "health" is uncertain.

Thus we see that both People vs. Belous and United States vs. Vuitch were decided upon the narrow grounds of ambiguity and uncertainty of the language of the statute. As such they have sidestepped and avoided the primary constitutional issues leading to the ultimate question of whether a legislature may in 1970 enact any law prohibiting the performance of an abortion by a medical doctor. The Court believes that this Court, as well as other courts, in view of the thousands and perhaps millions of lives profoundly affected by such laws, can no longer avoid, but must now face this ultimate question, as well as the specific questions relating to this particular statute. The Court will do so now.

The Act provides, among others, that a woman may obtain an abortion if her pregnancy resulted from incest. Incest is a crime punishable by imprisonment in the State Penitentiary for from one to fifty years (Penal Code Section 285). In order to qualify for an abortion under this section of the Act, a woman must admit that she has committed incest to her physician. In addition, pursuant to the statute, she must sign an affidavit that she has in fact committed incest, and naming the date the act occurred and the man with whom the act occurred. Further, the form in general use, pursuant to the Act, calls for a "true description of the events, complete with time, date and location."

The information submitted is required to be submitted to the District Attorney's office. Of what possible use can this information be put to except for prosecution? Clearly none.

This Court will not hear the People claim that although it appears to be incriminatory on its face it in fact is not because they do not prosecute women for this offense. To do so would force the courts to declare the incest statute unconstitutional in that although apparently constitutional on its face, the practice of enforcement would be a clear violation of of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution inasmuch as an arbitrary classification is made in practice; that is, men are treated differently than women. Both the man and the woman involved in an incestuous relationship must be treated equally.

The Court concludes, therefore, that this section violates the privilege against self-incrimination and is in violation of the Fifth Amendment of the United States Constitution.

In order for the defendant to assert as a defense this ground of unconstitutionality must it be shown that the alleged victims in this case became pregnant as a result of incestuous relationships? Clearly not. To require the defendant to inquire at all would be to require the violation of the Fifth Amendment protection. Thus the entire statute must fall.

Even though it is not the defendant's Fifth Amendment privilege which is being violated, he is clearly a proper person to assert the privilege in this case, in accordance with numerous recent decisions of the United States and California Supreme Court.

The next question is whether the authority delegated by the Legislature to the Joint Commission of Accreditation of Hospitals is a proper delegation of legislative authority. In order to be proper, definite and certain guidelines must be set forth so that the person exercising the authority knows exactly what the legislature intended, and so that the courts can review the exercise of authority.

In this statute there are virtually no established standards to limit the authority. What words of the statute there are which it might be argued set standards are so vague as to be completely meaningless.

Improper delegation of legislative authority in the case of this statute leads to a far greater fault in the statute: The violation of the Equal Protection Clause of the Fourteenth Amendment.

The cases are now clear that in considering the Equal Protection Clause we look to the practice and effect of the statute not the mere face of the statute. What is the practice and effect here? It is that there is a distinct disparity of treatment and operation of the law in different geographic areas of the State. This can only be the result of improper delegations of legislative authority. We see that in an area which accounts for 16 per cent of the live births, 50 per cent of the abortions are performed, whereas in an area of the State which accounts for 50 per cent of the live births, 23 per cent of the abortions are performed. Such unequal treatment cannot be tolerated.

The Court finds also that there is a pronounced disparity of treatment between the rich and the poor, which is an improper, arbitrary classification, clearly violative of the Equal Protection Clause. The

percentage of rejected applicants is far greater in "charity" or indigent hospitals than it is in private hospitals. The rich can "purchase," by consultation fees, letters from the necessary psychiatrists to support their applications -- the poor cannot. The result is that the rich can arrange for abortions under the present law almost at will. The poor cannot.

The Constitution of the United States does not, and the People of the United States will no longer countenance nor permit the unequal treatment of individuals based on their economic positions. All persons, regardless of their financial standing, must be treated equally, and any law not so treating them cannot stand. The time is past when this community -- The United States -- can or will tolerate arbitrary discrimination or unequal application of the laws.

The next issue I wish to consider is whether the statute is in any way vague or uncertain. A criminal statute must be definite and certain enough to apprise the public as to what acts are prohibited. Failing this, the statute is in violation of the Due Process Clause of the Fourteenth Amendment. For the most part, the statute is definite and certain. However, that part which refers to mental illness "to the extent that the woman is dangerous to herself or to the person or property of others or is in need of supervision or restraint," is completely without meaning and offers no guide whatsoever by which a person can determine what is permitted and what is prohibited. Does supervision mean in an institution, by a psychiatrist, at home? What does dangerous to herself mean? What does restraint mean? They have no meaning certain enough to apprise a person what conduct is prohibited. In addition the Court notes that these words are in the disjunctive, which compounds the vagueness.

This brings us to the primary underlying problem. Does a woman have a constitutional right to make a free choice whether or not to bear children, i.e., whether or not to have an abortion? The Constitution of the United States is strong and lasting because it was written, intentionally, in such a way as to guarantee certain basic freedoms yet to be able to expand and develop to meet changing times, attitudes and approaches. The framers of the Constitution recognized that a constitution stiff and unbending could not long endure. They, therefore, framed, and Thomas Jefferson most clearly pointed out, a Constitution which would be able to

develop to protect societies of which they could not dream. We are, therefore, faced with an area which might have been proper for legislation at the inception of the laws regulating abortion in 1850, but is no longer permissible in 1970, People vs. Belous, supra.

Griswold vs. Connecticut, 38 U.S. 479, states quite correctly that the People of the United States have certain non-enumerated fundamental rights. That among these are a right of privacy and a right to conduct interpersonal relationships between individuals in such a manner as the individuals choose.

This Court rules, that unless the State has a compelling state interest which permits it to interfere in this area, that the total freedom of choice as to whether or not to bear children including the unrestricted right to have an abortion, is such a fundamental right, see also People vs. Belous, supra.

At the inception of the old abortion law in 1850 the State had a compelling state interest in the preservation of the health of women involved. Abortion operations were dangerous with a high incidence of infection and death resulting. Due to the advance of medical science, this is no longer true. An abortion, properly done, is one of the safest operations with virtually no incidence of fatality. There is less danger to a woman from an abortion than from carrying the pregnancy to birth. Thus this state interest is no longer present.

It has been suggested that there is a state interest in preserving the morals of the state and controlling promiscuity. Besides the obvious fact that laws such as this have no effect whatsoever on sexual attitudes of the community, the Griswold case makes it clear that private sexual relations are beyond the purview of the state. The state has no compelling interest in controlling promiscuity.

The state no longer has, if it ever had, a compelling interest in increasing the population of the state. We need not consider this argument further, as the decision is abundantly clear.

The primary contention of compelling state interest advanced on this issue is that the law is necessary to preserve the life of the unborn. This argument will not stand the test of logic, however. When is there

life present in the eyes of the law? Certainly not at conception. If there were life present at conception abortions would not be permitted in cases of rape or incest, or the other exceptions any more than it would be permitted to terminate the life of a one-year old whose life had come as the result of rape or incest. We also see no suggestions that intrauterine devices or "morning after" pills, both of which are abortive devices, are illegal.

The case of Keeler vs. Amador County Superior Court, 276 A.C.A. 324, considering the death of a 31- to 36-week fetus states that the killing of a viable fetus -- one capable of life out of the mother's womb -- (which would always occur in the third trimester of a pregnancy) can be prosecuted for murder as the killing of a human being. Before this stage, the fetus is not considered a human being or alive.

In view of these and many other examples of the law treating the embryo different from a human, we cannot permit a legislative theory which decrees that life begins at conception. To do so would be to blandly adopt the philosophy of one of the country's major religions, an act which clearly would be in violation of the First Amendment to the United States Constitution.

Thus the Court can find no compelling interest of the state, and concludes that the right to choose to bear or not to bear children is a fundamental right of the individual woman to be exercised in any manner she chooses and which may not in any way be abridged by law.

The Court concludes that the Complaint fails to state a cause of action against the defendant inasmuch as the statute is violative of the United States Constitution.

The Complaint is ordered dismissed and the defendant discharged.

I might say that I belong to the religion that was just referred to, and I dislike to render this opinion. I must follow the law under my oath as a Judge. I am a Catholic which makes it very, very difficult -- but my oath of office calls for me to follow the law as stated and set out by the Appellate Courts of this State.

Thank You.

MR. MINTZ: Thank you, very much, your Honor.

We are very happy that we find ourselves in the courtroom of a Judge who has the courage that your Honor has displayed today. We are very appreciative.

THE COURT: Thank you, Herman.

DATED: March 24, 1970

/s/ T.L. Foley
Presiding Judge

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

FILED
JUL 22 1971
Court of Appeal - First App. Dist.
CLIFFORD C. PORTER, Clerk
By _____ Deputy

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, v. ROBERT W. BARKSDALE, Defendant and Respondent.	1 Crim. 9526 (Muni.Ct.No. 332370-C)

Defendant Robert W. Barksdale was charged by a complaint in the Municipal Court of the San Leandro-Hayward Judicial District, with a violation of Penal Code section 274, as amended in 1957, which states:

"Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, except as provided in the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health & Safety Code, is punishable by imprisonment in the state prison not less than two nor more than five years."

The Therapeutic Abortion Act, q.v., was enacted in 1967. It provides that a licensed physician and surgeon is authorized to perform an abortion in "a hospital which is accredited by the Joint Commission on Accreditation of Hospitals" (Health & Saf. Code, § 25951, subd. (a)), if such abortion is approved in advance by a committee of the hospital's medical staff under certain prescribed conditions (§ 25951, subd. (b)), and the committee finds that one or more of the following conditions exist: "(1) There is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother; (2) the pregnancy resulted from rape or incest" (§ 25951, subd. (c)). On the grounds of statutory rape (Pen. Code, § 261, subd. 1) an abortion may be approved only if the girl is under the age of 15 years (§ 25952, subd. (c)). "The committee . . . must, in all instances, consist of not less than two licensed physicians and surgeons, and if the proposed termination of pregnancy will occur after the 13th week of pregnancy, the committee must consist of at least three such licensed physicians and surgeons. . . ." (§ 25953.) The act further provides that an abortion shall not be approved after the 20th week of pregnancy. (§ 25953.)

Prior to any preliminary examination, defendant generally demurred to the complaint, urging that Penal Code section 274, being violative of the Constitution of the United States, failed to state a public offense. The municipal court, stating -- "The court can find no compelling interest of the state, and concludes

that the right to choose to bear or not to bear children is a fundamental right of the individual woman to be exercised in any manner she chooses and which may not in any way be abridged by the law" -- sustained the demurrer and thereafter dismissed the complaint.

The People appealed the judgment of dismissal to the Alameda County Superior Court. (See Pen. Code, § 1466.) That court reversed, but certified "that the transfer of [the] case to the Court of Appeal appears necessary to secure uniformity of decision or to settle important questions of law." (See Cal. Rules of Court, rules 63 and 64.) We thereupon ordered the cause transferred to this court for hearing and decision.

The parties have chosen to concede in their briefs and oral argument, and at least for the purposes of this appeal, (1) that the charged abortion was performed during the first trimester (13 weeks) of the woman's pregnancy, (2) by a "licensed physician and surgeon," (3) but <u>not</u> in "a hospital which is accredited by the Joint Commission on Accreditation of Hospitals," or in any hospital.

Defendant's primary contention is stated in this manner: "California Penal Code section 274, beyond requiring that abortions must be performed by medical doctors under medically competent procedures, may not prohibit a woman from aborting her first trimester embryo or fetus." More specifically it is urged that the right of a woman to abort an early pregnancy is essentially one of the "penumbral" rights created by the First,

Third, Fourth, Fifth and Ninth Amendments, "the right of privacy as described and given effect in Griswold v. Connecticut, 381 U.S. 479, 484-485.

Principal reliance is placed by defendant upon certain dicta of People v. Belous (1969) 71 Cal.2d 954, which considered the constitutionality of Penal Code section 274, as in effect prior to its 1967 amendment. The earlier statute provided: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years." (Emphasis added.)

In Belous the California Supreme Court, divided 4 to 3, concluded that the pre-1967 section 274 was constitutionally invalid, for the reason that its language permitting an abortion only when "necessary to preserve [the woman's] life," was unconstitutionally "vague and uncertain." The court went no further in its actual holding.

We shall first discuss the effect to be given dicta of California's Supreme Court by the lesser courts of the state.

Dicta, of course, consists of things said in an opinion that are not necessary in reaching the decision of the court. (See Childers v. Childers, 74 Cal.App.2d 56, 61-62.) It is held that such "statements of conclusions not necessary to the

decision are not to be regarded as authority. . . ." (Cox v. Tyrone Power Enterprises, 49 Cal.App.2d 383, 397; see also People v. McAllister, 15 Cal.2d 519, 523; Hills v. Superior Court, 207 Cal. 666, 670.)

Nevertheless, it has been pointed out that the real criticism of dicta "goes to those portions of an opinion which assume to determine matters outside the issues and hence [are] not fully discussed and considered. . . ." (Estate of Wever, 12 Cal.App.2d 237, 239.) Where a point, although dictum, is "quite elaborately considered" (Adams v. Seaman, 82 Cal. 636, 639), or given "full consideration" (Lossman v. City of Stockton, 6 Cal.App.2d 324, 330), it will be given respectful consideration by another reviewing court. (See also San Joaquin etc. Irr. Co. v. Stanislaus, 155 Cal. 21, 28; Granger v. Sherriff, 133 Cal. 416, 417; Paley v. Superior Court, 137 Cal.App.2d 450, 460; Donnell v. Linforth, 11 Cal.App.2d 25, 29.) When the dicta is that of our state's Supreme Court this rule must be particularly applicable to its Court of Appeal.

The respect which must be shown such considered comment of the California Supreme Court was elaborated by the United States Supreme Court in Nolan v. Transocean Air Lines, 365 U.S. 293, 295. There the court found "considered [relevant] dictum" in the case of Leeper v. Beltrami, 53 Cal.2d 195. It was said: "Inasmuch as the view expressed therein by the highest court of California may be decisive of an issue critical to petitioners' claims, and inasmuch as the Court of Appeals for the Second

Circuit is charged with mandatory appellate review in the present case, that court should decide what relative weights, as authoritative sources for ascertaining California law, the New York Court of Appeals would accord to the Sears-Haro line (direct holdings of District Courts of Appeal between 1930 and 1938) and to Leeper (a considered, relevant dictum of general scope by the California Supreme Court in 1959). We set aside the judgment of the Court of Appeals and remand to that court for reconsideration of the case in light of the new factor introduced by Leeper v. Beltrami, supra."

The California Supreme Court in People v. Belous, supra, 71 Cal.2d 954, was of course speaking in the context of a law generally denying a woman's right to an abortion. It was said (p. 963): "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex."[1] And speaking of

---

[1] The Belous court's citation of authority to this proposition follows (pp. 963-964):

"(See, e.g., Griswold v. Connecticut, supra, 381 U.S. 479, 485, 486, 500 [14 L.Ed.2d 510, 515, 516, 524, 85 S.Ct. 1678]; Loving v. Virginia (1967) 388 U.S. 1, 12 [18 L.Ed.2d 1010, 1018, 87 S.Ct. 1817] [statute prohibiting interracial marriages, violative of due process clause]; Skinner v. Oklahoma (1942) 316 U.S. 535, 536, 541 [86 L.Ed. 1655, 1657, 1660, 62 S.Ct. 1110] [sterilization laws; marriage and procreation involve a 'basic liberty']; Pierce v. Society of Sisters (1925) 268 U.S. 510, 534-535 [69 L.Ed. 1070, 1077-1078, 45 S.Ct. 571, 39 A.L.R. 468] [prohibition against nonpublic schools; same]; Meyer v. Nebraska (1923) 262 U.S. 390, 400 [67 L.Ed. 1042, 1045-1046, 43 S.Ct. 625, 29 A.L.R. 1446]

(continued)

the right of a woman to choose whether to bear children, the court stated (p. 964), "It is not surprising that none of the parties who have filed briefs in this case have disputed the existence of this fundamental right."

The court continued (p. 964): "The critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state . . ., whether the regulation is 'necessary . . . to the accomplishment of a permissible state policy' . . ., and whether legislation impinging on constitutionally protected areas is narrowly drawn and not of 'unlimited and indiscriminate sweep' . . . ."[2]

(Fn. 1 continued)

[prohibition against teaching children German language; same]; Perez v. Sharp, 32 Cal.2d 711, 715 [198 P.2d 17]; see also Custodio v. Bauer, 251 Cal.App.2d 303, 317-318 [59 Cal.Rptr. 463].) That such a right is not enumerated in either the United States or California Constitutions is no impediment to the existence of the right. (See, e.g., Carrington v. Rash (1965) 380 U.S. 89, 96 [13 L.Ed.2d 675,680, 85 S.Ct. 775] [fundamental but nonenumerated right to vote]; Aptheker v. Secretary of State (1964) 378 U.S. 500, 505-506 [12 L.Ed.2d 992, 996-997, 84 S.Ct. 1659], and Kent v. Dulles (1958) 357 U.S. 116, 125 [2 L.Ed.2d 1204, 1209, 78 S.Ct. 113] [right to travel]; Bolling v. Sharpe (1954) 347 U.S. 497, 500 [98 L.Ed. 884, 887, 74 S.Ct. 693] [right to attend federal unsegregated schools]; Otsuka v. Hite, 64 Cal.2d 596, 602 [51 Cal.Rptr. 284, 414 P.2d 412] [right to vote]; cf. Finot v. Pasadena City Board of Education, 250 Cal.App.2d 189, 199 [58 Cal.Rptr. 520].)"

(end fn. 1.)

[2] The text of the above with cited authority follows:

"The critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state (Shapiro v. Thompson (1969) 394 U.S. 618, 634 [22 L.Ed.2d 600, 615, 89 S.Ct. 1322]; Sherbert v. Verner (1963) 374 U.S. 398, 403

(continued)

The Belous co[illegible] then proceeded to discuss the several suggested "compelling" state interests in the suppression of abortions.

First considered was the unquestioned state interest in the health and well-being of the pregnant woman. It was pointed out (in the course of a scholarly study, see generally pp. 964-965) that "When California's first anti-abortion statute was enacted, any surgical procedure which entered a body cavity was extremely dangerous. Surgeons did not know how to control infection, and mortality was high. [Citation.] In 1867 Joseph Lister first published his findings on antiseptic surgery . . ., but even in 1883 the techniques he developed were condemned . . ., and as late as 1895 were not well understood or properly applied by even leaders of the medical profession. [Citations.] [¶]

(Fn. 2 continued)

[10 L.Ed.2d 965, 969, 83 S.Ct. 1790]), whether the regulation is 'necessary . . . to the accomplishment of a permissible state policy' (McLaughlin v. Florida (1964) 379 U.S. 184, 196 [13 L.Ed. 2d 222, 230, 85 S.Ct. 283]; see also, N.A.A.C.P. v. Button, 371 U.S. 415, 438 [9 L.Ed.2d 405, 421, 83 S.Ct. 328]; Bates v. Little Rock (1960) 361 U.S. 516, 527 [4 L.Ed.2d 480, 488, 80 S.Ct. 412]; Huntley v. Public Utilities Com., 69 Cal.2d 67, 74 [69 Cal.Rptr. 605, 442 P.2d 685]; Vogel v. County of Los Angeles, 68 Cal.2d 18, 21 [64 Cal.Rptr. 409, 434 P.2d 961]; People v. Woody, 61 Cal.2d 716, 718 [40 Cal.Rptr. 69, 394 P.2d 813]), and whether legislation impinging on constitutionally protected areas is narrowly drawn and not of 'unlimited and indiscriminate sweep' (Shelton v. Tucker (1960) 364 U.S. 479, 490 [5 L.Ed.2d 231, 238, 81 S.Ct. 247]; see also, Cantwell v. Connecticut (1940) 310 U.S. 296, 308 [84 L.Ed. 1213, 1220, 60 S.Ct. 900, 128 A.L.R. 1352]; In re Berry, 68 Cal. 2d 137, 151 [65 Cal.Rptr. 273, 436 P.2d 273]; In re Hoffman, 67 Cal. 2d 845, 853-854 [64 Cal.Rptr. 97, 434 P.2d 353])."

(end fn. 2.)

Although development was slow, techniques of antisepsis and asepsis became major general advances in surgery at and after the turn of the century. In due course safe procedures were developed for specific operations. Curettage, used for abortion in the first trimester, became a safe, accepted and routinely employed medical technique, especially after antibiotics were developed in the early 1940's. [Citation.] It is now safer for a woman to have a hospital therapeutic abortion during the first trimester than to bear a child."

Suggesting that the health of the pregnant woman may have been a compelling state interest bolstering the state's early anti-abortion law, the court added (p. 967): "Although we may assume that the law was valid when first enacted, the validity of the law in 1850 does not resolve the issue of whether the law is constitutionally valid today. [Citations.]"

We note the emphasis of Belous that its study indicated that the relative safety of present day medical techniques exists when the therapeutic abortion occurs during the earlier period of the pregnancy. The court strongly implied that a compelling state interest in the health of the woman, justifying a statutory proscription of abortions, does exist at some later stage of the pregnancy.

The court then discussed the dangers of so-called "criminal abortions," i.e., those prohibited by section 274 and usually performed by unlicensed persons. It was said (pp. 965-966):

"Although abortions early in pregnancy, and properly performed present minimal danger to the woman, criminal abortions are 'the most common single cause of maternal deaths in California.' [Citation.] In California, it is estimated that 35,000 to 100,000 such abortions occur each year. [Citation.]

"The incidence of severe infection from criminal abortion is very much greater than the incidence of death. The Los Angeles County Hospital alone, for example, in 1961 admitted over 3,500 patients treated for such abortions. [Citation.] Possibly more significant than the mere incidence of infection caused by criminal abortions is the result of such infection. 'Induced Illegal Abortion . . . is one of the important causes of subsequent infertility and pelvic disease.' [Citations.]

"Amici for appellant, 178 deans of medical schools, including the deans of all California medical schools, chairmen of medical school departments, and professors of medical schools state: 'These recorded facts bring one face-to-face with the hard, shocking -- almost brutal -- reality that our statute designed in 1850 to protect women from serious risks to life and health has in modern times become a scourge.'"

The Belous court also considered the argument that the state has "a compelling interest in the protection of the embry and fetus." (P. 967.) It appeared to recognize that at some stage of pregnancy the state did acquire such an interest, even to the exclusion of the conflicting right of the woman. (See pp. 967-969.) But the court made it clear that a woman's right

to choose whether to bear children must prevail over such a state right in the pregnancy's early stage.

It was not contended by the People in Belous, and it is not contended here, that any legitimate state interest requires a larger or expanding population, at least as against the right of a woman to choose whether to bear children. Such a contention, if made, would seem to run contrary to reason in the light of scientific knowledge and the world's present day and projected population problems.

It must be said that the text of Belous which we have discussed discloses thorough and thoughtful consideration of the rights of a pregnant woman, vis-a-vis the state, in the matter of abortion legislation. Under the authority we have cited, ante, and as an intermediate appellate court of this state, we feel obliged to respect the dicta of Belous and to accept it as a correct expression of the law.

Several federal district courts have paid similar respect to the discussion of Belous.

Doe v. Scott (1971) 321 F.Supp. 1385, 1388 (N.D. Illinois, E.D.), concerned an attack on the constitutionality of an Illinois statute which prohibited all abortions except those "'performed by a physician . . . in a licensed hospital . . . because necessary for the preservation of the woman's life.'" The issue presented was (p. 1390) "whether the state has a compelling interest in preventing abortions in the early stages of pregnancy . . . ." The majority of a three-judge court, relying heavily on Belous,

ruled (p. 1391): ". . . that during the early stages of pregnancy--at least during the first trimester--the state may not prohibit, restrict or otherwise limit women's access to abortion procedures performed by licensed physicians operating in licensed facilities." The pertinent statute was held unconstitutional insofar as it restricted or prohibited the "performance of abortions during the first trimester of pregnancy by licensed physicians in a licensed hospital or other licensed medical facility."

In Roe v. Wade (1970) 314 F.Supp. 1217 (N.D. Tex.) a Texas anti-abortion law was under constitutional attack. The statute made felonious any abortion not required "for the purpose of saving life of the mother." Belous was interpreted (p. 1222) as according "Freedom to choose in the matter of abortions . . . the status of a 'fundamental' right." The Texas statute was found to infringe upon this fundamental right, the three-judge court stating:

"While the Ninth Amendment right to choose to have an abortion is not unqualified or unfettered, a statute designed to regulate the circumstances of abortions must restrict its scope to compelling state interests. There is unconstitutional overbreadth in the Texas Abortion Laws because the Texas Legislature did not limit the scope of the statutes to such interests. On the contrary, the Texas statutes, in their monolithic interdiction, sweep far beyond any areas of compelling state interest." (P. 1223.)

The court recognized a probable legitimate state concern over "abortion of the 'quickened' fetus." (P. 1223.) However, it said: "The difficulty with the Texas Abortion Laws [under consideration] is that, even if they promote these interests, they far outstrip these justifications in their impact by prohibiting all abortions except those performed 'for the purpose of saving the life of the mother.'"

Belous (71 Cal.2d 954) was again relied upon by a three-judge court in Babbitz v. McCann (1970) 310 F.Supp. 293 (E.D. Wisconsin) wherein a Wisconsin abortion statute was declared violative of the United States Constitution. That statute proscribed abortions unless necessary to save the life of the mother, in which case it must be performed by a physician and, unless "an emergency prevents," in a licensed maternity hospital. The court (pp. 301, 302) quoted the following language of Belous: "'The critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state. . . .'" and then continued:

"Similarly, in the case at bar, we must decide whether the state of Wisconsin has a sufficiently compelling interest to justify the broad restriction on a woman's inherently personal right that is contained in § 940.04(1) and (5), Wis. Stats.

"The defendants urge that the state's interest in protecting the embryo is a sufficient basis to sustain the statute. Upon a balancing of the relevant interests, we hold that a woman's

right to refuse to carry an embryo during the early months of pregnancy may not be invaded by the state without a more compelling public necessity than is reflected in the statute in question. When measured against the claimed 'rights' of an embryo of four months or less, we hold that the mother's right transcends that of such an embryo."

"[P. 302.] Under its police power, the state can regulate certain aspects of abortion. Thus, it is permissible for the state to require that abortions be conducted by qualified physicians. The police power of the state does not, however, entitle it to deny to a woman the basic right reserved to her under the ninth amendment to decide whether she should carry or reject an embryo which has not yet quickened. The challenged sections of the present Wisconsin statute suffer from an infirmity of fatal overbreadth."

It is to be noted that Doe v. Scott, supra, Roe v. Wade, supra, and Babbitz v. McCann, supra, as well as Belous, place heavy emphasis on the woman's right to an abortion during the early period of the pregnancy. Expressly or impliedly they assert that at some point during pregnancy the woman's right must yield to the state interest in the preservation of the fetus. Roe v. Wade (314 F.Supp. 1217) suggests that this state interest becomes paramount with the "quickened fetus." And as noted, answering the argument that the state has such an interest in the protection of the embryo as to sustain an abortion statute, the court in Babbitz v. McCann stated that the

woman's right transcended that of an embryo of four months or less.

This special consideration of the law for the advanced fetus is well documented historically. Courts and Legislatures, in varying contexts, have traditionally demonstrated greater concern for the "quickened" unborn child.[3] A sampling of such authority follows. In ancient English law the killing of the fetus of a "woman quick with childe" was manslaughter; later common law provided as one of the elements of abortion murder that "the foetus [be] quickened." Without such quickening the crimes did not appear to lie. (See Keeler v. Superior Court, supra, 2 Cal.3d 619, 626.) An 1829 statute of New York provided that: "'The wilful killing of an unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree.'" (Idem. p. 628.) An early Wisconsin statute (Wis. R.S. 1849, ch. 133) made abortion a punishable offense only if performed upon an unborn "quick" child. A present day statute of the same state (Wis., Stats. § 940.04) provides a much greater penalty for aborting an "unborn quick child," than for an abortion on an "unborn child."

---

[3] Webster's New International Dictionary (2d ed.) Unabridged, defines "quickening" as "The first motion of the fetus in the uterus felt by the mother, occurring usually about the middle of the term of pregnancy." In Keeler v. Superior Court, 2 Cal.3d 619, 624, fn. 1, the court concluded: "The average full-term pregnancy is 40 weeks."

And as we have seen, the court in Roe v. Wade, supra, 314 F.Supp. 1217, expressed the state concern over abortion of the "quickened" fetus.

From a consideration of Belous and the other authority we have referred to, we are impelled to conclude that a woman has a constitutional right to terminate her pregnancy, subject only to reasonably imposed state restrictions designed to safeguard the health of the woman, and to protect the advanced fetus.

We now direct our inquiry into the reasonableness of the restrictions imposed by the Therapeutic Abortion Act on the woman's right to an abortion.

The first question is whether the provisions requiring an abortion to be performed by a licensed physician and surgeon in a hospital accredited by the Joint Commission on Accreditation of Hospitals are reasonably calculated to safeguard the woman's health and well-being.

It is obvious that without the surgical training and expertise of a licensed physician and surgeon an abortion would endanger the health and even life of the woman; no contention to the contrary is made. But the defendant strenuously insists that the place of an abortion operation, as with any other surgical procedure, should be determined by the doctor, in consultation with his patient, uncontrolled by law and in accordance with sound and established medical procedure. He contends that the legislative requirement of a hospital unnecessarily and unreasonably abridges the constitutional right for which he here argues.

We advert again to the scholarly dissertation of Belous. There the court concluded that it was "now safer for a woman to have a hospital therapeutic abortion during the first trimester than to bear a child." (Emphasis added.) (71 Cal. 2d at p. 965.) Its studies had indicated that "in California from November 1967 through September 1968, 3,775 therapeutic [hospital] abortions were reported without a maternal death. . . ." (P. 965, fn. 7.) On the other hand, during one year alone over 3,500 women with severe infection resulting from illegal non-hospital abortions were found to have been treated in one Los Angeles hospital. (P. 966.) And such illegal non-hospital abortions were disclosed to be "'the most common single cause of maternal deaths in California.'" (P. 965.)

For obvious reasons women seeking abortions often wish to keep knowledge of this fact from others, particularly their families and friends. Given the choice of hospital or more private surroundings they would more often choose the latter, for a hospital stay with its relative lack of privacy and its attendant records is far more likely to become commonly known. Such consideration would tend to place undue pressure on the doctor to arrange an inadequate medical environment, even when his medical judgment indicates the need of a hospital situs for the operation.

We note that in Doe v. Scott, supra, 321 F.Supp. 1385, 1391, the court found a statutory requirement that a constitutionally permitted abortion be "performed by licensed physicians

operating in licensed facilities" (emphasis added) not to be unreasonably restrictive. And the court in Roe v. Wade, supra, 314 F.Supp. 1217, 1223, found a legitimate state interest "in seeing to it that abortions are performed by competent persons and in adequate surroundings." (Emphasis added.)

We conclude that the licensed "physician and surgeon" and the "hospital" requirements of the Therapeutic Abortion Act are reasonably designed by the Legislature to further the health and welfare of the pregnant woman seeking an abortion.

Pointing to the act's requirement of a hospital accredited by the Joint Commission on Accreditation of Hospitals, defendant insists that in any event this constitutes "overbreadth," and constitutional vulnerability.

We first observe that in California all hospitals must be licensed by the State Department of Public Health. (Health & Saf. Code, § 1400.) The department is required to make and promulgate reasonable rules and regulations "prescribing minimum standards of safety and sanitation [and] of diagnostic, therapeutic and laboratory facilities and equipment . . . ." (Health & Saf. Code, § 1411.) Hospitals must be periodically inspected by the department (Health & Saf. Code, § 1407), in which authority is vested to suspend or revoke a hospital license for, among other things, violation of the prescribed rules and regulations (Health & Saf. Code, § 1412).

We note further that the Joint Commission on Accreditation of Hospitals is a private body composed of members and

organizations of the medical profession. Its purpose is to maintain and supervise professional standards in accordance with its "Standards for Hospital Accreditation." While most of California's hospitals appear to be "accredited," it nevertheless appears that many, even county hospitals, lack such accreditation and are therefore unavailable for the otherwise legitimate purpose of the Therapeutic Abortion Act.

As we have concluded, a woman has a constitutional right to terminate a pregnancy subject to reasonably enacted legislative restrictions supporting legitimate state interests. By its "accredited hospital" provision the Legislature has delegated to a private organization power to determine the hospital standards under which abortions may be performed. It is established law that a Legislature may not delegate its legislative power to a private person or organization. (Carter v. Carter Coal Co., 298 U.S. 238; Schechter Corp. v. United States, 295 U.S. 495; Daigh v. Shaffer, 23 Cal.App.2d 449. See also 16 Am.Jur.2d, Constitutional Law, § 249, p. 499; 16 C.J.S., Constitutional Law, § 137, pp. 566-567; and see the authorities in those works cited.) This rule must apply with even greater force to a legislative delegation of power affecting a constitutionally guaranteed right.

It appears that an abortion is now a relatively simple and safe surgical procedure. (See discussion, People v. Belous, supra, 71 Cal.2d 954, 965-967.) Yet, although any other surgical procedure, no matter how intricate or demanding or

dangerous, may be performed in a "licensed" hospital, abortions alone must under the act be performed under the higher or different standards of an "accredited hospital."

Further, it is obvious that the "accredited hospital" provision decreases the number of hospitals available for abortion procedures. And the requirement must, in many cases, unnecessarily increase the distance to the hospital and otherwise inconvenience the physician and surgeon and his patient seeking an abortion.

We conclude that the accredited hospital provision imposes an unnecessary and unreasonable restraint upon the constitutionally guaranteed right under discussion.

We also find the act's requirement of approval of an abortion in advance by a committee of the hospital's medical staff to be without reasonable constitutional justification. The obvious principal purpose of this requirement is to assure that a statutory condition permitting an abortion, i.e., danger to the woman's health, or rape, or incest, exists. As we have shown, no compelling state interest can be found in this area. To the extent that the committee might provide additional assurance that the woman's health would not be adversely affected by the operation we also find no compelling state interest. It will reasonably be presumed that the woman's health would be considered and safeguarded by her physician and surgeon.

The act's provision that no abortion be allowed after the twentieth week of pregnancy undoubtedly rests upon legislati

consideration for the protection of the quickened fetus, as well as the greater danger to the woman attending the abortion of an advanced pregnancy. This restriction, we believe, is reasonably supported by the compelling state interests we have discussed.

No merit is found in defendant's contention that he and his patient were denied equal protection of the law. (Cf., Babbitz v. McCann, supra, 310 F.Supp. 293, 298.) And we find nothing resembling a bill of attainder in the subject statutes. Other points raised by defendant, because of the conclusions we have reached, have become moot to a determination of his appeal.

It is established law that "'When part of a statute is declared unconstitutional, the remainder will stand if it is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidity of the statute.'" (In re Perez, 65 Cal.2d 224, 231.) "The test of severability is whether the invalid parts of the statute can be severed from the otherwise valid parts without destroying the statutory scheme, or the utility of the remaining provisions. . . ." (Blumenthal v. Board of Medical Examiners, 57 Cal.2d 228, 238.) Applying these rules we conclude that the unconstitutional features of Penal Code section 274 and the Therapeutic Abortion Act which we have pointed out are severable from the remainder of the statutes.

We hold that Penal Code section 274 and the Therapeutic

Abortion Act are unconstitutional insofar as they purport to deny, or impose restrictions upon, a woman's right to terminate her pregnancy within its first 20 weeks by an abortion which is performed by a licensed physician and surgeon in a licensed hospital of this state.

From all of the foregoing it appears that the municipal court complaint which, among other things, by legal implication charges that the subject abortion was not performed in a hospital, does allege the commission of a public offense by defendant. The sustaining of his demurrer by the municipal court was error.

The judgment of dismissal by the municipal court is reversed.

Elkington, J.

I CONCUR:

Sims, J.

I concur and dissent. I concur in the determination that the complaint states a public offense and that, therefore, the judgment of dismissal by the municipal court must be reversed. I do not, however, concur in the majority holding that a woman has the constitutional right to terminate pregnancy by abortion subject only to the conditions that such abortion must take place within the first 20 weeks of pregnancy and that it be performed by a licensed physician and surgeon in a licensed hospital in this state; nor do I concur in the determination that Penal Code section 274 and the Therapeutic Abortion Act (Health & Saf. Code, §§ 25950-25954) are unconstitutional in the respects indicated by the majority.

The effect of the majority opinion is to remove from the Therapeutic Abortion Act, as constitutionally invalid, the requirements that an abortion may be performed only when the pregnancy would gravely impair the physical or mental health of the mother or the pregnancy resulted from rape or incest, and the requirement that an abortion must take place in an accredited hospital with the prior approval of the hospital's therapeutic abortion committee.

It should be noted, initially, that a statute is presumed to be constitutional unless its unconstitutionality clearly and unmistakably appears that all intendments are in favor of its validity, and that mere doubt is not a sufficient reason for a judicial declaration of its invalidity. (Fox etc. Corp. v. City of Bakersfield, 36 Cal.2d 136, 141; Lockheed Aircraft Corp. v.

Superior Court, 28 Cal.2d 481, 484; Jones-Hamilton Co. v. Franchise Tax Bd., 268 Cal.App.2d 343, 349; People v. Aguiar, 257 Cal.App.2d 597, 601.) As observed in United States v. Vuitch, ____ U.S. _____, _____ [28 L.Ed.2d 601, 608], "statutes should be construed whenever possible so as to uphold their constitutionality."

In People v. Belous, 71 Cal.2d 954, on whose dicta the majority opinion relies, the Supreme Court observed that it did not have to reach the issue of the constitutional validity of the Therapeutic Abortion Act because the abortion in that case had been performed prior to the adoption of the act. (At p. 973, fn. 15.) A close reading of the case indicates, however, that the reviewing court deemed that the state has a compelling interest in regulating abortions. Implicit throughout the decision is the concept that abortions may be limited by the state if the statute is sufficiently clear and narrowly drawn. I perceive that although the court had ample opportunity in Belous to strike down abortion laws in general it did not do so. Instead it simply found that Penal Code section 274, as it read when the conduct there under consideration occurred, contained vague and uncertain provisions which jeopardized its operation by placing an unfair and dangerous responsibility upon any medical practitioner who attempted to follow it.[1] (At pp. 972-973.)

---

1 - Section 274 of the Penal Code then read as follows: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the State prison not less than two nor more than five years

In reaching its conclusion with respect to the validity of the Therapeutic Abortion Act the majority seizes upon the statement in Belous that "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex. [Citations.]" (71 Cal.2d at p. 963.) My colleagues interpret this statement to mean that a woman has a fundamental right to have an abortion subject only to the condition that it be performed in a licensed hospital by a licensed doctor.

None of the cases cited as authority by Belous for the principle embraced in the subject statement, including Griswold v. Connecticut, 381 U.S. 479, stands for the proposition that a woman has an unqualified right to have an abortion or that she has such a right subject to appropriate medical procedures. At most these cases hold that a woman can choose whether or not she wishes to conceive a child. Adverting to Griswold, I perceive that its holding was limited to a declaration that a statute forbidding the use of contraceptives violates the right of marital privacy guaranteed by several fundamental constitutional guarantees specified in the Bill of Rights. (Pp. 484-485.)[2]

---

[2] - Two of the cases cited in Belous deal particularly with the right to have offspring as a right which is basic to the perpetuation of a race. In Skinner v. Oklahoma, 316 U.S. 535, the United States Supreme Court struck down a statute of Oklahoma which provided for the sterilization of persons defined to be "habitual criminals." The court there made this statement: "We are dealing here with legislation which involves one of the basic civil

(Fn. 2 cont'd)

Contrary to the implications of the majority opinion, Belous lays great stress upon the prospective mother's health and the criteria of good medical practice as valid standards for determining whether an abortion is lawful. (At pp. 965-971.) Recognition is specifically given to the test established in the Therapeutic Abortion Act., i.e. that abortion is permissible during the first 20 weeks of pregnancy if performed by a licensed physician in an accredited hospital and if it is determined "under prescribed procedures" that there is a substantial risk that the continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the pregnancy resulted from rape or incest. (71 Cal.2d at p. 971; emphasis added.)

In Belous there is specific recognition of the necessity that an abortion be performed in a hospital providing an accepted surgical environment. The dangers posed by a non-hospital abortion were noted thusly: "Although abortions early in pregnancy, and properly performed present minimal danger to the woman, criminal abortions [i.e., those obtained other than from a physician in an accepted surgical environment] are 'the most common single cause of maternal deaths in California.' [Citation.]" (At p.

---

2 - (Cont'd) rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." (At p. 541.) In Loving v. Virginia, 388 U.S. 1, the United States Supreme Court declared unconstitutional a Virginia statute which prevented marriages between persons solely on the basis of racial classifications. In that case we find this statement: "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." (At p. 12.) It is clear that these two cases were concerned with procreation rather than the termination of pregnancy

965 and fn. 8 at p. 965.)

In Ballard v. Anderson, 4 Cal.3d 873, the Supreme Court, although not specifically called upon to pass on the constitutional validity of the Therapeutic Abortion Act, did, by its analysis and application of the provisions of the act to the facts at hand, give its stamp of approval to the act. Thus, in Ballard, we find the following significant language: "A legal therapeutic abortion under the act may be given only if qualified medical opinion finds (1) a substantial risk that continuancy of the pregnancy will impair the mental or physical health of the prospective mother, or (2) that the pregnancy resulted from rape or incest." (At p. 879; emphasis added.)

In Ballard the question presented was whether the Therapeutic Abortion Committee of a hospital was required to consider the application of a minor for a therapeutic abortion without the consent of her parents. The reviewing court held that such consent was not necessary and that mandamus lies to compel such a committee to exercise its discretion to approve or disapprove a minor's application for abortion "according to the statutory criteria set forth in Health and Safety Code sections 25951-25954." (4 Cal.3d at p. 884.) It is reasonable to assume that the Supreme Court would not have issued the peremptory writ if it had any misgivings that the requirement of prior approval of an abortion by a committee of a hospital's medical staff was an unconstitutional provision or that the court's direction was nothing more than an idle act.

I apprehend that Belous and Ballard clearly recognize a compelling state interest in protecting the health of a pregnant mother and that the Therapeutic Abortion Act is a salutary method of insuring such protection pursuant to the state's traditional police power to restrict medical procedures to competent medical practitioners operating in sanitary facilities under safe conditions.

It should be noted here that in United States v. Vuitch, supra, ____ U.S. _____, _____ [28 L.Ed.2d 601, 610], a case decided subsequent to Belous, the United States Supreme Court held that a District of Columbia statute,[3] containing language similar to that struck down in Belous, was not constitutionally vague. Significant to the consideration of the instant discussion is the following statement in Vuitch: "The statute does not outlaw all abortions, but only those which are not performed under the direction of a competent, licensed physician, and those not necessary to preserve the mother's life or health." (At p. 608.)

In my opinion the state also has a compelling interest to protect the embryo or fetus as the center of legal rights. There is abundant and respected authority for the proposition that at some time during the period of gestation the embryo or fetus

---

3 - This statute provided: "Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years; . . ."

becomes a human being entitled to the right of life. Among these are those who hold that human life begins at conception upon the thesis that the genes of the ovum and sperm have every characteristic a human being will ever have as soon as they are united. Others are of the opinion that human life begins at a time during the period of gestation when the fetus takes on a truly human appearance.

There is also abundant and respected contrary authority to the effect that the embryo or fetus is not a human being during the period of gestation, and that human life does not begin until the fetus has developed into a being that is able to live outside the uterus. Until then, say those who hold this opinion, the fetus enjoys no rights and such rights as are generally attributed to it reflect only the interest of the parents. (See People v. Belous, supra, 71 Cal.2d 954, 967-968.)

These propositions appear to be of such generalized and universal knowledge that their existence is beyond dispute so as to require that judicial notice be taken of them. (Evid. Code, § 451, subd. (f).) At the very least they are propositions whose proposals are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. As such they are matters which may be judicially noticed. (Evid. Code, § 452, subd. (h).)

In the instant case the trial court in passing upon the sufficiency of the complaint took judicial notice of these conflicting viewpoints since the matters embraced therein came to

the attention of the court in its consideration of the points and authorities submitted by the parties upon the hearing of the demurrer. (See Evid. Code, §§ 453, 454, 455.) This the trial court was justified in doing since matters which must or may be judicially noticed are a part of the complaint to be read into it together with the matters contained within its four corners. (South Shore Land Co. v. Petersen, 226 Cal.App.2d 725, 742-747; Colvig v. RKO General, Inc., 232 Cal.App.2d 56, 63-64.) As indicated by the trial court in its "Decision on Demurrer" these viewpoints were considered by it. In its decision the trial court adopted as part of its rationale the proposition that life is not present in the embryo at conception and apparently adopted, as a legal proposition, the concept that the fetus is not a human being until it is capable of life out of the mother's womb.

Among the matters called to the attention of the trial court in connection with the aforementioned viewpoints as to when human life begins was evidence adduced at legislative hearings in 1962 to the effect that human life begins at the time of conception. It is inconceivable that the Legislature which enacted the Therapeutic Abortion Act in 1967 did not have before it this proposition as well as the varying and conflicting viewpoints mentioned above.

As a reviewing court, this court is justified in taking judicial notice of each matter properly noticed by the trial court. (See Evid. Code, § 459; Smith v. Hatch, 271 Cal.App.2d 39, 49.) This court is also entitled to consider the facts as they

appear on the face of the Therapeutic Abortion Act, since the construction of a statute and its applicability to a given situation are matters of law, and we are not bound by the trial court's construction. (Estate of Madison, 26 Cal.2d 453, 456; Neal v. State of California, 55 Cal.2d 11, 17; Plum v. City of Healdsburg, 237 Cal.App.2d 308, 313.)

Accordingly, it appears to me that in enacting the subject act the state clearly evinced a genuine interest and concern for the unborn. That such was the legislative intent is demonstrated by the provisions of the act which limit abortions to cases where the continuance of the pregnancy would gravely impair the physical and mental health of the mother and to those cases where the pregnancy results from rape or incest. If the Legislature had no interest in the embryo or fetus it could simply have provided that a woman was entitled to have an abortion subject only to certain approved medical procedures. The act, however, clearly outlaws all abortions except those performed according to the limitations therein delineated--limitations which Belous recognizes to be properly within the police power of the state.

It is logical to deduce from the facts as appear on the face of the enactment that it was the legislative intent to give the rights of the pregnant woman whose physical or mental health was gravely endangered or whose pregnancy resulted from rape or incest precedence over the rights of the unborn only during the first 20 weeks of pregnancy. It is also logical to deduce from

the enactment that it was the legislative intent to outlaw abortions after the 20th week of pregnancy because of the concomitant compelling interest the state has in the health and welfare of the prospective mother and the fetus she is carrying. Belous points out that a hospital therapeutic abortion is a relatively safe procedure in the first trimester of pregnancy (at p. 965), but takes cognizance that "By limiting [in the Therapeutic Abortion Act] the abortion to the first 20 weeks, the Legislature has taken into account the danger to the mother of the later abortion . . . ." (At p. 971.)

In sum, the Therapeutic Abortion Act discloses by its provisions a concern for a pregnant woman's health and the risks of death due to an abortion, a concern that a woman who is the victim of an unwanted pregnancy should not be compelled to give birth to a child so conceived, and a concern for an unborn child's right to life. All of these considerations entered into the legislative process and the resulting legislation was clearly an attempt to reconcile the rights of the prospective mother and those of the embryo or fetus as a human being entitled to life. In the specific instances in which abortions are permitted under the act the Legislature, under its prerogative to determine the wisdom or necessity of the law, has declared that the mother's rights transcend those of the embryo or fetus.

In reaching this conclusion I am not unmindful of the dictum in Belous that "There is nothing to indicate that in adopting the Therapeutic Abortion Act the Legislature was asserting an

nterest in the embryo." (71 Cal.2d at p. 971.) A reading of Belous discloses, however, that the decision does not completely reject the concept that the embryo or fetus is a center of legal rights but postulates that a pregnant woman's right to life takes precedence over any interest the state may have in the unborn. (At p. 969.)

For the reasons indicated the Therapeutic Abortion Act must be construed so as to uphold its constitutionality. The termination of pregnancy is not an unqualified right beyond regulation by the state, but subject to reasonable limitations consonant with the state's compelling interest in the health and welfare of the prospective mother and the protection of the embryo or fetus. California has imposed valid limitations in its enactment of the act. Since the act is constitutional in its entirety, it is not the province of this court to weigh the desirability of the social policy underlying it or to question its wisdom. These are purely legislative matters.

Molinari, P.J.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

JOSEPH PAUL SHIVELY, M.D., Petitioner, vs. THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA, an Administrative Agency, Respondent.	No. 590333 FINDINGS OF FACT AND CONCLUSIONS OF LAW (C.C.P.,Secs. 632; 1109)

The above entitled cause came on regularly for hearing on July 16, 1968. Robert L. Lamb and Charles G. Norris appeared for Petitioner; Thomas Lynch, Attorney General of the State of California, by Gerald Carreras, Deputy Attorney General, appeared for Respondent.

The cause was submitted and heard on the pleadings, documents and records herein; the Record; Transcript of Testimony, Volumes I and II and Exhibits introduced "In the Matter of the Accusation against J. Paul Shively, M.D.," said hearing held on January 22 and 23, 1968. Said testimony and exhibit being duly filed and introduced in evidence. Respondent's Decision and Findings; Points and Authorities; Summaries and Arguments of respective counsel.

The matter was submitted to the Court for decision, and the Court being fully advised in the premises, and having rendered its decision in favor of Petitioner and against Respondent now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. In each instance alleged in Respondent's Accusation, as hereinafter specified, Petitioner J. Paul Shively, M.D. participated in the obtaining or performing of a therapeutic abortion at an accredited hospital with the approval of the hospital's therapeutic abortion committee in a case of proven rubella in the first trimester of the patient's pregnancy.

2. On or about August 6, 1963, Petitioner did not aid and abet a criminal abortion upon the person of Alice F. McIntosh.

3. On or about April 20, 1964, Petitioner did not

p. 269

aid and abet a criminal abortion upon the person of Diana Martin.

4. On or about April 22, 1964, Petitioner did not attempt to perform a criminal abortion upon the person of Diana Martin.

5. On or about May 18, 1965, Petitioner did not agree and offer to procure a criminal abortion upon the person of Eileen Selig.

6. On or about May 18, 1965, Petitioner did not aid and abet a criminal abortion upon the person of Eileen Selig.

7. On or about May 20, 1965, Petitioner did not attempt to perform a criminal abortion upon the person of Eileen Selig.

8. On or about May 20, 1965, Petitioner did not agree and offer to procure a criminal abortion upon the person of Sharon Signer.

9. On or about May 20, 1965, Petitioner did not aid and abet a criminal abortion upon the person of Sharon Signer.

10. On or about May 22, 1965, Petitioner did not perform a criminal abortion upon the person of Sharon Signer.

11. On or about June 9, 1965, Petitioner did not aid and abet a criminal abortion upon the person of Betty Logwood.

12. On or about May 28, 1964, Petitioner did not aid and abet a criminal abortion upon the person of Thelma Lofink.

13. Petitioner, in good faith, and with a sincere opinion that it was an acceptable standard of medical practice in the City and County of San Francisco to perform therapeutic abortions in accredited hospitals in cases of proven rubella during the first trimester where the approval of a therapeutic abortion committee was first obtained rendered said medical attention to each individual named in the Accusation against him.

14. Petitioner's conduct was influenced by the fact that the Medical Schools of the University of California, the University of California at Los Angeles, Stanford University, and the University of Southern

California, during the period of 1964 and 1965, taught, in the medical curriculum, that it was an acceptable standard of medical practice to perform therapeutic abortions in an accredited hospital in cases of proven rubella during the first trimester, when the approval of a therapeutic abortion committee was first obtained.

15. Petitioner's conduct was further influenced by the fact that a large segment of the licensed and practicing physicians and surgeons in the counties contiguous to San Francisco Bay held the same opinion as did Dr. Shively.

With respect to Petitioner's involvement as found in Causes and Action First, Second, Fourth, Fifth, Seventh, Eighth, Tenth and Eleventh of the Accusation, Petitioner was voluntarily acting, without compensation, as a member of a Therapeutic Abortion Committee as the result of Petitioner's being a staff member of an accredited hospital, in conformity with what was, in good faith, believed to be acceptable medical practice.

16. In each instance, Petitioner followed procedures and practices and complied with existing standards of acceptable medical care recognized and approved by those reasonably skilled in his profession practicing in the same community.

17. Petitioner rendered professional care, in each instance, in an honest, competent and professional manner in the exercise of his best skill and understanding in good faith, with concern for the health, life and welfare of the patient.

18. In each alleged instance, Petitioner intended and believed that the therapeutic abortion was necessary to preserve the life of the mother.

19. In each alleged instance of Petitioner's participation in the performance of a therapeutic abortion with the approval of the appropriate committee in and of an accredited hospital in cases of proven rubella in the first trimester of pregnancy, the operation was necessary to preserve the life of the mother.

20. The permanent and public record of an unjustified conviction of criminal abortion causes serious and ir-

reparable injury to Petitioner's reputation and future as a Board certified obstetrician and gynecologist.

CONCLUSIONS OF LAW

1. The statement in Business and Professions Code §2377 that a criminal abortion constitutes unprofessional conduct, refers to that activity and intent defined as the crime of abortion by Penal Code §274, as the statutes exist in 1963, 1964 and 1965 when the conduct in question occurred.

2. The abortion statute, Penal Code §274, does not mean by the words "unless the same is necessary to preserve her life" that the peril to life be imminent. It is enough that the dangerous condition be potentially present, even though its full development might be delayed to a greater or less extent. Nor was it essential that the doctor should believe that the death of the patient would be otherwise certain in order to justify him in affording present relief.

People v. Ballard, (1959) 167 Cal. App. 2d. 803, 805, 814
People v. Abarbanel (1965) 239 Cal. App. 2d 31, 34

3. The burden of establishing the criminal nature of the abortions in which Petitioner participated rests with the Respondent Board of Medical Examiners and requires a demonstration through evidence that the procedure was not necessary to preserve the life of the mother; an abortion is not necessarily, in and of itself, a criminal act.

People v. Ballard (1959) 167 Cal. App. 2d 803, 805, 814
People v. Abarbanel (1965) 239 Cal. App. 2d 31, 34

4. The criminal intent necessary to be established by Respondent Board of Medical Examiners in order to find that Petitioner was guilty is the intent to commit a criminal abortion; that is, an abortion for the purpose other than to preserve the life of the mother.

People v. Ballard (1959) 167 Cal. App. 2d 803, 805, 814
People v. Abarbanel (1965) 239 Cal. App. 2d 31, 34

5. Petitioner acted in good faith in accordance with the practices and procedures recognized and approved by those reasonably skilled in his profession in the community, then it cannot be said that the operation was not necessary to preserve the life of the patient.

6. Petitioner, exercising his best professional skill and understanding, honestly believes that the operation is necessary for the preservation of the life of the mother, he cannot be found guilty of a criminal abortion.

People v. Ballard (1959) 167 Cal. App. 2d 803, 805, 814

People v. Abarbanel (1965) 239 Cal. App. 2d 31, 34

7. Respondent's power to discipline medical practitioners is not punitive and requires an established instance of professional disservice, ignorance, dishonesty or incompetence justifying action for public protection.

8. Respondent's disciplinary authority over Petitioner as a licensed physician and surgeon justifies the proceedings and includes the power to inquire as to the facts upon which Respondent's jurisdiction depends.

9. Respondent may resolve and determine issues of fact, but can neither restrict the legal consequences thereof nor render a valid order upon an erroneous conclusion of law for to do so would exercise judicial powers reserved to the courts.

Garfield v. Bd. Med. Exam. (1950) 99 Cal. App. 2d 219, 231

Aylward v. Bd. Chiropractic Exam. (1948) 31 Cal. 2d 833, 839

10. Where an administrative decision is not based upon a determination of fact, but upon an erroneous conclusion of law, and is without the Board's authority, the order is void.

Aylward v. Bd. of Chiropractic Exam. (1948) 31 Cal. 2d 833, 839

11. Respondent's decision finds, on the basis of uncontroverted evidence, that Petitioner acted in the honest opinion that the procedures in which he participated conformed with approved medical practice, were followed by many physicians and surgeons in the community, were taught by the major medical schools in this State and were rendered due to his concern for preserving the life of the patient. Respondent's interest and authority over the subject-matter terminated upon finding facts contradicting and excluding unprofessional conduct.

12. Respondent's determination of facts set forth in the Decision rendered in Petitioner's proceeding is based upon uncontroverted evidence and testimony establish-

ing circumstances precluding Petitioner's guilt of a criminal abortion as a matter of law.

13. On the basis of the Findings of Fact Petitioner was not guilty of performing a criminal abortion in that all of the women allegedly aborted were entitled to protection under the provisions of Amendment VIII of the Constitution of the United States, and Article I, Section 6, of the Constitution of the State of California.

14. On the basis of the Findings of Fact, Petitioner was not guilty of performing a criminal abortion in that all of the women allegedly aborted were entitled to protection under the provisions of Amendment XIV of the Constitution of the United States, and Article I, Section 13, Clause 6, of the Constitution of the State of California.

First Natl. Ben. Soc. v. Garrison (D.C.1945) 58 F. Supp. 972, aff'd 155 F.2d 522
Wilson v. City of Los Angeles (1960)
In re Newbern (1960) 53 Cal.2d 786, 792

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: September 24, 1968

/s/ Andrew J. Hyman
Judge of the Superior Court

Item No. 33

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT - CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff	)	
	)	NO. 69-3429
vs.	)	
	)	
SPIRO P. ANAST,	)	
	)	
Defendant	)	

MEMORANDUM OPINION

1. The defendant has been indicted in a three-count indictment charging that he "committed the offense of solicitation to commit abortion in that he did willfully and unlawfully urge, encourage and advise a female..... to have an unlawful abortion committed, in violation of Chapter 38, Secs. 8-1 and 23-1, Illinois Revised Statutes, 1967." (Each of the three counts names a different female person.)

2. Defendant has filed a 2-pronged attack upon the indictment: (1) He moves to dismiss the indictment because the statute above referred to is unconstitutional because "it is vague, inexplicable of definition and impossible to decipher"; and, (2) because even presuming the constitutionality of the statute, the indictment does not charge the offense of "solicitation to commit abortion."

3. The defendant's position on both grounds is sustained by this Court.

THE FAILURE OF THE INDICTMENT TO ALLEGE A CRIME

4. Sec. 8-1 of Chap. 38, Ill. Rev. Stat. 1967, defines solicitation as follows:

> "A person commits solicitation when, with intent that an offense be committed he commands, encourages or requests another to commit that offense."

5. The indictment charged the defendant with encouraging a female to "have an unlawful abortion committed". It is obviously impossible for the female to commit a legal abortion on herself, as the Abortion Statute, Sec. 23-1, plainly imports the commission of an abortion upon a woman by another. And, it is obvious that the indictment does not charge that the defendant encouraged or requested the female to commit the crime of abortion, merely to have "an unlawful abortion committed".

6. The statute is plain and unambiguous: A person is guilty of solicitation when he encourages or requests another *to commit the offense of abortion*. Encouraging a female to have an abortion committed, which is what the indictment charges, is nowhere made an offense by any statute. Where an indictment, information or complaint which does not define those acts allegedly committed by the defendant to be specific and definite, the indictment fails.

7. And in the instant case, where the State alleged its specifics it failed to allege any crime in accordance with any existing statute.

8. Accordingly there can be no solicitation to encourage a female "to have an unlawful abortion committed" and the indictment is void on that ground.

9. Sec. 23-1 of the Criminal Code states as follows:

> "(a) A person commits abortion when he uses any instrument, medicine, drug or other substance whatever, with the intent to procure a miscarriage of any woman. It shall not be necessary in order to commit abortion that such woman be pregnant or, if pregnant, that a miscarriage be in fact accomplished. A person convicted of abortion shall be imprisoned in the penitentiary from one to ten years."
>
> "(b) It shall be an affirmative defense to abortion that the abortion was performed by a physician licensed to practice medicine and surgery in all its branches and in a licensed hospital or other licensed medical facility because necessary for the preservation of the woman's life. 1961, July 28, Laws 1961, p. 1983, Sec. 23-1".

The statute is unconstitutional (1) for vagueness; and (2) for infringing upon a woman's right to control her body.

10. In *Lanzetta v. New Jersey,* 306 U.S. 451, the Supreme Court held that when a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application, such statute violates the first essential of due process of law, (p. 453).

11. A similar statute was held unconstitutional by the Supreme Court of California, *People v. Belous,* 80 Cal. Reptr. 354 (1969). That court held that a statute making a person who performs an abortion punishable unless abortion is necessary to preserve a mother's life was invalid where the term "necessary to preserve" was not susceptible to a construction which was sufficiently certain to satisfy due process requirements.

12. Just as the defendant in *Belous,* who did not commit the abortion but who referred the patient to a non-physician who did, had standing to raise the constitutional question, the instant defendant likewise has standing. *Griswold v. Connecticut,* 381 U.S. 479, 481; *Barrows v. Jackson,* 346 U.S. 249, 257.

13. The court does not find any compelling state interest sufficient to override the infringement on the personal liberty of a woman effected by the statute here being challenged.

"The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgement of a 'right to privacy' or 'liberty' in matters related to marriage, family and sex. *Griswold v. Connecticut,* 381 U.S. 479; *Loving v. Virginia,* 388 U.S. 1, 12; 18 L. Ed. 2d. 1010 (statute prohibiting interracial marriages held violative of the due process clause).

Recently, a three-judge court sitting in the United States District Court, Eastern District of Wisconsin (Milwaukee), headed by Judge Kerner of the Seventh Circuit Court of Appeals, held unconstitutional a somewhat similar statute (Sec. 940.04 Wis. Stats.) as the one at bar. *Babbitz, Plaintiff v. McCann, et al, Defendants,* No. 69-C-548. The three-judge court held "upon a balancing of the relevant interest, we hold that a woman's right to refuse to carry an embryo during the early months of pregnancy may not be invaded by the State without a more compelling public necessity than is reflected in the statute in question. When measured against the claimed 'right' of an embryo of four months or less, we hold that the mother's right transcends that

of such an embryo." And recently also, a District Court in the District of Columbia invalidated an abortion law in slightly different language. *United States v. Vuitch,* 38 L. W. 2275 (Nov. 10, 1969). The court in *Vuitch* observed: "There has been moreover, an increasing indication in decisions of the Supreme Court of the United States that as a secular matter, a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in the early stages of pregnancy." Accordingly, the Illinois Abortion Statute is unconstitutional in the opinion of this Court.

CONCLUSION

16. For the foregoing reasons, this court holds the statute to be unconstitutional and further holds the indictment to be insufficient; and it is hereby dismissed.

Respectfully submitted,

/s/ George E. Dolezal, Judge
Criminal Division
Cook County Circuit Court

GED:mm

Item No. 34

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY
PENNSYLVANIA

CRIMINAL

COMMONWEALTH : No. 1968 - 353

VS. :

BARRY GRAHAM PAGE :

O P I N I O N

CAMPBELL, P.J.:

History

On October 21, 1968, the defendant, a motorcycle mechanic who acquired his expertise in the merchant marines, entered a plea of guilty to a charge that he aborted two unmarried pregnant women. He was sentenced to the state penitentiary for a term of two to five years.

The Act of June 24, 1939, P.L. 872, Section 718 (18 P.S. 4718) was the statutory basis for the prosecution. It is a "broad brush" statute prohibiting all abortions without exception within the state of Pennsylvania.

On March 4, 1970, the defendant filed a PCHA petition alleging that the aforesaid abortion statute is unconstitutional in that it violates the constitutions of Pennsylvania and the United States.

The Social Problem

The problem of abortion is a matter of great current concern in the United States. Aside from the moral and religious issues involved, the resulting social implications and effects are great. The Kinsey group have estimated that one out of every five pregnancies in the United States end in abortion. The annual take by non-professional abortionists has been estimated to be over $350,000,000 a year and is thought to be the third largest illegal endeavor in the United States, exceeded only by gambling and

narcotics. (1) It has further been estimated that over 5,000 women die each year from criminal abortions. (2) As a result of the enormous resulting problems, abortion statutes are being subjected to critical review.

State's Compelling Interest

The commonwealth is aided by the presumption in favor of the constitutionality of the statute. Aside from this presumption, courts have traditionally upheld the constitutionality of state legislation if it can establish an overriding legitimate legislative purpose to justify the interference with individual and family privacy. Thus the real question, as stated in ***People v. Belous,*** 80 Cal. Rep. 354; 38 LW 2167 (1969), was not "whether the right exists but whether the state has a compelling interest in the regulation of the subject which is within the police power of the state."

What is the state's compelling interest in the abortion statute? Is it to discourage fornication and other illicit sexual conduct? If so, why does the statute apply to both married and unmarried women?

Is the state's compelling interest the desire to preserve the health and welfare of women? Why, then, does it apply in bold fiat to medical doctors who possess the requisite skill to easily perform a safe abortion during at least the first trimester of pregnancy? There is abundant medical opinion that it is safer for a woman to have a hospital therapeutic abortion than to bear a child.

Is the state's compelling interest the desire to protect the rights of the fetus? The 14th Amendment to the U.S. Constitution requires that the state accord "due process of law" and "equal protection of the laws" to ***any person*** within their respective jurisdiction and that all ***persons born or naturalized*** in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. (emphasis added.) We know of no court which has construed the early development of the fetus as being a person within the meaning of the 14th Amendment and on the contrary believe that it is generally only applicable at birth. The protection of the embryo and fetus does not justify an abortion statute: ***People v. Belous, supra.***

---

(1) D. Lowe, Abortion and the Law, 3-5 (1966)

(2) Bates and Zawadski, Criminal Abortion, 3-4 (1964).

We can readily perceive of a valid compelling interest of the state in the subject of abortion if it were directed, for example, to prevent an unqualified, unlicensed and untrained individual to perform an abortion which medically would jeopardize the health and safety of the woman involved but, in order to accomplish the result in which the state is interested, the statute must be sufficiently narrow in scope to serve the limited purpose involved: ***McLaughlin v. Florida,*** 379 U.S. 184; 85 S. Ct. 283 (1964); ***Shelton v. Tucker,*** 364 U.S. 479; 5 L. Ed. 2d 231 (1960).

We flatly hold that the Pennsylvania statute does not meet this standard because of its broad unlimited and indiscriminate application.

Right to Marital and Personal Privacy

We pass now to the question of whether or not the abortion statute violates the woman's fundamental right to personal privacy and, likewise, the fundamental right to marital privacy.

The Supreme Court of the United States has shown a marked concern with regard to legislative interference in the marital relationship, the individual's right to bear children and to be free from unwarranted invasion upon one's right to privacy. The genesis of such a stance may be seen in such cases as ***Griswold v. Connecticut,*** 381 U.S. 479; 14 L.Ed. 2d 510 (1965)(upholding the right to distribute and use prefertilization contraceptive devices); ***Loving v. Virginia,*** 388 U.S. 1; 18 L.Ed. 2d 1010 (1967)(holding a statute prohibiting interracial marriage violative of the Due Process Clause); ***Skinner v. Oklahoma,*** 316 U.S. 535; 86 L.Ed. 1655 (1942)(holding a sterilization law illegal and finding the right to procreation a "basic liberty").

In these and other cases the court has recognized a constitutionally protected right to privacy which is made applicable to the states through the 14th Amendment to the United States Constitution.

We believe the rationale of the case of ***Griswold v. Conn., supra,*** is applicable and may be extended to abortive action after conception and that the abortion statute interferes with the individual's private right to have or not to have children. Both the Pennsylvania and Connecticut statutes are at odds with current medical practice, both invade the intimate realm of marital privacy, both interfere with a married couple's freedom to control the number and spacing of offspring, and both are in conflict with a solution of one of the world's critical problems, the population explosion.

The United States District Court in *U. S. v. Vuitch*, 38 LW 2275 (1969)(cert. granted) and the Supreme Court of California in *People v. Belous, supra*, have each declared an abortion statute unconstitutional. Although these statutes were factually dissimilar to the statute here in question, the rationale we believe to be applicable in many respects.

The United States District Court for the Eastern District of Wisconsin has declared a state abortion statute unconstitutional as violating a pregnant woman's Ninth Amendment right of privacy: *Babbitz v. McCann*, 38 LW 2498, decided March 5, 1970. In this case a Wisconsin physician was charged with aborting an unquickened fetus.

We are convinced that the Pennsylvania abortion statute clearly impinges on constitutionally protected areas and without a doubt it is so broad, unlimited and indiscriminate that it fails to meet the present day tests for constitutionality.

Conclusion

We sincerely regret that the question of the constitutionality of this statute should reach this court in its present posture. The reprehensible actions of the defendant are in no way approved or condoned by the language contained herein or the court's decision. The only solace one can gather is the fact that this very statute created the undesirable situation involved in this case and that the legislature may hasten to adopt an abortion statute to meet the needs of present day society. Defendant's petition is therefore granted and the defendant ordered discharged.

BY THE COURT:

/s/ R. Paul Campbell

P.J.

Dated: July 23, 1970

AND NOW, to-wit: July 23, 1970, an exception is noted and bill sealed for the Commonwealth.

BY THE COURT:

/s/ R. Paul Campbell

P.J.

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH DAKOTA, WITHIN AND FOR PENNINGTON COUNTY

STATE OF SOUTH DAKOTA, Plaintiff,
-vs-
H. BENJAMIN MUNSON, Defendant.

MEMORANDUM DECISION

Apr. 6, 1970

The defendant herein, a licensed physician, is charged with abortion. By motion his counsel seeks dismissal of the information on the grounds that the abortion statute, under which he is being prosecuted, is unconstitutional.

According to reliable estimates, more than a million American women had abortions last year. Of these about 350,000 needed hospital care when they attempted to abort themselves, and more than 8,000 of these self-help cases died. ("Life" Magazine, Feb. 27, 1970.) Enforcement of the abortion laws has been chiefly against quacks and charlatans who have botched the job, and the woman lived to complain. Where death ensues, the prosecution has been for homicide. It is a rare case where a licensed physician has been prosecuted. In no instances has the woman been prosecuted, although the abortion laws are directed equally against the woman seeking an abortion.

With such mass disregard for the abortion law, reflecting a radical change in public attitude, it is in order to determine whether the exercise of the police power in prohibiting abortion is "sanctioned by usage, held by prevailing morality to be necessary to public welfare, or endangers the vital interests of society", criteria which over the years have been used to measure the right of the state to regulate personal and private conduct.

There has been a concerted drive in recent years to abolish or liberalize the abortion laws by statute or to challenge the constitutionality of such laws. Where the legislatures have acted some have liberalized the abortion laws and some have repealed them outright. Abortion is legal in most of Europe and in England. Most of the abortion laws were passed in the so-called "Victorian" era, a time when moral and religious fervor against anything regarded as sinful, resulted in many laws governing morals and personal conduct. The South Dakota Statute dates back to 1877. Most of these laws governing personal or private conduct, like the "blue laws" have either been repealed or have not been enforced. The laws prohibiting abortion represented a change from the common law which permitted

1283

abortion in the initial stages of pregnancy, before quickening of the fetus. In the 19th century when the abortion laws originated, all surgery was risky, and the needs of the frontier era was additional manpower. Now abortion is safer than childbirth, and the highly publicized public interest is in population control.

With the abortion laws on the books, only a small proportion of abortions are performed by licensed physicians, because most doctors are not willing to take the risk of prosecution and loss of their license, however small that may be. The rest are performed by people on a descending scale of competence down to the outright quacks and charlatans, or are performed by the woman herself in desperation where she does not have the funds to finance an illegal abortion. Are the interests of society being served by a law which exposed over a million women last year to such risks? Are the interests of society being served by women bearing unwanted children, subjected to the pressures of an emotionally and financially deprived existence? Are the interests of society being served by the population explosion we are now witnessing?

The abortion law has been held unconstitutional in California on the grounds that the words "necessary to preserve her life" in that state's abortion statute were unconstitutionally vague. People vs. Belous, 458 P(2) 194 (Cal. 1969). The District of Columbia law was invalidated on the same grounds where the language of the statute was "necessary for the preservation of the mother's life or health". U.S. vs. Vuitch, 38 Law Weekly 2275 (Nov. 10, 1969). The language of the South Dakota statute forbidding abortion, "unless the same is necessary to preserve her life" likewise presents the same basis for invalidity.

However, in the opinion of this court, the invalidity of the abortion law goes much deeper in that it interferes with private conduct without serving any vital interest of society. Indeed, it is a disservice to society under the conditions that have been outlined above. This court agrees without reservation with the recent opinion handed down by a three judge panel of the U. S. District Court for the Eastern District of Wisconsin, in the case of Babbitz vs. McCann, et al., #69-c-548, a copy of which was furnished to the court and opposing counsel by counsel for defendant.

Dr. Babbitz sought an injunction in federal district court against a prosecution in state court for performing an illegal abortion. The Wisconsin statute, set forth in detail in the opinion, provided a different penalty for abortion before quickening of the fetus than was imposed for abortion of the quickened fetus. Dr. Babbitz was charged with aborting a fetus before quickening. The court held that the statute under which he was charged was unconstitutional under the Ninth Amendment to the U. S. Constitution, the court concluding that "the State of Wisconsin may not by statute deprive a woman of her private decision whether to bear her unquickened

child", thus squarely facing the fundamental issues involved in the abortion laws.

This court adopts the reasoning of the court in the Babbitz case, under Section IV, which should be read in its entirety, since only portions will be quoted herein for emphasis.

Quoted with approval in Babbitz is the following excerpt from an article by former Supreme Court Justice Tom C. Clark in the Loyola University Law Review for April, 1969, in which Justice Clark concluded from a study of Griswold (striking down Connecticut statute forbidding use of contraceptives) and its predecessor cases:

> "The results of these decisions is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution."

Quoting further from the language of the court in Babbitz:

> "The defendants urge that the state's interest in protecting the embryo is a sufficient basis to sustain the statute. Upon a balancing of the relevant interest, we hold that a woman's right to refuse to carry an embryo during the early months of pregnancy may not be invaded by the state without a more compelling public necessity than is reflected in the statute in question. When measured against the claimed "rights" of an embryo of four months or less, we hold that the mother's right transcends that of such an embryo."

The court went on to find no compelling interest of society in the need to protect the mother's life, since abortion is presently less dangerous than childbirth, or in connection with the discouragement of non-marital sexual intercourse. In fact, most abortions are sought by married women and the laws do not purport to distinguish between married and unmarried women.

Accordingly, defendant's motion for dismissal of the information filed herein will be granted on the grounds that the abortion statute is an unconstitutional invasion of individual right, without a compelling interest in the State.

Counsel for the defendant may prepare an order accordingly.

By the Court:

Clarence P. Cooper, Circuit Judge

ATE v. KETCHUM
ch. Dist. Ct., Mar. 30, 1970 (Reid, J.)

OPINION - MARCH 30, 1970

This is the case of the PEOPLE OF THE STATE OF MICHIGAN vs. DR. JESSE KETCHUM AND JUDITH KETCHUM. The Defendants are charged with the crime of CONSPIRACY TO PERFORM AN ABORTION, contrary to M.S.A. 28.773 and M.S.A. 28.204.

At the beginning of the preliminary examination, Mr. John Bai attorney for the Defendants made an oral motion to dismiss the complaint and warrant on the grounds that the Michigan statute on abortion is unconstitutional because it is indefinite and uncertain and vague and therefore is in violation of the due process clause of the Fourteenth Amendment of the United States Constitution.

This Court recognizes that the issues raised in this proceeding have far reaching moral implications, theological implications, and medical implications. However, this Court will address itself solely to the legal issues raised in the motion.

Neither the Defendants' attorney nor the prosecuting attorney have cited to this Court any Michigan Supreme Court decision nor any Court of Appeals decision which have previously held this statute constitutional so therefore this Court is not bound by any prior decisions.

Due process of law requires a penal statute to use clear, explicit, and unambiguous terminology so that men of common intelligence may not differ as to its meaning and application. See Connelly vs. General Construction Company 269 U.S. 385 and Lanzetta vs. New Jersey 306 U.S. 468.

It is the applicable terminology of the Michigan abortion statute "unless the same shall have been necessary to preserve the life of such woman" clear, explicit, and unambiguous? The three key words "necessary," "preserve," and "life" taken individually by both judicial interpretation and dictionary definitions create uncertainty as to their individual meaning. The entire phrase in itself is susceptible to a variety of interpretations. This Court concludes that the terminology is not sufficiently clear, and explicit and does not satisfy the due process requirements without infringing on fundamental rights. See People vs. Belous, 80 Calif. Reporter 354, and The United States vs. Vuitch 38 LW 2275.

The Michigan statute provides for the standard of "any person... with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of said woman." The standard allows "any person" to decide who shall be born and who shall not be born. Certainly our country is established and maintained on the principle of the rule of law - a nation of laws and not of men. The standard "any

person" provides no procedural guidelines. Is not the decision as to who shall or shall not be born a decision in which society has an interest and not a decision to be made conclusively by "any person" without any guidelines to protect the basic rights of the parties involved?

Is there an infringement on the basic rights of the parties as protected under the Fourteenth Amendment? The Court believes that the parties involved include the woman, the unborn, and any person who is performing the abortion. The woman certainly has a right to life as opposed to the risks of death in childbirth. The woman has a right to privacy in matters relating to marriage, family and sex. See Griswold vs. Connecticut 381 U.S. 479. The real issue is whether the state has a compelling interest in the regulation of the right to privacy in matters of marriage, family, and sex. Currently accepted standards of medical practice negate the original compelling interest of the state because the need of the state to protect the woman's health when the abortion statute was originally enacted is no longer evident in light of scientific advancements.

The Court believes that the unborn person may be a person under the Constitution, and thereby shall not be deprived of life without due process of law. In Michigan the unborn child has the right to maintain a tort action, to sue for wrongful death of its parents after its birth. The right to property by means of inheritance. The right to a guardian ad litem in certain actions. Does not the unborn child have an absolute right to life - the right to be born? The Michigan statute as written does not provide for the taking of the life of the unborn person with due process of law.

In addition the statute as written infringes on the right of privacy in the physician-patient relationship, and may violate the patient's right to safe and adequate medical advice and treatment.

Thus this Court finds that the Michigan abortion statute as written is vague and indefinite in its terminology and possible applications as to constitute a denial of due process as protected by the Fourteenth Amendment of the United States Constitution and the Michigan Constitution of 1963 Art. a Sec. 17, and that it infringes on the basic rights of privacy of the woman, and the basic right of life of the unborn person, and infringes upon the right to privacy between physician and patient, without a sufficient state interest in abridging the right of privacy and the right of life. This Court declares the Michigan abortion statute unconstitutional as a denial of due process of law as protected by the Fourteenth Amendment of the U.S. Constitution and Art. 1 Sec. 17 of the Michigan Constitution. In view of the foregoing, this Court finds it unnecessary to consider the other arguments raised by defense counsel. The motion to dismiss the complaint and warrant is granted.

/s/ Clarence A. Reid, Jr.
Clarence A. Reid, Jr.
District Judge

Item No. 37

Order of the District Court, Second Judicial District, County of Ramsey, Denying Motion to Dismiss Indictment Against Appellant Jane E. Hodgson, M.D., Entered June 29, 1970

DISTRICT COURT
STATE OF MINNESOTA

COUNTY OF RAMSEY—SECOND JUDICIAL DISTRICT

File No. 23789

STATE OF MINNESOTA,

vs.

DR. JANE ELIZABETH HODGSON.

The defendant is accused by the grand jury of the County of Ramsey in an indictment returned on May 21, 1970, of the crime of abortion, in that she, the defendant, intentionally produced a miscarriage of one, Jane Doe, which said miscarriage was not necessary to preserve the life of the said Jane Doe nor the child with which she was pregnant. The defendant's first appearance in court was on May 26, 1970, at which time she appeared with her Counsel, Stewart R. Perry, and indicated to the Court that her appearance was a special appearance for the purpose of moving the Court for an order dismissing the indictment for the reason and upon the ground that the statute under which the indictment was returned was unconstitutional. The date of June 12, 1970, was then set as the time for hearing, and the requests to file briefs by both the State and the defendant were granted by the Court.

On June 12, 1970, the defendant, together with her Counsel, appeared before the Court to argue the above described motion. The County Attorney was represented by Mr. Paul Lindholm, Assistant Ramsey County Attorney. In the interim, briefs had been submitted by Mr. Perry and by Mr. Stephen C. DeCoster, Assistant Ramsey County Attorney.

Upon all of the files, records, and proceedings had and filed in said matter, briefs and arguments of Counsel, and after due consideration of the same,

IT IS ORDERED:

1. That the motion brought by defendant to dismiss the indictment returned against her in the above entitled matter be and the same hereby is denied.

2. That the request of the defendant to certify the above entitled matter to the Supreme Court of the State of Minnesota as important and doubtful be and the same hereby is denied.

3. That the defendant will appear before the Court on August 5, 1970, prepared to proceed with her arraignment.

(Signature Illegible)
Judge of the District Court

Dated June 29, 1970.

MEMORANDUM

The statute in question, MSA 617.18, was first enacted into law by the Minnesota legislature in the year 1873. As far as can be ascertained, this is the first constitu-

tional challenge of the statute, and the issues presented in this motion have not been decided in this jurisdiction. The Court has taken judicial notice of the materials cited in the briefs, but they are of such common understanding that they need not be elaborated on here in great detail.

The undisputed facts appear to be that Jane Doe, a married woman, of the age of 23 years, was a patient of the defendant, and on April 14, 1970, was diagnosed as being pregnant. From the medical history obtained, it was suspected that Jane Doe had contracted rubella during the first four weeks of her pregnancy, and that Jane Doe had come to the defendant because she suspected that she had rubella during that period of time. She was apprehensive about her condition, particularly her unborn child, because of her knowledge of the dangerous propensities of the disease. The history of rubella given by Jane Doe was confirmed by clinical observations and laboratory tests on two of her children who at that time had the disease, the examination and tests being performed by a pediatrician located in Minneapolis, Minnesota. Upon the tests having been made, together with examinations in connection therewith, the defendant was of the opinion that Jane Doe had rubella during the first four weeks of her pregnancy. Jane Doe and her husband were aware of the danger to the fetus because of the contraction of the disease and requested the defendant to perform an abortion. The defendant believed in her medical judgment that a therapeutic abortion was medically indicated, and she secured consultations from other members of her profession in the community and in other parts of the United States, resulting in the performance of the abortion in a hospital located in Ramsey County, Minnesota, on April 29, 1970. At that time Jane Doe was about 12

weeks pregnant, and the fetus was not viable or "quick." Before proceeding with the operation, the defendant brought a motion in the United States District Court, District of Minnesota, seeking, essentially, the same relief here presented. A three-judge court denied the motion of the defendant and indicated that she seek her relief in the courts of the State of Minnesota. Because of the lack of time, the defendant proceeded with the operation, rather than first seek her relief in the district courts of the State.

The issues presented cover three, general, broad areas. First, whether or not the State has the right to interfere with the private rights of an individual; two, if the State does have such right, it must have an overriding and compelling interest to justify any such interference with the private life of an individual; and, three, if there is an overriding State interest present today that justifies the existence of MSA 617.18, it is incumbent upon the State to establish such interest.

The Court will touch upon the constitutional issues raised by defendant as they pertain to these three general areas.

Defendant contends that the statute infringes upon the personal liberties of the individual concerned, in that it interferes with a woman's right of privacy in determining whether she will or will not, or should or should not, allow to grow within her body embryo which she does not wish to grow, and that in order for the State to interfere, there must be shown a reasonable basis, an overriding justification, a social purpose of such interference. Defendant further contends that at the time of its enactment, in the year 1873, there was an urgent and well-founded health basis for its passage. Any surgical intrusion into the body

was, at that time, highly dangerous. Infection was almost insured, and mortality was high. Defendant argues that today an abortion performed under proper circumstances is a reasonably safe procedure, even safer than normal childbirth. No doubt these considerations were in the mind of our legislators almost a century ago when the law was first enacted. However, the statute has been periodically reconsidered over the years, most recently at the last legislative session. Whatever the dangers of surgery the legislators might have had in mind during the early years of the history of this law, those considerations have seemed [*sic*] to have disappeared during recent years, and the law is still on the books. The reason for its existence is not because of dangers of surgery or performing an abortion, medically speaking. Some considerations for the continued existence of the law are hereinafter discussed.

Defendant places great emphasis on the fact that the State of Minnesota has never considered an embryo or fetus as a "human being." Defendant further contends that the statute in question denies the rights of the Father or the Mother of the aborted foetus to privacy in contravention of the Ninth and Fourteenth Amendments to the United States Constitution. There is authority to the effect that the unborn child, even before it becomes viable, is an entity which the legislature is empowered to protect. In early recorded history, the child in the Mother's womb was considered a part of its Mother. Reference is made to Roman law, see Justinian, Digest 25.4.1.1. But since that early date we have seen the development of scientific methods to such an extent that the ancient law has been reconsidered, and no longer is the fetus considered to be a plant, static in habit, and growing only in size. Through the marvels of closed-circuit x ray and television, scientific observations of

this little human being during his first weeks of existence have been made possible. Studies of mental growth have been made possible, during the first few weeks of the child's existence. Some studies have indicated that even in the limb bud stage, when the embryo is only four weeks old, there is evidence of behavior pattern: the heart beats. In two or more weeks, slow back and forth movements of the arms and legs appear. Before the 12th week of uterine life, the fingers flex in reflex graphs. From the studies of certain child psychologists, it has been disclosed that the process of mental development which characterizes a 10-year old child or the one-year old child also characterizes the embryo who might be only one month old. Hence, it would appear that the time has been reached when society must discard the theory advanced by the old Roman law, that a parent has an absolute dominion over his offspring, or a return to the ancient notion that a fetus is "part" of his Mother. The Minnesota legislature has made no such distinction, nor has it attempted to set out by law at what stage during pregnancy a child may be considered "quick" or "viable" nor has it at anytime determined at what stage during pregnancy the life of a child can or could be taken for any reason or means. Rather, the legislature has decreed that a miscarriage shall not be caused at anytime during pregnancy unless the same is effected as necessary to preserve the life of the Mother or the life of the child. The State has an interest in the continued existence of every life.

Defendant contends that unless the fetus in question is "quick" or viable, the unborn child has no legal rights in the State of Minnesota. The rights of the unborn child are specifically recognized by Minnesota law in its various

fields, such as: intestate succession; testate successions; trusts and uses; workmen's compensation; paternity and support; land registration; and future interests in real property. Various quotations make reference to "unborn child" and "posthumous child," "lives in being," "twenty-one years and nine months," but the law is entirely lacking with respect to definitions of "quick child" or "viable child." The Court recognizes there are rules and regulations promulgated by the State Department of Health pursuant to MSA 144.151 (4) to the effect that destroying a fetus is not considered a fetal death if aborted for any reason less than 20 weeks after conception. See Registration Manual for Birth and Fetal Death, State Board of Health (1965), Section 5, page 14. However, such regulations and publications are not considered decisive case law, nor are they controlling in the instant matter. Turning our attention to the field of tort law, the first time that the Minnesota State Supreme Court was called upon to pass upon the issue of the right of the heirs of an unborn child to recover in a wrongful death action was in 1949. See *Berkenes* vs. *Corniea* (1949) 229 Minn. 365, 38 N.W. (2) 838. It is noted that the Court, in part of its opinion, quoted Blackstone as follows:

> "The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation. Life is the immediate gift of God—a right inherent by nature in every individual; and it begins, in contemplation of law, as soon as an infant is able to stir in the Mother's womb."

The Court further quotes the case of *Bonbrest* vs. *Kots* (D.C.) 65 Fed. Supp. 138:

> "From the viewpoint of the civil law and the law of property, a child en bentra [*sic*] sa mere is not only regarded as a human being, but as much [*sic*] from the moment of conception—which it is in fact."

While it is true that the child in the Berkenes case had reached a viable state, it is noted that the Court made no distinction between a viable or nonviable child, that is, it does not appear that had the child not been viable, recovery would have been denied. There is substantial authority in other jurisdictions which allow recovery for prenatal injuries to nonviable, unborn children. There appears to be no holding or decision to the effect that would allow a shifting of standards in certain cases. There appears to be no reason to allow a distinction to be made, based upon age of the child within the womb. The dean of tort law, Professor Prosser, states at Section 56:

> "Certainly the infant may be no less injured, and all logic is in favor of ignoring the stage at which it occurs."

If the State legislature has seen fit to give the right of recovery to an unborn child or his heirs at various stages during pregnancy in the civil field, why should the child be abandoned at certain stages of pregnancy in the criminal field? If the unborn child at age 12 weeks within the womb has vested rights or the right in certain instances to recover, as hereinabove set forth and described, why should any person be deemed competent to judge that the child's twelve-week life may be taken because of the wishes of its Mother or Father, or because it is unwanted, or because of the possibility of its being deformed or handicapped because

of exposure to certain diseases during the early stages of life? Defendant would ask this Court to so legislate, contrary to what has taken place in the halls of our legislature for generations past. For the reasons hereinafter enumerated, this Court does not so choose to do.

Defendant alleges that the statute in question, MSA 617.18, today is based on the concept of "morality and decency" arising from religious laws in violation of the First Amendment to the United States Constitution. Defendant then points out that these individuals who rely on the position of morality and decency overlook the end results where abortion is not allowed. That is to say, they overlook those children who are being born with gross defects, who must live with them day by day, while those who would preach morality and decency are prompted by it only on occasions where their attention is drawn to what someone else is doing. Defendant further points out that these people overlook the institutions in Minnesota filled with mentally retarded people whose life is tragic, and that they overlook the daily pain that the parents and siblings of such children live, day by day. They further overlook the unwanted children in institutions and overlook the children who are periodically in hospitals with the "battered child syndrome." Defendant contends that it is immoral and indecent not to prevent this, and that it is immoral and indecent to force these institutions to exist.

Where the statute involved deals with conduct which the State has valid grounds to prohibit, that is, the taking of the life of an unborn child, the fact that its policies coincide with the views of certain religious groups is without constitutional significance. It is almost inevitable that any position taken by the State through its legislature on the

subject of abortion must correspond with the religious or moral views of some group or groups within the community. In passing such a law, the legislature did not intend that it establish a religion in contravention of the First and Fourteenth Amendments to the United States Constitution. This subject has been the concern of philosophers and theologians since recorded history has begun. The relationship between religion, morality, and law, perhaps, is difficult to clearly define. However, history teaches that they do overlap in the subjects of their concern. An historical study of the works of our legislative bodies will clearly indicate that many men in their respective roles as legislators were committed to the proposition that the ultimate source of law is from the ultimate Lawgiver Himself. Many have clearly indicated that a just law binds one's conscience, and if a law does not bind one in conscience, it should not be law. There are numerous references in the Old Testament as to the source of our law, among which are the Book of Proverbs, Chapter 8, and Exodus, Chapter 24. Five thousand years ago Hammurabi recognized a supernatural source of authority, and the same reference is also made to Solon, the great leader of freedom-loving Greeks. It seems that down through the centuries, men have further recognized the authority for law and would keep those convictions alive in various forms in the halls of their legislatures. Seven hundred years ago Henry Bracton wrote:

> "The king is under God and the law. When the king or dictator or the State is held above God and the law, liberty is never secure, and the rights of man are mere franchises subject to the whims of other men."

In more modern times these same thoughts might have inspired our great leaders, such as Thomas Jefferson, when he wrote:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness."

Society would reach a strange position in its history if the legislatures of the several states were forbidden from making illegal that which is also immoral according to one's religion, or, indeed, all religions, on the grounds of the establishment clause of the First Amendment. Under such restrictions society might then return to a state of chaos, even barbarianism. The Court recognizes the sincere views of the defendant in this field, and the remarks hereinabove set forth are not in criticism or ridicule of those views or beliefs. The Court is also cognizant of the views of the minority in our various communities who have views which coincide with those of the defendant in this area. However, to give effect to those views of the defendant or the minority, the Court again is called upon to legislate, and for the reasons hereinafter set forth, the Court will not undertake such a responsibility. The Court is also not unmindful of the anxiety of the Mother in this case. Having been exposed to German measles, she was apprehensive of the possibility of bearing or giving birth to a deformed or handicapped child. Instead of agreeing to take the child's life because of this possible exposure, might she not have at least better yielded to the argument of a segment of our society who would state:

> "Let the child run its normal period of gestation, and upon birth if it is found that the child will be a burden to its parents or society, then provisions may be taken for its destruction."

The very thought of such argument, perhaps, appears abhorrent to responsible members of our community, but wherein lies the difference? At what stage in the course of human existence, or development, can it be decreed that life should be taken because of the potential inability to perform as normal persons are expected? Society is increasingly concerned with those who have been blessed with healthy bodies, and prefer to serve themselves, and blame society, rather than serve society and honor themselves. Society has never forgotten, nor should it ever forget, that men and women with withered limbs and bodies became outstanding citizens, leaders in their communities, but above all, masters of themselves, while other healthy, vigorous, intelligent individuals, warped within the philosophy of excuse, for one reason or another, have become instruments of their own damnation.

Defendant asserts that the statute in question interferes with the right of privacy of women in violation of the Ninth Amendment to the United States Constitution. The Court agrees that legislation of this type might and can interfere with the right of privacy of certain individuals. This is true with many of the laws of today. A simple illustration concerns the matters of traffic regulations involving the use of a motor vehicle upon the highway. Many such rules and regulations or statutes interfere with the manner in which a person might desire to operate a motor vehicle, but in the protection of life and property, legislative safeguards have been provided, many of which interfere daily

with the rights of individuals. The same problem exists with many other types of legislation. For instance, there are still on the books laws against adultery and fornication, and how intoxicants and narcotics shall be used. These laws are considered by a substantial minority to be archaic in design, and no longer serve a useful purpose in a modern and developing society. However, it is clearly noted that our legislature over the years has not yielded to such arguments and philosophies. This Court does not agree that the statute in question relative to abortion is in violation of the Ninth Amendment of the Constitution of the United States.

Defendant asserts that the statute in question interferes with the right of a medical doctor to practice medicine in the highest standards thereof in violation of the Fourteenth Amendment to the United States Constitution. The Court agrees that the right to pursue one's profession is a constitutionally protected right within the concept of "liberty" and "property." However, it is also noted that medical opinion is divided as to the situations under which a therapeutic abortion is medically indicated. If the State cannot constitutionally regulate the exercise of that judgment, legislators and courts alike would be superfluous, supplanted by a wise elite of doctors. In a democratic society, trust cannot be placed with a body of experts to determine issues of life and death, however qualified, well-motivated, and devoted the experts may be.

Defendant further contends that the statute delegates to the physician the duty and risk of deciding whether the abortion is necessary to preserve the life of the Mother or child and thus violates the Fifth and Fourteenth Amendments to the United States Constitution. Defendant points out the difficulty here is that the doctor must decide

whether or not the abortion is necessary to preserve the life of the patient, and she apparently has difficulty interpreting the word "preserve." Defendant alleges that it is incumbent upon her to make the right decision as to whether or not an abortion is necessary to preserve the life and is thus placed in a conflict of interests; that is, caught between the decision to do the abortion and the fear that if something should go wrong, the matter would be brought to the attention of the police. Thereafter, the doctor must then justify her opinion at a trial. Hence, she jeopardizes her practice and runs the risk of prosecution whenever the decision is made to perform an abortion, where there is any question that medical opinion could differ as to whether or not the operation was necessary to preserve the life of the Mother or the child. This Court, upon examination of the statute, is not persuaded that the words are indefinite or vague. In the Court's opinion, the word "necessary" and the expression "to preserve the life of the Mother" are both reasonably comprehensible in their meaning. The United States Supreme Court has ruled that a criminal statute must be definite enough to acquaint those who are subject to it with the conduct which will render them liable to its penalties. See *Lanzetta* vs. *New Jersey*, 306 U.S. 451, 59 S. Ct. 618, 83 L. PB. [*sic*] 888 (1939). And also see *Connolly* [*sic*] vs. *General Construction Company*, 68 [*sic*] U.S. 385, 46 S. Ct. 126, 17 L. PB. [*sic*] 322 (1926). This Court is of the opinion that the statute sets forth with reasonable clarity and sufficient particularity the kind of conduct which will constitute a violation. It is interesting to note that the defendant challenges the words "necessary to preserve her life" as being vague. The Court is not unmindful that the dedicated medical profes-

sion assumes this responsibility without hesitation almost daily in its various practices. It is deeply interesting to note that the statute in question has been law for a period of almost 100 years, and until the present time no one has challenged the provisions of the statute as being indefinite or vague. The Court cannot agree with the defendant that the statute involves a delegation of legislative responsibility. The legislature has simply set a certain standard, and that is, that no abortion shall be carried out unless necessary to preserve the life of the Mother, and then requires that the individual condition his or or her conduct on a respect for the standard as set. It would appear that the requirements laid out are no more burdensome than those which are established by any criminal law. Such a requirement placed upon the individual is, in no sense, a delegation of legislative responsibility.

The State contends that there are valid policy reasons underlying the statute in question; therefore, the doctrine of separation of legislative and judicial functions and the long-settled judicial rule of reticence in substituting the Court's own notions of legislative wisdom for that of a democractically elected legislature dictate that the challenged statute be sustained. The question of the validity of anti-abortion legislation is not the only issue of importance here. The issue of separation of legislative and judicial functions is as well involved. Even though a court may go so far as to opine that a particular statute in question be unwise, silly, or even asinine, if it has been demonstrated that the statute in question is reasonably tailored to the protection of societal interests with respect to which the legislature is entitled to act, then such act should not be torn down by a court who differs in opinion, philosophically or socially. This does not mean that there are

not policy grounds for a change in abortion laws which were ably stated in defendant's brief and exhibits. What it does mean is that these arguments are more properly addressed to the legislature of this State, and ultimately to its people. This Court is asked to balance the rights of an unborn child against the rights of the Mother, contrary to what the legislature has so consistently stated. Whose rights shall transcend? Who shall balance the relevant interests? This Court is of the opinion that the problem of balancing is more properly the function of the legislature and of the people of the respective states. In the case of Commonwealth vs. Brunell [*sic*], not yet reported, the Court stated:

> "The subject of abortion has become one of the most controversial social and legal issues of our contemporary society. Reasonable arguments have been advanced both in favor of and against abortion. But when a question is fairly debatable, the courts cannot substitute their judgment on it for that of the legislature." Citing *Druzik* vs. *Board of Health of Aberhill,* 324 Mass. 129. "It is only when a legislative determination cannot be supported upon any rational basis of fact that a court can strike it down. If the law on abortion is not as responsive to felt needs as the people believe contemporary life demands, the remedy rests with a democratically elected legislature and not with the court."

Defendant requests the Court that the statute in question be found constitutional but to then certify the matter to the Supreme Court of the State of Minnesota pursuant to MSA 632.10 for a determination of the constitutionality of

the statute prior to trial. This would obviate the necessity of raising the defense that she might have, relative to a verdict of innocence or guilt, and would at the same time give statewide effect to the ruling on constitutionality. If the Court in the local instance should find the statute unconstitutional, that ends the matter, and there would be no statewide effect of that local decision. Defendant also points out to the Court that a conviction, including a plea of guilty, would be most serious and would place her professional standing in jeopardy. She feels that if the matter should go to trial at the local level without a Supreme Court determination as to constitutionality, then her whole plan becomes moot inasmuch as she will be put to the task of defending herself against the charge brought by the grand jury, and if she is successful at the trial on the merits, again, the matter would not have any statewide impact.

In the light of the foregoing observations and conclusions drawn by the Court, it is obvious that the matter cannot be certified to the Supreme Court of the State of Minnesota, as important and doubtful. The Court believes that the issue or matter is important, but in this Court's opinion the constitutionality of the act in question is not in doubt. Under the circumstances, the Court has no alternative but to order that this matter proceed pursuant to the ordinary rules and processes of our criminal procedures.

The Court is not unmindful of the standing of the defendant in her community, her reputation as a citizen and as a dedicated physician and surgeon, and the Court is not unmindful of the serious position that she is in pursuant to the charge brought against her. However, it is she who chose to violate the law, and she certainly must have been cognizant of the consequences that might follow. In the

opinion of some of her professional colleagues as well as many in this community she will be considered as a very courageous and dedicated person in choosing the course of conduct that she did. Conversely, there will be other members of her profession and members of our community who do not and will not agree with her. Unfortunately, this Court cannot be a part of any plan or procedure other than those duly provided by law. No exception can be made in any case, even though a court might be in sympathy with the actions taken by the defendant.

The regular and ordinary criminal procedure processes established by law and within this Court's responsibility, require that the defendant be ordered to appear for her arraignment, which has been set for August 5th, next. Defendant will then have to decide whether to bring the matter on for trial relative to the issue of her innocence or guilt of the crime as charged or to enter a plea of guilty, and rest her future standing in the hope that the Supreme Court of the State will take a contrary view to that expressed herein.

HACKEY, *J.*

Item No. 38

Commonwealth of Massachusetts

Middlesex, ss.

Superior Court
No. 83879

COMMONWEALTH

v.

PIERRE VICTOR BRUNELLE

DECISION ON DEFENDANT'S SUBSTITUTE MOTION TO DISMISS

The defendant has been indicted for an alleged violation of G. L. c. 272, sec. 19, the so-called abortion statute. The indictment charges that he "with intent to procure the miscarriage of Linda A. Phillips, did unlawfully use a certain instrument upon the body of said Linda A. Phillips."

After pleading not guilty, the defendant filed a substitute motion to dismiss the indictment on the ground that the statute he is charged with violating is unconstitutional. At the hearing of this motion, evidence was received from experts in the fields of medicine and psychiatry. The motion sets out ten grounds on which the statute is claimed to be unconstitutional. Some of these grounds will be discussed separately; others will be grouped together.

I.

The Claim that the Statute violates the First Amendment and the Fourteenth Amendment in that it establishes a Religious Position Peculiar to one Religion.

The defendant contends, in substance, that the statute effects an establishment of religion because it enacts into law the doctrine of the Roman Catholic Church on the subject of abortion. Quite properly, the defendant does not contend that the original abortion statute enacted in 1845 (St. 1845, c. 27) was passed as a result of pressure by the Catholic Church or for the purpose of giving a Catholic moral position the force of law. But the defendant does contend that the effect of retaining in force G. L. c. 272, sec. 19 "is to enact into law theological tenets of some organized religions in this most important area of human life." (Defendant's Brief, p. 18). Two answers may be given to this argument.

307

First, the Massachusetts statute, as construed by the Supreme Judicial Court, is not in accord with the Catholic view on abortion. See Code of Cannon Law, 2350, sec. 1; Tinnelly, Abortion and the Penal Law, 5 Catholic Lawyer 187, 190. Second, there in no factual basis for any claim that the present purpose of the statute is to give legal effect to any particular religious viewpoint or that in its operation the statute does have that effect. It is almost inevitable that any position taken by the state through its legislature on the subject of abortion must correspond with the religious or moral views of some group within the community. The fact that a law coincides with a religious view does not render that law an unconstitutional establishment of religion. For example, the fact that Sunday is a day of particular significance for the dominant Christian sects does not bar the state from achieving the secular goal of requiring the observance of Sunday as a day of rest. *McGowan v. Maryland,* 366 U.S. 420; *Gallagher v. Crown Kosher Super Market,* 366 U.S. 617. If the state decides that it is in the public interest to restrict abortions to situations involving the life or health of pregnant women, it is not forbidden to do so because that view corresponds with the moral views of a majority or of a minority in the community.

The defendant's argument that the abortion statute violates the free exercise clause of the first amendment is without merit for, while the freedom to hold religious beliefs is absolute, the freedom to act upon those beliefs may be limited where there is a substantial state interest. *Braunfeld v. Brown,* 366 U.S. 599. The interest of the state in protecting what it considers to be human life would appear to be at least as substantial as any interest in maintaining Sunday as a day of rest. See *Raleigh Pitkin-Paul Morgan Mem. Hosp. v. Anderson,* 42 N.J. 421, 201A.2d 537, cert. den. 377 U.S. 985 (1964).

II.

The Claim that the Statute Violates the Due Process Clause of the Fourteenth Amendment and the Massachusetts Constitution, Part 2, C. I, Article IV, in that it is Arbitrary, Irrational, and Not Suited to Achieve any Valid Legislative End.

It is quite probable that the original Massachusetts statute on abortion when enacted in 1845 had as its primary purpose the protection of the health of the mother. At that time an abortion was attended by grave risk to the life and health of the pregnant woman. Due to advances in the last century in medical science and techniques,

an abortion today, carried out by a competent physician in an accredited hospital, involves no more risk to the mother than continued pregnancy and childbirth. It is still true, however, that abortions performed by non-medical persons involve serious risks to the life and health of the woman.

The defendant argues that since there is little danger, comparatively speaking, to the health of the mother in the case of an abortion performed by a properly trained physician, there is no valid state interest served by proscribing an abortion by such a physician even though the abortion may not be necessary to preserve the woman's life or health. In other words, it is argued, the state may not validly deprive a pregnant woman of the right to an abortion requested by her when the only ground of such proscription is the moral one of protecting the fetus.

At the outset, it may be doubted whether the defendant has standing to raise the issue of the constitutional right of a woman not to bear children. It does not appear that the defendant is a duly licensed physician. On a motion to dismiss I cannot assume that he is or is not so licensed. It is rather obvious that the state has the power to forbid persons who are unlicensed physicians to perform abortions. The risk to the health of the mother from allowing unlicensed persons to practice medicine would alone be an adequate ground for the state intervening.

Assuming, however, that the defendant does have standing to raise these issues, I shall deal with them on their merits. There can be no doubt that the abortion statute, although broadly construed by the Supreme Judicial Court, does restrict the liberty of action of a pregnant woman who seeks an abortion solely for personal or social or economic reasons. The question is whether this restraint on her liberty is justified by any compelling state interest. The Commonwealth asserts that the state has a justifiable and overriding interest in protecting the embryo or fetus and that the desire of the woman must be subordinated to this public interest. The basic question posed is whether the legislature may validly regulate the extermination of human life at an early state of its development.

The evidence before me clearly establishes that the product of human conception -- whether it be in the stage of zygote, embryo, or fetus -- may properly be classified as human life. It is not potential human life, but actual human life. The zygote contains within itself the genetic package that will control its development during

its life in the womb and in the world. It is uniquely different from any other part of its mother's body. It is a human being in and of itself in the sense that it is an individual entity human in origin, human in its characteristics, and human in its destiny. Whether it is proper to describe this entity as a human person is a matter of disagreement. The law has not, at least as yet, given full recognition as a juristic person to the embryo or fetus. To a limited extent the fetus has been granted rights as a person, contingent on its birth. *Torigian v. Watertown News Co. Inc.*, 352 Mass. 446; *Meyes v. Construction Service, Inc.*, 340 Mass. 633. Cf. *Dietrich v. Northampton*, 138 Mass. 14. It is difficult to accept the view that because the state has not fully recognized the unborn child as a legal person it lacks power to extend any protection to the fetus or embryo. Although there is some authority to this effect (*People v. Belous*, 80 Cal. Rptr. 354, 458 P.2d 194; *United States v. Vuitch*, 305 F. Supp. 1032), it is of questionable weight here in view of the different statutes under consideration in those cases. Protection of life has traditionally been one of the first duties owed by a state to its people. To say that the state has no interest in life prior to birth except as the mother may choose to permit the state to have an interest is to accept a proposition that contradicts the action of every state legislature. In this area of competing values, if the legislature sees fit to make a choice in favor of life, I find nothing in the federal or state constitution that says that such a choice is forbidden.

III.

The Claim that the Statute Infringes the Right of Privacy of a Pregnant Woman Desiring an Abortion.

The defendant contends that G. L. c. 272, sec. 19, not only invalidly restrains the liberty of a pregnant woman to bear or not bear a child, but that it also invades her constitutionally protected right of privacy. It is argued that her right to plan her reproductive life and her family as she sees fit is within a protected zone of privacy under the first, ninth, and fourteenth amendments of the constitution. Again, there is a question of the defendant's right to raise such an issue in the absence, at least, of evidence of his status as a duly licensed physician. But laying aside this objection, I rule that the claim is without substantial merit.

A nebulous concept of right of marital privacy found recognition in *Griswold v. Connecticut*, 381 U.S. 479. In that case the Supreme Court struck down the Connecticut

contraception statute. The defendant argues that, analogously, the abortion statute as applied to married women invades a constitutionally protected right of a married woman to the control of her reproductive faculties. Some support for this view can be found in the two abortion cases previously cited, *People v. Belous*, supra, and *United States v. Vuitch*, supra. However, there is a distinction between the state's attempted regulation of the marital use of contraceptives and the regulation of abortion. The state's interest in the protection of embryonic and fetal life, absent in the *Griswold* situation, is crucial to the abortion issue.

It may be added that it does not appear whether the woman named in this indictment as the subject of the abortion was married or unmarried.

IV.

The Argument that the Statute is Void on its Face because of its Vagueness.

The Statute in full (G. L. c. 272, sec. 19) reads as follows:

"Whoever, with the intent to procure the miscarriage of a woman, unlawfully administers to her, or advises or prescribes for her, or causes any poison, drug, medicine or other noxious thing to be taken by her or, with the like intent, unlawfully uses any insturment or other means whatever, or with like intent, aids or assists therein, shall, if she dies in consequence thereof, be punished by imprisonment in the state prison for not less than five nor more than twenty years; and, if she does not die in consequence thereof, by imprisonment in the state prison for not more than seven years and by a fine of not more than two thousand dollars."

It is an established constitutional principle that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process ..." *Connelly v. Central Construction Co.*, 269 U.S. 385, 391; *Lansetta v. New Jersey*, 306 U.S. 451. The broad language of the Massachusetts statute, if taken literally and without clarifying judicial construction, might well be open to the charge of vagueness. But the statute has been construed by the Supreme Judicial Court and has been given a specific content that provides adequate guidelines to physicians. Decisions of that court have held that a duly licensed physician may lawfully procure the abortion of a patient if he acts in good faith and in an honest be-

lief that it is necessary for the preservation of her life or to prevent serious impairment of her health, mental or physical, and if his judgment corresponds with the general opinion of physicians in the community in which he practices. *Commonwealth v. Wheeler,* 315 Mass. 394; *Commonwealth v. Nason,* 252 Mass. 545; *Commonwealth v. Brunelle,* 341 Mass. 675.

Moreover, the question is not an open one in this Commonwealth. In *Kudish v. Board of Registration,* Mass. Adv. Sh. (1969) 883 it was held that the statute was not void for vagueness. Two courts have recently utilized the void-for-vagueness principle to strike down abortion statutes which contained an exception permitting abortion when necessary to preserve the life of the mother in one case, and when necessary to preserve the life or health of the mother in the other case. *People v. Belous,* supra; *United States v. Vuitch,* supra. But in neither of these cases was the statute so construed as to give decisive weight to the good-faith judgment of the physician.

The statute, as construed by the Supreme Judicial Court, is no more vague than many traditional concepts of the law such as murder, manslaughter, criminal negligence, and the right of self-defense.

V.

The Claim that the Statute Infringes on the Constitutional Right of Free Speech and on the Freedom of Physicians to Practice their Profession.

The defendant contends that the abortion statute violates his constitutional right of free speech in that it makes criminal the mere conveying of information to a person, knowing that the person can utilize the information to procure an abortion. Also, the defendant claims that the statute unduly interferes with the freedom of the physician to practice his profession, according to his best medical knowledge.

The statute as applied to the defendant raises no question of freedom of speech or the rights of physicians to practice their profession. He is not charged with advising or prescribing an abortion. He is charged with unlawfully using an instrument on the body of a woman with intent to procure an abortion. Hypothetically, it is possible to imagine a situation in which a serious question of first-amendment rights may arise in the application of the statute, but this defendant lacks standing to raise it. Moreover, since it does not appear that he is a licensed physician, he is not entitled to come forward as the champion of the medical profession. As to the power of the state to regulate that profession, see *Kudish v. Board of Registration,* supra; *Lawrence v. Board of Registration,* 239 Mass. 424.

Some miscellaneous arguments advanced by the defendant do not require detailed treatment. For example, the defendant contends that the statute is an invidious discrimination against the poor in violation of the Equal Protection Clause of the fourteenth amendment in that the poor cannot afford to hire physicians or psychiatrists who can legally prescribe therapeutic abortion. The stature is nondiscriminatory on its face. To the extent that it may be discriminatory in operation, the cause is economic, not legal. If a remedy is needed, it lies with the medical profession and the legislature, not with the courts.

The defendant also complains that the statute subjects those who violate it to cruel and unusual punishment. This contention is without merit. A legislature is not required to fix or impose any particular penalty for a crime. The penalties set out in the statute cannot be said to be wholly disproportionate to the gravity of the evil which the legislature could deem to result from illegal abortions. In any case, the defendant has neither been convicted or sentenced. It will be time enough to consider the issue if and when it becomes relevant. See *Commonwealth v. Baird*, Mass. Adv. Sh. (1969) 727, 247 N.E. 2d 574; *Commonwealth v. Leis*, Mass. Adv. Sh. (1969) 97, 243 N.E. 2d 898.

CONCLUSION

The subject of abortion has become one of the most controversial social and legal issues of our contemporary society. Reasonable arguments have been advanced both in favor of and against abortion. But when a question is fairly debatable, courts cannot substitute their judgment on it for that of the legislature. ***Drusik v. Board of Health of Haverhill***, 324 Mass. 120. It is only when a legislative discrimination cannot be supported upon any rational basis of fact that a court can strike it down. If the law on abortion is not as responsive to felt needs as the people believe contemporary life demands, the remedy rests with a democratically elected legislature and not with the courts.

The defendant's substitute motion to dismiss is denied.

ENTERED:

Cornelius J. Moynihan
Associate Justice

III.

LEGAL COMMENTARY

RELIGION, MORALITY, AND ABORTION: A CONSTITUTIONAL APPRAISAL

*by Mr. Justice Tom C. Clark**

Thought without action is an abortion;
action without thought is folly.[1]

Our society is currently in the midst of a sexual revolution which has cast the problem of abortion into the forefront of religious, medical, and legal thought. In my day at the bar all discussion of abortion was taboo. For more than sixty years the American Medical Association had a negative policy respecting abortion. The A.M.A. often sought the prosecution of any doctor who engaged in the practice of abortion, regardless of the merits of the individual situation. Society's general attitude toward abortion was such that the patient was ostracised and the doctor was disgraced. As in so many other facets of its moral code, however, society was hypocritical in its behavior. Despite the public pronouncements against its practice, abortions increased, especially among married women, and judicial action against the participants decreased in proportion.[2]

Some social commentators argue that Freud prepared the way for the Kinsey Report, which in turn set the stage for the sexual permissiveness that Reinhold Niebuhr called "moral anarchism."[3] This permeating permissiveness engendered a need for more efficient birth control methods, such as "the pill," and precipitated the doom of the old hypocrisy.

The law, lagging behind as usual, began to emerge from its quagmire and rid itself of the archaic restraints on abortion. In 1962 the American Law Institute proposed an affirmative policy declaring that the termination of pregnancy is justified whenever (1) its continuance would gravely impair the physical or mental health of the mother, (2) the child would be born with grave physical or mental defects, or

---

* Associate Justice, Supreme Court of United States (Retired), 1949-67.

1 *The Wisdom of Nehru*, 34 WISDOM 62 (The Wisdom of India ed. 1960).

2 R. THOMLINSON, POPULATION DYNAMICS 198-99 (1965).

3 Niebuhr, *Kinsey and the Moral Problem of Man's Sexual Life*, in AN ANALYSIS OF THE KINSEY REPORTS ON SEXUAL BEHAVIOR IN THE HUMAN MALE AND FEMALE 62 (D. Geddes ed. 1954).

(3) the pregnancy was the result of rape, incest, or other felonious intercourse.[4]

Within five years of this proposal, the A.M.A. reversed its negative policy and adopted the A.L.I. proposal with only a few nuances.[5] During the next two years, five states liberalized their abortion laws and adopted the A.L.I. proposal.[6]

A further liberalization occurred in Great Britain with the adoption of the 1967 Abortion Act, which permits doctors to consider the mother's "actual or forseeable environment" in deciding whether an abortion is necessary.[7] The American College of Obstetricians and Gynecologists (A.C.O.G.) recently advocated enactment of similar legislation in this country.[8] While the permissiveness of the legislation would contradict existing laws in all states, the A.C.O.G. made it clear that it does not counsel disobedience to the law. It merely recommended liberalization and repeal of inconsistent laws. It did not, however, advocate the legalization of abortion for any unwanted pregnancy or as a population control device.

Various religious, medical, psychological, and legal organizations have been striving to reach some level of accord on the issues involved in promulgating a realistic and acceptable policy toward abortion. Emphasis on this topic is the result of many factors, including the chaotic state of thinking that prevails among the professions and the public, and the medical, emotional, and legal consequences which aborticide has on today's society.

The Christian Medical Society's symposium on controlling human reproduction provides a recent illustration of the disagreement that exists among professionals concerning abortion. Distinguished clerics, psychologists, doctors, and lawyers sought to determine what course of action should be followed. They were unable to answer many important questions, such as: Is the control of human reproduction against the will and spirit of God? At what stage of the gestation period does the fetus acquire human status? What are the constitutional limitations upon the State in prohibiting or limiting the control of

[4] MODEL PENAL CODE § 230.3(2) (Proposed Official Draft, 1962).

[5] Committee on Human Reproduction, *AMA Policy on Therapeutic Abortion*, 201 J.A.M.A. 544 (Aug., 1967).

[6] CAL. HEALTH & SAFETY CODE §§ 25950-54 (West Supp. 1967); COLO. REV. STATS. 40-2-50 (Perm. Cumm. Supp. 1968); GA. CODE ANN. § 26-1202 (effective July 1, 1969); LAWS OF MD. ch. 470 (Supp. 1968); N.C. GEN. STAT. § 14-45.1 (Supp. 1967).

[7] Abortion Act 1967, c. 87, at 2033.

[8] *Just How Great Are the Risks of The Pill?*, MEDICAL WORLD NEWS, May 24, 1968, at 23.

reproduction? I ask myself, "Heaven knows; who can tell? Who shall decide when experts disagree?" These and many other questions must be answered if we are to attain our goal of an aborticide policy that is responsive to modern society's needs and desires.[9]

In a recent conference the Association for the Study of Abortion experienced far greater success in agreeing on an aborticide policy. Dr. Robert Hall, President of the Association, said that the conference was designed to "relate what we know about abortion, and to determine what, if any, extent our attitude toward abortion should change with changing times. . . ."[10] The conference reviewed numerous reports dealing with present abortion laws. One of these reports concerned the effect of California's recently liberalized abortion law. It was noted that while the number of therapeutic abortions performed in California hospitals this year will rise from six hundred to about four thousand, there will continue to be some one hundred thousand illegal abortions performed in that state, because doctors are concerned about risking a prison sentence for an incorrect interpretation of ambiguous provisions of the liberalized law.[11] The conference was also informed that psychiatrists and physicians in various states were referring patients to doctors in states which have more liberal abortion laws. This practice renders the availability of legal abortion dependent upon the woman's ability to reach such states.[12] Many doctors admitted privately that they and most of their non-Catholic colleagues perform several illegal abortions each month. Kenneth R. Whittemere reported that his recent interviews revealed that in one small Southern city, women had a choice between "a chiropractor, an antique dealer, a mid-wife, a mechanic and a doctor dissatisfied with his profession to perform the operation."[13]

The Association reached an almost unanimous conclusion that all abortion laws should be abolished and that the right of childbirth should

---

[9] The theological and medical scholars did agree on *A Protestant Affirmation*. It did not undertake to answer any of the questions posed in the text. In substance, the consensus concluded that as to abortion "each case should be considered individually, taking into account the various factors involved and using Christian principles of ethics." It suggested that suitable cases for abortion would fall within the scope of the A.C.O.G. statement, but not including abortion for convenience only or on demand. *See* CHRISTIAN MED. SOC'Y J. (Nov.-Dec., 1968).

[10] Meeting of the Ass'n for the Study of Abortion, Hot Springs, Va., Nov. 18, 1968, reported in N.Y. Times, Nov. 24, 1968, at 77, col. 1.

[11] *Id.*

[12] *Id.*

[13] *Id.*

be left to each woman acting on the advice of her doctor. This would have the effect of removing the issue from the hands of the legislatures and the courts, which are virtually helpless to decide an ethical question as controversial and far-reaching as abortion.[14] Whether or not we agree with the Association's recommendations, it is readily apparent at this point that a uniform scheme concerning abortion is highly desirous.

Throughout history religious belief has wielded a vital influence on society's attitude regarding abortion. The religious issues involved are perhaps the most frequently debated aspects of abortion. At the center of the ecclesiastical debate is the concept of "ensoulment" or "personhood," *i.e.*, the time at which the fetus becomes a human organism. The Reverend Joseph F. Donseel of Fordham University admitted that no one can determine with certainty the exact moment at which "ensoulment" occurs, but we must deal with the moral problems of aborting a fetus even if it has not taken place.[15] Many Roman Catholics believe that the soul is a gift of God given at conception. This leads to the conclusion that aborting a pregnancy at any time amounts to the taking of a human life and is therefore against the will of God. Others, including some Catholics, believe that abortion should be legal until the baby is viable, *i.e.*, able to support itself outside the womb. In balancing the evils, the latter conclude that the evil of destroying the fetus is outweighed by the social evils accompanying forced pregnancy and childbirth.[16]

Most civilizations of antiquity prohibited the practice of abortion. Ancient Judaism prohibited birth control except in times of famine.[17] Assyrian law imposed the death penalty upon any person participating in an abortion, including the procurer.[18] Even pagan writers described abortion as an evil act prohibited by law.[19]

The New Testament is devoid of pronouncements bearing directly on the issue of birth control or abortion. The Old Testament, however, does not condemn abortion as a capital offense since the fetus was not regarded as possessing a soul within the Sixth Commandment

---

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] For studies in this area see L. EPSTEIN, MARRIAGE LAWS IN THE BIBLE AND THE TALMUD (1942); L. EPSTEIN, SEX LAWS AND CUSTOMS IN JUDAISM (1948).

[18] H. SAGGS, THE GREATNESS THAT WAS BABYLON 215 (1962).

[19] PAULY'S REAL-ENCYCLOPÄDIE DER CLASSISCHEN ALTERTUMSWISSENSCHAFT (Wissowa ed. 1962).

proscription.[20] It does declare, however, that conception is a gift of God which can be withdrawn at His will.[21] Many theologians today argue that man must not destroy what God has created and that aborting a pregnancy destroys the gift of human life.[22]

The medical profession is far from agreeing on the time at which the fetus becomes a human life. Some physicians argue that abortion should be permitted with impunity at any time up to the sixth month of pregnancy since prior to that time the fetus is no more than a growing plant.[23] On the other hand, many eminent physicians believe that the fertilized ovum has human life from the time of conception.[24] In support of this argument they refer to the International Code of Medical Ethics, which states that a physician will maintain the utmost respect for human life, from the time of its conception. A third view is that the decision to terminate a pregnancy must be made according to the circumstances of the particular case. Among the factors to be considered are the duration of the pregnancy, the physical and mental health of the mother, and the risk of serious fetal abnormality. This places the burden of decision upon the doctor and renders the selection of the physician a governing factor in securing permission to perform a therapeutic abortion.[25]

Sociologists have found themselves in a similar quandary over the issue. Some of these social philosophers argue that man is not merely a chemical machine and that he possesses a soul from the earliest stages of fetal development. Therefore the fetus cannot be destroyed with impunity. The control of human reproduction, according to this view, should concentrate on the prevention of conception rather than on abortion.[26] Other sociologists believe that there is no conclusive evidence or persuasive argument that the fetus is human.[27] Indeed,

---

[20] *Exodus* 3:21.

[21] *Genesis* 1:28, 4:1, 11:30; *Ruth* 4:13.

[22] Montgomery, *How to Decide the Birth Control Question*, CHRISTIANITY TODAY, March 4, 1966, at 10.

[23] Stern, *The Issue of Legalized Abortion*, 88 CAN. MED. ASS'N J. 899 (1963); J. FLETCHER, MORALS AND MEDICINE 152 (1967); address by E. Bidinton, Symposium of Christian Medical Society, Aug., 1968.

[24] *See generally* PHILOSOPHY AND ETHICS IN MEDICINE (M. Gelfand ed. 1968).

[25] *See Therapeutic Abortion*, 98 CAN. MED. ASS'N J. 512 (1968).

[26] R. ETTINGER, THE PROSPECT OF IMMORALITY 132 (1962). *But see* Hudeeczek, *De Tempore Animatianis Foetus Humanis Secundum Embroyologiam Hodiernam*, in XXIX ANGELICUM 162-81 (1952). *See also Cyronics and Orthodoxy*, XII CHRISTIANITY TODAY 816 (1968).

[27] Address by John Scanzoni, Ph.D., Assoc. Prof. of Sociology, Indiana Univ., Nat'l Convention of Christian Medical Society, Aug., 1968.

it cannot interact with other human beings. Therefore, there is no proof of life in the sense that the law contemplates proof of fact.

The moving spirit of the times also raises moral issues that divide the disciplines within themselves. A group of one hundred psychiatrists were questioned on the morality of abortion.[28] Twenty-four agreed that abortion should be available upon demand at an appropriate stage of pregnancy. Fifty-six, however, would require consideration of all of the medical and social factors involved in each case before deciding whether to terminate the pregnancy. Sixteen of those questioned would abort only when actual or threatened maternal disaster was present. Only four expressed other views. While this indicates a vast departure from the Christian concept, it does reveal residuals of morality affecting the opinions of over two-thirds of the group. In other words, over two-thirds of the group would not abort a pregnancy solely on demand.

Despite the fact that religious belief continues to permeate our attitude toward abortion, most people today agree with Justice Holmes that "moral predilections must not be allowed to influence our minds in settling legal distinctions."[29] This is illustrated by the fact that the present change in attitude toward abortion has developed while the need for abortion has diminished as a technique to save the life or health of the mother or to prevent fetal deformities. Despite the medical developments, the demand for abortions has increased astronomically.[30] This indicates a definite change in social mores, which is undoubtedly the result of increased knowledge and use of abortion. This attitude of permissiveness is replacing the hypocrisy that prevailed in the last generation.

A major contributing factor to this change in attitude has been the growing antagonism toward the double standard which permits those with social status and financial ability to obtain abortions, while those in the lower social and economic classes are denied this opportunity. We are in the midst of a worldwide movement to make "the pill" and abortion available in the slums as well as on Fifth Avenue. The statistics illustrate the disparity between the affluent and the nonaffluent. Three counties surrounding San Francisco are relatively affluent. These counties account for sixteen per cent of the live births and fifty

---

28 Howells, *Legalizing Abortion*, 1 LANCET 728 (1967).

29 O. W. HOLMES, THE COMMON LAW (1881).

30 *The Cost of Life*, 60 PROCEEDINGS OF ROYAL SOC'Y OF MEDICINE 1235 (1962); Cogan, *A Medical Social Worker Looks at the New Abortion Law*, 2 BRITISH MED. J. 235 (1968).

per cent of the abortions in California. The less affluent Los Angeles County with its widespread slum areas accounts for sixty per cent of the live births and twenty-three per cent of the abortions in California.[31] These facts demonstrate quite clearly that the affluent areas account for a number of abortions disproportionate to their population density.

The increasing number of abortions subjects physicians to increased dangers of liability for incorrectly interpreting a statute. It appears that doctors face an uncertain fate when performing an abortion. This uncertainty will continue unless the legislatures or courts provide relief from liability. Very few states, if any, will repeal all abortion laws as the Association for the Study of Abortion has recommended. Some states, however, may liberalize their laws in accordance with the A.L.I. suggestion, but we have already seen that in states such as California this is an inadequate remedy in many respects. If the medical profession is to be accorded complete protection, it will have to come through the judicial system.

The Supreme Court of the United States has gone far—some critics contend too far—in permitting individual action in the areas of the Bill of Rights. It has not, however, dealt directly with the problem under discussion, nor do the decided cases cast much light on its solution. The best that we can do is examine related areas and draw some analogies.

In 1922 the Court held that the right "to marry, establish a home and bring up children" was an essential liberty within the guarantees of the Fourteenth Amendment.[32] In 1925 a public school statute requiring attendance exclusively at state schools was declared unconstitutional on the ground that it unreasonably interfered "with the liberty of parents and guardians to direct the upbringing and education of children under their control."[33] This concept was later extended to include "the private realm of family life which the state cannot enter."[34] And in 1960 the Court declared, in very broad language, that where State action significantly encroached upon personal liberty, its action would be invalid unless the State had a compelling subordinating interest in the particular activity.[35] Finally, in *Griswold v. Connecticut*[36] the Court struck down the state's statute prohibiting the use of con-

31 N.Y. Times, Nov. 24, 1968, at 77, col. 1.
32 Meyer v. Nebraska, 262 U.S. 390 (1923).
33 Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).
34 Prince v. Massachusetts, 321 U.S. 158 (1944).
35 Bates v. Little Rock, 361 U.S. 516, 524 (1960).
36 381 U.S. 479 (1965).

traceptives. The statute was found to operate upon "an intimate relation of husband and wife" which came within the zone of privacy created by several fundamental constitutional guarantees, the penumbras of which gave protection to the sanctity of a man's home and the privacies of his life. The Court determined that the statute was aimed at use rather than regulation and therefore violated the principle that legislation must not be unnecessarily broad. This does not mean that judges are given a free rein to strike down state regulatory statutes. They must look to the collective conscience of our society in determining which rights are fundamental and therefore protected by the Constitution.

The result of these decisions is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children, and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution. No one will deny that a State has a valid interest in regulating the well-being of its inhabitants, especially when it is dealing with children, who are more susceptible to undesirable influences. We have also seen that a State may not unreasonably interfere with the intimate relations of its inhabitants. When deciding on the constitutional restraints imposed on a State's interference with individual rights, the vital question becomes one of balancing. It must be determined at what point the State is interfering with individuals and at what point it is exercising valid authority by regulating the well-being of children.

In his concurrence in *Griswold*, my brother Goldberg asked whether a decree requiring all husbands and wives to be sterilized after the birth of ten children would be valid. He answered the question in the negative.[37] But suppose that the husband and wife voluntarily submitted to sterilization. Would it then violate the Constitution? I think not. Does it therefore follow that voluntary destruction of the fetus is also protected from interference by the State? Perhaps—unless life is present so that the State's compelling subordinating interest in the life of one of its people predominates. However, I submit that until the time that life is present, the State could not interfere with the interruption of pregnancy through abortion performed in a hospital or under appropriate clinical conditions. I say this because State interfer-

[37] *Id.* at 482.

ence is permissible only if reasonably necessary to the effectuation of a legitimate and compelling State interest.[38] Prior to the time that life is present in the fetus, what interest does the State have? Procreation is certainly no longer a legitimate or compelling State interest in these days of burgeoning populations. Moreover, abortion falls within that sensitive area of privacy—the marital relation. One of the basic values of this privacy is birth control, as evidenced by the *Griswold* decision. Griswold's act was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent conception, why can he not nullify that conception when prevention has failed?

The common law courts uniformly held that an infant could not be the subject of a homicide until its complete expulsion from the body of the mother and the establishment of an independent existence.[39] The distinction between fetal life and independent life is that the latter has an independent circulatory system.[40] Hence, where the evidence showed that an infant was killed before its birth was complete or was killed by means used to assist in its delivery, it was not deemed a homicide.[41] Therefore, under the common law, abortion could not be murder. These concepts and distinctions have been somewhat eroded in recent years. At present the courts do not agree on the time when life begins. The courts, however, have held an *accoucheur* responsible for prenatal brain damage to an infant in a viable state.[42] In this line of cases, the courts have found that the unborn infant was a separate biological entity and hence a legal one in contemplation of law, indicating a departure from the requirement of an independent existence. From this reasoning the courts may well take the unborn child into their protective custody. Indications of such a trend are illustrated by the abolition of the viability rule in some jurisdictions[43] and the repudiation of the "live birth" doctrine by fourteen states.[44]

To say that life is present at conception is to give recognition to the potential, rather than the actual. The unfertilized egg has life, and if fertilized, it takes on human proportions. But the law deals in reality, not obscurity—the known rather than the unknown. When sperm

[38] *Id.* at 503 (concurring opinion).
[39] Morgan v. State, 148 Tenn. 417, 256 S.W. 433 (1923).
[40] State v. Prude, 76 Miss. 543, 24 So. 871 (1899).
[41] Evans v. State, 48 Tex. Cr. App. 589, 89 S.W. 974 (1905).
[42] Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946).
[43] *See* PROSSER ON TORTS (3d. ed. 1964).
[44] Del Tufo, *Recovery for Prenatal Torts: Actions for Wrongful Death*, 15 RUTGERS L. REV. 61 (1960).

meets egg life may eventually form, but quite often it does not. The law does not deal in speculation. The phenomenon of life takes time to develop, and until it is actually present, it cannot be destroyed. Its interruption prior to formation would hardly be homicide, and as we have seen, society does not regard it as such. The rites of Baptism are not performed and death certificates are not required when a miscarriage occurs.[45] No prosecutor has ever returned a murder indictment charging the taking of the life of a fetus. This would not be the case if the fetus constituted human life.

It has been urged that the courts are the proper forum to determine when life begins. I submit, however, that the professionals are better able to determine when life begins than are the courts. Tort cases might cast some light on the issue,[46] but I would prefer that the courts yield to the expert testimony of doctors. This testimony would vary greatly, but that is nothing new to our judicial system.

This is not a question that will be easily resolved. Few questions that reach the Supreme Court are. As was stated at the Christian Medical Society's Symposium, "professionals . . . do not wish to play God with human lives, whether in being or inchoate with life. But we can inform our judgment . . . by the widest interchange, airing and concensus. Humility is a large part of every professional's code."[47] It must be remembered that many imponderables are a part of Supreme Court adjudications.

Accommodation of conflicting doctrine is more difficult to achieve in the judicial than in the legislative process. Courts cannot reach out to reform our society. A problem comes to the Court in the form of a justiciable issue and is narrowly drawn, rendering the Court's ruling contracted and finespun. Legislatures, on the other hand, have such facilities for investigation as hearings and may address themselves to the necessities of broad social needs and the correction of evils, both probable and existing. As Mr. Justice Cardozo said, "Legislation can eradicate a cancer, right some hoary wrong, correct some definitely established evil, which defies the feebler remedies, the distinctions and the fictions familiar to the judical process."[48]

---

[45] Schwartz, *Abortion and 19th Century Laws*, TRIAL June-July, 1967, at 41.

[46] Kwaterski v. State Farm Mut. Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967); Hatala v. Markiewicz, 26 Conn. Supp. 358, 224 A.2d 406 (1966). *Contra*, Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (1954); Marko v. Philadelphia Transp. Co., 420 Pa. 124, 216 A.2d 502 (1966).

[47] Prof. Thomas Lambert, Jr., Editor-in-Chief, American Trial Lawyers Ass'n, former Prof. of Law, Boston Univ.

[48] B. CARDOZO, GROWTH OF THE LAW 134 (1924).

The courts work on a case-by-case system which deals with the past rather than the future. Society would not have the benefit of the sweeping effect of a statute, nor would the doctor have the protection that he is entitled to receive. The case method would be slow, expensive, and possibly disastrous. It is for the legislature to determine the proper balance, *i.e.*, that point between prevention of conception and viability of the fetus which would give the State the compelling subordinating interest so that it may regulate or prohibit abortion without violating the individual's constitutionally protected rights.

The present climate seems favorable for immediate legislative action. Five states have already led the way.[49] With appropriate action, many more will follow suit in liberalizing their abortion laws. But this process will take less talk and more action. As Nehru once said:

> I am tired of people who merely talk about things. However wise you may be, you can never enter into the spirit of a thing if you only talk about it and do nothing. Even scientists have a tendency to let a wonderful experiment remain an experiment once it has been performed. The next stage somehow does not come. They may well say that the next stage is somebody else's job, but I think if the scientist had a sense of practical application, he would either try to do it himself, or get somebody else to do it. This association of thought with action is, I think, of utmost importance. Thought without action is an abortion; action without thought is folly.[50]

[49] Georgia, Maryland, North Carolina, California, and Colorado.
[50] WISDOM, *supra* note 1.

LAW-MEDICINE NOTES

The Right to Health in National and International Law

WILLIAM J. CURRAN, J.D., S.M.HYG.

THE United States is in the midst of an upheaval of rights. The Supreme Court, which only a few years ago was primarily concerned with the distribution of powers between the federal government and the states, is now a court of civil rights. Throughout the world rising economic expectations are causing peoples to demand more personal and political rights and privileges.

In the World Health Organization, matters of human rights have been a central concern ever since the founding of the agency in 1946. The Preamble to the Constitution of WHO sets forth the basic principle: "The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."

Since 1946, the subject of human rights has received attention in various international meetings and formal protocols, and declarations have recognized certain specific personal rights, the most important being incorporated in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.

As a result of the International Conference on Human Rights in Teheran in 1968, the WHO was asked to make studies of the problems of human rights that could be occasioned by recent scientific discoveries and technologic advances. Action was taken by the WHO General Assembly in 1968 and again in 1970 concerning these matters. A preliminary report was prepared by the Secretary-General that collected the history of the subject in international agreements and surveyed the field broadly.[1] Among the newer areas examined in the report are the right of privacy, protection of human personality, experimentation on human subjects, deterioration of the environment, human-rights aspects of the delivery of health services, mental-health problems and nutrition. Nearly all these areas have been explored in these columns in the last few years.

The problem in WHO discussion of these subjects, of course, lies in the fact that nearly all of them are matters of national law rather than international legal powers. WHO and other international bodies can contribute greatly to the resolution of problems in these areas and can propose new formulations, but national action is nearly always required.

In the United States, recent legal developments have provided both greater general recognition of a right to health and direct legal actions concerning specific subjects. In the general area, one of the

most important pieces of legislation in Congress has been the Comprehensive Health Planning Act, now in full operation all over the nation on a co-operative, partnership basis among all levels of government. In the declaration of purpose of this legislation it is asserted, "The Congress declares that the fulfillment of our national purpose depends on promoting and assuring the highest level of health attainable for every person, in an environment which contributes positively to healthful individual and family living. . . ."[2]

The bills now before Congress proposing national health insurance and those expanding activities in the field of environmental health all speak in forceful tones about the people's right to health. There are also bills to require studies of the effect of technologic advances on health and human personality.

All physicians and all persons active in the health professions should be aware of the national and international legal activities in this field. These issues will be among the most important to come before the WHO, the UN, and our own national Congress this year.

References

1. United Nations General Assembly: Human Rights and Scientific and Technical Developments: Report of the Secretary-General: Addendum. New York, United Nations, November 30, 1970
2. Public Law 89-749. Comprehensive Health Planning Act of 1966: Findings and declaration of purpose

The rapid change which has taken place in the United States in the past few years in abortion laws and practices is reviewed, with special attention to judicial and legislative developments in America and in other countries. Lessons from the experiences of other countries are cited in terms of their relevance for this country.

ABORTION LAW REFORM AND REPEAL: LEGISLATIVE AND JUDICIAL DEVELOPMENTS

Ruth Roemer, J.D.

IN the three years from 1967 to 1970, a revolution has occurred in the abortion laws and practices in the United States. That revolution is still in process. Our once highly restrictive antiabortion laws have been reformed in 13 states and virtually repealed in four states. No other country has a statute which explicitly makes abortion a matter for decision by the woman and her physician. Although other countries permit abortion on request of the woman under certain circumstances, the four American states have pioneered in treating abortion, as a matter of law, like any other medical procedure.

As a result of recent developments, the United States has become a laboratory in which three different types of legal regulation of abortion can be compared and evaluated. We can also profit from the longer experience of other countries with abortion statutes of varying liberality, although account must be taken of differing family planning programs and systems of delivering health services.

Legislative Developments in the United States

Three kinds of modernized abortion laws have been enacted in the United States since 1967: (1) Twelve states have enacted all or part of the Model Penal Code first proposed in 1957 by the American Law Institute (ALI), under which abortion is not a crime when performed by a licensed physician because of substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the woman or that the child would be born with grave physical or mental defect, or in cases of pregnancy resulting from rape or incest.[1] (2) One state, Oregon, has expanded the American Law Institute grounds to include a sociomedical ground proposed originally by the American College of Obstetricians and Gynecologists[2] and patterned after a provision of the British Abortion Act of 1967,[3] i.e., that in determining whether or not there is substantial risk to the woman's physical or mental health, account may be taken of her total environment, actual or reasonably foreseeable.[4] (3) Four states—Alaska,[5] Hawaii,[6] New York[7] and the State of Washington (by referendum in November 1970)—have repealed all criminal penalties for abortion, provided only that the abortion is done early in pregnancy and by a licensed physician (Alaska, Hawaii, and Washington also stipulate that the opera-

tion must take place in a licensed hospital or other approved facility). Thirty-three states, however, still have laws making abortion a crime except when performed to save the life (or, in a few instances, the health) of the woman. None of these states even requires that the abortion be performed by a licensed physician.

The details of the new laws vary in their provisions.* The key developments relate to six general aspects:

1. All 17 states require that the abortion be performed by a licensed physician.

2. All the states with new laws, except Mississippi and New York, require that the abortion be performed in hospitals, with Kansas also permitting another place designated by law.[8] New York City has recently added the requirement that abortions be performed in hospitals or clinics, and not in doctors' offices.

3. All 17 states allow abortion to save the life of the woman, and also in pregnancies resulting from sex crimes.

All these 17 states (except Mississippi, which authorizes abortion only for rape or to save life) allow abortion to preserve the health or the physical or mental health of the woman. The sociomedical standard of the Oregon law mentioned above is a broader standard than the medical standard of the ALI-style laws.

Seven states set age limits on abortions for statutory rape. These limits may be lower than the age of consent. Thus, in California sexual intercourse with an unmarried girl below the age of 18 constitutes statutory rape; but if pregnancy results, it can be terminated only if the girl is below the age of 15.

All 17 states, except California and Mississippi, allow abortion for fetal abnormality.

4. The maximum time limits within which abortions may be performed vary from 16 weeks in Colorado, New Mexico, and Washington to 26 weeks in Maryland. In Oregon the time limit is 150 days; in Alaska and Hawaii, the fetus must be nonviable; and in New York the time limit is 24 weeks.

5. Medical approval by consultants, boards, or hospital therapeutic abortion committees is required in all states (except Mississippi) with ALI-style laws, although the Model Penal Code did not propose such procedures. In Oregon, two physicians must certify the circumstances justifying an abortion; in Alaska, Hawaii, and New York, only one physician is required.

6. New York and the following ALI-style states have no residency requirement: California, Colorado, Kansas, Maryland, Mississippi, and New Mexico. South Carolina, Hawaii, and the State of Washington have a 90-day residency requirement, and Arkansas, Delaware, North Carolina, and Virginia require four months' residency. Oregon requires that the patient be a resident, and Alaska requires 30 days' residency.

Actual practice, of course, may differ from the provisions of the statutes. In some places, doctors will not perform abortions as late as the statute allows. Nonresidents may not be welcomed even though the state has no residency requirement. Consents, consultations, and committee approvals may be required that are not specified in the statutes. It is also possible that residency requirements may not be strictly enforced and procedures may be more simple than those provided in the statute.

On the federal level, a bill introduced in Congress by Senator Packwood to legalize abortion throughout the nation made no progress. A recent policy enunciated for U.S. military hospitals, how-

* The provisions of all the abortion laws in the United States are summarized in a table, "Current Status of Abortion Laws—August 1, 1970," available upon request from the National Center for Family Planning Services, Health Services and Mental Health Administration, U. S. Department of Health, Education, and Welfare, Rockville, Maryland 20852.

ever, permits abortions and sterilizations for military personnel, active or retired, and their families, regardless of state or local laws.[9] In October, 1970, a White House task force on the mentally handicapped recommended that, in the interest of both maternal and child mental health, no woman should be forced to bear an unwanted child.

Judicial Developments in the United States

Legislative developments have been accompanied by an emerging body of court decisions on the constitutionality of antiabortion laws. The picture changes almost from day to day. As of autumn, 1970, five cases were on the U.S. Supreme Court docket, more than 20 cases were before three-judge federal courts; and, excluding the 20 states with federal cases, many of which also had state cases, another 11 states had cases pending in local courts.[10] The following important cases may be noted.

1. In September, 1969, the Supreme Court of California, in the first decision on the constitutionality of any antiabortion statute, invalidated the pre-1967 antiabortion law of California. In a four to three decision in *People* v. *Belous*,[11] the court held the statute unconstitutional on two principal grounds: (1) that the phrase, "necessary to preserve life," was so vague as to be violative of the due process requirements for a criminal law, and (2) that the law was in violation of a woman's fundamental rights to life and to choose whether to bear children. The latter follows from the U.S. Supreme Court's acknowledgment of a right of privacy or liberty in matters related to marriage, family, and sex.[12]

The critical issue defined by the California Supreme Court was whether the state had any legitimate interest in the regulation of abortion which would justify so deep an infringement of the fundamental rights of women. The court held that the state had no such compelling interest. The court said that it would not speak to the constitutionality of the current California Therapeutic Abortion Act, since Dr. Belous was charged under the old law. But one might well infer from the decision that the current law may be declared unconstitutional on similar grounds. The court did express the view, however, that the decision to terminate pregnancy under the 1967 Therapeutic Abortion Act was solely a medical one, and so long as the physician follows the procedural requirements of the act his judgment may not later be challenged by a jury or prosecutor in a criminal case.

2. Following the landmark decision of the California Supreme Court, the first decision of a federal court invalidating an antiabortion statute was handed down. In *U.S.* v. *Vuitch*,[13] the U.S. District Court for the District of Columbia held unconstitutional the District of Columbia statute which made abortion a felony unless performed by a licensed physician for the preservation of the mother's life or health. The court held this phrase so uncertain and ambiguous as to invalidate the statute for want of due process, and it recommended appeal to the U.S. Supreme Court. The opinion of Judge Gerhard A. Gesell in *Vuitch* emphasized, as the *Belous* decision had done, the woman's liberty and right of privacy in matters related to family, marriage, and sex and the necessity for demonstrating affirmatively the interest of the state in infringing on such rights. The opinion pointed out the discriminatory application of the statute with respect to women who are poor. This case is now on appeal to the U.S. Supreme Court, which has raised certain jurisdictional questions concerning the propriety of direct appeal to the Supreme Court without first proceeding to the U.S. Court of Appeals for the District of Columbia.

3. In addition to these two decisions which broke new legal ground, a number of other courts have invalidated pre-

ALI-style antiabortion laws. These cases have arisen in both federal and state courts.

Three-judge panels of federal district courts have held the pre-ALI-style laws of Texas[14] and Wisconsin[15] unconstitutional because of overbreadth. One court also held the statute void for vagueness, and both courts found the statutes an unconstitutional invasion of private rights and not justified by a compelling interest of the state. Contrary is one federal court which, in a two to one decision, upheld the antiabortion statute of Louisiana.[16]

Similar suits have been brought in federal courts involving the Arizona,[17] Illinois,[18] and New Jersey laws.[19] Suits challenging the Kentucky[20] and Minnesota[21] laws were dismissed on jurisdictional grounds, and the New York case was dismissed as moot on repeal of New York's antiabortion statute.[22]

State courts have also struck down pre-ALI-style laws. In Illinois, a judge of the criminal court held the abortion statute unconstitutional on grounds of vagueness and infringement on the woman's right to control her body.[23] In Pennsylvania, a county court judge found that that state's statute impinges on constitutionally protected areas and is so broad, unlimited, and indiscriminate that it fails to meet present-day tests for constitutionality.[24] In South Dakota, a circuit court condemned the statute because it interferes with private conduct without serving any vital interest of society.[25] In Michigan, the statute was found defective as infringing on the right of privacy in the physician-patient relationship and as possibly violative of the patient's right to safe and adequate medical treatment.[26] Contra, however, is the Massachusetts Supreme Judicial Court, which upheld the constitutionality of the state's statute prohibiting "unlawful" abortion against a charge of vagueness in a case sustaining revocation of a medical license.[27] Suits challenging other pre-ALI-style laws are still pending elsewhere.[28]

4. Attempts are currently being made to obtain an adjudication of the constitutionality of reformed ALI-style laws.[29] Thus far, only one reformed ALI-style law has been invalidated by a federal court—Georgia's 1968 abortion law. The U.S. District Court in Atlanta held unconstitutional those parts of the 1968 Georgia law that limited the woman's right to abortion to the three ALI grounds.[30] The basis of the court's decision was violation of the woman's right of privacy. Retained as a proper exercise of state power, however, were the requirements for medical consultation, hospital committee approval, hospital accreditation and exemption provisions, and the residency requirement.

On the state level, the California Therapeutic Abortion Act has been challenged in three cases. Two cases involving Doctors Robb and Gwynne are still pending, but preliminary decisions involving these doctors have held the California statute unconstitutional.[31] In *People* v. *Barksdale*, a municipal court in Alameda County held the current California law unconstitutional as violative of the equal protection clause of the 14th Amendment, as a vague and improper delegation of legislative authority to the Joint Commission on Accreditation of Hospitals, as discriminatory between the rich and the poor, as lacking the certainty required for a criminal statute with respect to the definition of mental illness, and as violative of the fundamental right of the woman to make a free choice whether or not to bear children.[32] In rejecting the argument that the state has a compelling interest in protecting the embryo, Judge T. L. Foley added the following poignant words:

> I might say that I belong to the religion that was just referred to, and I dislike to render this opinion. I must follow the law under my oath as a Judge. I am a Catholic which makes it very, very difficult—but my

oath of office calls for me to follow the law as stated and set out by the Appellate Courts of this State.[83]

The judicial picture is in constant flux as new cases are filed in federal and state courts; as the defense of unconstitutionality is raised in criminal prosecutions of doctors; as issues are raised concerning jurisdiction of courts and standing of plaintiffs to sue; and as decisions come down and appeals are taken.

On at least eight occasions, the United States Supreme Court has declined to review state court decisions that involved restrictive antiabortion laws.[84] One of these cases was the landmark decision of the California Supreme Court in *Belous*. On October 13, 1970, the court dismissed an appeal from the decision of a three-judge federal court holding the Wisconsin antiabortion statute unconstitutional.[85] Action by the court on the merits of abortion cases will be decisive, but it is possible that some of the cases will go off on questions of jurisdiction or on grounds other than the basic constitutional issues.

Although the final outcome cannot be predicted, three eventualities seem fairly certain. First, more and more states will change their laws in accordance with one or another of the three patterns now prevailing in the United States. Second, as in other nations of the world, moderately reformed laws will be amended to expand the grounds and to simplify the procedures; alternatively, antiabortion laws will be repealed. Third, in every state pressure will mount for making abortion available *de facto* as well as *de jure* to women, rich and poor, faced with the despair and desperation occasioned by unwanted pregnancy.

Recent Developments in Other Countries

The abortion laws of the world have been described on a five-stage continuum, ranging from the most permissive to the most restrictive.[86] Recent legislative changes show that more and more countries are liberalizing their laws or the interpretation of their laws all along this continuum.

1. *Abortion on the Insistence of the Woman*—No new jurisdictions have joined this category, except the four states in the United States discussed previously. The tightening of the Bulgarian law in 1968[87] in order to encourage population growth has been eased by a 1970 interpretation that allows abortion virtually on request for unmarried women and women having at least one child.[88] The hope is that this interpretation will reduce the number of illegal abortions. In these cases, the Bulgarian law resembles once again the most liberal laws of the USSR and Hungary. Now that the German Democratic Republic has liberalized its policy on abortion, as mentioned below, the only restrictive abortion statutes remaining in eastern Europe are those of Romania and Albania.

2. *Abortion on Social Grounds*—Two Scandinavian countries, Finland and Denmark, have liberalized their statutes further to include social grounds. The 1970 law in Finland specifies, in addition to medical and humanitarian reasons and the age of the mother (under 17 or over 40 or already the mother of four children), the following social ground:

> . . . when the delivery and care of the child would constitute, by reason of the conditions of existence of the woman and her family, as well as other circumstances, a change for her.[89]

A unique provision, relevant for all countries faced with expanding demand for abortions, requires the Finnish Department of Health to assure a sufficient number of qualified physicians and abortion hospitals and also impartial and uniform conduct from physicians.

The Danish law of 1970 permits abortion without authorization of a committee for reasons of life or health or in cases where the woman is over 38 or has four children under age 18 who

reside with her.[40] Authorization of a committee is required if the abortion is sought for sociomedical reasons, danger of fetal abnormality, or pregnancy resulting from a sex crime.

Sweden has not yet announced changes in its abortion law which have been under consideration for three years. Various alternatives are bruited about; that abortion may be permitted on the free choice of the woman provided she consults fully with an abortion service or, possibly, that the decision-making process may be decentralized in order to reduce the current delay which drives many women to illegal abortion.

3. *Abortion on Sociomedical Grounds*—Singapore has enacted sociomedical grounds for abortion along the lines of the British Abortion Act of 1967 but with approval required by a Termination of Pregnancy Authorisation Board, except when abortion is to preserve life or health.[41] This is the first Asian country, after Japan, to enact a liberalized abortion law.

The state of South Australia has also enacted an abortion lay modeled after the new British law.[42] Similar legislation is under discussion in New South Wales. A poll of general practitioners in Sydney, N.S.W., found that 957 women approached 92 general practitioners with requests for help in obtaining an abortion in a single year.[43] The fact that each general practitioner is confronted with a major dilemma of this kind ten times a year explains the high proportion of general practitioners in Sydney (76%) who favor liberalization of the law.

Since 1965, the German Democratic Republic has liberalized interpretation of its law, so that abortion is now authorized on sociomedical grounds.[44]

Legislation is still pending in India, which in the form proposed would allow abortion on sociomedical grounds and in cases of contraceptive failure.[45]

Experience in England, Wales, and Scotland during the first 18 months of the operation of the 1967 British abortion law reveals a shift from illegal to legal abortion, a shift from the private sector to the National Health Service, a slowing down of the illegitimacy rate (47% of all abortions in the first 18 months were for single women), and a narrowing of regional discrepancies in the operation of the law.[46] With the aid of voluntary pregnancy advisory services, abortion is being made available to women in all geographic areas and income groups.[47] Attitudes of gynecologists are becoming more sympathetic to applicants for abortion, as reflected by "the granting of National Health Service abortions on an increasing scale and by bodies such as the Royal College of Obstetricians and Gynaecologists taking a sincere, if belated, interest in contraception and sterilisation."[48] The most serious problem appears to be the universal need for improving contraceptive services and practices.

4. *Abortion on Medical Grounds*—Canada[49] and Peru[50] have broadened their abortion laws to permit abortion on the grounds of danger to the life or health of the woman.

5. *Abortion Only to Save the Life of the Woman*—This category has lost adherents. It will continue to do so as current law reform activities in many countries, e.g., France, increase in tempo.

Insights from Abroad

As the United States moves into the problems associated with providing medical care under its new abortion laws, several lessons from the experience of other nations seem relevant.

1. A liberal abortion law will transfer a number of illegal abortions to safe, clinical practice; but as long as restrictions in grounds or procedures remain, some illegal abortion will persist.[51] Initial experience under the California Therapeutic Abortion Act confirms this finding.[52] Therefore, experience in the

four states that have removed virtually all restrictions will be extremely important.

2. The earlier in pregnancy that abortion is provided, the less tendency there is to resort to illegal abortion. In eastern Europe, where abortion is generally done early in pregnancy, illegal abortion has been almost eliminated. The reverse is true in Sweden, where administrative procedures delay authorization for legal abortion. The U.S. laws specify time periods within which the abortion must be performed, but, in addition, women should be educated to seek abortions early and procedures should be simplified to achieve this objective.

3. On the basis of experience from eastern Europe, mortality from legal abortion can be anticipated to be low, particularly if performed early in pregnancy.[53] Complications in eastern Europe affect less than 3 per cent of patients.[54] England, as yet, has insufficient data on morbidity. One British authority has suggested that the requirement of a medical report within seven days after the abortion is too short a time to provide accurate information on complications.[55] Accurate records and reporting are essential.

4. As the British experience indicates, the climbing rate of illegitimacy in the United States may be slowed by increased availability of abortion. With nearly 10 per cent of all U.S. births in 1967 illegitimate, the option of abortion will need to be made widely known and accessible if the risks to health and the social disabilities of births to unmarried mothers are to be lessened.[56]

5. Uneven application of the law by reason of varying attitudes on the part of physicians can be anticipated from the experience in England and Norway. California's experience is similar. Continuing education programs for the medical profession and reforms in medical education are urgent.

6. Shortages of medical and auxiliary personnel may impede full implementation of new laws. In England, however, it was found that, if evenly distributed among all gynecologists, the increased number of abortions would not constitute an excessive workload.[57] It has been suggested that in the United States the load might be distributed among a larger group of physicians than those specialized in gynecology, if the social policy expressed by the new laws is to be implemented. Residents and interns on all services might be expected to perform abortions. Nurse-midwives might also be trained and utilized to perform early abortions. Such a decision would require amendment of the licensure laws in the three states that now license nurse-midwives and enactment of such licensure laws in other states.

7. England's experience shows the bottleneck that may result from shortage of facilities. Ambulatory care, as provided in other countries and as now demonstrated in the United States, is a promising solution for early abortions. Moreover, ambulatory treatment reduces the cost of abortions.

8. Evidence from Chile, South Korea, and Taiwan indicates that, in a country with a high or increasing abortion rate, the conditions are favorable for effective family planning programs.[58] A possible hazard is that the easy solution of abortion may generate a lack of responsibility in using contraceptives. Zeal to meet a long-neglected human need should be accompanied by efforts to use abortion as a means of encouraging effective contraception. A number of European statutes prohibit abortion if an abortion has been performed in the preceding six-month period. A more effective deterrent to repeated abortion would consist in aiding every woman who has an abortion to obtain and use effective methods of contraception.

The dynamic legislative and judicial developments in the laws governing abortion in the Untied States have generated

a ground swell of change. The action of the U.S. Supreme Court is crucial to the rate of progress, but, regardless of the outcome of cases pending before the court, the clock can never be turned back. Safe, legal abortion is now recognized as a fundamental right of women, a protection of maternal health and family welfare, and an assurance that every child is a loved and wanted child. Abortion, however, should be only one service in an array of services that should also include effective contraception, education for responsible sexual relationships, and health protection for mothers and children.

ACKNOWLEDGMENTS—For helpful information on recent legal cases, grateful acknowledgment is made to four authorities on abortion law: Roy Lucas, Norma Zarky, Alan Charles, and Zad Leavy. Any errors are, of course, the responsibility of the author.

REFERENCES

1. American Law Institute, Model Penal Code, sec. 230.3(2) (Proposed Official Draft, 1962). On Aug. 4, 1970, the Commissioners on Uniform State Laws issued a Second Tentative Draft of a Uniform Abortion Act, which authorizes abortions within 24 weeks after commencement of the pregnancy without specific grounds or after 24 weeks on the grounds set forth in the code. The 12 statutes incorporating all or part of the Model Penal Code are: Ark. Stat. Ann., secs. 41-301 to 41-310 (Supp. 1969); Cal. Health & Safety Code Ann., secs. 25950-54 (Supp. 1970); Colo. Rev. Stat. Ann., secs. 40-2-50 to 40-2-53 (Supp. 1967); Del. Code Ann., tit. 11, sec. 301 (1953) and Laws 1969; Ga. Code Ann., secs. 26-9920a to 26-9925a (1969); Kan. Stat. Ann., sec. 21-3407 (Supp. 1969) and Laws 1969; Md. Ann. Code, art. 43, secs. 149E to 149G (Supp. 1969); Miss. Code Ann., sec. 2223 (Supp. 1968); N. M. Stat. Ann., secs. 40A-5-1 to 40A-5-3 (Supp. 1969); N. C. Gen. Stat., secs. 14-44 to 14-45.1 (1969 Replacement Vol. 1B); S. C. Code, secs. 16-82 to 86 (1962) and Laws 1970; Va. Code Ann., secs. 18.1-62 to 18.1-62.3 (Supp. 1970). For discussion of these laws, see Lucas, Roy, "Laws of the United States" in *Abortion in a Changing World* (Robert E. Hall, Ed.), vol. I, p. 127, Columbia Univ. Press, 1970.
2. The American College of Obstetricians and Gynecologists has recently liberalized its position further to approve abortion on the decision of the patient and her physican without additional medical consultation. *AMA News*, Sept. 28, 1970.
3. Elizabeth II, Ch. 87 (1967) permitting termination of pregnancy on the opinion of two registered medical practitioners that continuance of the pregnancy would involve risk to the life of the pregnant woman or injury to the physical or mental health of any existing children of her family greater than if the pregnancy were terminated.
4. S.B. 193, amending Ore. Rev. Stat., secs. 465.110, 677.188, and 677.190 and repealing sec. 163.060 (Laws 1969).
5. S.B. No. 527 repealing and re-enacting Alaska Stat., sec. 11.15.060 (Laws 1970).
6. Public Law No. 1 amending Hawaii Rev. Stat., ch. 768 (Laws 1970).
7. N. Y. Penal Law, sec. 125.05(3) (McKinney Supp. 1970-71).
8. Many states require that the hospital be not only licensed but accredited. For discussion of the unreasonableness and probable unconstitutionality of a requirement restricting performance of abortions to hospitals accredited by the Joint Commission on Accreditation of Hospitals, see Brief *Amici Curiae*, Ass'n for the Study of Abortion, Inc., Planned Parenthood Ass'n, et al., in Vuitch v. Maryland, Court of Special Appeals of Maryland, Sept. Term, 1970, No. 32, argued Sept. 28, 1970.
9. International Herald Tribune, p. 3, Aug. 19, 1970.
10. Personal communication from Roy Lucas, President and Associate Counsel, The James Madison Constitutional Law Institute, N. Y., Oct. 22, 1970.
11. 71 Cal. 2d 954, 458 P. 2d 194, 80 Cal. Rptr. 354 (1969), cert. denied, 397 U. S. 915 (1970).
12. Id. at 963, 458 P. 2d at 199.
13. 305 F. Supp. 1032 (D.D.C. 1969), ques. of juris. postponed to merits, 397 U.S. 1061, further juris. questions propounded, 399 U.S. 923 (1970) (No. 84, Oct. 1970 Term). On the practical availability of abortion under D.C. law, see court order requiring the D.C. General Hospital to give abortions to women meeting the standards for admission to the hospital. Doe v. Gen'l Hosp. of D.C., 313 F. Supp. 1170 (D.D.C. 1970), on motions to hold hospital officials in contempt, —— F. 2d ——, No. 24,011 (D.C. Cir. Mar. 20 and May 15, 1970).
14. Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970) (per curiam), appeal docketed,

39 U.S.L.W. 3151 (U.S. Oct. 7, 1970) (No. 808, Oct. 1970 Term).

15. McCann v. Babbitz, 306 F. Supp. 400 (E. D. Wis. 1969) (three-judge court convened), 310 F. Supp. 293 (1970) (per curiam) (on the merits), appeal dismissed, 400 U.S. ——, 39 U.S.L.W. 3132 (Oct. 13, 1970) (per curiam), perm. injunc. issued, —— F. Supp. —— (E.D. Wis. Nov. 18, 1970) (per curiam).
16. Rosen v. La. State Bd. Med. Examiners, 318 F. Supp. 1217 (1970) (Cassibry, J., dissenting).
17. Planned Parenthood Ass'n of Phoenix v. Nelson, Civ. No. 70-334 PHX (D. Ariz. Aug. 24, 1970) (per curiam).
18. Doe v. Scott, —— F. Supp. —— (N.D. Ill. 1971) (Illinois statute held unconstitutional as impermissibly vague and unduly infringing on the woman's right of privacy in restricting abortion during the first trimester of pregnancy.
19. YWCA v. Kugler, Civ. No. 264-70 (D.N.J., filed Mar. 5, 1970).
20. Crossen v. Breckenridge, Civ. No. 2143 (E. D. Ky.), dismissed June 15, 1970 by U. S. Judge Swinford, Lexington (Ky.) Herald, June 16, 1970. On appeal.
21. Doe v. Randall, 314 F. Supp. 32 (D. Minn. 1970), rehearing denied, 314 F. Supp. 36 (D. Minn. July 1, 1970) (per curiam), appeal docketed *sub nom.* Hodgson v. Randall, 39 U.S.L.W. 3115 (Sept. 21, 1970) (No. 728, Oct. 1970 Term).
22. Hall v. Lefkowitz, 305 F. Supp. 1030 (S.D.N.Y. 1969), dismissed as moot, Op. No. 36936 (S.D.N.Y. July 1, 1970) (per curiam).
23. People v. Anast, No. 69-3429 (Ill. Cir. Ct., Cook County, 1970) (Dolezal, J.).
24. Commonwealth v. Page, Centre County Leg. J. at 285 (Pa. Ct. Comm. Pl., Centre County July 23, 1970).
25. State v. Munson (S.D. 7th Jud. Cir., Pennington County Apr. 6, 1970) (Clarence P. Cooper, J.).
26. State v. Ketchum (Mich. Dist. Ct. Mar. 30, 1970) (Reid, J.).
27. Kudish v. Bd. of Registration in Med., 355 Mass. ——, 248 N.E. 2d 264 (1969). Similar decisions have upheld the Iowa and Vermont statutes as not unconstitutionally vague.
28. See, for example, Arnold v. Sendak, No. IP 70-C-217 (S.D. Ind., filed Mar. 29, 1970); Rodgers v. Danforth, Civ. No. 18360-2 (W.D. Mo., filed May 15, 1970); Steinberg v. Brown, No. C-70-289 (N.D. Ohio); Doe v. Rampton, Civ. No. 234-70 (D. Utah, Sept. 14, 1970). (Temporary restraining order against enforcement of Utah statute issued).
29. Corkey v. Edwards, Civ. No. 2665 (W.D.N.C., filed May 12, 1970); Gwynne v. Hicks, Civ. No. 70-1088-CC (C.D. Calif., filed May 18, 1970); Doe v. Dunbar, Civ. No. C-2402 (D. Colo., filed July 2, 1970), juris. granted —— F. Supp. —— (D. Colo. Dec. 22, 1970). (One of the attorneys in the Colorado suit challenging the first ALI-style law enacted is Richard D. Lamm, sponsor of the reformed legislation in the Colorado Legislature.)
30. Doe v. Bolton, —— F. Supp. ——, Civ. No. 13676 (N.D. Ga. July 31, 1970) (per curiam), appeal docketed, 39 U.S.L.W. 3227 (U.S. Nov. 17, 1970) (Nos. 971, 973, Oct. Term 1970).
31. People v. Robb, Nos. 149005 & 159061 (Calif. Mun. Ct., Orange County, Jan. 9, 1970) (Mast, J.); People v. Gwynne, No. 173309 (Calif. Mun. Ct., Orange County, June 16, 1970) (Thomson, J.); People v. Gwynne, No. 176601 (Calif. Mun. Ct., Orange County, Aug. 13, 1970 (Schwab,
32. People v. Barksdale, No. 33237C (Calif. Mun. Ct., Alameda County, Mar. 24, 1970) (Foley, J.).
33. Ibid.
34. The Jurdisdictional Statement filed in the U.S. Supreme Court on Oct. 7, 1970 by Roy Lucas et al. in Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970) (per curiam), No. 808, Oct. 1970 Term cites the following cases at p. 18, n. 30: Muncie v. Missouri, 398 U.S. 938 (June 1, 1970), denying cert. to 448 S.W. 2d 879 (Mo. 1970); California v. Belous, 397 U.S. 915 (Feb. 24, 1970), denying cert. to 71 Cal. 2d 954, 458 P. 2d 194, 80 Cal. Rptr. 354 (1969); Molinaro v. New Jersey, 396 U.S. 365 (Jan. 19, 1970) (per curiam), dismissing appeal from 54 N.J. 246, 254 A. 2d 792 (1969); Knight v. Louisiana Bd. of Medical Examiners, 395 U.S. 933 (June 2, 1969), denying cert. to 252 La. 889, 214 So. 2d 716 (1968) (per curiam); Morin v. Garra, 395 U.S. 935 (June 2, 1969), denying cert. to 53 N.J. 82 (1968) (per curiam); Moretti v. New Jersey, 393 U.S. 952 (Nov. 18, 1968), denying cert. to 52 N.J. 182, 244 A. 2d 499 (1968); Fulton v. Illinois, 390 U.S. 953 (Mar. 4, 1968), denying cert. to 84 Ill. App. 2d 280, 228 N.E. 2d 203 (1967); Carter v. Florida, 376 U.S. 648 (Mar. 30, 1964), dismissing appeal from 150 So. 2d 787 (Fla. 1963).
35. McCann v. Babbitz, 310 F. Supp. 293 (E.D. Wis. 1970), appeal dismissed, 400

U.S. ——, 39 U.S.L.W. 3132 (Oct. 13, 1970) (per curiam), supra note 15.
36. Roemer, R. Abortion Law: The Approaches of Different Nations. A.J.P.H. 57,11:1906 (Nov.), 1967; Roemer, R. "Abortion Laws of the World: Recent Trends and Policy Issues" in *Abortion in a Changing World*, supra note 1 at p. 119.
37. Bulgaria. Law of 16 Feb. 1968, Int. Dig. Health Leg., vol. 19, pp. 589-602, 1968.
38. David, Henry P. *Family Planning and Abortion in the Socialist Countries of Central and Eastern Europe, A Compendium of Observations and Readings*, p. 69, The Population Council, New York, 1970.
39. Finland. Law No. 239 of 24 Mar. 1970 on the interruption of pregnancy, Int. Dig. Health Leg., vol. 21, no. 4, 1970.
40. Denmark. Law of 18 Mar. 1970, Int. Dig. Health Leg., vol. 21, no. 3, 1970.
41. The Abortion Act of Singapore, 1969, Republic of Singapore, passed 29 Dec. 1969 and assented to by the President 31 Dec. 1969, Int. Dig. Health Leg., vol. 21, no. 4, 1970.
42. South Australia. An Act to amend the Criminal Consolidation Act, 1935-1966, No. 109 of 1969, assented to 8 Jan. 1970.
43. Sussman, William, and Adams, Anthony I. General Practitioners' Views on Pregnancy Termination. M. J. Australia, pp. 169-173, July 25, 1970.
44. Supra note 38 at p. 233.
45. India. The Medical Termination of Pregnancy Bill, 1969 (Bill No. XXII of 1969).
46. Diggory, Peter, and Potts, Malcolm. Preliminary Assessment of the 1967 Abortion Act in Practice. Lancet, pp. 287-291, Feb. 7, 1970.
47. Id. at p. 290.
48. Ibid.
49. Stats. of Canada, C. 38, sec. 18 (1968-69).
50. Peru. Decree-Law No. 17505 of 18 Mar. 1969, Ch. 11, sec. 19, Int. Dig. Health Leg., vol. 21, p. 137 at 140, 1970.
51. Potts, D. Malcolm. "Induced Abortion—the Experience of Other Nations" in *Population Control, Implications, Trends, and Prospects*, Proceedings of the Pakistan International Family Planning Conference at Dacca, Jan. 28-Feb. 4, 1969, p. 241, Sweden Pakistan Family Welfare Project, Lahore, West Pakistan, March 1969.
52. See California State Department of Public Health, *A Report to the 1970 Legislature, Third Annual Report on the Implementation of the California Therapeutic Abortion Act*, p. 5, estimating that 81,600 abortions were done on California women in 1968, of which 76,600 were illegal. Even substantially increased numbers of therapeutic abortions—which have occurred since 1968—will not eliminate an illegal abortion problem of this magnitude. The source of the estimated number of illegal abortions was a carefully controlled study in North Carolina. Abernathy, James R.; Greenberg, Bernard G.; and Horvitz, Daniel G. "Estimates of Induced Abortion in Urban North Carolina." Demography, vol. 7, no. 1, p. 19, Feb., 1970.
53. See Tietze, Christopher. "Abortion Laws and Practices in Europe," *Excerpta Medica International Congress*, Series No. 207, April, 1969; and Tietze, Christopher, "Mortality with Contraception and Induced Abortion," *Studies in Family Planning*, vol. 45, p. 6, Sept. 1969.
54. Supra note 38 at p. 253.
55. Supra note 46 at p. 290.
56. On the higher risks of the unmarried mother and her child, see *Health Aspects of Family Planning*, Report of a WHO Scientific Group, World Health Organization Tech. Rep. Series, No. 442, p. 10, Geneva, 1970.
57. Supra note 46 at p. 288.
58. Engstrom, Lars Erik. "Abortion as a Method of Population Control," in *Population Control, Implications, Trends, and Prospects*, supra note 51 at p. 240.

Dr. Roemer is with the University of California Institute of Government and Public Affairs, Los Angeles, Calif. 90024.

This paper was presented before the Maternal and Child Health Section of the American Public Health Association at the Ninety-Eighth Annual Meeting in Houston, Tex., October 27, 1970.

This paper will appear as a chapter in the book, *Abortion and the Unwanted Child*, edited for the California Committee on Therapeutic Abortion by Carl Reiterman, Ph.D., to be published in June, 1971, by Springer Publishing Company (200 Park Ave. South), New York, N. Y. 10003.

IV.

MEDICAL AND SOCIAL SCIENCE STUDIES ON ABORTION PRACTICES

The "Perfect Contraceptive" Population

The extent and implications of unwanted fertility in the United States are considered.

Larry Bumpass and Charles F. Westoff

Recent discussions of population pol- have raised and sharpened the ques- of unwanted fertility in the United es (*1*). The issue is whether the ination of unwanted fertility would e a significant effect on our rate of ulation growth, and the discussion revolved in part around what might called the demographic implications 'perfect contraception." We are not esting that such a technological de- pment is in sight, or that, if it were, we would not have to be concerned about problems of distribution and use. The "perfect contraceptive" population is simply a model in which couples can avoid having more children than they want and do not have children before they want them. In the broader sense we are visualizing the "complete fertility controlling population" rather than the "perfectly contraceptive population." The achievement of such a state of affairs might well require social policies for the development of more effective contraceptive techniques and more efficient distribution systems as well as the legalization of abortion on request. However, this article is focused on *implications* of the elimination of unwanted fertility rather than on specific policies necessary to realize this goal.

We make no artificial assumptions about fecundity; we assume that the current incidence of subfecundity (less than normal capacity to reproduce) in the United States will continue. Also, we are *not* assuming that every couple will practice contraception or that all couples will begin using contraception at the same stage of their marriage. The system is completely voluntary. The only condition we are imposing is that couples can control their fertility completely in the sense that they can, within the limits of physiological capacity and variability, have the number of children they want, when they want them. If a husband and wife prefer to have chil-

Dr. Bumpass is assistant professor of sociology at the University of Wisconsin, Madison. Dr. Westoff is professor of sociology at Princeton University, Princeton, New Jersey, and executive director of the National Commission on Population Growth and the American Future, Washington, D.C.

Table 1. Percentages of births occurring between 1960 and 1965 reported to have been unwanted, by birth order and race. The values in parentheses are numbers of births.*

Race	All	Birth order					
		1	2	3	4	5	6+
		1) Unwanted by both spouses					
Total	17	4	6	18	25	39	45
White	14	3	5	17	23	36	39
Negro	31	9	17	24	37	51	61
		2) Unwanted by at least one spouse					
Total	22	5	10	24	35	49	55
White	19	4	7	23	32	46	48
Negro	41	15	24	37	51	61	72
		3) Medium estimate, average of categories 1 and 2					
Total	19 (4,264)	5 (1,090)	8 (1,020)	21 (792)	30 (532)	44 (328)	50 (502)
White	17 (3,091)	4 (839)	6 (779)	20 (602)	28 (397)	41 (215)	43 (259)
Negro	36 (1,108)	12 (234)	20 (229)	30 (180)	44 (131)	56 (107)	66 (227)

* The 1965 NFS double-sampled Negroes. Consequently, for measures computed for the total sample, the data for non-Negroes are weighted by a factor of 2. In this and all subsequent tables based on the NFS, the number of cases reported for the total are unweighted and represent the actual number of sample cases on which the statistics are based. Non-whites other than Negroes are included in the total.

dren right away or want a large family, they may use no contraception at all. On the other hand, if they wish to control their fertility (a virtually universal wish in the sense that practically all exposed couples in the United States use contraception sooner or later) (*2*), they shall be able to practice completely effective and completely acceptable contraception continuously. "Completely effective" means that the failure rate is zero; "completely acceptable" means that the use of contraception carries no costs of any kind—economic, social, or psychological—and that its use would be interrupted only for the purpose of conceiving. While such conditions are Utopian, the model provides a useful framework for assessing the implications of current levels of unwanted fertility in the United States for the rate of population growth.

Radically different policy implications flow from (i) the position that achieving a zero or near-zero rate of population growth requires changing the number of children couples want, and (ii) the position that eliminating unwanted births is sufficient. Consequently, it is important that we evaluate the number of unwanted births in the United States on the basis of the most recent detailed data available. Our estimates are based on the 1965 National Fertility Study (NFS), an interview survey of a probability sample of 5600 married women throughout the nation (*3*).

Measurement of Unwanted Fertility

Reliable reports on unwanted births are difficult to obtain, since the admission that a birth was unwanted reflects on the respondent's ability to control fertility and perhaps also on the status of the child. Unwanted fertility was measured in the 1965 NFS on the basis of questions about the circumstances of each pregnancy. Women who reported the use of some contraceptive method preceding a pregnancy were asked, "Under which of these circumstances did this pregnancy occur?" A card listing the following categories was shown to the respondent:

1) While using a method and did not want to become pregnant at that time.
2) While not using a method but did not want to become pregnant at that time.
3) When stopped using a method in order to have a child.

Women who reported circumstances 1 or 2 were then asked, "Before you became pregnant this time, did you want to have a child (or another child) sometime?" and "Did your husband want to have a child (or another child) sometime?"

Women who reported not having practiced contraception prior to pregnancy were asked: "Was the *only* reason you did not use any method then because you wanted to have a baby as soon as possible?" Those who answered "No" were asked the same questions as the other group about whether they had wanted another child sometime.

Since couples are not always in agreement on the desirability of having additional children, alternative definitions of "unwanted" fertility are possible. A minimal definition would require that both spouses had been reported not to have wanted another child before pregnancy occurred. A broader definition would require only that one spouse had been reported not to have wanted an additional child. When husband and wife disagree on this question, some couples will intentionally have another child, others will not. It seems reasonable to assume that the proportion of unwanted births lies somewhere between estimates resulting from these two definitions, and that the average of the two constitutes a best estimate. We use this estimate throughout the text, although the consequences of alternative definitions are reported in several tables for the reader's evaluation.

To what extent are these measures of unwanted fertility reliable and valid? As part of the 1965 NFS, a subsample of the original sample of women was re-interviewed 3 to 5 months later, to assess the reliability of survey data on fertility and family planning. The percentage of births classified as unwanted differs by 0.3 percent in the two interviews. Checks for internal consistency reveal that none of the women who reported that their last child was unwanted replied (to a different question) that they intended to have additional children. In addition, the NFS estimate is consistent with reports of other fertility surveys based on differing measurement techniques (*4*).

An indirect check on the validity of our estimates can be made in terms of contraceptive efficacy. When we consider women who are near the end of the childbearing stage (40 to 44 years of age), the percentage classified as having experienced at least one unwanted birth implies, even when allowance is made for underreporting, an average contraceptive efficacy that is improbably high (*5*). Realistic assumptions about the level of contraceptive efficacy of this population would very likely lead to a figure for the proportion who had experienced at least one unwanted birth that is higher than the estimate obtained by the measures used here (*6*). This is independent evidence that there is considerable rationalization in the report of unwanted births and that our estimates of unwanted fertility are not likely to be too high.

Incidence and Characteristics of Unwanted Fertility

In order to focus on the most recent picture for which data are available, we have limited the analysis in this section to births which occurred between the beginning of 1960 and the time of interview, the autumn of 1965.

It is evident from the data of Table 1 that unwanted births comprised a sub-

proportion of total births during
ars. Our estimates indicate that
of all births and more than
d of Negro births between 1960
5 were unwanted. As one would
the proportion of unwanted
increases rapidly with birth
Almost one-third of all fourth-
births and one-half of all sixth-
her-order births were unwanted;
groes the corresponding propor-
re nearly one-half and two-thirds.
high level of unwanted births
Negroes indicates the magni-
of the burden of unwanted de-
nts that is borne by this popu-
but the problems of unwanted
are substantial among whites
ll.

incidence of unwanted births is
vely related to both education and
e (Tables 2 and 3). In general,
roportion of unwanted births is
ximately twice as high among
with less than a high school edu-
as among wives who have at-
d college. By income, the propor-
of births reported as unwanted
little for families whose 1964
ne was over $5000, but it is more
twice as high for families with incomes of less than $3000 as for those with incomes of over $10,000. This differential is particularly marked among Negroes.

We have approximated the Social Security Administration's definition of poverty (*7*), and the results are presented in Table 4. Since family size is one component of that definition, many couples would not have been classified as poor were it not for their having had unwanted children. Consequently, the results indicate the coincidence of poverty and unwanted births rather than a propensity of the "poor" to have unwanted children. Among the "poor" in 1965, unwanted births constituted almost two-fifths of all births and three-fifths of all sixth- and higher-order births; among the "non-poor" one out of every seven births was unwanted among whites and one out of every five among Negroes (*8*).

Estimates for All Women

The foregoing analysis is based on a sample of married women living with their husbands in 1965; consequently, births to women not living with their husbands and most illegitimate births are not represented (*9*). In the absence of reliable data on the subject, our procedures are based on the assumption that the incidence and birth-order distribution of unwanted births are the same for such births as for births reported by wives now living with their husbands. This undoubtedly is a bias in the direction of underestimating the extent of unwanted fertility.

We prepared our estimates separately by race and birth order and then summed them to obtain the total. We estimate that in the period 1960 to 1965 there were 4.7 million births that would have been prevented by "perfect contraception." These births represent one-fifth of all births during the period. Approximately 2 million of these unwanted births occurred among the poor and the near-poor, and half of these among the Negro poor and near-poor (Table 5).

Timing Failures

While the level of unwanted births is high, the data of Table 6 make it clear that many desired births are tim-

2. Percentages of unwanted births (medium estimate) occurring between 1960 and 1965, by wife's education, by race, and by birth r. The values in parentheses are numbers of births.*

Wife's education	Total	White	Negro	Birth order for total					
				1	2	3	4	5	6+
than 12 years	26 (1,842)	21 (1,153)	42 (693)	5 (341)	11 (380)	26 (339)	31 (249)	42 (188)	54 (335)
ears	16 (1,742)	14 (1,361)	28 (358)	4 (525)	6 (437)	20 (232)	32 (207)	48 (102)	44 (139)
ge	13 (688)	11 (577)	25 (95)	4 (223)	8 (202)	16 (121)	22 (76)	42 (38)	45 (28)

e footnote to Table 1.

le 3. Percentages of unwanted births (medium estimate) occurring between 1960 and 1965, by 1964 family income, birth order, and e. The values in parentheses are numbers of births.*

Income (dollars)	Total	White	Negro	Birth order for total				
				1	2	3	4	5+
s than 3,000	34 (436)	27 (178)	42 (244)	10 (95)	14 (79)	38 (62)	42 (48)	57 (152)
00-4,999	24 (1,032)	18 (562)	39 (446)	7 (282)	12 (224)	23 (170)	30 (122)	56 (234)
00-6,999	16 (1,289)	14 (977)	30 (298)	3 (358)	6 (335)	22 (248)	30 (144)	44 (204)
00-9,999	16 (867)	16 (772)	28 (84)	4 (214)	4 (226)	20 (174)	29 (121)	42 (132)
000 and over	15 (561)	15 (541)	16 (19)	3 (123)	9 (143)	14 (120)	26 (88)	34 (87)

See footnote to Table 1.

ble 4. Percentages of unwanted births (medium estimate) occurring between 1960 and 1965, by poverty status, race, and birth order. The lues in parentheses are numbers of births.*

Poverty status	Total	White	Negro	Birth order for total					
				1	2	3	4	5	6+
or and near-poor	32	25	46	7	14	28	34	46	56
Poor	37 (861)	31 (346)	47 (494)	9 (135)	16 (179)	30 (213)	35 (186)	47 (178)	61 (337)
Near-poor	23 (424)	16 (253)	40 (170)	5 (137)	10 (151)	22 (130)	32 (77)	43 (63)	42 (120)
on-poor	15 (2,979)	15 (2,492)	22 (444)	4 (1,674)	6 (1,481)	20 (1,061)	28 (670)	42 (308)	42 (320)

See footnote to Table 1.

Table 5. Estimated numbers (in thousands) of unwanted births in the United States between 1960 and 1965,* by birth order, race, and poverty status.

Race	All birth orders	Poor and near-poor	Non-poor	Birth order for total					
				1	2	3	4	5	6+
			1) *Unwanted by both spouses*						
Total	4,050	1,738	2,312	261	369	831	742	669	1,178
White	2,828	838	1,990	176	236	677	576	499	664
Negro	1,103	836	267	82	116	126	151	157	471
			2) *Unwanted by at least one spouse*						
Total	5,321	2,214	3,107	376	553	1,102	1,031	841	1,418
White	3,736	1,062	2,674	234	375	879	800	632	816
Negro	1,432	1,067	365	132	163	193	206	186	552
			3) *Medium estimate, average of categories 1 and 2*						
Total	4,685	1,976	2,709	319	461	966	886	755	1,298
White	3,282	950	2,332	205	306	778	688	566	740
Negro	1,267	951	316	107	139	159	178	172	512

* Proportions of unwanted births in the NFS sample are applied to vital statistics data for the United States (see Appendix for technical details). In the absence of official data on births by poverty status, we have estimated the number of unwanted births to the poor and near-poor on the basis of the distribution by poverty status of unwanted births in the NFS sample.

ing failures. A birth was classified as a timing failure when it was reported as wanted but not the result of the deliberate interruption of contraception.

Of wanted births occurring between 1960 and 1965, two-fifths would have occurred later if their timing had been controlled. The short-run demographic effects of the prevention of timing failures depend upon the length of time considered and the assumed time required for the transition to perfect contraception (contraception enabling every couple to avoid failures in regulating family size and in timing births). For example, if perfect contraception had been universally employed at the beginning of 1960, perhaps 7 percent of the wanted births that occurred between 1960 and 1965 would have been delayed until after 1965. This estimate is based on the assumption that the average length of a successfully planned interval is 1 year longer than that of an interval in which timing was not controlled. If births are delayed, total fertility for each cohort (women born in the same year) being kept constant, there is a dip in births while the change occurs and no subsequent "makeup" of the lost births until the mean age of childbearing falls. When the transition is complete, a certain number of births will have been deferred to subsequent years, and this number will remain fixed so long as the new spacing pattern persists.

After the transitory dip is over, the number of births may be affected by increased spacing (total fertility for each cohort being kept constant) because fertility is centered on a lower portion of the stable age distribution. This effect is negligible in a low-mortality population reproducing at a rate near replacement.

There is, however, one possible indirect consequence of such timing changes that has potential long-run significance. It has been suggested that the longer a birth is delayed, the less likely a woman is to have that birth or a subsequent birth (*10*). The longer a couple puts off having a "wanted" child, the more opportunity the wife has to acquire role patterns at variance with early child-care responsibility. At some point that birth, or a desired subsequent birth, may no longer seem so desirable. In addition, the delay of a desired birth increases the possibility that the birth will be prevented by subfecundity. In any event, the major demographic effect of the universal use of contraception would be the prevention of unwanted births. In the next section we will discuss the long-run implications of this effect.

Table 6. Percentages of wanted births classified as timing failures,* by birth order and race. The values in parentheses are numbers of births.†

Race	All birth orders	Birth order					
		1	2	3	4	5	6+
Total	43 (3,217)	38 (1,020)	42 (906)	50 (587)	50 (335)	44 (162)	47 (207)
White	42 (2,513)	36 (805)	40 (722)	48 (466)	48 (269)	42 (116)	46 (135)
Negro	56 (657)	50 (199)	61 (174)	59 (114)	62 (64)	57 (42)	50 (64)

* A birth was classified as a timing failure when reported as wanted but not the result of deliberate interruption of contraception. † See footnote to Table 1.

Long-Run Implications for U.S. Growth Rate

Since nearly 20 percent of all recent births were unwanted, the elimination of unwanted births could substantially reduce our future growth rate. However, the size of this reduction would depend upon the number of children that women now entering the childbearing years will ultimately want to have.

Viewed from a cohort perspective, for women who were near the end of their childbearing years in 1965 (ages 35 to 44), the elimination of births reported to have been unwanted would have reduced their fertility from 3.0 to 2.5 births per woman. Since an eventual zero rate of population growth would require cohort fertility of about 2.25 births per woman, the elimination of unwanted births would not have been sufficient to establish exact replacement for this cohort, but it would have resulted in considerable progress toward that objective. The proportion of unwanted births (16 percent) reported by this cohort—the figure used to calculate the above estimate of 2.5 births—is lower than the proportion reported for all women in the period 1960–1965, probably due to additional underreporting of unwanted births resulting from the longer period of time that had elapsed since the events in question in the case of the women aged 35 to 44. The demographic effect of eliminating unwanted births is probably greater than we infer because of this underreporting by older women and the probable underreporting of unwanted births in general, and also because the additional children born to these older women before they reach menopause will undoubtedly be mostly unwanted.

The above estimate is based on the experience of married women whose childbearing took place in the high fertility period of the early 1950's. Under circumstances of perfect contraception, women now entering the childbearing years might decide to have larger families than women who have preceded them would have had if they had complete control of fertility, but this does not seem likely. Rapid diffusion of use of the pill has continued since 1965, and one of the consequences of this diffusion may be reduction of the number of "desired" as well as of unwanted children. As women are able increasingly to postpone pregnancy and to enter into nonfamilial roles (particularly employment), many may prefer to have

amilies than they would otherse chosen. If, in addition, there ad toward nonfamilial female ere may be strong pressures any upsurge in the average ze that would be achieved by n women with complete fertility

t there are already indications ultimate family size of the most ohorts may be lower than that ding cohorts (*11*). This decline the result of some reduction in d births, in some reduction in ber of children women want to r in some combination of these Predicting the fertility of young is always precarious, but it ikely to us that, under the asn of perfect contraception, the e number of children today's women would bear would be the number inferred, under the ssumption, for women who were n the ages of 35 and 44 in 1965. is some evidence from longitutudies that success in the control tility results in smaller families vere originally desired (*12*).

vever, it is very important that ep in mind the legacy of past y when considering the potential ations, for the U.S. growth rate, e elimination of unwanted births. if exact cohort replacement could hieved, the population would not diately cease to grow. The time red for cohort fertility to reach replacement rate would depend the speed with which universal ct contraception was achieved. the replacement rate had been ed, it would be some time before ffects of past fertility on the age ture would level off. Frejka has ared estimates directly relevant to question (*13*). He demonstrates that e cohort comprised of women enter- their childbearing years between 5 and 1970 and all subsequent cos were to achieve a cohort fertility exact replacement, the population ld continue to grow at least until year 2035, with a resultant increase ize of 40 to 50 percent.

n summary, the elimination of unted births would lead to a reduced wth rate for the United States, bar- a marked increase in the average nber of children desired. However, n if cohort replacement were ieved (perhaps as a consequence of er developments as well), a zero wth rate for the United States could not be achieved for over 60 years, by which time the population would number over 280 million. The longer it takes to achieve universal perfect contraception, the longer it will take to reduce our growth rate, and the larger, of course, will be the eventual size of our population.

In terms of the implications for a population policy goal of zero growth, our findings do not imply that the task of influencing people to want fewer children should be ignored, especially since this number could shift upward again. However, the elimination of unwanted births would have considerable demographic effect, it would be desirable in human terms, and it would probably be a more readily attainable objective.

Appendix: Comparison with Other Measures

Since the conclusions reached by the use of more conventional measures of "desired" or "ideal" family size (*14*) differ radically from those reached by our procedure of inferring the desired number of children, a word on the differences in the two approaches is necessary. The first is used typically in surveys with married women of all ages within the reproductive span and with varying numbers of children; in this approach the woman is simply asked how many children she would like to have or how many she would consider ideal for herself, or, in some instances, for the average American family. Our approach has been to infer the desired number of children by subtracting the number of unwanted births from the total number of births. The latter procedure results in considerably lower estimates of the number desired. For example, married women aged 35 to 44 in 1965 reported, through the direct approach, a "desired family size" of 3.4 children, as compared with 2.5 children as estimated by our procedure.

In general, the difference is probably attributable to real differences reflected by the two types of measurement. In the direct approach, desired family size relates to the time of the survey and is based on the respondent's fertility history and on her and her husband's adjustment to it. It is not at all inconsistent for a couple that has had a child that had been unwanted to state later, on the basis of a satisfactory (even beneficial) adjustment to the unwanted birth, that the size of their family is what they desire. To infer that this is the number of children such couples would have wanted under the conditions of perfect fertility control would be erroneous. For couples early in their life cycle, the measure of "desired family size" may be highly invalid as a predictor of the number of children they would have if they could control their fertility. The average family size desired by young couples corresponds closely with the eventual average family size for these couples, regardless of the number of unwanted births; this suggests that the number of children young couples desire before the experience of childrearing may be largely a reflection of the observed sizes of the families of other couples of similar social status.

On the other hand, when desired family size is measured by subtracting (for women past the childbearing years) the number of unwanted births from the number of children borne, the time focus is on evaluation of the event at the time of pregnancy. Although the responses may still be influenced by intervening experience, this bias should be much less than the bias when the reference is to the present, or to the future conditioned by the present.

The two types of variables can be measured independently, since about half of the women who reported an unwanted birth also said they would not have preferred to have fewer children than they had. Both measures are useful, but it seems to us that the approach we have defined in this article is the more suited to the task of assessing the demographic implications of perfect contraception.

References and Notes

1. J. Blake, *Science* **164**, 522 (1969); O. Harkavy, F. S. Jaffe, S. Wishik, *ibid.* **165**, 367 (1969).
2. C. F. Westoff and N. B. Ryder, in *Fertility and Family Planning: A World View*, S. J. Behrman, L. Corsa, R. Freedman, Eds. (Univ. of Michigan Press, Ann Arbor, 1969), p. 394.
3. For a description of this sample see N. B. Ryder and C. F. Westoff, *Science* **153**, 1199 (1966). A high level of unwanted fertility in the United States has been reported on the basis of national fertility studies; in this article we draw attention to the implications of the current patterns of unwanted births. For the earlier reports see R. Freedman, P. K. Whelpton, A. A. Campbell, *Family Planning, Sterility and Population Growth* (McGraw-Hill, New York, 1959), pp. 100–153; P. K. Whelpton, A. A. Campbell, J. E. Patterson, *Fertility and Family Planning in the U.S.* (Princeton Univ. Press, Princeton, N.J., 1966), pp. 221–275, 361–370; N. B. Ryder and C. F. Westoff, *Demography* **6**, 435 (1969).
4. N. B. Ryder and C. F. Westoff, *Reproduction in the United States: 1965* (Princeton Univ. Press, Princeton, N.J., in press), chap. 14, table 5.
5. Ryder notes that these levels of unwanted fertility are consistent with a regulatory pro-

cedure that is 99 percent perfect. See N. B. Ryder, "The time series of fertility in the United States," paper presented before the International Union for the Scientific Study of Population, London, 1969.

6. R. G. Potter and J. M. Sakoda, *Demography* 3, 450 (1966).
7. M. Orshansky, *Soc. Secur. Bull.* (March 1968).
8. These estimates of the percentages of unwanted births among poor and non-poor, and the estimates of the gross number of unwanted births in the period 1960 to 1965, discussed in the next section, are of the same order of magnitude as values presented in a preliminary approximation by F. S. Jaffe and A. F. Guttmacher, *Demography* 5, 910 (1968).
9. Our sample design for a new national study in 1970 which calls for a sample of "ever married" women will provide a better basis for making these estimates.
10. R. Freedman, L. C. Coombs, L. Bumpass, *Demography* 2, 267 (1965).
11. N. B. Ryder, in *Fertility and Family Planning: A World View*, S. J. Behrman, L. Corsa, R. Freedman, Eds. (Univ. of Michigan Press, Ann Arbor, 1969), pp. 99–123.
12. C. F. Westoff, E. G. Mishler, E. L. Kelly, *Amer. J. Sociol.* 62, 494 (1957). Additional evidence pointing to the same hypothesis appears in the Princeton Fertility Study (unpublished tabulations).
13. T. Frejka, *Population Stud.* 23, 394 (1969).
14. For discussion of the relationships between these variables see N. B. Ryder and C. F. Westoff, *Population Res.* (March 1969) and A. A. Campbell, *Fam. Planning Perspect.* 1, No. 2, 33 (1969).

15. We thank Ansley J. Coale, Ronald Freedman, Fred Jaffe, Suzanne Keller, and Norman B. Ryder for critical appraisals of the manuscript. We also acknowledge the able computer programming assistance of Andrea Smith.

A picture is presented of the distribution and concentration of the needs and services for family planning in the United States by county. Noteworthy is the concentration of the heaviest program inputs as well as the largest number of women not served in a relatively few urban counties.

GEOGRAPHIC DISTRIBUTION OF NEED FOR FAMILY PLANNING AND SUBSIDIZED SERVICES IN THE UNITED STATES

Raymond C. Lerner, Ph.D.

Introduction

A STUDY, *Need for Subsidized Family Planning Services: United States, Each State and County, 1968,* has recently been released by the Family Planning Office of the Office of Economic Opportunity. This paper will review the purpose and design of the study, and discuss findings which relate to the distribution of women at risk, the number reported served in subsidized programs, and the number unserved, by county, for the United States.

The object of this work was to collect, for each of the 3,072 counties in the U. S., basic data on the need for subsidized family planning services, the services currently available, selected characteristics relevant to need, and resources available for the delivery of services.

The purpose in compiling and collecting such data was, for the first time, to develop a capability for estimating the level of organized family planning services in the U. S. In addition, such information could assist in planning by making it possible to examine where program inputs were going and where they were needed. A file of this nature, it was felt, would also provide baseline data useful for monitoring improvements in the distribution of program efforts over time, and might also serve as a preliminary tool for evaluating the effectiveness of publicly financed family planning programs in reaching program objectives.

For each county in the U. S., selected variables on needs and resources have been compiled from existing sources; however, data on services required field surveys. This paper will deal with only a limited portion of the material on file; the items included in the study for each county are listed in the Appendix.

Methodology

The report, *Need for Subsidized Family Planning Services: United States, Each State and County, 1968,** includes

* Available from the Family Planning Program, Office of Health Affairs, Office of Economic Opportunity, Washington, D. C., or the Center for Family Planning Program Development of Planned Parenthood-World Population, New York, N. Y. 10022.

a full discussion of the methodology and the limitations of data. However, a few important points relevant to the material in this paper will be discussed here.

Population

The basic population denominator and number of women age 15-44 in this work consist of 1966 population estimates for the United States, by county, made by the State and Local Population Estimates Branch, Population Division, U S. Bureau of the Census.*

Need

The total number of women age 15-44 estimated to require subsidized family planning services consist of those who can be classified as medically indigent, fertile, exposed to risk of pregnancy, not currently pregnant or seeking a desired pregnancy. This has been approximated by applying the Dryfoos-Polgar-Varky formula to the census estimates for each county for 1966. The methodology employed by the formula, which was developed at Planned Parenthood, is described in detail in the full report.

Current Services

Because there were no readily available nationwide statistics giving patient figures from which to determine how many women were currently receiving family planning service from organized programs during the period from July 1, 1967, to June 30, 1968, three mail surveys had to be conducted.

We know that health departments, hospitals, and free-standing clinics are the major channels through which subsidized family planning services are delivered, but knowledge of the level of service and the exact locations of service facilities is severely limited. In order to establish a preliminary universe of agencies providing organized family planning services to low-income women, available data from previous reports and surveys were examined for each of these three channels. The field to be surveyed included voluntary and public hospitals, health departments, Planned Parenthood clinics, OEO family planning projects, Neighborhood Health Centers, maternity and infant care projects, and other agencies known to be providing family planning.

It was decided to survey hospitals, Planned Parenthood affiliates, and state health departments—individually and directly—to determine the number of patients served in their programs, and the addresses of their clinics. Responses originating from the same locality were compared for duplications, since combined funding and sponsorship sometimes result in duplicate reporting. When necessary, responses were also edited for conversion from visits to persons served since some agencies do not have record systems which enable them to report unduplicated counts of patients served. While the service figures are probably the best available nationally, they must be regarded as approximations.

No attempt was made to obtain figures on the number of women in the target population served by private physicians at their own expense or through Medicaid. Estimates based on scanty data place this proportion at less than 10 per cent of those in need. Nor could a study of this kind attempt to assess the retention rate of service programs or to evaluate their general quality. Therefore, while the term "number of women served" is employed, it would be more accurate to refer to the "number of patients enrolled" by an organized family planning service. How well or how fully the patients are served is not known, and it is probable that great variation exists from program to program. The study, therefore, could be

* Current Population Reports Series, p-25, Nos. 401, 404, 407 and 409, 1968, describe methodology.

regarded as estimating the extent to which organized programs have been successful in at least enrolling the population in need—a necessary first step toward the systematic evaluation of any program.

Within the defined universe of programs and agencies from which service data were sought, the response rate was excellent, nearly 100 per cent in all categories.

Findings

The data to be presented now are limited to distributions of need and services by county, along with a preliminary assessment of some general characteristics of the counties containing and not containing organized services.

Table 1 provides a summary of the distribution of U. S. counties by the number reporting organized family planning services in fiscal 1968.

In the U. S., it is estimated that, in FY 1968, there were approximately 5.4 million medically indigent women in need of subsidized family planning services. Among the 3,072 U. S. counties, only 1,200 reported organized programs, while, in 1,872 counties, no family planning programs for medically indigent women were identified. One hundred and twenty-two counties reported programs, but were not able to provide figures on the number of women served; they are included among the 1,200 counties with reported programs.

The 1,200 counties reporting organized family planning programs make up 39 per cent of U. S. counties; they also contain approximately 75 per cent of the total U. S. population, and of women aged 15-44, as well as the same proportion of low-income women in need of subsidized family planning services. Almost 800,000 women received subsidized services within these (1,200) counties, which amounts to about 15 per cent of all the women in the U. S. who are estimated to be in need of family planning services (Table 1a). At risk and remaining to be served in the counties with reported programs, were 3.2 million women, or 70 per cent of the total number of women who are unserved in the U. S.

While only 15 per cent of the women in need are being served nationally, there is, of course, great variation from county to county in the current service picture; a few counties were found to provide service to more than 40 per cent of the group at risk, while others reported less than 1 per cent. Among the 1,200 counties reporting services, 20 per cent of those at risk are being served. We still have a long way to go.

The 1,872 counties without reported programs constitute 61 per cent of all U. S. counties but they contain only about 25 per cent of the total U. S. population, about the same proportion of women age 15-44, and 1.4 million or 27 per cent of all low-income U. S. women at risk and in need of family planning. Since no programs are reported, unserved females also equal 1.4 million and unmet need equals 100 per cent.

In summary, about three-fifths of U. S. counties contain one-quarter of those at risk and report no organized programs; conversely, two-fifths of U. S. counties contain three-quarters of those at risk in the entire country and report service to about one-fifth of this group (Table 1). Since the two-fifths of U. S. counties with service contain roughly three-quarters of the U. S. population, it is obvious that these include most of the major urban areas in the country, where need is more highly concentrated. On the other hand, as noted earlier, the 1,872 counties with no organized programs contain only about 1.4 million women at risk, indicating that the need is much less concentrated in these counties.

Table 2 shows the distribution of counties ranked by quartiles of women

Table 1—Distribution of U. S. counties by number reporting organized family planning services for medically indigent women served and unserved: total U. S. population,[a] women age 15-44,[a] estimated number of women in need,[b] number of women served and unserved

	No. of counties	Total population[a] (1966 est.)	Female population[a] Age 15-44	Female population in need[b]	Females reported served	Unserved females
		(000)	(000)	(000)	(000)	(000)
U. S. counties reporting no organized family planning services to indigent women	1,872	48,888[c]	9,577	1,430	—	1,430
Counties reporting organized services to indigent women	1,200[d]	146,811	29,966	3,937	773	3,164
Total	3,072	195,699	39,543	5,367	773	4,594
			Vertical per cent			
No service	60.9	25.0	24.2	26.6	0.0	31.1
With service	39.1	75.0	75.8	73.4	100.0	68.9
Total	100.0	100.0	100.0	100.0	100.0	100.0
			Horizontal per cent			
	(000)					
No service	(N = 48,888)		19.6	2.9	0.0	2.9
With service	(N = 146,811)		20.4	2.7	0.5	2.2
Total	(N = 195,699)		20.2	2.7	0.4	2.3

a. U. S. Bureau of Census, 1966 population estimates.

b. Estimated by applying the Dryfoos-Polgar-Varky formula to female population age 15-44, 1966.

c. Rounding to the nearest thousand was done after computation.

d. One hundred twenty-two counties reporting service but not providing figures on the number of women served have been included; present information is that the number of women served in these counties is not significant.

Table 1a—Number of medically indigent women served and unserved as per cent of U. S. total estimated at risk for subsidized family planning services, fiscal 1968

	No.	%
Served	800	15.4
Unserved	4,600	84.6
Total need	5,400	100.0

served in the 1,200 counties with reported organized programs. The significant finding here is the concentration of service in relatively few counties: 8 counties, or 0.3 per cent of all U. S. counties, account for the first quartile in which about 200,000 women were served (or 25 per cent of reported services). Only 23 more counties, or 0.7 per cent of all U. S. counties, account for the next quartile—200,000 women served. Expressed cumulatively, *31 or only 1 per cent of all U. S. counties account for 50 per cent of all women reported served in subsidized family planning programs throughout the United States.*

Going one step further, the next quartile adds 86 counties. Thus, 117 counties, or 4 per cent of U. S. counties, account for 75 per cent of women reported served; that is, 600,000 out of 800,000 served throughout the U. S. This obviously reflects concentration of program inputs and, as will be shown later in more detail, those service areas include nearly all of the great urban counties where population is concentrated, where needs are most obvious, and where resources for delivery of services are most readily at hand..

Finally, the last quartile of women are served in 961 counties; these are for the most part quite small programs. On an average basis, there are about 200 women per county receiving service in the latter group of counties through all delivery agencies (although in most of these counties only one agency is usually providing services).

Table 3 shows the distribution of quartiles of unmet need: that is, the number of women estimated to be in need of subsidized family planning services but not reported as receiving them, and the number of counties in each quartile. There are approximately 4.6 million women still in need of service.

Table 2—Quartile range of women served in subsidized family planning programs for U. S., fiscal 1968; number and per cent of counties in each quartile

Women served			Counties			
No.	Cum	Cum %	No.	%	Cum	Cum %
(000)	(000)					
200	200	25	8	0.3	8	0.3
200	400	50	23	0.7	31	1.0
200	600	75	86	3.0	117	4.0
200	800	100	961	31.0	1,078	35.0
			122[a]	4.0	1,200	39.1
	None reported		1,872	61.0	3,072	100.0
			3,072	100 0		

a. One hundred twenty-two counties reporting service but not providing figures on the number of women served have been included.

Table 3—Quartile range of women estimated at risk for subsidized family planning services not receiving service for U. S., fiscal 1968, and number and per cent of counties in each quartile

Women unserved			Counties			
No.	Cum	Cum %	No.	%	Cum	Cum %
(000)	(000)					
1,150	1,150	25	69	2	69	2
1,150	2,300	50	244	8	313	10
1,150	3,450	75	626	20	939	31
1,150	4,600	100	2,133	69	3,072	100
			3,072	100		

Here, too, great concentration is evident: relatively few counties in the U. S., 69 in all, account for 25 per cent of the unmet need. The next quartile of unmet need involves 244 additional counties. Thus half of the unmet need of 2.3 million women is found in 313 counties (about 10 per cent of all counties).

It can be noted at this point that most counties with the greatest need figures are also found heading the list of counties with the largest program inputs. For example, if one compares the 50 counties with the greatest need to the first 50, by numbers served, 29 appear on both lists, indicating that there is fair correspondence between location of needs and service efforts. However, the magnitude of the input relative to need is as yet grossly insufficient, inasmuch as several million women remain to be reached and over one million of these are in relatively concentrated target areas in only 69 U. S. counties.

Table 3 shows that the fourth quartile of unmet need is spread over a vast area involving 2,133 counties. While these counties include some metropolitan areas, they are for the most part rural and rural-farm areas with small and dispersed populations and with few health resources, making it difficult and costly to reach the patient.

Table 4 expands on reported services as presented initially in Table 2. In Table 4, as in the earlier table, the number of women served is the controlling variable. The eight counties comprising the first quartile are detailed in Table 4 and vividly illustrate how service inputs have been concentrated in major urban areas. It was to show this that the county, state, and major city identifications were provided. Note that the East appears to be first with three New York City counties, Baltimore, and Washington, D. C. The Midwest is represented by Cook County (Chicago) and Wayne County (Detroit). Finally, in the Far West, we have Los Angeles County.

For proportion of those in need who are served, these areas represent fairly substantial program achievements when compared to the national average: in these eight counties 12 per cent were served—200,000 of 471,000 in need—whereas nationally only 15 per cent were served.

In the second quartile, involving 23 counties, 36 per cent of those at risk were served, in the third quartile 23 per cent, and in the fourth—the least densely populated counties of the U. S.—only 10 per cent. The column labeled "total population" illustrates the increasing dispersion as one moves from high to low

Table 4—U. S. counties by quartiles of women served in subsidized family planning programs; number of women served, estimated need, number unserved, female population age 15-44, total population*

No. of counties	Rank by no. served	County	State	Principal city	No. served (fiscal 1968)	Estimated need	Unserved	Females 15–44 (1966)	Total population (1966)
					(000)	(000)	(000)	(000)	(000)
Detailed listing of 8 counties comprising first quartile, with ranking by number served	1	Cook	Ill.	Chicago	38	82	44	1,029	5,400
	2	L. A.	Calif.	L. A.	33	126	94	1,375	6,814
	3	N. Y.	N. Y.	N. Y. C.	30	49	19	305	1,540
	4	Kings	N. Y.	N. Y. C.	22	64	42	548	2,702
	5	Wayne	Mich.	Detroit	21	59	39	532	2,705
	6	Bronx	N. Y.	N. Y. C.	19	36	17	314	1,543
	7	D. C.	—	Washington	18	21	2	164	806
	8	Baltimore	Md.	Baltimore	18	32	14	303	1,489
8	–	—	—	—	200	471	272	4,572	22,999
23	–	—	—	—	200	550	352	4,600	22,700
86	–	—	—	—	200	860	660	7,735	37,649
1,083[a]	–	—	—	—	200	2,080	1,880	13,059	63,463
1,872	–	—	—	—	No. services reported	1,430	1,430	9,577	48,888
3,072					800	5,367	4,594	39,543	195,699

* Rounding to nearest thousand performed after computation. Total computed in columns or horizontals may not tally due to rounding.

a. One hundred twenty-two reporting service but not providing figures on the number served have been included.

service areas. The first eight counties contain as many people as the next 23. The next 86 counties contain fewer people than the first two groups of 31 counties, and so on. The data make clear that the question of providing family planning services in those areas where population is spread thin has only begun to be examined. Indeed, this is generally true for nearly all health services, not merely family planning.

Table 5 presents data on the population size and the range of the percentage of rural-farm population in the 1,200 counties reporting service figures, arranged again by quartiles of women served. It can be seen from the range of population size that, while in general the counties with least service in the fourth quartile must include many sparsely populated areas, they are not exclusively so. One county in this quartile contains 1.3 million people—suggesting that even in large urban areas the extent of programing for family planning services is severely deficient.

It appears that the first two quartiles, accounting for half of the women served, are comprised exclusively of high-population counties. For example, in quartile two the smallest county by population size is 320,000. Very few of these 31 counties in the first quartiles have any rural-farm population.

The third quartile contains counties that range from relatively small—25,000 population—up to quite large—1.4 million—and show a wide variation in percentage of rural-farm population.

In the fourth quartile, there is a tremendous range, both of population size—from less than 1,000 to 1.3 million—and of rurality—from zero to 59.5 per cent (an inordinately high proportion to be classified as rural-farm). These 1,083 counties are a great mixture of county types, including some highly urban areas which are in fact part of great metropolitan centers (i.e., Boston, Massachusetts; Passaic, New Jersey; Suffolk County, New York) as well as some of the most rural parts of the United States.

It is obviously not always possible to categorize counties as urban or rural-farm areas. The usual problems of classification plague the researcher on this as on so many other dimensions. For, within a single county, there may be extensive urban as well as rural-farm areas. The socioeconomic ecology of a region does not usually oblige us by observing county jurisdictional lines. This factor often results in the mixture of characteristics demonstrated in the tables. Table 6 provides an overview of the number of women unserved with respect to the rural-farm characteristics. All U. S. counties have been ranked from low to high according to per cent rural-farm, and then distributed by quarters by the number of women needing subsidized family planning service. In addition, the number of counties for each quarter with no reported programs are shown.

The 124 least rural counties contain a

Table 5—Quartile range of women served in subsidized family planning programs for U. S., fiscal 1968; for each quartile: the number of counties, range of population size, and range of per cent rural-farm population

Women served	No. of[a] counties	Range of[b] population size	% rural-farm[c]
(000)		(000)	
200	8	800–6,800	All less than 1
200	23	320–2,000	0.0– 2.4
200	86	25–1,400	0.0–17.5
200	1,083[a]	<1–1,300	0.0–59.5
800	1,200		

a. One hundred twenty-two counties reporting service but not providing figures on the number of women served have been included.

b. Bureau of Census estimate for 1966.

c. 1960 Census.

Table 6—All U. S. counties ranked by per cent rural-farm population and distributed by quarters of women unserved (fiscal 1968), range of per cent rural-farm poputation per quarter, number and per cent of counties, and number and per cent of counties with no program

Range % rural-farm population[a]	No. of women unserved	No. of U. S. counties	% of U. S. counties	Counties with no subsidized programs		
				Nr	%	
	(000)					
0.0– 0.9	1,150	124	4.0	26	21.0	(N=124)
1.0– 5.2	1,150	359	11.7	45	12.5	(N=359)
5.3–17.8	1,150	876	28.5	500	57.1	(N=876)
17.9–86.0	1,150	1,713	55.8	1,301	75.9	(N=1,713)
	4,600	3,072	100.0	1,872	60.9	(N=3,072)

a. 1960 Census.

quarter of the number of women needing service (1.15 million). No county within this group exceeds 0.9 per cent of rural-farm population; and only 26 or one-fifth of these counties report no program. In the next group, all counties show a small proportion of rural-farm population, not less than 1 per cent and not more than 5 per cent. Here also a small number of counties, about one-eighth, report no program.

Group three moves into the middle to upper range with respect to rurality, and this includes 28.5 per cent of all U. S. counties; 500 or 57 per cent of these report no programs. Finally, in group four, we are really in the country. These are predominately rural counties and include over half of all counties in the U. S. Seventy-five per cent of these counties report no program. As rurality increases, programing decreases.

Table 7 illustrates the program potential of 1,872 counties with no reported service. In this table, the distribution of all counties with no service is

Table 7—Number and per cent of U. S. counties with no subsidized family planning services, by range of estimated number of women in need; number and per cent of women unserved

Counties with no service				Range, estimated no. of women needing service	No. unserved	Cum	%	Cum %
No.	Cum	%	Cum %					
					(000)	(000)		
123	123	6.6	6.6	2,000–10,000	382	382	26.7	26.7
315	438	16.9	23.5	1,000– 1,999	428	810	29.0	55.7
558	996	29.7	53.2	500– 999	395	1,195	27.8	83.5
876	1,872	46.8	100.0	000– 499	235	1,430	16.5	100.0
1,872		100.0			1,430		100.0	

controlled by the range of estimated number of women in need. The total number of women in need is also presented for each group of counties.

Line two in the table shows that a total of 438, or 24 per cent of counties with no program, contain 1,000 or more women at risk; cumulatively, these counties contain a total of 819,000, or 56 per cent, of all those unserved in counties without programs. They should be regarded as areas with high program potential since they contain 1,000 or more women at risk.

The figure of 1,000 or more women per county at risk and in need is a useful measure of the service potential in these areas, since it is estimated that this number of patients is sufficient to provide minimum economy of scale in the operation of a clinic program.

The remaining two groups, totaling three-quarters of all U. S. counties without programs, are the more sparsely populated ones and account for 44 per cent of women at risk in unserved areas.

Summary

This paper has presented in broad terms the distribution and concentration of needs and services in the United States by county.

Of particular note is the concentration in relatively few urban counties of both the heaviest program inputs as well as the greatest number of women unserved. Equally important, a program potential exists in 438 counties with no service provided and more than 1,000 women at risk.

The data also point up the virtual nonexistence of *organized* programs in sparsely populated and rural-farm areas of the United States. In qualitative human terms, the need for family planning programs here is undoubtedly just as great as in metropolitan communities.

Dr. Lerner is Assistant Professor, Department of Community Health, Albert Einstein College of Medicine, Bronx, N. Y.

This paper was presented before a Joint Session of the Center for Population Research and the Epidemiology Section of the American Public Health Association at the Ninety-Seventh Annual Meeting in Philadelphia, Pa., November 13, 1969.

This work was performed at the center for Family Planning Program Development, the Technical Assistance Division of Planned Parenthood-World Population, N. Y. C., pursuant to a contract with the Office of Economic Opportunity, Washington, D. C., Contract No. B 89-4588. During the course of this work the author was director of planning of CFPPD.

APPENDIX

What Is in the File—for Each County in the United States.

a. *Needs and Services*

Total population of U. S., 1966; women in the childbearing years, i.e., 15-44; number of women medically indigent needing subsidized family planning services; number receiving family planning services through subsidized clinic programs; number in need not receiving services, or unmet need; number of home-based migrant workers; number of American Indians under the jurisdiction of the Indian Health Service of DHEW.

Under needs we have also selected health and demographic indexes which provide greater insight into the characteristics of each county: infant mortality rate; number of infant deaths in excess of 17.8 per 1,000 for the five years 1961-1965; fertility rate per 1,000; live birth order as a per cent of all births; out-of-wedlock births per 1,000 live births (not reported for 16 states); births of 2,500 grams or less as a per cent of live births.

Each county is classified by whether it is within a Standard Metropolitan Statistical Area or State Economic Area (for New England) or a nonmetropolitan county according to total population of SMSA, SEA or county.

b. *Resources*

Physicians—Number of nonfederal physicians in patient care with offices in the county; ratio of M.D.'s per 100,000 population; num-

ber of general practitioners; ratio per 100,000 population; number of obstetrician-gynecologists and ratio per 100,000 population.

Hospitals—For all short-term, general-care, nonprofit hospitals reporting births, operated by private agencies, nonfederal governmental agencies, but including the Public Health Service and Indian Health Service hospitals: number in each county; total births reported for all hospitals in the county; number reporting family planning services.

Other Resources — Counties with medical schools; community action agencies; OEO-funded Family Planning Projects; OEO-funded Neighborhood Health Centers; counties with Model City Programs; Children's Bureau Maternal and Infant Care Projects; Public Health Service Neighborhood Service Projects; counties where the health department provides family planning services; and finally, counties where Planned Parenthood affiliates provide family planning services.

To what extent can greater accessibility to abortion services affect poverty and its problems? This analysis addresses itself to such questions and develops proposals for identifying the socioeconomic impact of liberalized abortion laws and accessible services.

SOCIOECONOMIC OUTCOMES OF RESTRICTED ACCESS TO ABORTION

Charlotte Muller, Ph.D., F.A.P.H.A.

THE recent changes in the legality of abortion in the United States through repeal, reform and court action, and the various court cases and legislative movements in the current news, have changed the nature of the problem of access to a large degree. Once chiefly a matter of leveling legal barriers, the access problem now relates to financing, referral, organization of appropriate facilities for care, and patient factors influencing utilization in different social and age groups. The implications of restricted access to care, the subject of the present paper, apply, for different reasons, to post-repeal states (Alaska, Hawaii, New York and Washington), to reform ("health and life"*) states such as California, and to states with old-style laws, which still constitute the majority.

The small market for legal abortions in states with old-style laws has been restricted in access to a certain number of women of means who are able to procure private medical and psychiatric care[8] in hospitals amenities. Meanwhile, their less affluent sisters have rarely been able to receive medically equivalent care in the wards of public hospitals and as service patients in voluntary hospitals. These facts have been well-documented by Hall for hospitals in New York City, New York State, and the United States in reports showing ward/private differences in the ratio of abortions to deliveries, and similar differences between public and other hospitals.[5,6]

The far larger market for illegal abortions (and now, for out-of-state legal abortions) has also been class-structured in that it was the non-poor candidate who could afford jet travel to a service area or the attentions of a qualified physician, although without hospital protections or amenities, in an illegal abortion. The poor candidate was more likely to end up in the hands of the non-medical practitioner or to substitute crude attempts at self-induced abortion through chemical and physical means.

Imperfection in the market inheres in uneven access to knowledge of sources of supply as well as in uneven access to suppliers for economic, social class, and geographical reasons. The result of market imperfections including legal constraints on entry is a lessening of consumer welfare, and in particular, a restriction on the option of couples to choose a fertility level consistent with their total set of preferences for leisure, material goods, the company of children,

* With account taken of present and future environment in determining the risk to health in Oregon's law.

and the educational package they consider normal for each produced child.[2]

Unlike some other health services, the improved accessibility of abortion (which for the poor is a matter of present concern) is evidently a service whose utilization greatly rises in the event of legal accessibility. This is shown by the experience of countries which have passed laws broadening the grounds for abortion to include health as well as life of the mother and admitting socioeconomic considerations. It is also shown in states like California and Colorado which have liberalized the law.[1] A more advanced law in Great Britain was followed by a shift in performance of abortions from private auspices to National Health Service financing, as well as an over-all rise.[16] With wider legal access, the seeking of inferior substitutes, including attempts at self-induced abortion, will doubtless decline, with direct improvement in the maternal death rate among black and Puerto Rican women.[4] It is not clear that all latent demand would be satisfied: some women are held back by the lack of privacy of official procedures, and review committees as in states where "health and life" are accepted grounds; some physicians would continue to refuse to perform the operations; and, some women would deny the reality of the pregnancy until late in its course as they now do. The price of the service would still be a factor in utilization, although it is not easy to say just how elastic the demand is where the legal barrier exists.

Barriers to legal abortion affect the ratio of unwanted children born. Low-income couples express the same family-size goals as higher income couples,[7a] but are less successful, on the whole, in the use of contraception. The leverage power of abortion in adapting actual to desired family size is thus of relatively greater importance for low-income groups.

However, it is necessary to have a limited expectation of the extent to which, based on the foregoing, reduction in unwanted births will solve poverty problems. So long as poor couples desire 3 or 4 children—or more—available means of birth prevention would not necessarily be used to control family size and per capita income would remain low. And, independent of family size among the poor, the reduction of poverty requires a variety of specific programs to deal with low job skills, deficient labor market organization, family health needs, and income maintenance problems, to cite a few items on the national agenda.

The negative effect of unwanted births on family economic and social welfare is felt by way of defects in the timing of the first birth, defects in spacing the interval between children, which affects family capacity to accept the new child, and defects in terminating family formation. Although the reduction of welfare is really the joint result of limitations of the present arrangements for birth control (deficient access, failure to utilize and imperfections in method) and of restricted access to abortion, it is nevertheless possible to avert negative outcomes by better availability of abortion alone, and this is especially true, for the reason cited above, for low-income groups.

One of the important situations relates to the separation of the teen-age male from the educational process.

Alvin Schorr has beautifully presented the mechanism and the evidence linking the family cycle and economic life. Early marriage is generally forced marriage, the result of premature pregnancy. The young father leaves school and cannot return. His bargaining power in the job market is poor and his first job choices are in low-opportunity situations as a result of immediate necessity, lack of information, and low skill. He may also fail to find work. The marriage of the young is less stable, statistically

speaking, than that of a later age, but the probability of a large family is also associated with early age of marriage. Whether the family is separated or united, the burden of support prevents the young adult from experimenting with various types of work. And the family fails to accumulate capital for any decisive improvement in circumstances such as additional training.

Statistical support for this model includes:

1. The high per cent of premarital pregnancy in school-age marriage (one-third of all school age marriages, 87% where both spouses were high school students).

2. The larger family size for both white and black mothers who marry at 18 compared with 2 or 3 years later (white, 3.7 compared with 2.8 children; black, 4.3 compared with 4.0 children). This comparison also reveals the limited success of black families at birth control, with age of marriage having less effect on family size than among whites.

3. The occupational distribution of teen-age males compared with older workers.[15]

In 1966 there were 1.2 million young males aged 16 to 21 who were school dropouts and members of the labor force. Sixty-one per cent of them worked as operatives and non-farm laborers.[21a] (This number rose to 1.6 million in 1969.)[21b]

The crucial outcome in terms of the economic history of the teen-age male is the reduced lifetime earnings of a man who has not completed high school, and again the greater earnings of the college graduate compared to the high school graduate.* Differences also show up in a cross-section. Let us compare just two educational levels within white and black groups. Money income figures for 1968 by years of school completed show 5.9 million white family heads who are college graduates with median income of $13,589, and 7.1 million who started but did not finish high school with median income of $8,525. In non-white families, where the head finished college, the family income was $12,472 (267,000 families); where he started but did not finish high school (1.0 million families), the median income was only $5,766.[21c]

The ratios implicit in the above income figures would be altered with changes in the relative supply of males at the different educational levels, and are also influenced by the structure of demand for workers at different levels. But the return on human capital added by educational processing is real, and it is estimated that four-fifths of high school dropouts are intellectually capable of additional education.[20]

Another problem for economic improvement in the family concerns job-seeking by the mature woman with children. The crucial statistic is that median family income (1968) is 30 per cent higher for families with a male head when the wife is in the paid labor force than when she is not.[21d] The presence of children under six is a deterrent to labor force participation.[22] It is true that an untrained woman may not add greatly to family resources by her employment. What this implies, perhaps, is that training programs are needed to capitalize on the economic opportunity presented to the family by the mother's freedom from pregnancy. It also calls attention to the compulsory school-leaving for girls consequent on pregnancy in many communities, a factor which adds to the effect on long-run family earning potential described above for teen-age males. Girls who started their families in their teens, in their maturity make up a portion of the group

* Data for 1968 estimate lifetime incomes for males 25 years and over by years of schooling: 1-3 years of high school, $294,000; 4 years of high school, $350,000; 4 or more years of college, $586,000. (*Statistical Abstract of the United States*, 1970, p. 111.)

of untrained women. Finally, for married women, mothers of young children, who must work out of financial necessity—18 per cent of those who took jobs in 1963 did so for this reason[24]—unsatisfactory arrangements for child care represent a family price that is paid for their labor force participation and a possible source of fluctuating availability for work. To a considerable degree this is also true for middle-class women who wish to work for personal satisfaction and extra income.

Like the married woman returning to the labor market, the young widow is available for employment to an extent dictated by the age of her youngest child and the number of her children. Half of widowed mothers with 3 or more children did not work at all in 1962, compared with 28 per cent with only one child, and the former group tended to work part-time, if at all. Since part-time employment is in lower-paying occupations, earning power was doubly affected. Furthermore, employment and earnings after termination of child care benefits under Social Security are found to be greatly affected by work experience in the preceding 5 years. Hence, the economic potential of young widows is greatly influenced by size and spacing of families.[25]

A third economic problem exacerbated by uncontrolled family size is present poverty. According to Mollie Orshansky,

> "The family with 5 or more children was still (in 1966) 3½ times as likely to be poor as the family raising only one or two, and . . . almost half the poor children were in families with 5 or more children."[12a]

She further points out that large family size (4 or more children) was found in an increasing number of poor families where the head was a fully employed worker (37% in 1965).[12b] How poor is poor? The median income of a poor family with male head in 1966 was $3,308 for a 4-child family, $3,590 for a 5-child family, and $3,410 for a family of 6 or more children.[12c]

About one-fourth of poor families, and about one-fifth of near-poor families, had 4 or more children[12d]—or 2,214,000 out of 15,240,000 families in the poor and near-poor categories.

The family income figures for the large poor family are equivalent to per capita income of $552, $513, and $430 (or less) respectively. In sharp contrast the lowest budget standard for a 4-person urban family, as priced by the Bureau of Labor Statistics in 1967, was $5,915 or $1,479 per capita.[23]

The immediate consequence of spreading fixed family resources over more persons is fewer goods and services per capita. Transfer payments received by about one-fourth of the poor (assistance, Social Security payments, veterans' pensions, and other devices to transfer current national income between persons by the tax-spending mechanism) are already counted in current income. Even with public assistance the large poor family could not hope to consume at anywhere near the lowest budget standard of the BLS.

Children who lack a welcoming and nurturing parental home can be counted along a continuum of extrusion from the family of origin. The continuum includes adoption, foster home placement, court action for neglect and dependency and less severe but indifferent or otherwise unsatisfactory parental role performance within the family of origin. To count numbers involved is to become cognizant of the numbers of children affected by various degrees and causes of being unwanted during childhood, although one cannot infer that the child was unwanted during the pregnancy. The program costs involved, as in foster or institutional care, must be reduced by the amount of the maintenance component, which would be incurred (although not necessarily at the same level), regardless of where a child is

raised. However, program costs would be higher if services such as schooling for pregnant girls were more adequate.

One measure of children with a problem related to their birth is out-of-wedlock births. The number in 1967 was 318,072, with the figure expected to reach 403,000 by 1980 without any increase in rate. (The rate was 24 births per 1,000 unmarried women ages 15–44 in 1967.) Forty-seven per cent of these births are to girls under 20 years of age.[11] Illegitimate births were 9.7 per cent of total live births in 1966.[21e] Occasionally, out-of-wedlock births are not unwanted, and some are followed by marriage.[14] If this indicates that the figure overstates the problem, it should be remembered that many births in married women are undesired as well as unplanned. One even finds children placed for adoption with both parents living and together. Both in this group and in children retained in the family origin are children born after pregnancy has been followed by marriage.

Another aggregate cited is the number of children given for adoption. This group numbered 158,000 in 1967, or 82.3 per 10,000 children under 5,[21f] but only two-thirds of these were out-of-wedlock births.[18] Extra-legal but permanent adoptions add to these figures.

Many children are not adoptable because of defect or retention of parental rights by incompetent parents or for reasons of racial or religious prejudice. Yet adoptions certainly provide a minimum estimate for the occurrence of preventable births.

The unwanted child is not necessarily indicated by birth order. A wealthy family can provide for a fourth or fifth child materially, and with personal care. A poor family, or one where the mother has a health impairment, may not be able to welcome a third child. Nevertheless birth order, especially in conjunction with income level, is a useful measure of the problem of preventable births. Orshansky's figures yield a count of at least 2.2 million fourth children in birth order among the poor and near-poor, 1.3 million fifth children, and .7 million sixth children.[12e] These figures may be compared with average family size preferences of 2.9 children for non-whites and 3.3 for whites.

It may be pointed out here that in a study of cases of severe parental neglect, the average family size was 8 people. The neglectful family was cited as having inadequate diet, irregular meals and poor food preparation; lack of cleanliness, absence of routine; and neglect of medical problems. Apathy was the predominant attitude. There was a lack of internal and external means for building a positive life-style. The children were often having trouble in school.[30]

The possibility of identifying unwanted children by comparing family-size goals with family size achieved depends on the time at which desired family size is ascertained, since people adapt their announced goals in the event of pregnancy (and a portion of them even succeed in adapting their attitudes and behavior).[3] Conversely, a child originally desired may become unwanted because of the likelihood of deformity, the death or disability of a parent, income change—or the breakup of the marriage. (This change in status of the child has a bearing on the question of abortion only insofar as the change occurs soon after conception.)

If correct, this comparison is a powerful measure. It reveals between 750,000 and 1,000,000 excess births a year between 1960 and 1965. These figures are based on a re-analysis of 1965 national survey data by Charles F. Westoff. The lower estimate is based on births unwanted by both parents, and the higher, on births unwanted by at least one parent. If one uses the higher estimate, 445,000 births among the poor and near-poor are classed as excess, or 42 per cent of all their births, compared with

17 per cent among the non-poor. The incidence of unwanted births increases rapidly with birth order. The estimates cited are minimal in that births retrospectively rationalized by the parents, and births representing timing failures, are omitted.[32]

Children born and living their early years under psychological rejection by mothers, social abandonment by fathers, poverty and other disadvantaged conditions, are exposed to risk of impaired development which, regardless of all other consequences, is economically important as a cause of inferior earning power at maturity. In the several aspects of this problem to be discussed, it is suggested that it is chiefly impaired educational chances which threaten future economic potential. Let us look first at mental retardation.

Seeking of prenatal care late in pregnancy, and inadequate nutrition, are typical or frequent in unwanted pregnancies. At least for high-risk mothers, late care and nutritive lacks are a factor in complications and prematurity, which in turn are found to be related to impaired learning potential. Pasamanick has pointed out that very young mothers and older women had a higher risk of producing mentally defective children, and increasing birth order also increased the risk.[13a] It has also been noted that the extra medical risks of pregnancy among the very young are complicated by the unmarried status and poverty of the adolescent girl typically involved.[17]

Although the status of being unwanted does not predict a certain incidence of mental retardation, in the sense of being either a necessary or a sufficient cause, it is pertinent that of the many births among the poor, who are exposed to the hazards which may lead to mental retardation, a large per cent appear to be unwanted.

Since mental retardation is a multi-caused phenomenon in which the nurture, educational stimulation and social opportunities of the child affect outcome, it is surmised that a mild handicap (the more typical case) is continually reinforced in the large, poor, culturally isolated family.

Furthermore, once adolescence is reached, access to higher education and to jobs with responsibility for large assets is dependent on being in the upper track of learners. The chance to increase earning power either by adding to human capital or by associating with expensive cooperating factors of production is impaired by mild mental retardation.

General mental health of the infant is said to be affected by the same considerations of the prenatal environment as applied to development of learning capacity. Pasamanick mentions 5 clinical entities in children significantly associated with complications of pregnancy and prematurity: cerebral palsy, epilepsy, mental deficiency, behavior disorders and reading disabilities.[13b] "Cases" differ from controls not in operative procedures or in long and difficult labor, but in long toxemias and bleeding —i.e., in medical rather than obstetrical features. Summing up, Pasamanick states:

> "There exists a continuum of reproductive insult, at least partially socio-economically determined, resulting in a continuum of reproductive casualty extending from death through varying degrees of neuropsychiatric disability."[13c]

Acceptance by and interaction with parents continues to be an influential factor in the course of mental health throughout childhood.[10,27]

In a study of cases of children requiring agency foster care in New York City, 10 per cent of initial placements were due to severe neglect or abuse and 33 per cent to family problems including rejection milder than the preceding category.[9] An annual figure of 154,000, 2.1 per 1,000 children, for juvenile court

cases of dependency or neglect, in jurisdictions covering two-thirds of the population under 18, is said to be an understatement of the incidence of this problem.[19a]

Impaired mental health interferes with the formal educational process (for example, when there is a behavior problem in the classroom) and with socialization of the child so that he can perform in the labor market at the maximum level for his capacities. At the extreme, delinquency and punishment or other social response removes him from the conventional developmental sequence. It is noted that delinquents often come from broken homes or have many brothers and sisters. A correlation is also noted between adolescent misbehavior and the absence of the father or limited opportunity to identify with him.[28a] (We note about 700,000 children in juvenile delinquency cases in 1967, or 2.3 per cent of those between 10 and 17 years, and an upward trend in rate.)[19b]

Educational growth of the child is recognized to be handicapped in the large family where income and parental time are inadequate. (Income is a substitute for time as when the mother reads to the four-year-old while a sitter walks the baby, or when the four-year-old is sent to a private nursery school while the mother tends the baby.) This problem is broader than the case of actual retardation or diagnosed mental illness in a child.[28b]

Finally, the large poor family is less likely to secure medical attention for its children.[26] The number of school days lost because of illness is greater than for higher income groups.[25] Nutritional defects add to time of recovery after infection and are related to days of school missed. Continuous school attendance has significance for development of human capital.

Summary

It is difficult to assign a weight to the importance of births in excess of desired family size, or births ill-timed in terms of family welfare, in the creation of social problems of neglect, delinquency, psychological and social incapacity to care for children, and the like. Nor is it easy to isolate the effects of this factor on the set of job *vs.* education choices made by the young father, the difficulties faced by the mature woman in planning re-entry to the labor market, and the experience of being a youthful consumer at the poverty-level of income. Equally, the underdevelopment of human capital by reason of mental retardation, physical and psychiatric health problems, and educational undernourishment defies exact division among specific causes. However well research methods for dealing with multi-caused phenomena succeed in elucidating these relationships in the future, there is in any event food for thought in the present. Ability to control family-size, including the right to abortion, must essentially seek approval on its merits. Personal freedom, equal access to care, and medical protection of the poor are all involved. Yet the discussion cannot help being influenced by observed associations between unplanned births and poverty, untimely marriage, and creation of stress on parental capacities of the more vulnerable for whatever reason.

Future Research

The design of relevant research concerning access to, and financing of, abortion services calls for flexibility because of the fluid situation which now exists with respect to law and policy. If realistic, such research can be useful in guiding policy choices.

1. *Financial needs of patient groups* can be identified by studying total service costs under different marital, social, racial and medical-clinical situations of the patient. Women who have had illegal abortions appear to be more willing than it was previously assumed to reveal information bearing on incidence, preva-

lence, and attendant circumstances.[31] Legality should improve the information flow. This may make it possible to develop estimates for direct costs for medical care and associated travel, and for the indirect costs of lost work-time and child-care replacement, both on a per case basis, and for aggregates. The present cost of surgery, hospital days, and pregnancy tests, determined by familiar methods of medical care research, can serve as a guide to the program expenditures that would be necessary to assure economic access for the low-income woman as state laws yield to the reform movement.

2. Systematic observation of the medical and behavioral *effects of non-hospital service programs*, and of the use of manpower and facility space resources which they entail, could be carried out as such programs are mounted. Such study will aid in developing and revising standards for a non-hospital service.

3. Understanding of one and two is essential for the design of an adequate prepayment benefit; this task needs to be supported by *continuing surveillance of present coverage and gaps*. Insurance entitlements for maternity in the private sector vary widely by employment group and carrier.[33] Nevertheless, a knowledge of current practice as to waiting periods, in-hospital care requirements, payment schedule limits, and family contract conditions is needed for policy purposes. Public sector entitlements have their own sources of geographical and program variation within military dependents, welfare and OEO medical care programs.

4. Finally, *manpower needs* are crucial in view of previous unmet demand. The assessment of additional training required to prepare practicing physicians and medical students to participate in the provision of abortion service is one task, and the appraisal of the attitude of professionals focuses on an element as important as numbers with requisite preparation. The possible role of paraprofessionals in a related theme for health manpower research. This is especially interesting, because in creation of a service able to handle a mass demand, traditional guild issues may be somewhat subdued.

States which have liberalized their abortion laws constitute a natural laboratory for the trial of new approaches in regard to financing, organization, manpower, and referral. Although little advantage has yet been taken of this fact, evaluation of early experience should be encouraged to aid in the development of appropriate social mechanisms for service.

REFERENCES

1. Frank J. Ayd, Jr., "Liberal Abortion Laws," America, February 1, 1969, p. 131; E. W. Overstreet, "Logistic Problems of Legal Abortion," AJPH, 61:3, March, 1971, p. 496.
2. Richard A. Easterlin, "Towards a Socio-economic Theory of Fertility: Survey of Recent Research on Economic Factors in American Fertility," in Fertility and Family Planning, edited by S. J. Behrman, Leslie Corsa, Jr., Ronald Freedman, Ann Arbor, 1969, pp. 134–135.
3. "Economic Status, Unemployment, and Family Growth," Social Security Bulletin, May, 1966, p. 39.
4. Edwin M. Gold *et al.*, "Therapeutic Abortion in New York City: a 20-Year Review," American Journal of Public Health, July, 1965.
5. Robert E. Hall, "Present Abortion Practices in Hospitals of New York State," New York Medicine, vol. XXIII, No. 4, pp. 124–126, March, 1967.
6. Robert E. Hall, "Therapeutic Abortion, Sterilization, and Conception," American Journal of Obstetrics and Gynecology, vol. 91, No. 4, pp. 518–532, February 15, 1965.
7. Frederick S. Jaffe and Alan F. Guttmacher, "Family Planning Programs in the United States," Reprinted from Demography, vol. 5, No. 2, 1968, a, p. 1 (citing Freedman, Whelpton and Bogue Studies), b, pp. 3, 9.
8. See JAMA, January 16, 1967, vol. 199 No. 3, Editorial, "Abortion and the Law" on use of psychiatric grounds for therapeutic abortion.
9. Shirley Jenkins and Mignon Sauber, Paths to Child Placement, New York City Department of Welfare and The Community

Council of Greater New York, 1966, pp. 9, 24.
10. Robert M. Mulford, "Emotional Neglect of Children: A Challenge to Protective Services," Child Welfare, October, 1958, p. 20.
11. National Council on Illegitimacy, "Comments on Recent Trends in Illegitimacy in the U. S.", June 13, 1969.
12. Mollie Orshansky, "The Shape of Poverty in 1966," Social Security Bulletin, March, 1968, a. p. 9, b. p. 11, c. p. 20, d. p. 7, e. Table 4.
13. Benjamin Pasamanick, "Epidemiological Investigations of Some Prenatal Factors in the Production of Neuropsychiatric Disorders," in Health and the Community, Alfred H. Katz and Jean S. Felton, Editors, New York, 1965, a. p. 204, b. p. 203, c. p. 211.
14. Mignon Sauber and Elaine Rubenstein, Experiences of the Unwed Mother as a Parent, Community Council of Greater New York, 1965, pp. 152-153.
15. Alvin L. Schorr, "The Family Cycle and Income Development," Social Security Bulletin, February, 1966.
16. Christopher Tietze, "Legal Abortion in Industrialized Countries," presented in Pakistan, January 28-February 4, 1969, p. 15.
17. U. S. Children's Bureau, Childbearing in and Before the Years of Adolescence, reprinted 1967, pp. 3, 10.
18. U. S. Children's Bureau, Statistical Series 92, Supplement to Child Welfare Statistics—1967, Adoptions in 1967 (1968), pp. 1, 11.
19. U. S. Children's Bureau, Statistical Series 93, Juvenile Court Statistics 1967 (1969), pp. 1, 6, a. pp. 1, 6, b. p. 1.
20. U. S. Children's Bureau Publication No. 460, The Nation's Youth, A Chart Book, 1968, Chart 28, text.
21. U. S. Department of Commerce, Statistical Abstract of the United States, a. (1968) p. 111, b. (1970) p. 113, c. (1970) p. 325, d. (1970) p. 324, e. (1970) p. 50, f. (1968) p. 10.
22. U. S. Department of Commerce, United States Census of Population 1960 Labor Reserve, PC (2) 6C, 1966, Table 14.
23. U. S. Department of Labor, 3 Standards of Living for an Urban Family of Four Persons, Spring, 1967, Bulletin No. 1570-5, 1969 p. 6.
24. U. S. Department of Labor, Special Labor Force Report No. 59, Why Women Start and Stop Working: A Study in Mobility, September, 1965 (from Monthly Labor Review, Reprint No. 2476), p. 1078.
25. U. S. National Center for Health Statistics, Series 10 No. 47, Disability Days United States—July 1965-June 1966, October, 1968), p. 7.
26. U. S. National Center for Health Statistics, Series 10 No. 49, Volume of Physician Visits United States--July 1966-June 1967, (November, 1968), p. 6.
27. U.S., NIMH, National Clearinghouse for Mental Health Information, Mental Health Program Reports No. 1, February 1967, pp. 255 65, "Studying the Infant-Mother Relation-ship for Clues to the Causes of Aberrant Development," Nahman H. Greenberg, M.D.
28. U.S., NIMH, The Mental Health of Urban America, PHS Pub. No. 1906, April, 1969, a. pp. 17, 32, b. p. 12.
29. U. S. Social Security Administration, Research and Statistics Note No. 15—1969, Some Facts About the Employment of Widowed Mothers, August 20, 1969.
30. L. R. Young, "An Interim Report on an Experimental Program of Protective Service," Child Welfare, July, 1966, pp. 371-377.
31. Nancy Howell Lee, Acquaintance Networks in the Social Structure of Abortion, Harvard University, 1967.
32. Charles F. Westoff, "The Extent of Unwanted Fertility in the U.S.," presented at Planned Parenthood-World Federation, October 28, 1969.
33. C. Muller, "Health Insurance for Abortion Costs: A Survey," *Family Planning Perspective*, 2(3, October, 1970.

Dr. Muller is a Professor at the Center for Social Research, City University of New York, 33 West 42nd Street, New York, N.Y. 10036

This paper was revised from a paper prepared for the Workshop on Abortion, Obtained and Denied: Research Approaches to Outcomes. It was sponsored by National Institute of Child Health and Development and the National Institute of Mental Health.

This paper was submitted for publication in July, 1970.

Item No. 45

One Hundred and Twenty Children Born After Application for Therapeutic Abortion Refused

Hans Forssman and Inga Thuwe

INTRODUCTION

The aim of the present study was to determine the mental health, social adjustment and educational level of children born after their mothers had applied for legal abortion on psychiatric grounds, and been refused. For this purpose we compared a series of children born of these pregnancies with an equally large control series, following all the subjects up to their 21st birthday.

Therapeutic abortion was first officially legalized in Sweden in 1939 and during the years of relevance to this study it was permissible on the following grounds (which are still valid):

When, because of disease, physical defect or weakness in the woman, the birth of the child would endanger her life or health.

When the pregnancy is the result of a felony, such as rape or incest, or intercourse with a girl under 15, or of the woman being made to submit to intercourse against her will because of being dependent on the man, or when it is any other way the result of gross violation of the woman's freedom of action.

Acta Psychiatrica Scandinavica, 42: 71-88, 1966

When the expected child might inherit a mental disease, mental deficiency, or a severe physical disease or deformity, either from its mother or father.

On July 1, 1946, the law was broadened to include the following indication:

When, in view of the woman's living conditions or other circumstances, it can be assumed that the birth and care of the expected child will seriously undermine her mental or physical health.

This indication came too late for the mothers of the present subjects. It has led to much debate in Sweden, but the psychiatrists at our hospitals seem to have based their recommendations for or against abortion on essentially the same grounds before 1946 as they did afterwards.

Much has been written about abortion during recent years. Among Swedish studies are: *Lindberg's* (1948) What does the woman do when the psychiatrist says no to her application for abortion?; the social worker *Karin Malmfors'* (1951) follow-up study of 200 women who had applied for abortion; *Ekblad's* follow-up study (1955) of 479 women granted an abortion on psychiatric indications; *Arén & Åmark's* (1957) study of the outcome in 244 cases of authorized but unperformed abortions; *Arén's* (1958) study of 100 newly delivered mothers who had a former pregnancy prematurely terminated on legal grounds; *Kerstin Höök's* (1963) follow-up study of 249 women refused a legal abortion. *Schlaug* (1952) studied the male partner in 488 cases of application for abortion. *Ekblad's* and *Hook's* publications also contained data on the men concerned.

Thus several studies have been made of the mothers and fathers involved in cases of abortion. But little has been written about the third member of the trio involved—the unwanted child. *Arén & Åmark* (1957) related that 12 out of 162 children born to women who had gone through with their pregnancy were sent to a foster home for permanent care or adoption. *Malmfors* (1951) related that 7 out of 85 children born after an application for abortion had been refused were left for adoption. These authors said nothing more about the fate of these children, and *Arén & Åmark* did not check their information in the official registers. Furthermore, both these studies were made between 3 and 5 years after the children were born, when they were too young to permit any conclusion about their mental health or social adjustment. *Höök* (1963) followed a number of features in 204 children in her series

until they were 8 1/2 years old, on the average, the ages ranging from 7 to 11 1/2; 15 were left for adoption; the rest of her data about the children cannot be compared with any of the figures from the present study. This seems to be all that is written in Sweden about the fate of these unwanted children.

The Danish author *F. B. Nielsen* (1960), reported that, of 92 children born after application for abortion had been refused, 2 were stillborn, 82 healthy and 8 abnormal in some respect. But his children, too, were too young to permit any conclusion on their mental health and social adjustment.

It is beyond the scope of this investigation to go into the lengthy debate that has been going on about the legislation governing premature termination of pregnancy. Extensive reviews of this are given in the publications of *Ekblad* (1955) and *Höök* (1963).

The problem of abortion was given particular attention in the December 12, 1964, issue of the Lancet, which contained articles by *Tredgold* and by *Uhrus* and a leading article on the subject. The leading article concurred with the demand made at a meeting of U.S.A. specialists in 1955 for "more research into the background, motivation, mechanisms and results" of therapeutic termination of pregnancy.

As therapeutic abortion was not regularized by law in Sweden until January of 1939, it has hardly been possible until now to determine the long-term social and psychiatric consequences for the children born after application for abortion has been refused. In 1960 we published the preliminary results of this study in Swedish.

Material

Unwanted Children

The subjects studied came from Göteborg, Sweden's second largest city, with a population of about 280,000 at the time in question–1939-1942. During these years, the city had only one large general hospital, the Sahlgren Hospital. In October of 1938, a psychiatric department was opened at the hospital, and among its other activities, this department served as a counselling center for mothers seeking legal abortion. During the years of relevance to the present study, it was the only center of this kind in Göteborg. The few cases

taken in hand by private practitioners during this period are not included in our series.

Thus, the material for this investigation originates from all the cases of women living in Göteborg who applied for a therapeutic abortion to the Psychiatric Department of the Sahlgren Hospital during the years 1939 to 1941, inclusive, and were refused. These included both the women coming only to the outpatient service and the ones hospitalized for observation. We took 1941 as the last year so that we could follow the children born of these pregnancies until the age of 21.

During the years 1939 to 1941, altogether 197 women living in Göteborg had 199 applications for legal abortion refused, 2 women having been refused for two pregnancies. These do not include any woman who changed her mind and took back her application. In 188 of the 199, the psychiatrist at the department decided against abortion, in 10 cases, which had been referred to the Medical Board, the Board refused to authorize the abortion, and in one case, also referred to the Medical Board, the Board authorized the abortion but the obstetrician refused to do the operation because the pregnancy had proceeded too far.

Three of the 197 women could not be traced. One was a refugee who lived only a short time in Sweden. It is impossible to explain why the other 2 could not be traced; they may have given a false name or only a temporary address. This left 194 women and 196 refused applications.

Sixty-eight of these 196 pregnancies ended in abortion, spontaneous or provoked. Sixty-eight out of 196 is a large percentage—34.7 percent—and undoubtedly many of them were illegal. Since the drop-out rate is indicative to some extent of the kind of subjects chosen for study—the narrower the indications for legal abortion, the greater the number of illegal abortions—it is interesting to compare this figure with those from other Nordic countries on the frequency of interrupted pregnancy after legal permission for abortion had been refused. There is not much point in comparing our figures with those of other than these countries because the conditions differ too much.

Lindberg (1948) found that only 50 (14.5 percent) did not give birth at the expected time out of all 344 women refused an authorized abortion after being admitted as inpatients to the Psychiatric Department of the Sahlgren Hospital between 1940 and 1946. *Hultgren*

(1959) found that 14.4 percent of 4,274 women whose petitions for abortion had been turned down by the Medical Board during 1954 to 1956 did not go through with their pregnancy; 224 of the 4,274 were from Göteborg, and 35 of these 224 (15.6 percent) did not go through with their pregnancy.

Thus the percentage of prematurely terminated pregnancies, spontaneous or provoked, was smaller in these two Swedish series than in ours. It is true that all *Lindberg's* women had been under observation as inpatients, as against only 49 of our 199. One probably does not get such a good psychotherapeutic grip on patients only coming to an outpatient service as one does when they are hospitalized. On the other hand, only 83 of 136 Danish women refused legal abortion after observation at the Psychiatric Department at Frederiksberg's Hospital went through with their pregnancies, the drop-out rate in this series thus amounting to 39 percent (*Delcomyn*, 1952).

A more probable explanation for the difference is this. *Lindberg's* series comes from 1940-1946, *Hultgren's* from 1954-1956, and ours from 1939-1941. In 1939 the number of legally authorized abortions in Sweden amounted to 439, in 1946 it rose to 2,378 and in 1951 it reached a peak of 6,328; it then fell slightly, amounting to about 5,000 in 1952-1954, 4,562 in 1955, and 3,851 in 1956. Another way of following the trend is to compare the number of legal abortions with the number of livebirths during the same period. During 1939 to 1942, 0.5 pregnancies were terminated by legal abortion for every hundred livebirths. In 1946 the proportion rose to 1.8, and in 1951 to 5.7. In 1952 and 1954 it was 4.8, in 1955 it was 4.3, and in 1956 it was 3.6.

In short, many more authorized abortions were done after than during the years of relevance to our investigation. Because it was harder to get permission for therapeutic abortion in 1939-1941 than later it is reasonable to assume that more illegal abortions were performed in our series than in later series. *Delcomyn* (1952), comparing the Danish figures for 1945-1949 with those for 1950 and the first half of 1951, found that there were relatively more authorized abortions in the second period, and also that a larger percentage of the women refused a legal abortion went through with their pregnancy the second period. She gave no figures for her observation.

Thus 128 of the pregnancies in our series (representing 126 women) proceeded to term. The result was 134 children, including 6 pairs of twins. Four of the 134 were stillborn, and 8 died within a

year, one before it was 2 and one before it was 3. Excluding these 14 cases of early death left 120 children. The present study is based on these 120 all of whom reached the age of 21. They include 4 pairs of twins and 2 twins whose partners had died. Table 1 shows the 120 divided by year of birth and sex.

TABLE 1. *The 120 children born after their mother's application for legal abortion was refused, by year of birth and sex*

Year of birth	Boys	Girls	Total
1939	9	6	15
1940	32	13	45
1941	17	22	39
1942	8	13	21
Total	66	54	120

Control Children

All but 1 of the 120 unwanted children were registered in Goteborg when they were born. We chose control subjects for these 119 as follows: When the infant was born in one of the city's maternity hospitals, we took the next same-sexed child born in the same hospital for its control subject. For the 17 born elsewhere, we took the first same-sexed child registered in the city hospitals on the same day. When the control subject died before the age of 21, we replaced it with the first same-sexed child born after it in the same hospital. For control subjects for twins, we took the next pair of twins, same-sexed or bi-sexed as the case was, born in the same hospital. For the 2 children of twin birth, one of whose partners was stillborn and one died within 3 months, we chose control subjects as if the original children were singletons.

For the control subject of the child born outside Göteborg we took the next child of the same sex registered in the book of the same parish.

Sources of Data Analyzed*

From the civil and parish registry offices we found out: whether the would-not-be mother had had her child after her application was turned down; the addresses of the unwanted children and their control subjects from birth until they reached the age of 21; the marital status of the children and whether they in turn had had any children. One control subject lived in another country for six months when she was 18; apart from this we were able to follow every subject from the time they were born until they were 21.

From the child welfare boards (see p. 132) in the various districts in which the subjects had lived, we learned whether they had any of the subject's names in their files and, if so, why.

At the child-guidance clinics and youth psychiatry centers in the districts where the subjects lived or had lived we asked whether they had been consulted for mental deviation or illness in any of the subjects. We did the same at all the mental hospitals and psychiatric departments in general hospitals, and at all the psychiatric outpatient services in the districts where the subjects had lived after the age of 15. We also wrote to all the rural and urban psychiatric consulting bureaus run independently of the psychiatric departments in the general hospitals. We were not able to cover all the private practitioners who might have been consulted and we therefore disregarded anything we happened to hear from one of them having been consulted.

Sweden has a central penal register for the whole country, where every act of the authorities restricting the liberty of an individual is recorded, whether it be sentence to an adult or juvenile prison or internment in some other kind of an institution; also every instance of exemption from legal punishment because of legal irresponsibility, fines above a certain level and fines for crimes for which the alternative is penal servitude. All cases of conditional sentence are also recorded there. After receiving special permission from the government, we went through these files to see whether we could obtain any further evidence of antisocial conduct on the part of the subjects until they reached the age of 21.

*In these analyses we have called a P value of <0.05 probably significant, of <0.01 significant and of <0.001 highly significant.

We also inquired at all the official temperance boards and social agencies in the districts where the subjects lived after the age of 16. (Not until 16 are persons registered in their own names in the records of the social agencies.)

We inquired about the subjects' schooling in the various school districts to which they belonged. Whenever they proceeded to secondary schools, we inquired at these schools whether they had gone on from them to other forms of study, and about any examinations they had passed. Thus we have full information on all the examinations the subjects passed prior to university. We then learned whether they had studied at any university before the age of 21 by going through the annual lists of the students enrolled at the various Swedish universities.

The information we got from the schools and the files of the social agencies showed that there was no point in inquiring at the agencies for the education and care of the mentally retarded.

In Sweden military service is obligatory for men, but not for women. We enquired at the Swedish Institute of Military Psychology about the fitness group into which the male subjects had been classed, and, if they had completed their military service, about how they had succeeded with their duties there. As a rule the young men must enroll for military service the year they become 18, but they can put it off up to the age of 21 or more for reasons of health or education. When they did this, we sometimes extended our limit beyond the 21st birthday in this one respect.

Three subjects (1 original and 2 control subjects) were the children of leading citizens in small communities, and we felt that it would be unfair to make inquiries about them in the local agencies in their neighborhood. But we got all the information we needed about them from other sources and there being no difference between them and the other subjects in depth of penetration we have included them with the others in the various analyses.

Differences Between Original and Control Series

Age, Maternal Age and Social Group

The ages of the two series of subjects correspond almost to the day. The greatest difference amounted to 25 days (twin cases).

The unwanted children were born to mothers 30 years old on the average, the control children to mothers of 28, on the average. There is a significant difference here ($0.01 > p > 0.005$).

We also compared the two series for the social group into which they were born, using the norms from the Swedish electoral statistics for the years 1937 to 1940. We did the grouping according to the father's occupation at the time, or if the mother was unmarried according to hers. Children adopted by couples neither of whom was their real parent, were grouped according to the occupation of the adoptive father at the time. But children adopted by men their mothers married after they were born were grouped according to their mothers' occupation when they were born. The result of this comparison is seen from table 2, which also shows how the inhabitants of Göteborg were distributed by social group in 1940.

More of the control than unwanted children were born into group II, and the reverse held for group III. Combining groups I and II gave 25 for the unwanted children and 36 for the control children, against 95 and 84 for group III. Thus the two series did not differ significantly in this respect ($p \simeq 0.10$), though no consideration was given to social group when choosing the control subjects.

Seventy-seven pairs, each consisting of one subject from either series, belonged to the same social group, 43 did not.

TABLE 2. *The unwanted and control children, by original social group*

	Number		Percentage		
Social group	Unwanted children	Control children	Unwanted children	Control children	Whole of Göteborg in 1940
I	3	4	2.5	3.3	6.5
II	22	32	18.3	26.7	31.4
III	95	84	79.2	70.0	62.1
Total	120	120	100.0	100.0	100.0

Results of Comparing Family and Social Environment of Unwanted and Control Children

Insecure Childhood

We considered that the following circumstances in the history of the subjects pointed to an insecure childhood background:

1. Complaints to a child welfare board about the way the subjects were being treated at home.

Every local authority district in Sweden is required to set up a child welfare board whose duty is to see that all children in its district are properly cared for. Up until 1960 the boards were required to interfere whenever children under 16 were being exposed to physical or mental harm through cruelty or neglect at home, or in danger of becoming delinquent because of their parents' depravity, negligence, or inability to bring up their children.

2. The child taken into custody by a child welfare board for protective care.

If consulting with, advising or warning the parents had no effect, or if the board decided that it would be a waste of time to try to persuade the parents to mend their ways, the board had the right to take the child away from its parents for protective custody.

3. Placement in a foster home.
4. Placement in a children's home.
5. Childhood in broken home, i.e. loss of a parent through divorce or death before the child was 15, or birth out of wedlock not followed by legitimization.

Table 3 shows how many subjects in either series were brought up under each of these circumstances. As seen there, 32 (26.7 percent) of the unwanted children were born out of wedlock, against only 9 (7.5 percent) of the control children. The difference is highly significant ($p < 0.001$). Eighty-six pairs (one member from each series) agreed in regard to legitimacy; 34 did not. The parents legitimized 5 of the 32 unwanted children born out of wedlock by getting married 2 to 24 months after they were born, and the parents of 5 of the 9 illegitimately born control children did the same 2 to 33 months later. Eight of the unwanted children were adopted by others than their

real parents (7 of these were illegitimate). None of the control subjects were adopted.

According to the criteria laid down, 72 (60 percent) of the unwanted children had an insecure childhood, as against only 34 (28.3 percent) of the control children. If one disregards the stays in children's homes, many of which were for only a short while, the figures change to 65 (54.2 percent) against 26 (21.7 percent), and the difference remains highly significant ($p < 0.001$).

In short, it is obvious that the children born after an application for abortion had been refused ran a greater risk of insecurity in childhood than did their control subjects.

TABLE 3. *Comparison between unwanted and control children for circumstances in history pointing to insecurity in childhood (The same child may occur in several categories)*

Circumstances pointing to insecure childhood	Unwanted children		Control children	
Report to children's aid bureaus about unsatisfactory conditions at home	17		6	
Child removed from home by authorities	2		0	
Placement in foster home	19		4	
Placement in children's home	30		10	
Parents divorced before child was 15	23		13	
Parent(s) died before child was 15	10	60	5	22
Born out of wedlock and never legitimized	27		4	
Born out of wedlock and legitimized	5		5	

Disposition to Move to Other Local Authority Districts

There being more delinquency in cities than in other regions we determined how many of either series had stayed the whole time in Göteborg. Another reason for doing so was that we had unusually good possibilities of getting complete information about these subjects since our place of work is in Göteborg. We also checked whether they differed in tendency to move from place to place.

Seventy-seven (62.2 percent) of the unwanted children stayed in Göteborg until they were 21, and 85 (70.8 percent) of the control subjects. Twenty-one (17.5 percent) of the unwanted children had lived in three or more local authority districts, and 19 (15.8 percent) of the control subjects. Thus the two series agreed well, both for permanency of residence in Göteborg, and for tendency to move from one district to another. There were 55 pairs in which both the original and control subject had lived the whole time in Göteborg.

Results of Comparing Personal Data in Original and Control Series

Psychiatric Consultation and Hospitalization

Thirty-four of the unwanted children (28.3 percent) had gone to a psychiatric clinic of some kind or received psychiatric care in a hospital. The corresponding figure for the control subjects was 18, or 15 percent. The difference is probably significant ($0.025 > p > 0.01$).

Twenty-nine of the unwanted children had been under the care of a child psychiatrist, 28 only as an outpatient, and one as an inpatient as well. Six had visited a center for adult psychiatry; 3 of these had been hospitalized, one in a psychiatric department at a general hospital, one at a mental hospital, and one at both. One of the latter belonged to the 29 who had gone to an outpatient department for child and youth psychiatry.

Fifteen of the control subjects had visited a center for child psychiatry, all of them only for outpatient treatment. Four had been patients at a center for adult psychiatry, 2 as an outpatient, one at a mental hospital, and one at both a mental department in a general hospital and a mental hospital. One of these 4 belonged to the 15 who had gone to a center for child psychiatry.

The question arises: Was it because the mothers of the unwanted subjects had been in contact with psychiatrists before the children were

born that so many of these children were registered at centers for child psychiatry? It may be that, having once consulted a psychiatrist, these mothers found it easier to do so again, whereas the mothers of the control subjects, who had seldom if ever consulted a psychiatrist about themselves, did not go to a psychiatrist for their children unless something was seriously wrong. Likewise, the mothers who had consulted a psychiatrist about abortion might be more apt than others to seek psychiatric advice for other personal troubles afterwards, and if they then complained about their children being nervous, the child might very likely be sent to a psychiatrist while the perhaps equally nervous children of other mothers might not.

In 1959 we determined how many of the mothers up to that year had consulted a psychiatrist for matters not directly concerned with the abortion, but only among the mothers of the 57 pairs in which both partners had lived in Göteborg all the time up to then. Twenty-seven of the 57 would-not-be mothers had gone to one of the municipal psychiatric outpatient departments for complaints not directly concerned with the abortion, and 10 of their children had done so. The corresponding figures for the control series were 9 and 0. It is apparent from this that it was not because the would-not-be mothers had consulted a psychiatrist about abortion that these children went more often than the others to a child psychiatrist. When all the subjects reached the age of 21, the number of pairs living the whole time in Göteborg dropped to 55, but we did not consider it worth while to do the analysis again for this sake.

Delinquency and Crime

Our figures for acts of delinquent nature reported to the child welfare boards do not cover drunken misconduct; this will be taken up in the next section.

Twenty-two (18.3 percent) of the unwanted subjects, 19 boys and 3 girls, were registered with the child welfare boards for delinquency, against 10 (8.3 percent) of the control subjects, 9 boys and one girl. The difference is probably significant ($p < 0.05$).

The boards had made investigations in 12 of the first 22 subjects and in 4 of the second to determine whether formal charges brought against them should be dropped. This happened 19 times in the

original series, 8 times in the control series. Three of the first series and one of the second were removed from their homes and placed in protective custody elsewhere, in accordance with the law then in force, according to which correctional measures must be undertaken when children under 18 show severe forms of maladjustment. One of these 3 unwanted children, as well as the control subject, was sent to a reformatory.

The penal register contained the names of 10 of the unwanted children (8.3 percent) and of 3 control subjects (2.5 percent). The difference is not significant ($0.10 > p > 0.05$). Nine of the first 10 were male, one was female. The control subjects were all male.

Drunken Misconduct

The records of the official temperance boards contained the names of 19 of the unwanted children (15.8 percent) and 13 control subjects (10.8 percent) for drunken misconduct. The difference is not significant ($0.50 > p > 0.30$). Two of the first 19 subjects were women. The 13 control subjects were all men.

Public Assistance

Seventeen of the unwanted children (14.2 percent) had received some form of public assistance between the ages of 16 and 21, and 3 of the control subjects (2.5 percent). The difference is significant ($0.005 > p > 0.001$).

Only one subject, a boy in the control series, received a disablement pension from the government; he was an idiot and permanently institutionalized.

Educational Subnormality

Under this heading we included all the uneducable subjects, the ones taught in special schools for the mentally retarded, those whose last year at school was spent in a special class. In the last group we also included a few subjects whose educational subnormality was well documented, but who were taught in ordinary classes because there was no form of special training available for them.

The large cities have a graduated series of special classes in the ordinary schools called remedial reading classes, observation classes,

extra classes and health classes, but we paid no attention to the kind of special class the subjects pupil attended, mostly because it depended on where they lived what kind of class they could choose from.

According to these criteria, 13 of the unwanted children (10.8 percent) were educationally subnormal, as against 6 of the control subjects (5.0 percent). This difference is not significant ($p = 0.10$).

There was one case of well documented mental retardation both in the original and in the control series.

Theoretical Studies Beyond the Obligatory

On drawing a line between the subjects who had done more advanced theoretical study than that required by the school law, and those who had not, we found that only 17 (14.2 percent) of the unwanted had had some form of higher education, as against 40 (33.3 percent) of the control subjects. The difference is highly significant ($p < 0.001$).

Eight unwanted and 12 control children had taken university entrance examinations. Five unwanted children and 11 control children had studied at a university. Neither of these differences is significant.

As mentioned (table 2), more of the control than original subjects came from social group II and the reverse was true for social group III. As a child's education depends a great deal on the social standing of its parents, we also compared the schooling in the two series after excluding the subjects left over when the two kinds of subjects were paired according to social group. This left 77 subjects in each series. Ten of these 77 (13.0 percent) unwanted children had had some form of higher education, against 21 of the 77 control children (27.3 percent). The difference is probably significant ($p < 0.05$).

One can also study the effect of social standing on the education by taking one social group at a time; for this we had to combine groups I and II, as there were too few cases in group I. Five of the 95 unwanted children (5.3 percent) coming from group III had had higher education, against 17 of the 84 control subjects (20.2 percent) coming from the same social group. The difference is significant ($p < 0.01$). The figures for group I + II were 11 out of 25 (44.0 percent)

against 28 out of 36 (77.8 percent). Here the difference is probably significant ($p < 0.05$).

Continuing with these calculations, chi square amounts to 7.93 for social group III and to 5.89 for I and II combined. The sum, 13.82, with 2 degrees of freedom gives a p of <0.001, showing a highly significant difference for the three social groups combined.

Thus it was not differences in proportion of different social groups that caused the difference in schooling between the unwanted and control children.

Military Service

Ten of the 66 males in the original series (15.2 percent) were judged unfit for military service, either at the time of enrollment or after they had started, as opposed to 4 (6.7 percent) of the control subjects. This is not a significant difference ($0.20 > p > 0.10$). According to our information, 4 of the 10 first males were exempted for mental reasons; our information in this respect may not be complete, however. Two of the control subjects were exempted on these grounds.

When a Swedish recruit enrolls, he is classified into one of four groups according to his fitness for military service, from group 1 for a completely satisfactory condition down to group 4 who are assigned to fatigue duty. Apart from exemption from service, our two series were distributed very much alike by fitness for military service.

Marital Status and Parenthood

As we only followed our subjects up to the age of 21, we cannot say much about how they compare with regard to marriage and parenthood. Some differences did emerge, however.

Twenty of the unwanted children (17 women, 3 men) married before the age of 21, and 14 of the control subjects (9 women, 5 men). The difference is not significant here, either for the sexes combined or for one of them.

Two of the female subjects from the original series had also divorced before the age of 21; none of the control women had done so, and no man from either series.

We restricted our analysis of parenthood to the women, as there was no hope of getting reliable figures for the men in this respect.

Fourteen out of 54 women from the original series had had 19 children before they were 21, 4 out of wedlock, and 7 of the 54 female control subjects had had 9 children, 3 out of wedlock.

It is impossible to draw any conclusions from these figures. It will be noted, however, that the control series (which had more education on the whole) contained fewer cases of early marriage and of young mothers. This tallies with the observation that the age of marriage and parenthood rise with the degree of education.

Freedom From Defect in All Respects Studied

Sometimes the same subject will occur in more than one of the groups studied here. Thus a subject registered with the authorities for abuse of alcohol will often be found in the files of the centers for child psychiatry as well; a man who has been in a mental hospital will sometimes be exempted from military service; an uneducable subject will be registered as receiving public assistance, as being educated in a special class, and so on. It is interesting, therefore, to compare the two series for the number of subjects showing no defect in any of the respects studies, i.e., registration for antisocial behavior in the books of the child welfare boards or penal register; official registration for drunken misconduct; education in a special class or school, or uneducability; public assistance or government pension; visits to psychiatric inpatient or outpatient departments during childhood or adulthood. Fifty-eight (48.3 percent) of the unwanted children showed none of these defects against 82 (68.3 percent) of the control subjects. The difference is significant ($0.005 > p > 0.001$).

Taking social group III separately from I and II combined showed the following: Forty of the 95 unwanted children (42.1 percent) coming from group III showed no defect, against 54 of the 84 control subjects (64.3 percent) from the same group. The difference is significant ($0.005 > p > 0.001$). The corresponding figures for group I and II combined were 19 out of 25 (76.0 percent) against 28 out of 36 (77.8 percent). Here the difference is not significant.

The same analysis of the 77 pairs concordant for social group gave 34 unwanted cases (44.2 percent) showing no defect, against 54 control (70.1 percent). The difference is significant ($0.005 > p > 0.001$).

Similar analysis of the 55 pairs living in Göteborg the whole time gave 20 (36.4 percent) showing no defect against 38 (69.1 percent). The difference is highly significant ($p < 0.001$).

As children from broken homes are more apt than others to be antisocial and mentally disturbed, we compared the two series for the number of cases showing none of the aforementioned defects among the subjects who had lived with both their real parents until they were 15. Thirty-three out of the 60 such subjects from the original series (55.0 percent) showed none of these defects, and 68 out of the 98 control subjects of this category (69.4 percent). The difference is not significant ($0.10 > p > 0.05$).

Discussion

Table 4 gives a survey of the ways in which the children born after their mother had been refused a legal abortion differed from the control series of same-aged subjects chosen at random. As seen there, the unwanted children were worse off in every respect, the only exception being due to the one case of a government pension which came from the control series. The differences were often significant, and when they were not, they pointed in the same direction (except for the case just mentioned)—to a worse lot for the unwanted children.

When one looks for a reason for the differences, one is struck mostly by the greater frequency of factors tending to disrupt the stability of the home in the case of the unwanted children, such as birth out of wedlock, and death or divorce of their parents while they were still young. In other words, not as many unwanted children were brought up by both their real parents as were control subjects. Probably as a corollary of this, more of them were brought up by foster parents of in children's homes. But the latter may also have been a consequence of the greater number of complaints to the children's welfare boards about the way in which they were being treated at home.

The difference that turned up most consistently in various forms of analysis was the difference in amount of education. Whatever categories of subjects were studied—different social ranks or different subgroups of the same social rank—the unwanted children got a significantly smaller amount of education than the control subjects.

The reason the unwanted children had had so much contact with psychiatrists was probably not—as we showed—that their mothers

TABLE 4. *Survey of important differences between the unwanted and control children*

	Unwanted children			Control children			
	No. in resp. series	Feature present		No. in resp. series	Feature present		Level of sign. of differ.
		No.	%		No.	%	
Psychiatric consultation and hospitalization	120	34	28.3	120	18	15.0	*
Registration for delinquency at children's aid bureaus	120	22	18.3	120	10	8.3	*
Registration for crime in Penal Register	120	10	8.3	120	3	2.5	–
Registration for drunken misconduct	120	19	15.8	120	13	10.8	
Public assistance between age of 16 and 21	120	17	14.2	120	3	2.5	**
Subnormal educability or uneducability	120	13	10.8	120	6	5.0	–
Theoretical studies beyond the obligatory:							
Whole series	120	17	14.2	120	40	33.3	***
Subjects in pairs congruent for social group	77	10	13.0	77	21	27.3	*
Subjects from social group III	95	5	5.3	84	17	20.2	**
Subjects from social groups I + II	25	11	44.0	36	28	77.8	*
Exemption from military service	66	10	15.2	66	4	6.7	–
Freedom from inferiority in above respects:							
Whole series	120	58	48.3	120	82	68.3	**
Social group III	95	40	42.1	84	54	64.3	**
Social groups I + II	25	19	76.0	36	28	77.8	–

Subjects in pairs congruent for social group	77	34	44.2	77	54	70.1	**
Subjects living all their life in Göteborg	55	20	36.4	55	38	69.1	***
Subjects brought up by both their real parents	60	33	55.0	98	68	69.4	

found it easier to consult a psychiatrist about their child because they had once before consulted a psychiatrist about themselves. It was probably because these mothers were more vulnerable mentally than the others, and passed on this failing to their children, either through genes or through the effect it had on the home environment, or both.

The investigation has shown that children born after their mothers have been refused permission for legal abortion are born into a worse situation than other children. From this one may assume that the children who are not born because their mothers get authorization for abortion would have had to face still greater disadvantages, socially and mentally. Thus, the very fact that a woman seeks an authorized abortion, no matter how trivial her grounds may appear to some, means that the expected child will run a larger risk than its peers of an inferior standing in life. In our opinion, the present investigation shows that the provisions for therapeutic abortion in the law should not only aim to prevent the private tragedy; they should also aim to improve mental hygiene in a wider sense. Thus the legislation should also consider the social handicaps awaiting the unwanted child, not only, as it does now, the genetic risk in the narrow sense of the terms.

SUMMARY

The authors examined 120 children born after their mothers had applied for therapeutic abortion on psychiatric grounds and been refused, comparing them with an appropriate control series of the same size. All the subjects studied lived and were followed up until the age of 21. Data were assembled from civil and ecclesiastical registry offices, social agencies, school authorities, military authorities and all the psychiatric inpatient and outpatient departments everywhere the

subjects had lived. It was ascertained how many of each series had been registered for mental ill-health, antisocial and criminal actions, drunken misconduct, and different forms of public assistance; for the men it was ascertained how they had got on during their military service; likewise the marital status, number of children, and school ability and educational level was determined.

A study of the social features revealed that many more of the unwanted than control children had not had the advantage of a secure family life during childhood. They were also registered more often in psychiatric services, and a few more of them than control subjects received psychiatric care. They were more often registered for antisocial and criminal behavior, and slightly more often for drunken misconduct, and they got public assistance more often than the control subjects. A few more of them were educationally subnormal and far fewer had pursued theoretical studies over and above what is obligatory. They were more often exempted from military service. More of the females married early and had children early than in the control series. The differences between the two series in these respects were often statistically significant, and when they were not significant they always pointed in the same direction—to the unwanted children being born into a worse situation than the control children. Table 4 gives figures for most of the features just mentioned.

The authors conclude that the very fact a woman applies for legal abortion means that the prospective child runs a risk of having to surmount greater social and mental handicaps than its peers, even when the grounds for the application are so slight that it is refused. In their opinion, the legislation of therapeutic termination of pregnancy should also consider the social risks to which the expected child will be exposed.

REFERENCES

Arén, P. (1958): Undersökning av 100 nyblivna mödrar med legal abort i anamnesen (One hundred newly delivered mothers with a history of legal abortion). *Svenska Läk.-Tidn. 55*, 505-522.

Arén, P., & C. Ämark (1957): Prognosen vid beviljad men icke utförd legal abort (Outcome in cases of authorized but not performed therapeutic abortion). *Svenska Läk.-Tidn. 54*, 3709-3784.

Delcomyn, K. (1952): Efterundersogelse af Kvinder, der har faet Afslag pa Anmodning om Abortus provocatus (Follow-up study of women whose application for therapeutic abortion was refused). *Nord. Med. 48*, 980.

Ekblad, M. (1955): Induced abortion on psychiatric grounds. *Acta psychiat. scand.*, supp. 99.

Forssman, H., & I. Thuwe (1960): En socialpsykiatrisk efterundersökning av 120 barn födda efter avslag pa abortframställning (Mental health and social adjustment of 120 children born after application for therapeutic abortion refused). *Nord. psykiat. T. 14*, 265-279.

Hultgren, G. (1959): Avslag på ansökan om legal abort (Application for legal abortion refused). *Nord. Med. 62*, 1182-1185.

Höök, K. (1963): Refused abortion. A follow-up study of 249 women whose applications were refused by the National Board of Health in Sweden. *Acta psychiat. scand.*, supp. 168.

Lancet (1964): Termination of pregnancy on psychiatric grounds, Leading article in II, Dec. 12.

Lindberg, B. F. (1948): Vad gör den abortsökande kvinnan när psykiatern sagt nej? (What does the woman do when the psychiatrist says no to her application for abortion?). *Svenska Läk.-Tidn. 45*, 1381-1391.

Malmfors, K. (1951): Den abortsökande kvinnans problem (Problems of the woman seeking abortion). *Svenska Läk.-Tidn 48*, 2445-2468.

Nielsen, F. B. (1960): Afgorelser i et Modrehjelpssamråd og en Efterundersogelse (Decisions by a maternity assistance board and a follow-up study). *Ugeskr. Laeg. 120*, 330-335.

Schlaug, R. (1952): Om de abortsökande kvinnoras män (The male partners of women applying for therapeutic abortion). *Svenska Lak.-Tidn. 49*, 849-862.

Svensk författningssamling (Swedish Statue Code) (1938): Lag om avbrytande av havandeskap (Legislation on abortion). No. 318. Stockholm.

Sveriges officiella statistik (Official Swedish statistics) (1941): Riksdagsmannavalen aren 1937-1940 (Government election statistics for 1937-1941). Stockholm.

Sveriges officiella statistik (Official Swedish statistics) (1959): Allmän hälso- och sjukwärd 1957 (Public health and care of the sick in 1957). Stockholm.

Text till lag om samhällets barnavärd och ungdomsskydd (Proposed wording for the legislation governing official supervision of child welfare and protection of youth) (1950): Svenska socialvärdsförbundet (Swedish Social Welfare Association), Stockholm.

Tredgold, R. F. (1964): Psychiatric indications for termination of pregnancy. *Lancet*, 12 Dec., *7372*, 1251-1254.

Uhrus, K. (1964): Some aspects of the Swedish law governing termination of pregnancy. *Lancet*, 12 Dec. *7372*, 1292-1293.

Item No. 46

The public health aspects of abortion have still not received the attention they deserve. After reviewing various facets of the problem with specific reference to hospitals in the United States, the author proposes emphasis on abortion law reform, promotion of sex education, and pursuit of an active contraceptive program.

ABORTION IN AMERICAN HOSPITALS

Robert E. Hall, M.D.

THE practice of abortion in American hospitals is inequitable, inconsistent, and largely illegal. The basic reason for this is that this aspect of twentieth-century medicine is governed by nineteenth-century laws.

With minor exceptions the laws in all 50 states permit abortion only "if necessary to preserve the life of the mother." Yet, as medicine has progressed, it has become apparent that considerations other than the preservation of maternal life are involved in the practice of abortion.

Only 25 years ago the risk to the maternal life of women with heart disease, diabetes, and tuberculosis was sufficient to warrant interruption of their pregnancies in compliance with the law. Most abortions then were done for such reasons. Now increased medical knowledge has enabled us to carry many of these women safely through pregnancy; but, at the same time, other medical discoveries have revealed to us equally valid reasons for therapeutic abortion, which do not necessarily entail danger to maternal life.

Need for Abortion Law Reforms

Chief among these new-found indications are psychiatric disease and maternal rubella. The ominous implications of both of these conditions were not known when the abortion laws were written. Since the laws have not yet been changed in conformity with these advances in medical science, doctors today are forced to break the law in order to practice modern medicine. And since fully half of the hospital abortions today are performed for psychiatric disease and maternal rubella, it is readily apparent that the law is being broken fairly often.

In the United States, where abortion laws are strict, the ratio of therapeutic abortions to live births is 1:500 and the ratio of illegal abortions to hospital abortions is 100:1. In Denmark, where the abortion law is liberal, the ratio of therapeutic abortions to live births is 1:20 and the ratio of illegal abortions to hospital abortions is 4:1. In Japan, where abortion has been legalized, there are as many abortions as live births. These figures are based, of course, on educated estimates only, but they do serve to illustrate (a) that hospital abortions are exceptionally rare in this country and (b) that the demand for abortion is met illegally when it cannot be satisfied through legal channels. The one million criminal abortions thought to be performed in this country every year

comprise a public health problem of pandemic proportions.

Needless to say, there are no statistics available to document the psycho-socio-medical sequelae of these million criminal abortions, but they are obviously extensive and they are suffered almost exclusively by those who cannot afford the skilled abortionist's fee. Infected-abortion cases abound on our charity wards, not in our private pavilions. To a degree the medical profession is responsible for this dichotomy through its inequitable distribution of therapeutic abortions among ward and private patients.

Rate of Therapeutic Abortions

National surveys bear testimony to the fact that hospital abortions are performed four times as often on the private services as on the ward services.[9,14] In New York City, between 1960 and 1962 the ratio of therapeutic abortions to live births in the proprietary hospitals was 1:250; on the private services of the voluntary hospitals, 1:400; on the ward services of the same voluntary hospitals, 1:1,400; and in the municipal hospitals, 1:10,000. The same inequity pertains to ethnic origin. The rate of therapeutic abortions per live births among white women in New York is 1 per 380, among nonwhites 1 per 2,000, and among Puerto Ricans 1 per 10,000. Approximately half of the puerperal deaths among New York's Negroes and Puerto Ricans are due to criminal abortions, as opposed to only a quarter of the puerperal deaths among white women.[2] This surely is a problem in preventive medicine which public health measures could help to solve.

Over all, criminal abortion as a cause of maternal mortality is on the upswing. Concurrently, the relative and absolute incidence of hospital abortion is decreasing. Whereas about 20 years ago there was one therapeutic abortion per 150 live births, now there is one per 500.[5] Aside from the lessened need for abortions on purely medical grounds, the principal reason for this decline has been the establishment of therapeutic abortion boards. These boards have become increasingly prevalent in the past 15 years, partly due to the mistaken belief that they are required by the Joint Commission on Accreditation of Hospitals. At present about half of our teaching hospitals have such boards.

In theory these boards serve to police the abortion practices of staff physicians, to prevent them from yielding to the pressure of undeserving patients, and to protect them from possible litigation. In fact these boards serve as medical tribunals which are frequently called upon to render moral judgments. Through the detachment typical of committees in general, this judgment is likely to be more academic than humane. After the establishment of such a board at Sloane Hospital, for example, the therapeutic abortion rate declined by one-third.[5]

Abortions for Rubella

It took many years to convince these boards that they should approve abortions for rubella. The ravages of rubella in pregnancy include a fetal death rate of 16 per cent, a prematurity rate of 16 per cent, a deformity rate of 17 per cent, and a 30 per cent incidence of congenital deafness.[13,6] Most of these dangers have been known to the medical profession for 25 years, but at first no abortions were done for this reason because it was argued that such abortions are, after all, illegal. The first rubella abortions were done under psychiatric guise upon the wives of insistent physicians. And now, as the knowledge of rubella deformities has become widespread, the general public has become equally insistent and obstetricians have been forced to comply with their demands in open defiance of the law. Dur-

ing the 1964 epidemic 329 such abortions were done in New York City alone.[3] Although most American hospitals now permit abortions for rubella, some do not. This inconsistency sometimes proves tragic to the individual rubella victim, for even the more liberal abortion committees usually refuse to approve the abortion of a woman who has had her previous obstetrical care at another hospital. As an illustration of the farcical extent of this situation, nine San Francisco obstetricians have been ordered to appear before the State Medical Board on the charge of unprofessional conduct for having performed therapeutic abortions for rubella, whereas at the same time in New York City a hospital is being sued for refusing to perform an abortion on a woman with documented first-trimester rubella which resulted in the birth of a deformed infant.

Abortions for Psychiatric Disease

A different set of inequities is associated with the psychiatric aspects of abortion. In order to comply with the law, abortions for psychiatric disease can be done only if there is a risk of suicide, yet suicide is known to be rare among pregnant women. In New York City, for example, where the suicide rate among women in the reproductive age range is 5.5 per 100,000, the rate among pregnant women in 1953 was 0.5 per 100,000.[7] For this reason, some hospitals refuse to sanction any abortions on psychiatric grounds.[12] In most hospitals, however, the psychiatrists are willing to exaggerate the risk of suicide in order to protect the overall well-being of their patients. As a consequence, about 10 per cent of today's hospital abortions are done for psychiatric conditions.[1,4,8,10,11] Needless to say, it is the private patient who most often profits from this rationale. At Sloane Hospital in the 1950's there was one abortion for psychiatric reasons per 1,119 deliveries on the ward service and one per 101 deliveries on the private service.[5]

Abortion policies vary not only from hospital to hospital but also from service to service within the same hospital. They also vary widely from doctor to doctor on the same service of the same hospital. In one of the large teaching hospitals in the East, for example, the individual abortion-to-delivery ratio of its staff members ranges from 1:110 to 1:11.

The victim of all this confusion is, of course, the American female. Even if she has a legitimate reason for therapeutic abortion she must find Doctor X in hospital Y with policy Z in order to have it done. If she makes the slightest deviation from this route she must seek a criminal abortion or raise an unwanted child. And it is the unwanted child of today who becomes the battered child of tomorrow.

A growing number of prestigious individuals and organizations have recently come to recognize the enormity of this problem and to recommend the abortion law reform necessary as a first step in its solution. Among these groups are the American Law Institute, the New York Civil Liberties Union, the New York Academy of Medicine, the California Medical Association, the American Association of Planned Parenthood Physicians, and the Unitarian Universalist Church. All of these groups have given public support to proposals at least as liberal as that recommended by the American Law Institute in its Model Penal Code, which provides that abortion should be permitted when the mother's mental or physical health is endangered, when there is a significant risk of fetal deformity, and in cases of rape and incest. Bills embodying these proposals have been introduced before the Legislatures of California and New York. Although considerably less liberal than the laws in Scandinavia, Japan, the

Communist world, and the law soon to be enacted in England, these bills represent an enlightened effort to update archaic legislation.

Suggestions for APHA

The public health aspects of abortion have, in my opinion, been too long overlooked. One million cases of cholera every year would create a public health scandal, or even a million cases of rickets. But one million criminal abortions every year are embarrassingly ignored. There are three important approaches to this problem which the American Public Health Association would do well to consider: (1) The promotion of sex education in our schools. In granting that our children are participating in a sexual revolution, are we not remiss in failing to provide them with intelligent guidelines? (2) The pursuit of an active contraceptive program.[4] In recognizing that birth control is an important public health measure, are we not remiss in failing to provide it as a public health service? (3) The sponsorship of abortion law reform. In conceding that the practice of abortion in American hospitals is inequitable, inconsistent, and largely illegal and that this situation is largely due to the impossibility of practicing twentieth-century medicine under nineteenth-century law, are we not remiss in failing as individuals and as organizations to stand up and be counted?

REFERENCES

1. Boulas, S. H.; Preucel, R. W.; and Moore, J. H. Therapeutic Abortion. Obst. & Gynec. 19:222-227 (Feb.), 1960.
2. Gold, E. M.; Erhardt, C. L.; Jacobziner, H.; and Nelson, F. G. Therapeutic Abortions in New York City: A 20-Year Review. A.J.P.H. 55:964-972 (July), 1965.
3. Gold, E. M. Personal communication.
4. Guttmacher, A. F. Therapeutic Abortion in a Large General Hospital. Surg. Clin. North America (Apr.), 1957, pp. 459-469.
5. Hall, R. E. Therapeutic Abortion, Sterilization, and Contraception. Am. J. Obst. & Gynec. 91:518-532 (Feb.), 1965.
6. Jackson, A. D. M., and Fisch, L. Deafness Following Maternal Rubella. Lancet 2:1241-1244 (Dec.), 1958.
7. McLane, C. M. In: Abortion in the United States. Calderone, M. S. (ed.). New York: Paul B. Hoeber, 1958, p. 140.
8. Ninnander, K. R., and Klein, M. Changing Attitudes Toward Therapeutic Abortion. J.A.M.A. (in press).
9. Rossi, A. S. Abortion Laws and Their Victims. Trans-action 3:7-12 (Sept./Oct.), 1966.
10. Russell, K. P., and Moore, J. G. Maternal Medical Indications for Therapeutic Abortion. Clin. Obst. & Gynec. 7:43-53 (Mar.), 1964.
11. Scherman, Q. Therapeutic Abortion. Obst. & Gynec. 11:323-335 (Mar.), 1958.
12. Thornton, W. N., Jr. Therapeutic Abortion. Responsibility of the Obstetrician. Obst. & Gynec. 2: 470-475 (Nov.), 1953.
13. Warkany, J., and Kalter, H. Congenital Malformations. New England J. Med. 265:993-1001 (Nov.), 1961.
14. Westoff, C. F., and Ryder, N. B. Personal communication.

Dr. Hall is associate clinical professor of obstetrics and gynecology, Columbia University College of Physicians and Surgeons, New York, N. Y. 10032.

This paper was presented before a Joint Session of the Epidemiology and Maternal and Child Health Sections of the American Public Health Association at the Ninety-Fourth Annual Meeting in San Francisco, Calif., October 31, 1966.

[This page intentionally left blank]

Item No. 47

Therapeutic abortion, sterilization, and contraception

ROBERT E. HALL, M.D.
New York, New York

IN AN EFFORT to assess the current birth control practices in the United States, the experience of the Sloane Hospital for Women has been analyzed for the years 1951 through 1960 and a survey of 65 major American hospitals has been made. The data thus obtained will be presented in three separate parts: Therapeutic Abortion, Sterilization, and Contraception.

I. Therapeutic abortion

On Sept. 1, 1955, a Therapeutic Abortion Board was formed at Sloane Hospital. Prior to this date the mechanism for obtaining permission to perform an abortion, although it entailed approval of the Chief of Service, was considerably less formal. Since this date abortion applications have been reviewed by a three-member board composed of a senior obstetrician, internist, and psychiatrist. Because of this abrupt change in policy, the abortion cases for this study were selected from the time period between Sept. 1, 1950, and August 31, 1960.

Incidence. During these study years, the ratio of therapeutic abortions to deliveries was as follows:

	Ward	*Private*	*Total*
1950 through 1955	1:141	1:37	1:69
1956 through 1960	1:429	1:111	1:225
1950 through 1960	1:224	1:55	1:110

As can be seen from these figures the incidence of abortions following establishment of the Board has been almost precisely one third of that during the previous 5 years, and abortions were performed four times more frequently on the private service than on the ward service.

Case material. Of the 118 ward patients in this series, 69 were Caucasian, 47 were Negro, and 2 were Oriental. The Caucasian: Negro ratio of 1.5:1 is almost identical to the 1.4:1 ratio on the entire ward obstetrical service. Of the 248 private patients, 247 were Caucasian, none was Negro, and one was Oriental.

In the entire series, 15 patients were under the age of 20, 61 were between 20 and 24, 92 between 25 and 29, 84 between 30 and 34, 73 between 35 and 39, and 41 were more than 39 years old.

One hundred and ninety-nine patients were Protestant, 80 were Jewish, and 69 were Catholic. Twenty-two per cent of the white patients were Catholic.

Two hundred and seventy-six of the patients were married; 90 or 25 per cent were not.

Three hundred and nine or 84 per cent of the patients were less than 13 weeks pregnant, 51 were between 13 and 16 weeks, and 6 were between 17 and 20 weeks.

Type of surgery. The various surgical methods by which these abortions were performed are listed in Table I.

Indications. The indications for the abortions are presented in Table II.

Sterilizations. Sterilization procedures which were carried out in conjunction with

From the Department of Obstetrics and Gynecology, Columbia University, College of Physicians and Surgeons

therapeutic abortions are enumerated in Table III. Sterilizations were two and one-half times more common on the ward service.

Repeat abortions. The patients in this series who underwent more than one therapeutic abortion are recorded in Table IV. Twelve of these 20 women were sterilized at the time of their last abortion. The indications for the abortions were of a psychiatric nature in only 4 instances. Twelve were private patients and 8 were ward patients.

Legality. In New York State abortion is illegal "unless the same is necessary to preserve the life of the woman or of the child with which she is pregnant." The customary latitude adopted in interpreting this law is exemplified by the contrast between the arbitrarily compiled Groups A and B in Table V.

Experience at other hospitals. Questionnaires were sent to the directors of the obstetrical services of 65 randomly selected major hospitals, requesting the number of ward and private deliveries and therapeutic abortions performed on their services during any recent year or years. Useful information was received from the 60 hospitals listed in Table VI. As indicated by this table, 45 of the hospitals have both ward and private services, ten have ward services only, and five have private services only.

Among the 45 hospitals with both ward and private services, the incidence of therapeutic abortions was higher on the private services in 36; there were no ward or private abortions performed at five other hospitals, which reported 7,869 ward and 1,759 private deliveries; and the incidence of abortions was higher on the ward services of four hospitals which collectively performed only 8 abortions during the years chosen for review. No therapeutic abortions were done on 23 of the 55 ward and 9 of the 50 private services.

There is, of course, some statistical inaccuracy involved in appraising the combined incidence of therapeutic abortions at these various hospitals, for neither the size, the composition, nor the duration of the individual series is constant. It is nevertheless not without significance that the over-all frequency of therapeutic abortions at 60 outstanding American hospitals is 3.6 times higher on their private services than on their ward services. This is consistent with the New York City data presented in Table VII.

Comment.

The ward-private ratio of therapeutic abortions. The incidence of therapeutic abortions is strikingly higher on the private services than on the ward services. This has been observed before.[2-6] How can it be explained?

Part of the explanation lies in the dual tendency of the ward patients to register for antepartum care later in their pregnancies and to be less aware of their need to be aborted. That even this obstacle to ward-private equality can be overcome has been shown at Mount Sinai Hospital in New York, where the abortion rates for the two services between 1952 and 1955 were virtually identical.[7]

Another part of this discrepancy may be attributed to the higher incidence of abortions for psychiatric indications among private patients. Whereas at Sloane Hospital one therapeutic abortion was performed for psychiatric reasons per 1,149 deliveries on the ward service, the comparable ratio for the private service was one per 104. Psychotherapy is known to have been given to 19 of 22 ward patients (86 per cent) and only 69 of 118 private patients (57 per cent) who had abortions for psychiatric reasons. It would appear therefore that private patients

Table I. Type of surgery

	Ward	*Private*	*Total*
Curettage only	53 (45%)	175 (71%)	228
Abdominal hysterotomy and bilateral tubal ligation	41	36	77
Abdominal hysterectomy	19	8	27
Abdominal hysterotomy only	3	22	25
Curettage and bilateral tubal ligation	2	7	9

Table II. Indications in detail

	1951 through 1955		
	Ward	*Private*	*Total*
Psychiatric			
No specific diagnosis	4	37	41
Neurosis	0	21	21
Psychosis	8	44	52
	12 (14%)	102 (55%)	114
Cardiovascular			
Rheumatic	15	6	21
Hypertensive	12	5	17
Congenital	2	1	3
Other	1	0	1
	30	12	42
Pulmonary			
Tuberculosis	9	11	20
Asthma	0	2	2
Bronchiectasis	2	1	3
Sarcoidosis	1	0	1
Other	0	0	0
	12	14	26
Fetal			
Rubella	1	9	10
Rh incompatibility	0	6	6
Radiotherapy	2	0	2
Hereditary disease	1	2	3
	4	17	21
Oncological			
Breast	0	8	8
Other	2	3	5
	2	11	13
Neurological			
Multiple sclerosis	3	3	6
Brain tumor	1	0	1
Epilepsy	1	2	3
Other	4	2	6
	9	7	16
Renal			
Chronic nephritis	4	0	4
Other	0	3	3
	4	3	7
Other medical			
Arthritis	0	4	4
Lupus erythematosis	2	1	3
Colitis	1	2	3
Purpura	1	1	2
Liver disease	1	0	1
Esophageal varices	0	0	0
Diabetes	1	1	2
Otosclerosis	1	1	2
Previous toxemia	1	2	3
Recent surgery	1	2	3
Alcoholism	0	2	2
Ileitis	0	1	1
Amebic dysentery	0	1	1
Hyperemesis	0	1	1
Fibromyomas of the uterus	0	1	1
Ruptured intervertebral disc	0	1	1
Addison's disease	1	0	1
Dermatitis herpetiformis	1	0	1
Myasthenia gravis	0	0	0
Misdiagnosis	0	0	0
	11	21	32

1956 through 1960			1951 through 1960		
Ward	*Private*	*Total*	*Ward*	*Private*	*Total*
1	12	13	5	49	54
2	3	5	2	24	26
8	15	23	16	59	75
11 (33%)	30 (49%)	41	23 (19%)	132 (53%)	115
4	1	5	19	7	26
2	2	4	14	7	21
0	1	1	2	2	4
1	2	3	2	2	4
7	6	13	37	18	55
0	2	2	9	13	22
1	0	1	1	2	3
0	0	0	2	1	3
1	0	1	2	0	2
0	1	1	0	1	1
2	3	5	14	17	31
0	0	0	1	9	10
0	1	1	0	7	7
1	2	3	3	2	5
0	0	0	1	2	3
1	3	4	5	20	25
2	4	6	2	12	14
1	2	3	3	5	8
3	6	9	5	17	22
1	1	2	4	4	8
0	2	2	1	2	3
0	0	0	1	2	3
0	0	0	4	2	6
1	3	4	10	10	20
0	2	2	4	2	6
0	3	3	0	6	6
0	5	5	4	8	12
0	0	0	0	4	4
2	0	2	2	1	5
1	0	1	1	2	4
0	0	0	0	1	2
1	0	1	1	0	2
2	0	2	2	0	2
1	4	5	2	5	7
0	0	0	1	1	2
0	0	0	1	2	3
0	0	0	1	2	3
0	0	0	0	2	2
0	0	0	0	1	1
0	0	0	0	1	1
0	0	0	0	1	1
0	0	0	0	1	1
0	0	0	0	1	1
0	0	0	1	0	1
0	0	0	1	0	1
0	0	0	1	0	1
1	0	1	1	0	1
1	1	2	1	1	2
9	5	14	20	26	46

with unwanted pregnancies are more often referred for primary psychiatric evaluation and/or that psychiatric justification for abortion is more easily obtained for private patients.

But this is far from the complete explanation. As can be seen from Table II, abortions were more common among the private patients at Sloane Hospital for virtually all of the more debatable indications, such as arthritis, inactive tuberculosis, and rubella, and more common among the ward patients for most of the less debatable indications, such as rheumatic heart disease and hypertensive cardiovascular disease. Although comparably detailed information was not solicited from the 60 other hospitals, their participation in this trend is implied by their similar ward-private abortion ratios.

Further evidence of the greater liberality in the private abortion practice lies, of course, in the fact that at Sloane Hospital sterilizations accompanied abortions more than twice as often on the ward service whether the indication was psychiatric or medical.

The legality of therapeutic abortions. Today *the life of the mother* is almost never jeopardized by pregnancy, but *the mental and physical health of the mother and the proper development of the fetus* are not infrequently so jeopardized. Abortion is legally sanctioned by most states only if the former threat exists; yet abortion is medically approved and performed when the latter threats exist. The laws should be clarified to permit the indications for abortion which accepted medical practice has already legitimized.

The American Law Institute unanimously approved of a plan to liberalize our abortion laws 5 years ago. Nothing has been done to transform this proposal into legislation because no group has sought this action. Since it is the obstetricians who violate these laws, it is they, perhaps through their national societies, who should seek their renovation.

II. Sterilization

The sterilizations performed at Sloane Hospital were reviewed for the decade between Jan. 1, 1951, and Dec. 31, 1960. These procedures consisted of bilateral tubal ligations and cesarean hysterectomies. No attempt was made to determine which oophorectomies, salpingectomies, hysterectomies, or radiation castrations were performed for the primary purpose of sterilization, but this practice is uncommon at this hospital.

Table III. Sterilizations in association with therapeutic abortions

Indication for the abortion	*Ward*		*Private*		*Total*	
	No.	*%*	*No.*	*%*	*No.*	*%*
Psychiatric	7	30	18	14	25	16
Medical	55	58	33	28	88	42
Total	62	53	51	21	113	34

Table IV. Repeat therapeutic abortions during the study years

No. of patients	*No. of therapeutic abortions per patient*
1	3
7	2
2	2*
8	1*
2	1†

*Plus 1 more at Sloane Hospital or elsewhere prior to Sept. 1, 1950.

†Plus 2 more at Sloane Hospital or elsewhere prior to Sept. 1, 1950.

Incidence. The incidence of bilateral tubal ligations following vaginal deliveries of viable infants was as follows:

	Ward	*Private*	*Total*
A. No. of bilateral tubal ligations	464	137	601
B. No. of vaginal deliveries	24,406	12,120	36,526
Ratio of A:B	1:53	1:88	1:61

The incidence of sterilizations in association with cesarean sections was as follows:

	Ward	*Private*	*Total*
C. No. of bilateral tubal ligations	309	168	477
D. No. of cesarean hysterectomies	66	80	146

Table V. Legality of indications

Indication	Ward		Private	
	1951 through 1955	*1956 through 1960*	*1951 through 1955*	*1956 through 1960*
Group A				
Rubella	1	0	9	0
Rh incompatibility	0	0	6	1
Multiple sclerosis	3	1	3	1
Cancer, non-mammary	2	1	3	2
Arthritis	0	0	4	0
Epilepsy	1	0	2	0
Radiotherapy	2	1	0	2
Recent surgery	1	0	2	0
Alcoholism	0	0	2	0
Recurrent pyelitis	0	0	1	0
Asthma	0	0	2	0
Amebic dysentery	0	0	1	0
Brain tumor	1	0	0	2
Dermatitis herpetiformis	0	0	1	0
Liver disease	1	1	0	0
Anomalous children	1	0	0	0
Mental deficiency	1	0	0	0
Purpura	1	0	1	0
Otosclerosis	1	0	1	0
Diabetes	0	0	1	2
Misdiagnoses	0	1	0	1
Congenital cataracts	0	0	1	0
Fibroids	0	0	1	0
Ruptured intervertebral disc	0	0	1	0
Poliomyelitis	0	0	1	0
Previous nephrectomy	0	0	1	0
Totals	16	5	44	11
Group B				
Suicide attempt	0	0	2	0
Advanced tuberculosis	2	0	0	0
Chronic nephritis	4	0	0	1
Ureterosigmoidostomies	0	0	0	1
Severe rheumatic heart disease	3	0	2	1
Severe hypertensive disease	11	2	3	1
Expanding intracranial lesion	1	0	0	0
Intracranial aneurism	0	0	1	0
Severe congenital heart disease	0	1	1	0
Diabetes with renal damage	1	1	0	2
Totals	22	4	9	6

E. No. of cesarean sections	1,947	1,426	3,373
F. No. of nonprimary cesarean sections	866	681	1,547
Ratio of C + D:E	1:5	1:6	1:5
Ratio of C + D:F	1:2.3	1:2.7	1:2.5

The cumulative ratio of all postpartum sterilizations to all viable deliveries (A+C+D: B+E) was 1:31 or 3.2 per cent for the ward service, 1:35 or 2.9 per cent for the private service, and 1:33 or 3.0 per cent for both services.

Table VI. Incidence of ward and private therapeutic abortions at 60 hospitals

Years of report	*Institution*
1960-62	University of Iowa Hospitals
1961-62	Baylor University Medical Center, Dallas
1961-63	New York Hospital—Cornell
1960-61	Grace-New Haven Community Hospital
1960-62	University of California Hospital, San Francisco
1957-61	Johns Hopkins Hospital
1961-62	Pennsylvania Hospital
1959-62	University of Florida Hospital
1958-62	North Carolina Memorial Hospital
1961-62	Palo Alto-Stanford Hospital
6/62-5/63	St. Louis Maternity Hospital
1956-62	Providence Lying-In Hospital
1962	University of Maryland Hospital
1962	Michael Reese Hospital
1957-62	University of Mississippi Medical Center
1960-62	Woman's Hospital, New York City
1962	Albany Medical Center
1961	Medical College of Virginia Hospital
1962	Vanderbilt University Hospital
1/62-6/63	Syracuse Memorial Hospital
1956-61	Harper Hospital, Detroit
1962	Presbyterian Hospital, Denver
1962	Kapiolani Hospital, Honolulu
10/61-9/62	South Carolina Medical College Hospital
1961	Boston Lying-In Hospital
7/57-6/61	Strong Memorial Hospital, Rochester
1951-62	George Washington University Hospital
1951-62	Columbia Hospital for Women, Washington
1961-62	University of Vermont Hospitals
7/62-6/63	University of Virginia Hospital
1960-62	Ohio State University Hospital
1962-63	University of Wisconsin Hospitals
1962	University Hospitals of Cleveland
1953-62	University of Missouri Medical Center
1962	Presbyterian Medical Center, San Francisco
1962	Children's Hospital, San Francisco
1955-62	U. C. L. A. Medical Center, Los Angeles
1962	Hartford Hospital
7/60-6/61	University of Michigan Medical Center
1961-62	Evanston Hospital, Illinois
1960-62	Magee-Woman's Hospital, Pittsburgh
1962	Jackson Memorial Hospital, University of Miami
1958-62	St. Luke's Hospital, San Francisco
1962	West Virginia University Hospital
1962	University of Minnesota Hospital
	Totals
7/61-6/62	University of Illinois Research & Education Hospitals
1962	University of Nebraska Hospital
1957-62	Chicago Lying-In Hospital
1962	Louisville General Hospital
1957-62	Cincinnati General Hospital
1951-62	D. C. General Hospital, Washington
1962	Jefferson Davis Hospital, Houston
1961	Eugene Talmadge Hospital, Augusta
7/52-6/62	University of Colorado Medical Center
1/60-6/63	University of Oregon Medical Center
	Totals
1961-62	Mayo Clinic
1953-62	The California Hospital, Los Angeles
1962	Henry Ford Hospital, Detroit
7/62-6/63	Swedish Hospital, Seattle
1961	St. Luke's Episcopal Hospital, Houston
	Totals
	Grand totals

Ward			Private		
No. of deliveries	*Abortions*	*Abortions: deliveries*	*No. of deliveries*	*Abortions*	*Abortions: deliveries*
4,606	3	1:1,535	1,536	7	1:219
878	1	1:878	14,985	22	1:681
7,314	6	1:1,219	6,973	15	1:465
2,676	5	1:535	7,674	31	1:248
4,852	16	1:303	1,272	15	1:85
11,358	20	1:568	6,046	25	1:242
2,793	4	1:698	3,246	25	1:130
2,388	2	1:1,194	483	6	1:80
4,346	10	1:435	2,125	11	1:193
782	5	1:156	5,172	52	1:99
1,127	1	1:1,127	1,402	2	1:702
7,083	0	0:7,083	45,775	11	1:4,161
2,381	0	0:2,381	538	0	0:538
1,371	1	1:1,371	1,560	10	1:156
8,678	2	1:4,339	736	5	1:147
4,501	5	1:900	2,023	101	1:20
552	0	0:552	1,857	1	1:1,857
4,529	3	1:1,510	1,455	2	1:728
793	0	0:793	393	1	1:393
606	0	0:606	3,800	3	1:1,267
2,595	0	0:2.595	11,051	3	1:3,684
423	0	0:423	1,895	5	1:379
390	1	1:390	4,092	3	1:1,364
2,147	0	0:2,147	208	0	0:208
2,181	8	1:273	3,926	24	1:164
4,765	2	1:2,383	5,824	13	1:448
4,324	1	1:4,324	38,917	178	1:218
1,345	0	0:1,345	3,756	30	1:125
677	1	1:677	3,900	7	1:557
1,535	0	0:1,535	529	0	0:529
7,360	2	1:3,680	3,927	4	1:982
275	2	1:138	207	0	0:207
1,618	8	1:202	2,526	19	1:133
2,388	1	1:2,388	724	0	0:724
241	0	0:241	613	17	1:36
286	0	0:286	1,719	20	1:86
6,634	20	1:332	2,951	36	1:82
621	0	0:621	4,886	18	1:271
1,086	0	0:1,086	373	0	0:373
373	0	0:373	3,944	4	1:986
4,666	2	1:2,333	13,152	15	1:877
3,361	0	0:3,361	1,242	3	1:414
1,773	0	0:1,773	5,383	9	1:598
302	1	1:302	308	0	0:308
720	0	0:720	120	0	0:120
125,700	**133**	**1:945**	**225,700**	**753**	**1:300**
2,500	2	1:1,250			
908	0	0:908			
14,332	63	1:227			
2,831	0	0:2,831			
24,417	0	0:24,417			
71,705	5	1:14,341			
6,500	0	0:6,500			
1,041	0	0:1,041			
13,563	24	1:565			
5,429	7	1:776			
143,226	**101**	**1:1,417**			
			3,439	5	1:688
			17,911	40	1:488
			1,300	4	1:325
			2,786	3	1:927
			2,969	0	0:2,969
			28,405	**52**	**1:546**
268,926	**234**	**1:1,149**	**253,652**	**805**	**1:315**

Table VII. Incidence of therapeutic abortions at various types of hospitals in New York City, 1957-1960[1]

Type of hospital	*Ratio of therapeutic abortions to live births*
Proprietary	1:204
Voluntary, private service	1:417
Voluntary, ward service	1:1,667
Municipal	1:5,000

Table VIII. Indications for postpartum and postabortal sterilizations

	No. of ward cases	*No. of private cases*	*Total No. of cases*
Category 1 (slight medical disease)			
Rh or ABO incompatibility	9	9	18
Emotional disturbance	9	8	17
Varicose veins	2	6	8
Habitual abortions	5	1	6
Moderate hypertension	3	0	3
Sickle cell trait	2	0	2
Recurrent toxemia	2	0	2
Recurrent hyperemesis	1	0	1
Recurrent delivery complications	1	0	1
Liver disease	1	0	1
Syphilis	1	0	1
Neurodermatitis	1	0	1
Tuberculosis, husband	1	0	1
Cataracts	0	1	1
Arrested tuberculosis	0	1	1
Category 2 (serious medical disease)			
Heart disease	22	5	27
Severe hypertension	26	1	27
Rh sensitization	12	7	19
Diabetes	8	2	10
Renal disease	8	2	10
Psychosis	9	0	9
Active tuberculosis	7	0	7
Thrombophlebitis	3	4	7
Familial diseases	3	3	6
Epilepsy	3	2	5
Sickle cell anemia	3	0	3
Intracranial aneurism	2	0	2
Addison's disease	2	0	2
Multiple sclerosis	2	0	2
Asthma	2	0	2
Miscellaneous	14	1	15
Category 3 (parity in excess of 4)	302	36	338
Category 4 (no medical disease; parity less than 5)	7	54	61

In addition to the postpartum sterilizations there were the following:

	Ward	*Private*	*Total*
G. Bilateral tubal ligations following spontaneous abortions	9	6	15
H. Bilateral tubal ligations at laparotomy for ectopic pregnancies	2	0	2
I. Bilateral tubal ligations with therapeutic abortions	62	51	113
J. Interval tubal ligations	59	39	98

The yearly incidence of sterilizations between 1951 and 1960 remained remarkably constant for all of the above categories except for the interval sterilizations on the ward service, 66 per cent of which were performed during the last three years of the study period.

Since the subjects of postpartum and interval sterilizations are slightly different, they will be discussed separately.

Puerperal sterilizations.

Case material. The following data pertain to the patients in Categories A and G above. The cases of sterilization associated with cesarean sections were not analyzed in detail.

Two hundred and forty-two of the ward patients were Negro, one was Oriental, and 230 were Caucasian. This Caucasian:Negro ratio of 0.95:1 is considerably lower than the 1.4:1 ratio for the entire ward obstetrical service. Of the private patients, three were Negro and 140 Caucasian.

Excluding the Negroes and Puerto Ricans, 69 per cent of the 163 remaining ward patients and 25 per cent of the remaining 138 private patients were Catholic.

The average age of the ward patients was 32.2 years; of the private patients, 33.7. Thirty-one per cent of the ward patients were under the age of 30, as opposed to 14 per cent of the private patients.

*Indications.** For the purpose of analytic simplification, the indications for postpartum

*Generally speaking, postpartum sterilization is permissible at Sloane Hospital for medical indications, repeat cesarean sections, and parity in excess of four.[3]

and postabortal sterilizations were grouped into the four categories shown in Table VIII. The relative frequency of these various categories is outlined in Table IX. Fifty-four per cent of the private cases and 6 per cent of the ward cases fell into Category 1 (slight medical disease) or Category 4 (no medical disease, parity less than 5). Moreover, the parity of the private patients in Categories 1 and 4 was three or less in 49 per cent (25 patients were para iii, 13 were para ii, one was para i), whereas the parity of the ward patients was three (never less) in only 13 per cent (6 patients).

Parity. The average parity of the ward patients was 6.1, and of the private patients 3.8.

Experience at other hospitals. Of the 65 hospitals in the survey, useful information about postpartum sterilizations was received from the 53 listed in Table X. Since it was unclear from some of the replies whether sterilizations at the time of cesarean sections and abortions were included among the data submitted, it is probably reasonable to assume that the actual incidence of postpartum sterilization is slightly higher than that shown by this table. Although the range from one sterilization per eleven deliveries to one per 467 deliveries on the ward services and from 1:10 to 1:483 on the private services is wide, the over-all minimum average incidence of 2.5 per cent (10,075 sterilizations among 409,374 deliveries, including the Sloane Hospital figures) is probably fairly accurate.

The ward and private rates in this series (including the Sloane Hospital figures) were 2.4 per cent and 2.2 per cent respectively. A similar survey by Starr and Kosasky[9] of 5,673 puerperal sterilizations among 177,433 live births revealed a ward rate of 3.0 per cent and a private rate of 3.3 per cent. These sets of incidence figures are generally in keeping with those reported elsewhere.[10-14]

Comment.

1. The ward-private ratio of puerperal sterilizations. The fact that the ward and private sterilization rates are virtually identical is deceptive, for it suggests the incorrect conclusion that ward and private patients are sterilized in accordance with similar standards. That a double standard does actually pertain to the practice of sterilization as well as abortion is indicated in part by the fact that the average parity of the ward and private patients sterilized at Sloane Hospital was 6.1 and 3.8, respectively, and the medical indications for these sterilizations were debatable in 54 per cent of the private cases and only 6 per cent of the ward cases. There is no reason to believe that similar disparities do not prevail at other hospitals.

2. The legality of sterilizations. There are two states (Virginia and North Carolina) which have recently enacted laws permitting sterilization for any reason considered sufficient by two physicians and specifically protecting these doctors from legal redress. These laws are not ideal. In the first place they require a thirty-day waiting period between patient permission and medical action, thus rendering postpartum sterilization practically impossible for the late antepartum registrant. Secondly, they require hospitalization of the patient, thus complicating the simple office procedure of vasectomy. Thirdly, and perhaps worst of all, the very existence of these laws in two states has led many of the physicians in the other 48 states to fear that they should be similarly protected in order to perform a sterilizing procedure.

What is the need for such laws? There is no legal precedent to support the physician's fear that freely requested and medically sanc-

Table IX. Frequency of indications for postpartum and postabortal sterilizations

	Ward	*Private*	*Total*
Category 1			
Parity of 4 or less	23	23	46
Parity of 5 or more*	15	3	18
Category 2			
Parity of 4 or less	76	23	99
Parity of 5 or more*	50	4	54
Category 3*	302	36	338
Category 4	7 (1.5%)	54 (38%)	61

*Total with parity of 5 or more was 410; 367 (78 per cent) were ward and 43 (30 per cent) were private patients.

Table X. Incidence of ward and private postpartum sterilizations in 53 hospitals

Years of report	Institution	Ward			Private		
		No. of deliveries	No. of sterilizations	Sterilizations: deliveries	No. of deliveries	No. of sterilizations	Sterilizations: deliveries
1961-62	Baylor University Medical Center, Dallas	878	11	1:80	14,985	719	1:21
1960-61	Grace-New Haven Community Hospital	2,676	57	1:47	7,674	135	1:56
1960-62	University of California Hospital, San Francisco	4,852	177	1:27	1,272	31	1:36
1957-61	Johns Hopkins Hospital	11,358	538	1:21	6,046	72	1:84
1961-62	Pennsylvania Hospital	2,793	71	1:39	3,246	121	1:27
1959-62	University of Florida Hospital	2,388	44	1:22	482	1	1:483
1958-62	North Carolina Memorial Hospital	4,346	43	1:101	2,125	16	1:133
1961-62	Palo Alto-Stanford Hospital	782	29	1:27	5,172	130	1:40
6/62-5/63	Washington University Hospital, St. Louis	1,127	30	1:38	1,402	39	1:36
1956-62	Providence Lying-In Hospital	7,083	91	1:78	45,775	316	1:145
1962	University of Maryland Hospital	2,381	39	1:61	538	42	1:13
1962	Michael Reese Hospital	1,371	50	1:37	1,560	31	1:50
1960-62	Woman's Hospital-St. Luke's	4,501	182	1:25	2,023	74	1:27
1962	Albany Medical Center	552	4	1:138	1,857	10	1:186
1961	Medical College of Virginia Hospital	4,529	403	1:11	1,455	80	1:18
1962	Vanderbilt University Hospital	793	71	1:11	393	39	1:10
1/62-6/63	Syracuse Memorial Hospital	606	0	0:606	3,800	24	1:158
1956-61	Harper Hospital, Detroit	2,595	97	1:27	11,051	264	1:42
1962	Presbyterian Hospital, Denver	423	14	1:30	1,895	127	1:15
1962	Kapiolani Hospital, Honolulu	390	22	1:16	4,092	236	1:17
10/61-9/62	South Carolina Medical College Hospital	2,147	51	1:42	208	8	1:26
1961	Boston Lying-In Hospital	2,181	47	1:46	3,926	105	1:37
7/57-6/61	Strong Memorial Hospital, Rochester	4,765	46	1:104	5,824	72	1:64
1961-62	University of Vermont Hospitals	677	39	1:17	3,900	83	1:47
7/62-6/63	University of Virginia Hospital	1,535	85	1:18	529	10	1:53
1962-63	University of Wisconsin Hospitals	275	5	1:55	207	3	1:69
1962	University Hospitals of Cleveland	1,618	28	1:58	2,526	104	1:24
1962	Presbyterian Medical Center, San Francisco	241	8	1:30	613	16	1:38
1962	Children's Hospital, San Francisco	286	9	1:32	1,719	30	1:57
1955-62	U. C. L. A. Medical Center, Los Angeles	6,634	82	1:81	2,951	40	1:74
1962	Hartford Hospital	621	8	1:78	4,886	83	1:59
7/60-6/61	University of Michigan Medical Center	1,086	11	1:99	373	3	1:126

Table X. Cont'd

Years of report	Institution	Ward			Private		
		No. of deliveries	No. of sterilizations	Sterilizations: deliveries	No. of deliveries	No. of sterilizations	Sterilizations: deliveries
1960-62	Ohio State University Hospital	7,360	294	1:25	3,927	240	1:16
1961-62	Evanston Hospital	373	19	1:20	3,944	163	1:24
1960-62	Magee-Woman's Hospital, Pittsburgh	4,666	10	1:467	13,152	226	1:58
1962	Jackson Memorial Hospital, Miami	3,361	12	1:280	1,242	15	1:83
1958-62	St. Luke's Hospital, San Francisco	1,773	19	1:93	5,383	77	1:70
1962	West Virginia University Hospital	302	15	1:20	308	7	1:44
1962	University of Minnesota Hospital	720	15	1:48	120	1	1:120
	Totals	96,967	2,776	1:35 (2.9%)	172,582	3,793	1:45 (2.2%)
7/61-6/62	University of Illinois Research & Education Hospitals	2,500	41	1:61			
1962	University of Nebraska Hospital	908	29	1:31			
1957-62	Chicago Lying-In Hospital	14,332	617	1:64			
1962	Louisville General Hospital	2,831	55	1:51			
1957-62	Cincinnati General Hospital	24,417	235	1:104			
1962	Jefferson Davis Hospital, Houston	6,500	262	1:25			
1961	Eugene Talmadge Hospital, Augusta	1,041	19	1:55			
7/52-6/62	University of Colorado Medical Center	13,563	225	1:60			
1/60-6/63	University of Oregon Medical Center	5,429	224	1:24			
	Totals	71,521	1,707	1:42 (2.4%)			
1961-62	Mayo Clinic				3,439	26	1:132
1953-62	The California Hospital, Los Angeles				17,911	294	1:448
7/62-6/63	Swedish Hospital, Seattle				2,786	113	1:25
1961	St. Luke's Episcopal Hospital, Houston				2,969	111	1:27
1962	Henry Ford Hospital, Detroit				1,300	31	1:42
	Totals				28,405	575	1:49 (2.0%)
	Grand totals	168,488	4,483	1:38 (2.6%)	200,987	4,368	1:46 (2.2%)

tioned sterilization procedures are forensically indefensible. As a matter of fact, in the only sterilization case ever tried on medical grounds in a United States' court it was held that [even] vasectomy does not constitute mayhem.[15]

Once again, since this is primarily an obstetrical issue, it should be resolved by obstetricians. With or without the formality of legislation, some representative body of obstetricians should establish an acceptable code of sterilization ethics.

Interval sterilizations.

Incidence. At Sloane Hospital during the years of 1951 through 1960 there were 59 interval sterilizations on the ward service

and 39 on the private service. One such procedure was performed for every 448 ward deliveries and for every 351 private deliveries. This ratio is of course less meaningful for this particular type of operation, but it is the only parameter available by which the frequency of this practice can be measured.

Case material. Forty-five of the 59 ward patients were Caucasian, 13 were Negro, and one was Oriental. All of the 39 private patients in this group were Caucasian.

Excluding the Negroes and Puerto Ricans, 75 per cent of the 24 remaining ward patients and 21 per cent of the 39 private patients were Catholic.

Fifty-three (90 per cent) of the ward patients lived in New York City; the remaining 6 lived elsewhere in New York State. Twelve (31 per cent) of the private patients lived in New York City, 11 elsewhere in New York State, and 16 in some other state.

The average age of the ward patients was 33.2 and of the private patients 34.0 years.

The average parity of the ward patients was 4.3, of the private patients 3.0.

Type of surgery. All of the sterilizations in this group were accomplished by bilateral tubal ligation. The approach to the tubes (whether abdominal or vaginal) and the nature of coincidental surgery (abdominal or vaginal), if any, are given in Table XI.

Indications. The various indications for which these sterilizations were done is shown in Table XII and the relative frequency of these five categories in Table XIII. Forty-nine per cent of the private cases and 8 per cent of the ward cases fell into Category 1 (slight medical disease) or Category 4 (no medical disease, parity less than 5).

Experience at other hospitals. Accurate data on the practice of interval sterilizations are difficult to obtain. The survey of 65 hospitals yielded the following: 34 hospitals reported 647 ward interval sterilizations and

Table XI. Surgical approach for interval sterilizations

Approach to sterilization	*Approach to coincidental surgery, if any*	*Ward*	*Private*	*Total*
Abdominal	None	11	16	27
Abdominal	Abdominal	1	10	11
Abdominal	Vaginal	11	6	17
Vaginal	None	15	0	15
Vaginal	Vaginal	21	7	28

Table XII. Indications for interval sterilizations

	No. of ward cases	*No. of private cases*	*Total No. of cases*
Category 1 (slight medical disease)			
Arrested tuberculosis	2	0	2
Varicose veins	0	2	2
Recurrent pyelonephritis	0	1	1
Muscular dystrophy, husband	0	1	1
Cerebral spasm with last pregnancy	0	1	1
Recent spinal fusion	1	1	2
Previous postpartum depression	0	1	1
Cervical amputation for leukorrhea	0	1	1
Neurosis	0	1	1
Habitual abortions	0	1	1
Moderate hypertension	1	0	1
Pachyonychia congenita	1	0	1
Mental depression	1	0	1
Category 2 (serious medical disease)			
Asthma	3	0	3
Heart disease	1	0	1
Psychosis	1	0	1
Ruptured intervertebral disc	1	0	1
Rheumatoid arthritis	1	0	1
Hereditary C. N. S. lesion	1	0	1
Postconcussion syndrome	0	1	1
Postpartum psychosis	0	1	1
Active tuberculosis	0	1	1
Category 3 (parity in excess of 4)	12	3	15
Category 4 (no medical disease, parity less than 5)	1	11	12
Category 5 (coincidental colporrhaphy)	32	12	44

XIII. Frequency of indications for interval sterilizations

	No. of ward cases	*No. of private cases*	*No. of cases*
Category 1			
Parity of 4 or less	4	8	12
Parity of 5 or more*	2	2	4
Category 2			
Parity of 4 or less	4	3	7
Parity of 5 or more*	4	0	4
Category 3*	12	3	15
Category 4	1	11	12
Category 5			
Parity of 4 or less	23	11	34
Parity of 5 or more*	9	1	10

*Total number with parity of 5 or more was 33; 27 (46 per cent) were ward and 6 (15 per cent) were private patients.

Table XIV. Frequency of contraceptive advice given to the ward patients of 55 hospitals

	No. of hospitals
Unknown	18
None	13
Less than 26 per cent	9
26 to 50 per cent	10
51 to 75 per cent	2
More than 75 per cent	3

102,849 ward deliveries, a ratio of 1:159; and 27 hospitals reported 595 private interval sterilizations and 126,674 private deliveries, a ratio of 1:213.

Comment. It is generally believed that tubal ligations should be performed almost exclusively in the puerperium. Hence, only 7 per cent of the sterilizations in the Sloane Hospital series were done on an interval basis, 35 per cent of these were done in conjunction with a colporrhaphy, and 21 per cent were done within 6 months of delivery. This belief needs reappraisal. Why should a patient be denied sterilization just because her youngest child is 2 years instead of 2 days old?

III. Contraception

Precise information with regard to the number of Sloane Hospital private and ward patients who have obtained contraceptive advice is unavailable. One approximate fact is known: about 275 new ward patients were seen in the contraceptive clinic every year between 1951 and 1960 and, hence, about 2,750 during the decade. Since there were 29,286 ward deliveries during these years, approximately 9.4 per cent of the ward patients received contraceptive advice. On the other hand, a poll of the attending physicians reveals that contraceptive advice was made available to all of the private patients who wanted it.

Experience at other hospitals. Precise data on the availability of contraceptive advice were also impossible to obtain from the 65 hospitals surveyed. The approximate calculations submitted from the ward services of 55 hospitals are shown in Table XIV. Of the 37 hospitals which estimated the incidence of giving contraceptive advice to their ward patients, 13 reported no contraceptive service, 19 reported an estimate of less than 50 per cent, and five an estimate of more than 50 per cent. Yet it must be safe to assume that contraceptive advice was available to virtually all of the private patients who wanted it.

Comment. The American College of Obstetricians and Gynecologists has already officially approved the principle of providing contraception to all who desire it. It now devolves upon the obstetricians of this country to convert this principle into fact.

Conclusion

The institution and implementation of birth control measures are primarily medical matters. The obstetrician's obligation to provide abortion, sterilization, and contraception is inadequately and inequitably met at the moment. The obstetricians of America must individually and collectively review these vital issues in an effort to establish a more uniformly humane birth control ethic.

REFERENCES

1. Gold, E. M.: Personal communication.
2. Tietze, C: Am. J. Obst. & Gynec. 60: 146, 1950.
3. Gebhard, P. H., Pomeroy, W. B., Martin, C. E., and Christenson, C. V.: Pregnancy, Birth, and Abortion, New York, 1958, Harper & Bros, and Paul B. Hoeber, Inc., p. 196.
4. Kleegman, S. J.: *In* Rosen, H., editor: Therapeutic Abortion, New York, 1954, Julian Press, Inc., p. 254.
5. Erhardt, C.: *In* Calderone, M. S., editor: Abortion in the United States, New York, 1958, Paul B. Hoeber, Inc., p. 77.
6. Mandy, A. J.: *In* Rosen, H., editor: Therapeutic Abortion, New York, 1954, Julian Press, Inc., p. 284.
7. Guttmacher, A. F.: Surg. Clin. North America 37: 459, 1957.
8. D'Esopo, D. A.: Bull. Sloane Hosp. for Women 7: 134, 1961.
9. Starr, S. H., and Kosasky, H. J.: Am. J. Obst. & Gynec. 88: 944, 1964.
10. August R. V.: Obst. & Gynec. 5: 715, 1955.
11. Savel, L. E., and Perlmutter, I. K.: Am. J. Obst. & Gynec. 80: 1192, 1960.
12. Lull, C. B., and Mitchell, R. M.: Am. J. Obst. & Gynec. 59: 1118, 1950.
13. Barnes, A. C., and Zuspan, F. P.: Am. J. Obst. & Gynec. 75: 65, 1958.
14. Prystowsky, H., and Eastman, N. J.: J. A. M. A. 158: 463, 1955.
15. Christensen versus Thornby, 255, N. W. 620 (Minnesota 1934).

622 West 168th Street
New York, New York 10032

Therapeutic abortion follow-up study

ALAN J. MARGOLIS, M.D.
LESLIE A. DAVISON, PH. D.
KARL H. HANSON, M.D.
SALLY A. LOOS, M.S.W.
CYNTHIA M. MIKKELSEN, M.S.W.
San Francisco, California

A heterogeneous group of pregnant women petitioned for abortion because of possible impairment of mental and/or physical health; 43 of 50 were followed for 3 to 6 months. Ambivalence and guilt appeared more substantially in young women under 18 years of age. Three to 6 months afterward, 29 patients expressed a positive reaction toward abortion, 10 reported no significant change in their life situations and 4 responded negatively. Of the 41 patients remaining fertile, 4 had purposely become pregnant again; 8 others were apparently without consistent contraception. It was concluded that preabortion counseling should outline the necessary steps for Committee consideration, give reassurance as to physical safety, and help the patient understand her motives and goals. Postabortion follow-up should emphasize a clear contraceptive program.

INDUCED ABORTION has become a major method of birth control in many parts of the world. Throughout the United States in the past 3 years, there have been significant modifications of a number of restrictive state abortion laws. Sloane's[1] recent review summarizes the current medical and social dilemma over this problem and concludes that psychiatric labels often mask humanitarian reasons for bortions.

After the 1967 abortion law revision in California, there was a rapid evolution in this field. With the ensuing increase in legal abortions, it became possible to study prospectively a heterogeneous group of women who desired abortions for a variety of reasons. This is a preliminary report on the follow-up of such a study group.

From the Departments of Obstetrics and Gynecology, Psychiatry, and Social Work, University of California–San Francisco.

Presented at the Thirty-seventh Annual Meeting of the Pafific Coast Obstetrical and Gynecological Society, Kauai, Hawaii, November 9-14, 1970.

Patients and procedures

From November 1, 1967, to June 30, 1968, 55 women applied to the staff of the Obstetrical Service of the University of California–San Francisco for termination of pregnancy because of its possible significant impairment of their mental or physical health. The screening procedures used in this study included: (1) a self-administered questionnaire* at the time of initial application for abortion, which provided demographic data and pertinent information; (2) a Minnesota Multiphasic Personality Inventory (MMPI) profile prior to abortion and again 3 to 6 months later (this test was omitted when cultural or linguistic factors obviated its use); (3) a psychiatric evaluation of the degree of psychiatric illness and/or possible effects of pregnancy on the patient's mental health; (4) a semistructured interview* by a social worker (adapted from Simon and associates[2]) 3 to 6 months after the abortion to

*Available on request to Dr. Davison, Adult Psychiatric Clinic, University of California–San Francisco, San Francisco, California 94122.

Table I. Therapeutic abortion committee results (Novemeber, 1967, to June, 1968)

Total No. of patients considered	55
Abortion refused	4
3 aborted elsewhere	
1 delivered twins at term, had tubal ligation	
Abortion granted	51
6 medical indications	
44 psychiatric indications	
1 refused and went to term	
Follow-up	
Complete	43
Incomplete	7

assess the postabortal responses and psychosocial situation.

The abortion techniques included dilatation and curettage in early weeks of pregnancy (in 2 women), aspiration (in 29), hypertonic injection (in 9), and hysterotomy (in 1). At the patients' own request, tubal ligation was also done in 4 who had aspiration abortion, in one with hypertonic injection, and in one with hysterotomy; 3 also had hysterectomies.

Results

The Therapeutic Abortion Committee (Table I) accepted 51 of the 55 women who applied, one of whom subsequently elected to carry her pregnancy to term. Three were rejected on the basis of insufficient evidence to substantiate impairment of mental health and obtained abortions elsewhere. A fourth patient, who was rejected because abortion seemed psychiatrically contraindicated, was delivered of twins at term and had a tubal ligation.

Information accrued (Table II) from the self-administered questionnaire showed a wide age range—from 13 to 44 years, with 46 per cent of patients falling between 21 and 26 years. Thirty-six were in the first trimester at the time of abortion, despite the 10 to 14 day preabortion procedures. The psychiatric evaluations at the time of approval included 15 with a situational reaction, 14 with neurosis, 10 with character disorders, 6 who had a major psychotic illness

Table II. Demographic data on 51 patients

Age (years)	
13-14	3
15-19	6
20-24	19
25-29	8
30-34	7
35-39	2
40 and over	6
Marital status	
Never married	23
Married or common-law relationship	21
Separated, divorced, or widowed	7
Race	
Caucasian	41
Negro	7
Filipino	2
Oriental	1
Education	
Below high school graduate	11
High school graduate	14
Some college	26
Income (self or family)	
$10,000 or more	8
5,000-10,000	13
3,000 - 5,000	12
3,000 or less, and welfare	13
Unknown	5
Patient status	
Private	15
Staff	36
Prior pregnancies	
None	19
Term or premature delivery	25
Spontaneous abortion only	1
Induced abortion	6
Present pregnancy (weeks' gestation)	
6-9	6
10-13	30
14-20	15
Contraception	
None or irregular	21
Rhythm, douche	4
Withdrawal, Foam	7
Condom, diaphragm	6
Intrauterine device	3
Oral contraceptive	9
Unknown	1
Prior sociopsychiatric assistance	
None	24
Individual psychotherapy	21
Hospital or day care	4
Group therapy	1
Social work interviews	1

Table III. Pregnancies following therapeutic abortion

Age	*Marital status*	*Prior pregnancies*	*Indications for abortion*	*Months to conception following abortions*	*Comments*
26	Common-law relationship	2 Illegal abortions	Mental health	5 months	Conceived intentionally in same relationship that prompted therapeutic abortion; now felt more secure and continued pregnancy.
26	Married	2 Term deliveries 1 Spontaneous abortion	Recurrent sarcoma	2 months	Regretful that abortion and chemotherapy did not influence extensive sarcoma; continued pregnancy.
22	Common-law relationship	1 Term delivery 2 Illegal abortions	Mental health	6 months	Therapeutic abortion for pregnancy by undetermined father; currently pregnant by man whom she has married; continued pregnancy.
16	Single	None	Mental health	2 months	Felt forced to abortion by family; conceived again and continued pregnancy.

concurrent with the pregnancy or in the immediate past, and 6 who had no obvious psychiatric problems.

Four to 6 months after abortion, the follow-up interview on 43 patients indicated that 22 had positive psychological changes, demonstrated by growth experience, increased empathy, increased sense of freedom, and greater sense of femininity. Seven reported other positive changes, such as less fear of pregnancy assured by sterilization or knowledge of better birth control methods, and improved marital or family relations. Four had negative reactions, such as guilt or fear of men, and 10 indicated no change in attitude.

The patients' principal fears of abortion were concerned with the possibility of injury as a result of the abortion technique (in 21 women), its effect on mental or physical health (in 6), retaliation by others or by one's own conscience (in 5), feelings about destroying living tissue (in 3), and Committee rejection (for 2). In the postabortion follow-up, 36 expressed negative reactions centered around the ignorance of the procedural technicalities (in 12), the time required for processing (in 13), and some apparently embarrassing personal encounters during the experience (in 11). The 25 positive responses indicated good supportive help from various staff members. The principal suggestion by the patients was a request for more available public information and less complex application requirements.

Of the 41 aborted women who were not sterilized, 4 became pregnant again (Table III). In each case the pregnancy was consciously sought for a variety of reasons. In 2, the abortion was a regretful experience, while in the other 2 the abortion seemed to have allowed more stable life situations to become manifest. In addition to the 16 year old, who was pregnant again, a 13 year old and a 14 year old also regretted their preabortion decisions; all three felt very guilty and believed they had injured a living being.

The mean preabortion MMPI showed abnormal elevations on the scales depicting depression, psychopathic deviation, and schizophrenia. A study of 36 paired pre- and post-abortion profiles showed that 15 of the 27 initially abnormal tests became essentially normal after abortion. This was a significant change ($P < 0.002$) by a test for correlated proportions.

In response to several questions designed to detect mixtures of feelings, 17 of those responding reported some guilt, and 20 had some ambivalence. Nevertheless, in a direct query as to whether they would repeat the abortion under similar circumstances,

Table IV. Recent therapeutic abortion follow-up studies within the United States

Source of data	*Years of study*	*Sample size studied*	*Total group aborted*	*Age (mean or range)*
Peck and Marcus,[3] Mt. Sinai Hospital, New York	1963 to 1665	50	85	20-40
Simon and associates,[2] Jewish Hospital of St. Louis	1955 to 1964	46	65	Not stated
Patt and colleagues,[4] Michael Reese Hospital, Chicago	1964 to 1968	35	48	23
Levene and Rigney,[5] San Francisco	1968	56	70	21
This study	1968	43	50	13-44

37 said they would, 6 were unsure, and 2 would have refused.

In contrast to the generally poor preabortion contraceptive practices, 25 patients were taking oral birth control pills 3 to 6 months after abortion. Two patients were satisfied with IUD's, and one patient used a diaphragm, and one used a condom. Six patients refused birth control advice, and 6 patients did not return for a postabortal doctor visit.

After therapeutic abortion, 3 patients initiated psychotherapy, and 11 continued psychiatric care, while 6 had short-term, problem-directed interviews with a psychiatrist or social worker. Twenty-three women had no sociopsychiatric follow-up observation beyond the tests made to complete this study.

Comment

Our data corroborate 4 recent studies of therapeutic abortion patients in the United States (Table IV), which show that terminations of pregnancy do not tend to aggravate mental illness and are often helpful to the life situation adjustment of these patients. The legal, social, and medical sanction for interruption of pregnancy results in minimizing untoward guilt and depressive reactions, leaving the great majority of women with a sense of rightness of their pregnancy terminations, now culturally approved.

Of particular concern to us, however, are the pregnant girls under 18. Although our study group was small, we encountered a great deal of ambivalence and guilt. As a result, we feel that especially careful evaluation and counseling should be provided for them and their families. The alternative of a teen-ager carrying a pregnancy to term presents great difficulties for the teen-ager and her child, and the delicate balancing of risks often requires the most expert collaborative effort of physician, psychiatrist, and social worker.

A large number of patients used oral contraceptives regularly after abortion; however, 8 women were apparently without satisfactory birth control advice 3 to 6 months afterward. Although they were not pregnant, they constitute a significant group of potential repeaters. It is mandatory that a therapeutic abortion unit place a high priority on understanding the patient's attitude toward birth control and help her to choose a method which she will use regularly.

The things that concerned our patients most about abortion were ignorance of what to expect in the preliminary screening process and fear of the physical danger of the

Marital status	*Socioeconomic status*	*Indication for abortion*	*General impression of outcome*
Mostly married	Caucasian Jewish private patients	25 Psych. 25 Nonpsych.	"The psychiatric status of 92 per cent . . . improved or unchanged. . . ." "Ninety-eight per cent . . . would . . . with hindsight . . . again elect abortion in perference to continuing pregnancy in question."
Not stated	Well-educated Caucasian Protestant or Jewish patients	16 Psych. 30 Nonpsych.	"Little new psychiatric illness . . . that could be related to abortion."
23 Unmarried 12 Married	31 Private patients 4 Staff service	35 Psych.	". . . with rare exceptions, abortion was genuinely therapeutic."
59 Unmarried 11 Married	70 Private patients	70 Psych.	"Properly done induced abortion does not in itself result in significantly noxious emotional sequelae."
22 Unmarried 21 Married 7 Separated	15 Private patients 36 Staff service	44 Psych. 6 Nonpsych.	29 patients expressed positive reaction after abortion; 10 reported no significant change; 4 responded negatively.

surgical procedure. Both of these areas should be emphasized in the preabortion counseling, as well as the fact that few requests for therapeutic termination are denied. Concerns over time schedule or anonynity can quickly be dispelled. The conflicting feelings arising from conscience or fear of family repercussions can be pinpointed for more intensive follow-up.

As a result of our study, we have tried to shorten the time between patient application, Committee decision, and abortion, as well as to minimize cost and provide efficient, effective care by come-and-go abortion procedures in the first trimester. At present, the time interval from first contact to abortion ranges from 36 hours to 2 weeks.

Since California law and others modeled on American Law Institute recommendations do not specify that a psychiatrist must attest to the degree of mental health impairment of the patient, we have encouraged the patient's physician to make that assessment. If a psychological problem is unresolved, or if the patient is grossly disturbed, a psychiatric consultation is obviously important. However, an interested and concerned obstetrician can usually make the necessary observations to permit a final judgment by the Committee. Currently, a formal psychiatric consultation is presented to the Committee in 10 per cent of the staff cases and in 20 per cent of the private cases.

For many women, therapeutic abortion will become an increasingly frequent alternate to a stressful pregnancy. An estimated 60,000 abortions will have been done in California during 1970. Such a procedure must continue to be carefully scrutinized so that it will be associated with minimal hazards and maximum efficiency and effectiveness.

REFERENCES

1. Sloane, R. B.: New Eng. J. Med. 280: 1206, 1969.
2. Simon, N. M., Senturia, A. G., and Rothman, D.: Amer. J. Psychiat. 124: 59, 1967.
3. Peck, A., and Marcus, H.: J. Nerv. Ment. Dis. 143: 417, 1966.
4. Patt, S. L., Rappaport, R. G., and Barglow, P.: Arch. Gen. Psychiat. 20: 408, 1969.
5. Levene, H., and Rigney, F.: J. Nerv. Ment. Dis. 151: 51, 1970.

Discussion

Dr. John C. McDermott, San Mateo, California. Dr. Margolis, along with many others, recognizes that abortion is not a simple matter and that problems other than morbidity and deaths are involved. He has attempted a prospective study for which he should be commended but to believe that observations over the 6 month postabortal period are of much importance is to give them more weight than they deserve. While anecdotal discussion is derogated by our scientific colleagues, my thoughts go back to the time I started private practice in 1936. During the great depression, abortions were as popular as they are today. At that time, most abortions were done by experts, since staying out of San Quentin was a strong incentive. They were also done early, a factor favoring a good outcome. As the depression receded, the number of infertility patients was high. Careful study disclosed a history of induced abortion in many. Among these persons, the feeling of guilt was great, and they were difficult to handle. Fortunately in most cases the blocked tubes opened up 6 to 8 years post abortion, and pregnancies ensued to the point where the problem was one of the opposite sort.

As chairman of the abortion committee from the time the California abortion law was changed to the present time, I have been forced to learn about a whole group of persons whose values differ from mine in almost all respects. These values do not stem from tradition but seem to represent those in the nonthinkers who dominate the news media. Samples of this thinking are: "If you feel like doing something, do it. Don't take a chance on injuring your psyche by any sexual repression. If anyone warns you of dangers in your course of action, ignore him because he represents the "straight" generation. Don't use birth control pills, they're dangerous. Do have an abortion, it's simple, quick, and safe." I could go on with samples of cliches promoted by news media—unfortunately supported by enthusiasts in our profession who think any means should be used to promote their goals. Persons with these attitudes by and large form the group requesting abortions at our hospital. Now, the question arises, should we go along with these misconceptions so that the patient will regard the abortion as an exciting episode in her young life and become an authoritative dispenser of misinformation to her friends.

The complete lack of correct information appears to me to be the biggest problem to be solved relative to abortions. This we attempt to correct among our abortion applicants. Each case is considered individually. Trained social workers spend much time trying to work out problems bearing on the patient's decision. All community resources are brought to her attention. Pressure from the husband, boy friend, or parent is determined and discussed, and, in some instances with extensive discussion, other solutions than abortion are selected. The true facts with regard to abortion dangers and sequelae are presented, so that a truly knowledgeable decision can be made. After abortion, we have "rap" sessions where an effort is made to present to the patient the effect of life style on health, both mental and physical.

Without scientific knowledge to tell us the real end result of abortions, we reason the extensive individual effort will help to diminish the adverse results. The current efforts to streamline the process and make only formal compliance with legal requirements brings me to the observation made by my social worker, that ultimate efficiency will have as its result the barren goal of nothingness.

Dr. Eugene C. Sandberg, Palo Alto, California. It is interesting to note the similarity in figures emanating from different areas. The recurrence rate of undesired pregnancies in Dr. Margolis' series was ten per cent. Two years ago, Dr. Von der Ahe[1] mentioned in a report to this Society that the recurrence rate for illegitimate (and presumably undesired) pregnancies was nine per cent among the patients at 4 Los Angeles facilities for unwed pregnant women. At Stanford University Hospital during the past three years, we have also noticed that five to ten per cent of patients requesting therapeutic abortions have had prior undesired pregnancies.

Similarity in figures is also noticeable regarding subsequent utilization of contraception. Two years ago Tyler and associates[2] studied a group of women who had been admitted to Grady Memorial Hospital in Atlanta with or for an induced abortion. Upon dismissal, only seventy-five per cent accepted contraception. In Dr. Margolis' group, the figure was essentially the same. This seems to be a very low rate of acceptance of contraception for a group of women who have just procured an abortion.

Last, I think it would be foolhardy for anyone to believe that pregnancy will be prevented on a long-term basis, even in the group accepting contraception. It is well known that the two-year dropout rate is approximately fifty per cent for

essentially each of the contraceptive methods. Additionally, in Tyler's study, twenty-two per cent of the patients admitted with or for an induced abortion had previously attended the Grady Memorial Hospital Family Planning Clinic. Obviously, something didn't take. And their experience is not unique.

REFERENCES

1. Von der Ahe, C. D.: AMER. J. OBSTET. GYNEC. **104:** 279, 1969.
2. Tyler, C. W., Asher, J. D., and Freeman, M. G.: Induced Abortion and Family Planning, Presented at the Workshop on "Abortion, Obtained and Denied: Approaches to Outcomes," Bethesda, December 15, 1969, National Institute of Child Health and Human Development and National Institute of Mental Health. In press.

DR. J. OPPIE MCCALL, Portland, Oregon. Opponents and proponents of therapeutic abortion seem to take an exquisite delight out of presentations such as Dr. Margolis has given us. We seem to take delight on whichever side of the fence we are on as to some prospective analysis of the individual after the fact. Did she think it was a good idea? We have here, of course, an extremely small number of patients but even with a large number of patients we have an extremely varied group to try to analyze, anywhere from the 12 year old to the 45 year old, married and unmarried, etc. I find it difficult to even achieve any semblance of order out of trying to see how this patient regarded her abortion after it was done. However, let me fall into the same trap of wanting to compare how she feels before and after and ask Dr. Margolis a question which all these studies so far have failed to bring out. That is, regardless of age, marital status, etc., have the psychiatrist and the psychologist interpreted what the effect was of the early-trimester abortion as opposed to the mid-trimester abortion. My own observation is that I fear the girl with a second-trimester abortion is going to have a much more violent reaction to her abortion.

DR. MARGOLIS (Closing). I appreciate Dr. McDermott's observations based on his long practice of our specialty. Some of our abortion patients have patterns of sexual behavior which some might consider promiscuous; however, our incidence of positive preabortion gonorrhea cultures is one per cent whereas it is 3 to 4 per cent in our antenatal group.

With regard to Dr. McCall's observation, I agree that a second-trimester abortion is technically significantly different from first-trimester abortion. I think also that a candidate for abortion in the second trimester is a different patient than a candidate for abortion in the first trimester. Knowledge of abortion may not have been easily available to her, or more important she might have a marked degree of ambivalence that would aggravate any reaction to abortion.

VIEWS AND REVIEWS

PSYCHOLOGIC AND EMOTIONAL CONSEQUENCES OF ELECTIVE ABORTION

A Review

GEORGE S. WALTER, MD, MPH, FACOG

Should we consider abortion as temerity or therapy? Tradition impugns to the aborted woman a burden of guilt and social stigma. However, scrutiny of available literature suggests that there is really no documentation for significant psychiatric sequelae. The review suggests certain inadequacies of reported studies and underscores the need for carefully controlled, long-term, prospective observation of the woman seeking abortion, and of her family.

Unto the woman He said:
I will greatly multiply thy sorrow and thy conception;
In sorrow thou shalt bring forth children,
And thy desire shall be to thy husband,
And he shall rule over thee.

Genesis 3:16

THE DAUGHTERS OF EVE, long laboring under the burden of this terrible curse, are beginning to stir. Who, but they, can rightly divine the moment when their full creative powers should bloom? A voice is heard!

But, it was not always so. The ancient Assyrians decreed that she be impaled upon a stake and not dignified by burial should she exercise her own judgment. The fanfare that was Greece and Rome winked at, yea welcomed, both abortion and infanticide, and yet allowed the ascetic Pythagoreans to, once again, deprive each woman of her birthright. The debate has continued through the centuries, with the cudgel of church and civil law on the one side, and necessity on the other,[38,121,128] while in between, male philosophers tendentiously argue at what metaphysical point of time life begins after the chance collision of an aggressive motile cell with the wall of one that is less so.[4,82]

But woman has been adamant in her self-determination, and by whatever means fell to her knowledge or power, has attempted to control her fertility. The vacillating pendulum of public practice has swung toward a more liberal approach to induced abortion in recent years, till we have more abortions than births in Hungary,[87,102] and 1 out of every 8 Japanese doctors may be an abortionist.[117] And yet, we hear that in certain groups in the United States, 94% of

Maternal and Child Health Consultant, Navajo Indian Health Area, Indian Health Service, HSMHA, Fort Defiance, Arizona.

This article was written by George S. Walter, MD, in his private capacity. No official support or endorsement by the Indian Health Service or the US Public Health Service is intended or should be inferred.

Submitted for publication Feb 16, 1970.

The illustration at the top of the page is "Two Doctors in Discussion," from *Treatise Against All Pestilence and Tainted Air* by Alonso Espina, published in 1518 in Valladoled, Spain (The Bettmann Archive).

Reprinted from Vol. 36, No. 3, September 1970

OBSTETRICS & GYNECOLOGY

Published by the MEDICAL DEPARTMENT
HARPER AND ROW
Copyright © 1970 *by*
AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS
Printed in the U.S.A.

pregnancies are unwanted![46] Confusion is no more rampant anywhere than in the professional arena, where we hear such cries as, "There are no nonmedical indications for abortion!" and "Teach chastity!"[40] The New Jersey Supreme Court has ruled that, "The unborn child would almost certainly choose life with defects as against no life at all."[33] Even such a prominent and usually progressive authority as Mary Calderone clouds the issue by saying, "Aside from the fact that abortion is the taking of a life, I am also mindful of what was brought out by our psychiatrists—that in almost every case, abortion, whether legal or illegal, is a traumatic experience that may have severe consequences later on."[18]

But, is this necessarily so? The purpose of this discussion will be to examine the woman who is faced with a pregnancy, to see upon what she bases her reaction to it, to consider with her the possible alternatives, and then to see what psychoemotional phenomena have been demonstrated by experience with women who have exercised their right not to bear a child.

A WOMAN LOOKS AT MOTHERHOOD

A woman will function appropriately and effectively as a mother if:

She achieves, besides language mastery, a level of abstract thought sufficient to see herself apart from others;

She esteems this concept of herself and finds it reliable;

Her actual self usually approximates this well-regarded image of herself;

She perceives the struggle out of which her identity evolved; and

She genuinely wants to be a mother.[109] She is expected to go through the progression of accepting her pregnancy (after an 85% initial rejection in primagravidas), developing an affiliative response to the fetus, and then assigning a reality-based identity to the newborn.[23] Fortunate indeed, are the majority of women who blissfully accomplish this metamorphosis from woman to mother.

If she is significantly maladapted in any one of these areas, then she may be one of the 3 to 13 women, per 1000 live births, who develops a significant puerperal psychologic illness.[13,30,68,88,160] The risk to her of recurrent episodes may increase tremendously with subsequent pregnancies.[72-74,116,134,161] So powerful is this emotional condition that illness has even been found in mothers after the adoption of children.[103] Indeed, her progression to emotional motherhood may be arrested, and the pregnancy will end. It has been postulated that the psyche might play a role in spontaneous abortion,[64,69] and most certainly does in habitual abortion; patients forced into motherhood and femininity by a successful Shirodkar procedure have had acute psychiatric disturbances.[152] This, then, is the powerful and overwhelming set of forces, some conscious, many others unconscious, focusing on the woman who contemplates bearing a child.

THE ALTERNATIVES TO CHILDBEARING

A woman may go ahead and bear her child, either adjusting reasonably well in the process, or rejecting the infant, although more will be said later about the child.[5,65]

She may threaten to procure, or even attempt, an illegal abortion,[47,65,100] particularly if she has been abandoned by her partner, and has hysterical traits.[4] She may actually obtain an illegal abortion, with its inherent dangers.[19,52,80,121] Interestingly enough, relaxation of abortion laws has not always led to a reduction of illegal abortions as was anticipated.[26,71,156]

She may threaten suicide, and in spite of suggestions to the contrary,[4,41-43,65,100,134] pregnant women do commit suicide, both before[16,21,123,158] and after termination of pregnancy.[145-148]

Whatever the patient's motivations or make-up, threats, whether toward abortion

or suicide, should be considered seriously and interpreted as signs of mental insufficiency and an inability to cope. This woman's behavior becomes an unpredictable entity.[4,158] Extensive studies of women who develop puerperal depression show that their personality make-up is such that their strong "mother-compliance" makes them very good patients and hard to recognize as women with great potential for acting-out behavior, either against themselves or the child.[36]

A woman's last alternative, available today only in certain privileged geographic and social circumstances, would be to seek a legal abortion. Let us digress slightly at this point to develop a train of logic which will set the stage for a consideration of the emotional sequelae of legal abortion.

We are told that neurotic women tend to have more pregnancies, abortions (all types), stillbirths, neonatal deaths, and psychiatric illness in their children.[96] We also know that there is a high degree of correlation between the prepregnancy state of mental health and the likelihood of puerperal illness.[4,35–36,41–43,70,94–95,100,113–115,130–137,156,158] Women with an earlier spontaneous abortion show significantly more psychiatric symptoms than others during subsequent pregnancies,[70] and some women have a "postabortion hangover" lasting until the projected term of the aborted pregnancy.[113] Mental illnesses associated with reproductive function account for 2–8% of all female psychiatric admissions,[30,88,160] with significant numbers of deaths,[7] and full recovery in only around 85%.[134]

If one of every five American pregnancies ends in abortion for some reason,[87] and if the incidence of mental insufficiency is higher after legal abortions,[67] and if some cognitive dissonance must be necessary to allow a woman to contemplate willful abortion, would it not be reasonable to expect a significant amount of mental illness after induced abortion?

EXPERIENCES WITH INDUCED ABORTION

There is a growing body of literature, much of it from northwestern Europe, and more recently from investigators in England and America, which discusses the psychiatric sequelae of induced abortion for nonmedical indications.[4,14,21,28,41–43,49,51,56,67,75,77,84,86–87,94–95,100,102,108,110,113–114,128,130–139,156,158] It is beyond the scope of this particular discussion to repeat the details of individual studies.

While there is some variation in their numbers and the quality of sampling and controls, if one removes the overlay of emotional, sentimental, and technical pejoratives, there is an amazingly consistent finding: legal abortion can be performed without fear of severe psychic harm to the woman. The reaction to abortion is determined almost entirely by a woman's previous psychologic set. Her feelings may fall into one of the following categories:

Guilt

Reported incidences varied from none at all to as high as 30%, with none severe. A critical factor in mild, immediate guilt is the actual physical setup of the clinical situation and the attitude of people caring for the patient. As time passed after the abortion, the degree of guilt decreased, until by one year, there was almost no guilt. What little did remain was frequently due to failure of the woman's manipulative effort, and was disguised as self-anger at the inability to structure a relationship or situation. True depression was rare, and suicide was almost absent from the data. The phenomenon of the so-called "atonement pregnancy," to make up for the one aborted, was noted in some studies, but has not been sufficiently investigated. While there was some concern about manifestations of delayed guilt, with possible involutional depression, none of the studies has progressed long enough to evaluate this yet.

Impaired Development of Adult Stages of Personality

This was found only if the woman proved sterile following the abortion, and this incidence was not greater than for normal pregnancy.[145,153,156] If she had a previous personality defect or frank illness, it might actually improve or remain essentially unchanged.

Disturbance of Relationship with the Opposite Sex

A woman might project her own childish or neurotic emotions upon her spouse and appease her own guilt by blaming it on him. This was particularly true if she had been pressured into the abortion by the man. The Kinsey group [49] went beyond mere figures showing patient satisfaction to evaluate a woman's subsequent performance in three areas. They found that 90% of postabortal unmarried women resumed premarital coitus, suggesting little psychic damage. Premarital abortion did not affect adversely the sexual adjustment in marriage as measured by the rate of orgasm during the first year of marital intercourse. And the incidence of marital break-up was actually lower in women who had had a premarital induced abortion. While one might argue with their criteria for measuring ill-effect, it does appear that their subjects' function was not interferred with.

When all the data are considered, we can probably say that legal abortion leaves its mark, just as does every other important event in a person's life. It is an unnatural way of solving conflict involved in an unwanted pregnancy. Women who are psychically vulnerable risk a deterioration in their condition through an unwelcome pregnancy and the extra load this involves, whatever course is adopted. Those who are mentally stable manage the pregnancy better. Those who come to therapeutic abortion are already highly selected in terms of their psychopathology. We must remember, therefore, in considering the rare unfavorable outcome that the pregnancy was a symptom of, rather than the cause of, the emotional disturbance, and that abortion was only a method of treating the symptom. Abortion may have no effect, or it may actually stabilize the underlying process.

Further Considerations of Effects of Abortion

We must think of any woman seeking abortion, even an unmarried one, as occupying a place in a social unit of interrelationships. In considering this unit, the most immediately apparent member is the sexual partner of the woman. A search of the literature reveals that there is really very little written about this important element of her psychologic field. Studies of women with puerperal emotional difficulties suggest that their husbands are frequently repeated images of their own rather weak and colorless fathers, and that the women feel victimized by and martyred to these ineffective men, whom they dominate. There is frequently a basic and covert sexual and procreative conflict which is unresolved as well. It is also known that women seeking abortion may do so at the insistence of partners whose neurotic behavior is being acted out upon their wives. The meaning of these relationships as well as of the induced abortion itself to the male is not clear.

Ekblad[41] reports that among the husbands of 479 women aborted upon psychiatric indications, 32% were neurotic, 14% more were alcoholic or criminal or both and 10% had somatic diseases. Hook reported similar patterns in 20% of partners of women who were refused abortion and 46% of partners of those granted abortion, suggesting once again that the request for abortion may have arisen from a mutual psychoemotional illness. The Kinsey group studies[49] report that following the abortion itself, only 4.2% of the male partners had

psychiatric consequences attributable to the abortion. This scanty data serves only to underline the importance of the man and the absence of any real body of information about his role.

Again, observing the woman as part of a biologic unit, we must ask about the effect of abortion upon children in that unit. Women seeking abortion on psychiatric grounds have been shown to have an immature emotional involvement with previous children.[109] Studies of puerperal illnesses suggest that when a mother has difficulty, it is not only a sick patient, but also a sick relationship between mother and child.[93] We also know that women with previous disturbances are the most likely to have repetitive episodes of disturbance when faced with pregnancy again, and that this disturbance can either lead a woman to request abortion or result in infanticide as often as once or twice in 500 births.[7,116] If abortion is selected as a solution to the immediate problem of an unwanted pregnancy, older children in the same family may misinterpret the act as a great threat and require psychiatric treatment.[100] From observing a group of 87 children whose mothers had aborted (type not specified), Cain reported two types of reactions: an immediate type, characterized by anxiety attacks, nightmares, increased aggressiveness, stuttering, running away, death phobias, increased separation anxiety, sudden outbursts of fear or hatred of the mother, and even suicide attempts; and a late type ranging from isolated fantasies to pervading, crucial, and disabling illness. He feels that the children's reactions are not predictable, but will be influenced by the degree of their knowledge of the abortion and their parent's attitude toward it and toward them. A very revealing retrospective study by Forssman and Thuwe followed 134 children born to 128 women who were refused abortion. Only 120 survived to 21 years. Seven and one-half percent were abandoned. They compared them to a self-selected control group of wanted children, and found that the "failed abortion" children had more family instability, more antisocial and criminal behavior, more drunken conduct, more military exemptions, less education, and needed more public assistance and psychiatric care. More of the girls in the unwanted group married early and had children early. Hook found in children under 12, born to mothers after abortion was refused them, an incidence of 22% disorders of behavior in the first 4 years of school, compared to 20% in the control group. There has not been adequate study of children, but we can conclude that the very fact that a woman applies for a legal abortion means that the prospective child risks having to surmount greater social and mental handicaps than his peers, even when the grounds for the application are so slight that it is refused. Legislation on therapeutic termination of pregnancy must consider the social risk to which the expected child will be exposed.

CRITICISM OF STUDIES REVIEWED

When the contributions of all authors are read and compared, some rather consistent defects in the body of knowledge and the methods used to obtain it are found.

Sampling methods are not uniform and not always good, so data may not be comparable. For example, psychiatric sequelae may be quite different in a cold, frightening, across-the-tracks type of abortion. Part of the guilt may actually be over money spent. A woman who has an abortion as the result of professional consultation shares the burden of decision. There is a high degree of self-selection in those seeking abortion. In the studies, there is no systematization of data gathering, and inadequate attempts are made to find those who do not return voluntarily. There may be a failure to standardize consideration of the patients by type of abortion—spontaneous, medically indicated, illegal or legal. The differentiation

and relationship between pre- and post-abortal psychopathology are not always clear. The meaning of the aborted pregnancy as well as that of subsequent pregnancies is not always investigated. Many of the studies mix patients who have concomitant sterilization with those were only aborted, and the majority of them have not followed their patients long enough to rule out late sequelae. Some of the evaluations of puerperal psychiatric illnesses do not include abortal histories. Only rarely does a study consider such factors as age, parity and spacing of children as influences on guilt formation. Probably one of the most serious errors is the almost universal projection of figures and results from Scandanavia into expectations from other countries. The difference in sociocultural concepts of abortion may make this a significant sociologic error.

PROFESSIONAL ATTITUDES TOWARD ABORTION

One cannot review this much material without being struck by the fact that one of the largest deterrents to a liberalized abortion policy, in spite of the public clamor, is the health profession itself.[10,21,53–4,59,61,97,116,128,138,156] Abortion is foreign to the attitudes fostered in physicians during their medical training; the gynecologist, the one to do the abortion, has a basic psychologic conflict. A whole generation of professional health workers refuses to let the myth die out that abortion will irreparably harm a woman and somehow place a stigma upon her. Physicians remain adamant. The male physician won't let the woman decide—reminiscent of the moralistic attitude about pain relief in childbirth before Queen Victoria demanded it for herself. The pregnant woman symbolizes proof of male potency, and if the male loosens his rule over women and grants them the right to dispose of that proof when *they* want to, the men then feel terribly threatened lest women can, at will, rob them of their potency and masculinity. This flaunting of traditional subservience may be one of the more powerful and less conscious determinants of our irrational opposition to granting women the right to decide matters in this crucial area of their lives. It may also function in the frequent professional insistence upon sterilization as a "package deal" with abortion. In this way the male physician can maintain control.[97,156]

CONCLUSIONS

Consideration of the emotional stresses of parturition would suggest that induced abortion could be a traumatic and damaging episode in a woman's life. Extensive review of the literature reveals that this has not been true. In fact, for the healthy woman with a happy marriage, abortion is most often truly therapeutic. There is still inadequate evaluation of the meaning of abortion to the woman's sexual partner and her other children. Various previous studies do not cast doubt upon our conclusion about the relative psychiatric safety of abortion, but they do point out the pressing need for baseline studies on the prevalence of psychologic disabilities resulting from other outcomes of pregnancy—the birth of a normal child, a premature child, a retarded or otherwise abnormal child; a neonatal death or late spontaneous abortion; and the consequences of unwanted parenthood for mother, child, family and community. Professional attitudes have been indicted as one of the major deterrents in keeping abortion from its rightful place as a useful tool in helping a couple thoughtfully and carefully plan their family.

Abraham Lincoln advised us well when he said, "The dogmas of the quiet past are inadequate to the stormy present. . . As our case is new, so must we think anew and act anew. . . We must disenthrall ourselves."

Box 76
Fort Defiance, Ariz 86504

REFERENCES

1. Aarons A: Therapeutic Abortion and the Psychiatrist. Amer J Psychiat 124:745, 1967
2. Addison P: Abortion Act, 1967. Lancet 2: 503, 1968
3. Amark C: Indications For Abortion in States of Psychic Insufficiency. Acta Psychiat Scand 34: Suppl 136:221, 1959
4. Anderson EW: Psychiatric Indications For the Termination of Pregnancy, J Psychosom Res 10:127, 1966
5. Aren P: On Legal Abortion in Sweden. Acta Obstet Gynec Scand 37:Suppl 1, 1958
6. Aren P, Amark C: Prognosis Where Abortion Granted But Not Carried Out. Acta Psychiat Scand 36:203, 1961
7. Arentsen K: Postpartum Psychosis. Danish Med Bull 15:97, 1968
8. Astrachan J: Severe Psychologic Disorders of the Puerperium. Obstet Gynec 25:13, 1965
9. Benson R, Collins H: The Medicolegal Aspects of Psychogenic Abortion. Clin Obstet Gynec 4:265, 1961
10. Bernstein I: Psychiatric Indications for Therapeutic Abortion. Minn Med 50:51, 1967
11. Bolter S: The Psychiatrist's Role in Therapeutic Abortion: The Unwitting Accomplice. Amer J Psychiat 119:312, 1962
12. Boulas SH, Preucel RW, Moore JH: Therapeutic Abortion. Obstet Gynec 19:222, 1962
13. Bratfos O, Haug J: Puerperal Mental Disorders in Manic Depressive Females. Acta Psychiat Scand 42:285, 1966
14. Brekke B: Other Aspects of the Abortion Problem.[18]
15. British Medical Association Committee on Therapeutic Abortion: Indications For Termination of Pregnancy. Brit Med J 1:171, 1968
16. Burke MF: Suicide in pregnancy. Brit Med J 2:49, 1968
17. Cain A, Erickson ME, Fast I, et al: Children's disturbed reactions to their mother's miscarriage. Psychosom Med 26:58, 1964
18. Abortion in the United States. Edited by MS Calderone. New York, Harper & Row, 1968
19. Calderone MS: Illegal abortion as a public health problem. Amer J Public Health 50: 948, 1960
20. Cheney C: Indications for therapeutic abortion. JAMA 103:1914, 1934
21. Clark M, Forstner I, Pond DA, et al: Sequels of unwanted pregnancy. Lancet 2:501, 1968
22. Cogan N: A medical social worker looks at the new abortion law. Brit J Med 2:235, 1968
23. Cohen R: Some maladaptive syndromes of pregnancy and the puerperium. Obstet Gynec 27:562, 1966
24. Cohen S: Abortion for the emotionally disturbed? J Med Ass Georgia 57:489, 1968
25. Corcoran C: Abortion—A catholic view. Illinois Med J 135:300, 1969
26. Cosgrove SA: Lack of Relation Between Therapeutic and Criminal Abortion. Quart Rev Surg Obstet Gynec 16:223, 1959
27. Council of the Royal College of Obstetricians and Gynecologists: Legalized Abortion. Brit Med J 5491:850, 1966
28. Crowley R, Laidlaw R: Psychiatric opinion regarding abortion: Preliminary report of a survey. Amer J Psychiat 124:559, 1967
29. Curran D: Psychiatric indications for the termination of pregnancy. New Zeal Med J 60:467, 1961
30. Daniels R, Lessow H: Severe postpartum reactions. Psychosomatics 5:21, 1964
31. Destounis N: Postpartum psychiatric syndromes. Delaware Med J 38:16, 1966
32. Deutsch H: The Psychology of Women, Motherhood, Vol 2, New York, Grune and Stratton, 1945
33. de Veber LL: Antenatal euthanasia. New Eng J Med 280:1248, 1969
34. Diggory PLC: Some experiences of therapeutic abortion. Lancet 1:873, 1969
35. Douglas G: Some emotional disorders of the puerperium. J Psychosom Res 12:101, 1968
36. Douglas G: Puerperal depression and excessive compliance with the mother. Brit J Med Psychol 36:271, 1963
37. Dunn HP: Therapeutic Abortion in New Zealand. New Zeal Med J 68:253, 1968
38. Eastman N: Induced abortion and contraception. Obstet Gynec Survey 22:3, 1967
39. Ebaugh F, Heuser KD: Psychiatric aspects of therapeutic abortion. Postgrad Med 2: 325, 1947
40. Editorial. New Eng J Med 280:1240, 1969
41. Ekblad M: Induced abortion on psychiatric grounds: A follow-up study of 479 women. Acta Psychiat Scand 31: Suppl 99:1, 1955
42. Ekblad M: Proceedings, International Planned Parenthood Conference, Stockholm, 1953
43. Ekblad M: Psychiatric follow-up study of women after legal abortion. Acta Psychiat Scand (Suppl) 80:162, 1953
44. Enoch MD: Psychiatric sequelae to the termination of pregnancy. Brit Med J 1:563, 1967
45. Field M: The Re-legalization of Abortion in Soviet Russia. New Eng J Med 255:421, 1956
46. Flowers CE: Address at Navajo Obstetrics and Gynecology Seminar, Gallup, New Mexico, 1968
47. Forssman H, Thuwe I: One hundred twenty children born after application for therapeutic abortion refused. Acta Psychiat Scand 42:71, 1966

48. Freundt L: Surveys in induced and spontaneous abortions in the Copenhagen area. Acta Psychiat Scand 40:Suppl 180:235, 1964
49. Gebhard PH, Pomeroy WB, Martin CE et al: Pregnancy, Birth, And Abortion. New York, Harper & Row, 1958
50. George BJ: Current abortion laws. Illinois Med J 131:696, 1967
51. Gillis A: Follow-up after abortion. Brit Med J 1:506, 1969
52. Gold E, Erhardt CL, Jacobziner H, et al: Therapeutic abortion in New York: Twenty year review, Amer J Public Health 55:964, 1965
53. Guttmacher A: "Therapeutic Abortion: One Physician's Viewpoint," Quart Rev Surg Obstet Gynec 16:235, 1959
54. Guttmacher A: "The Shrinking Non-Psychiatric Indications for Therapeutic Abortion.[122]
55. Hammond H: Therapeutic abortion. Amer J Obstet Gynec 89:349, 1964
56. Harrison CP: On the futility of legalizing abortion. Canad Med Ass J 95:360, 1966
57. Harrison C: Teenage pregnancy—Is abortion the answer? Pediat Clin N Amer 16: 363, 1969
58. Hartman R, et al: A symposium: Medical implications of the current abortion law in Illinois. Illinois Med J 131:666, 1967
59. Hauschild T: The role of the psychiatrist in therapeutic abortion and sterilization. Med Bull US Army Europe 20:322, 1963
60. Hayman A: Some aspects of regression in non-psychotic puerperal breakdown. Brit J Med Psychol 35:135, 1962
61. Heller A, Whittington H: The Colorado story: Denver General Hospital experience with the change in the law on therapeutic abortion. Amer J Psychiat 125:809, 1968
62. Helpern M: The problem of criminal abortion. Quart Rev Surg Obstet Gynec 16:231, 1959
63. Hemphill RE: Incidence and nature of puerperal psychiatric illness. Brit Med J 2: 1232, 1952
64. Henker F: Abortion and sterilization from psychiatric and medico-legal viewpoints. J Arkansas Med Soc 57:368, 1961
65. Hook K: Refused abortion. Acta Psychiat Scand 39:Suppl 168, 1963
66. Ingram J, Treloar HS, Thomas GP, et al: Interruption of pregnancy for psychiatric indications—A suggested method of control. Obstet Gynec 29:251, 1967
67. Jansson B: Mental disorders after abortion. Acta Psychiat Scand 41:87, 1965
68. Jansson B: Psychic insufficiencies associated with childbearing. Acta Psychiat Scand 39: Suppl 172, 1963
69. Javert C: Psychosomatic aspects of habitual abortion. Med Times 90:115, 1962
70. Jacobson L, Kaij L, Nilsson A: Post-partum mental disorders in an unselected sample: Frequency of symptoms and predisposing factors. Brit Med J 1:1640, 1965
71. Jensen M: quoted in Foreign Letters. JAMA 157:1578, 1955
72. Kaij L, Jacobson L, Nilsson A: Postpartum mental disorders in an unselected sample: The influence of parity. J Psychosom Res 10:317, 1967
73. Kaij L, Jacobson L, Nilsson A: Postpartum mental disorders in an unselected sample: The psychiatric history. J Psychosom Res 10:327, 1967
74. Kaij L, et al: Postpartum mental disorder in an unselected sample: The importance of the unplanned pregnancy. J Psychosom Res 10:341, 1967
75. Kaij L, Malmquist A, Nilsson A: Psychiatric aspects of spontaneous abortion: II. The importance of bereavement, attachment, and neurosis in early life. J Psychosom Res 13: 53, 1969
76. Kane F, Ewing J: Therapeutic abortion—Quo vadimus? Psychosomatics 9:202, 1968
77. Kay DWK, Shapira K: Psychiatric sequelae of termination of pregnancy. Brit Med J 1:5535:299, 1967
78. Kear-Colwell JJ: Neuroticism in the early puerperium. Brit J Psychiat 111:1189, 1965
79. Kenin L, Blass N: Mental illness associated with the postpartum state. Clin Obstet Gynec 5:716, 1962
80. Uhrus K: Some aspects of the Swedish law governing termination of pregnancy. Lancet 2:1292, 1964
81. Kestenberg J: Outside and inside, male and female. J Amer Psychoanal Ass 16:457, 1968
82. Knutson A: When does a human life begin? Viewpoints of public health professionals. Amer J Public Health 57:2163, 1967
83. Koeniger P: The physician and abortion law. Alaska Med 10:119, 1968
84. Kolstad P: Therapeutic abortion. Acta Obstet Gynec Scand 36: Suppl 6, 1957
85. Koya Y: A study of induced abortion in Japan and its significance. Milbank Mem Fund Quart 32:282, 1954
86. Kretzchmar RM, Norris AS: Psychiatric implications of therapeutic abortion. Amer J Obstet Gynec 198:368, 1967
87. Kummer J: Post-abortion psychiatric illness—A myth? Amer J Psychiat 119:980, 1963
88. Kummer J: Psychiatric contraindications to pregnancy. Calif Med 79:31, 1953
89. Lader L: Abortion. Indianapolis, Bobbs-Merrill Co, Inc, 1966
90. Laidlaw R: Other aspects of the abortion problem.[18]
91. Leng GA: British abortion law amendment. Singapore Med J 9:59, 1968

92. Lidz T: Other aspects of the abortion problem.[18]
93. Lomas P: Observations on the psychotherapy of puerperal breakdown. Brit J Med Psychol 34:245, 1961
94. Malmfors K: Status of women after legal abortion. Svensk Lakartidn 48:2445, 1951
95. Malmquist A, Kais L, Nilsson A: Psychiatric aspects of spontaneous abortion: I. A matched control study of women with living children. J Psychosom Res 13:45, 1969
96. Mandelbrote BM, Monro M: Neurotic illness as a factor in reproduction. Acta Psychiat Scand 40:419, 1964
97. Mandy AJ: Reflections of a gynecologist.[122]
98. Mandy T, Scher E, Farkas R, et al: The psychic aspects of sterility and abortion. Southern Med J 44:1054, 1951
99. Mann E: Psychiatric investigation of habitual abortion. Obstet Gynec 7:589, 1956
100. McCoy D: The emotional reaction of women to therapeutic abortion and sterilization. J Obstet Gynaec Brit Comm 75:1054, 1968
101. McGraw R: Legal aspects of termination of pregnancy on psychiatric grounds. New York J Med 54:1605, 1956
102. Mehlan KH: Combatting illegal abortion in the socialist countries of Europe. World Med J 13:84, 1966
103. Melges F: Postpartum psychiatric syndromes. Psychosom Med 30:95, 1968
104. Meyerowitz S, Romano J: Who may not have an abortion? JAMA 209:260, 1969
105. Montagu MF: Introduction.[18]
106. Montgomery T, Lewis A, Hammersly M: Maternal deaths in California 1957–1962. Calif Med 100:412, 1964
107. Moore R: Psychiatric and legal aspects of therapeutic abortion and sterilization. New Zeal Med J 58:772, 1959
108. Muller C: The dangers of abortion. World Med J 13:78, 1966
109. Mumford RS: An interdisciplinary study of four wives who had induced abortions. Amer J Obstet Gynec 87:865, 1963
110. Niswander K, Patterson R: Psychologic reaction to therapeutic abortion. Obstet Gynec 29:702, 1967
111. Norris AS: The tired mother. J Iowa Med Soc 54:478, 1964
112. Nuckols F: Postpartum and postoperative psychiatric emergencies: Related syndromes. Alabama J Med Sci 2:264, 1965
113. Patt S, Rappaport RG, Barglow P: Follow-up of therapeutic abortion. Arch Gen Psychiat (Chicago) 20:408, 1969
114. Peck A: Therapeutic abortion: Patients, doctors, and society. Amer J Psychiat 125:797, 1968
115. Peck A, Marcus H: Psychiatric sequelae of therapeutic interruption of pregnancy. J Nerv Ment Dis 143:417, 1966
116. Pitt B: Atypical depression following childbirth. Brit J Psychiat 114:1325, 1968
117. Pommerenke WT: Abortion in Japan. Obstet Gynec Survey 10:145, 1955
118. Robb DF: The abortion act of 1967. Practitioner 201:694, 1968
119. Robinson D: Management of combined organic and emotional factors in a post partum psychosis. Minn Med 49:1897, 1966
120. Roger TF: Attitude toward abortion. Amer J Psychiat 125:804, 1968
121. Abortion in America. Edited by H Rosen. Beacon Press, Boston, 1967
122. Therapeutic Abortion. Edited by H Rosen. Julian Press, New York, 1954
123. Rosenberg A, Silver E: Suicide, psychiatrists and therapeutic abortion. Calif Med 102: 407, 1965
124. Royal Medico-Psychological Association, Memorandum on Therapeutic Abortion, Brit J Psychiat 112:1071, 1966
125. Russell KP: Therapeutic abortions in California in 1950. Western J Surg 60:497, 1952
126. Sandosham AA: Legal abortion. Med J Malaya 22:167, 1968
127. Sandosham AA: Our abortion laws. Med J Malaya 22:165, 1968
128. Schwarz RA: Psychiatry and the abortion laws: An overview. Compr Psychiat 9:99, 1968
129. Senay E: Post partum depression: A case review, diagnostic, treatment, and sociomedical aspects. Conn Med 30:645, 1966
130. Shainess N: Abortion: Social, psychiatric, and psychoanalytic perspectives. New York J Med 68:3070, 1968
131. Sim M: Abortion and the psychiatrist. Brit Med J 5358:680, 1963
132. Idem: Abortion and the psychiatrist. Brit Med J 5350:145, 1963
133. Idem: A guide to psychiatry. London, Livingstone, 1968
134. Idem: Psychiatric disorders of pregnancy. J Psychosom Res 12:95, 1968
135. Simon A: Psychiatric indications for therapeutic abortion and sterilization. Clin Obstet Gynec 7:67, 1964
136. Simon N, Senturia A, Rothman D: Psychiatric Illness Following Therapeautic Abortion. Amer J Psychiat 124:59, 1967
137. Simon N, Senturia A: Psychiatric sequelae of abortion. Arch Gen Psychiat (Chicago) 15:378, 1966
138. Sloane RB: The unwanted pregnancy. New Eng J Med 280:1206, 1969
139. Sorrel WE: Abortion: Its psychodynamic effects. Psychosomatics 8:146, 1967
140. Stephenson HA: Therapeutic abortion. Obstet Gynec 4:578, 1954
141. Taylor ES, Droegemueller W, Drose V: The first year of experience in Colorado with the

new abortion law. Amer J Obstet Gynec 103:694, 1969
142. Teeter R: Psychiatric indications for abortion. Minn Med 50:49, 1967
143: Thurstone P: Therapeutic abortion. JAMA 209:229, 1969
144. Tietze C, Lewit S: Abortion, Sci Amer 220: 21, 1969
145. Tietze C: Induced abortion and sterilization as methods of fertility control. J Chronic Dis 18:1161, 1965
146. Tietze C: Legal abortion in Scandinavia. Quart Rev Surg Obstet Gynec 16:227, 1959
147. Tietze C: Therapeutic abortions in New York City, 1943–1947. Amer J Obstet Gynec 60:146, 1950
148. Idem: Therapeutic abortion in the United States. Amer J Obstet Gynec 101:784, 1968
149. Tod EDM: Postpartum depression. Lancet 2:1264, 1964
150. Tredgold RF: Psychiatric indications for the termination of pregnancy. Lancet 2:1251, 1964
151. Turner GP, Jr: Postpartum and postoperative psychiatric emergencies: A description of the syndromes. Alabama J Med Sci 2: 251, 1965
152. Vanden Bergh RL, Taylor ES, Drose V: Emotional illness in habitual aborters following suturing of the incompetent cervical os. Psychosom Med 28:257, 1966
153. Warner M: Successful pregnancies after spontaneous and induced abortions. Western J Surg 64:504, 1956
154. Watson T: Why therapeutic abortion? Minn Med 50:55, 1967
155. Westoff C, Moore EC, Ryden NB: The structure of attitudes toward abortion. Milbank Mem Fund Quart 47:11, 1969
156. White R: Induced abortions: A survey of their psychiatric implications, complications, and indications. Texas Rep Biol Med 24: 531, 1966
157. Wiener A, Steinhilber R: The postpartum psychoses. J Int Coll Surg 36:490, 1961
158. Wilson DC: Psychiatric implications in abortions. Virginia Med Monthly 79:448, 1952
159. Winokur G, Ruangtrakool S: Postpartum impact on patients with independently diagnosed affective disorders. JAMA 197:242, 1966
160. Wolff T, Caldwell J: Psychiatric aspects of therapeutic abortion. Florida Med Ass J 52:95, 1965
161. Yalom I, Lunde DT, Moos RH, et al: Postpartum blues syndrome. Arch Gen Psychiat 18:16, 1968

THERAPEUTIC ABORTION

Definitions. Therapeutic abortion is the termination of pregnancy before the period of fetal viability for the purpose of saving the life of the mother or safeguarding her health. Because concepts are changing rapidly, the definition of therapeutic abortion lacks precision. The word "health" in particular is variously interpreted. In its broadest sense, as defined by the World Health Organization, it applies not only to physical health but also to mental health and social well-being. Therapeutic abortion, unlike any other surgical operation, is governed by statute or common law in all states, but the wording of the regulations differs widely. In the strictest sense the law in most states does not permit the procedure for reasons such as illegitimacy, poverty, or rape, or on the basis that the infant is likely to be gravely malformed. Despite its apparent simplicity the law remains vague because the definitions of "life," "save," and "preserve" are subject to widely varying interpretation. For example, one English high court has acquitted a physician for performing therapeutic abortion in a case of rape of a young girl (*Rex* v. *Bourne*. For details see Harper). Abortions are commonly performed in cases of rubella, as a result of which the child may be malformed. In a time of rapidly changing laws, concepts, and mores, therapeutic abortion cannot be defined nor can the listing of its indications carry any degree of accuracy or permanence.

Legal Status. Contrary to popular belief today's stringent abortion laws are of fairly recent origin. Before quickening (the term applied to the first definite perception of fetal movement, which occurs between the sixteenth and twentieth weeks of gestation), abortion was either lawful or widely tolerated in both the United States and Great Britain until 1803. In that year, as part of a general overhaul of British criminal law, a basic criminal abortion law was enacted that made abortion before quickening illegal. Canon law, creating the dogma that in no circumstance is abortion justifiable, was established in 1869 by Pope Pius IX (Pilpel and Norwick).

The British law of 1803 became the model for similar laws in the United States, but it was not until 1821 that Connecticut enacted the nation's first abortion law. Throughout the nation abortion became illegal except to save the life of the mother. In a few states, the word "health" was added. Until very recently therapeutic abortion in most states was legally permissible only if it was necessary to save the *life* of the mother. Two states extended the exception to "to prevent serious or permanent bodily injury"; and in another two, the exception read "to preserve the life or health of the woman." If the "health of the woman" be construed to include her mental health, still in only two states was therapeutic abortion legally permissible on psychiatric indications or to prevent the birth of a malformed child (as in rubella), which might affect the mother's mental health. Since therapeutic abortion to save the *life* of the woman is rarely necessary, it follows that the great majority of such operations performed in this country went and still go beyond the letter of the law. Nevertheless, experience has shown that if a reputable physician, with the written approval of two other reputable physicians, carries out the operation openly in an accredited hospital, the propriety of the operation is rarely questioned by officers of the law. (For details of the legal status of therapeutic abortion in the United States, consult Harper). Many hospitals have set up abortion committees to decide the permissibility of abortion. Because the intent of these committees is to protect the reputation of the hospital, they have, in general, tended to be restrictive.

There is a growing body of both professional and lay opinion in favor of liberalization of the abortion laws. In 1943, the prestigious New York Academy of Medicine was among the first medical organizations to recognize the need for reform. Since that time the Academy has issued three statements on the subject; the last in 1969 favors repeal of existing abortion laws.

In 1959, the American Law Institute suggested a Model Penal Code governing abortion. This code would authorize therapeutic abortion when a licensed physician believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother, or that the child would be born with grave physical or mental defects, or that the pregnancy resulted from rape by force, or incest. Two physicians must certify in writing their belief in the justifying circumstance.

In 1967 the House of Delegates of the American Medical Association went on record as supporting reform of the abortion laws conforming to the general guidelines set forth in the Model Penal Code. In 1965 the American College of Obstetricians and Gynecologists recommended, in addition to the provision of the Model Penal Code, that social and total economic environment, actual or reasonably foreseeable, be considered as having a bearing on the health of the mother.

Between 1967 and 1969 eleven states amended their abortion laws by extending the indications for therapeutic termination of pregnancy. The new abortion act in Great Britain (1967) is among the most permissive of all recently enacted statutes. It contains two significant clauses in respect to the ascertainment of health of the mother:

1. "Account be taken of the pregnant woman's actual or reasonably foreseeable environment.
2. "Account be taken not only of the effect of pregnancy on the mother but on any existing children of her family."

If liberally construed, the current British abortion law is tantamount to virtually unrestricted abortion.

The report of Governor Rockefeller's special commission to review the New York State Abortion Law was published in March, 1968. The recommendations follow the Model Penal Code, but add two additional indications for abortion as follows:

1. "The pregnancy commenced while the female was unmarried and under 16 years of age, and is still unmarried.
2. "When the female already has four living children."

The principal arguments in favor of a more permissive abortion statute have been summarized by the Governor's special commission as follows:

1. "The deaths, sterility and harmed physical and mental health, resulting from the large number of illegal abortions each year could largely be prevented if such abortions were performed by competent physicians in proper hospital surroundings, within the framework of reasonable legislation.
2. "The wide disparity between the statutory law and actual practice encourages disrespect for the law and places upon the conscientious physician an intolerable conflict between his medical duty to his patients and his duty as a citizen to uphold the law.
3. "The present law places an unfair discrimination on the poor. Persons with money may obtain safe abortions either by traveling to other jurisdictions, by going to high-priced, competent though illegal abortionists, or by obtaining legal abortion here based on 'sophisticated' psychiatric indications."

The divergence between the literal interpretation of the law and current medical practice has led today's physician into an area of grave legal risk. There are indications that the courts may take action when reputable medical practice in accredited hospitals does not conform to strict interpretation of rigid abortion laws.

In 1969 there were two court decisions of major importance in this field. On September 5 the California Supreme Court in the case of *People* v. *Belous* declared the pre-1967 California abortion law unconstitutional on the following grounds:

1. The phrase "necessary to preserve life" is unconstitutionally vague;
2. "The fundamental rights of the woman to choose whether to bear children" is a right of privacy which the statute unconstitutionally abridges;
3. The statute violates the Fourteenth Amendment because of the "delegation of decision making power to a directly involved individual" (i.e., the doctor might be penalized for approving a request for abortion but not for denying a request).

In November, 1969, a decision in the United States District Court for the District of Columbia declared unconstitutional that part of the statute outlawing abortions other than those done "for the preservation of the mother's life or health." The reasoning was similar to, and in part relied upon, that in the *Belous* decision.

The New York law was recently challenged in the Federal Court for the Southern District of New York. The complaint in this case alleged that the abortion law is unconstitutional on grounds similar to those cited in the California case.

Minority reports accompanying many of these reports and resolutions are best summarized by the conclusion to The Minority Report of the Governor's Commission Appointed to Review New York State's Abortion Law, as follows: "Because we consider the proposals of the majority of our Committee to be violative of the fundamental rights of the human child *in utero* and detrimental to our traditional and still viable ideals of the sanctity of human life and the integrity of the family unit, we dissent."

The reform of abortion laws along the guidelines drawn by the American Law Institute has not worked well. Although the number of abortions has increased markedly, the poor still find it difficult to obtain abortions even in situations of obvious merit. Illegal abortions have probably not decreased. The laws are vague and in many instances capriciously interpreted (Monroe; Russell and Jackson; Droegemueller and co-workers; and Overstreet)

Although some states, notably Hawaii, Alaska, Washington, and New York have repealed their abortion laws, in most instances the solution to this complex problem may stem not from legislative reform of existing statutes but from action

of the courts on the constitutionality of abortion laws. (For full discussion of the constitutional questions, see Lucas.)

Indications. The indications for therapeutic abortion are discussed with the diseases that most commonly lead to the operation. A well-documented indication is heart disease in the wake of previous decompensation (p. 783). Another commonly accepted indication is advanced hypertensive vascular disease (p. 738). Still another is carcinoma of the cervix (p. 641).

Currently the two most frequently encountered indications for therapeutic abortion are psychiatric disease and potential abnormalities of the fetus. Among 4,675 therapeutic abortions performed in New York City between 1951 and 1962, inclusive, the major indication for the operation was a mental disorder (Gold and co-workers). Many, however, believe that interruption of pregnancy on psychiatric grounds is often a double-edged sword, which may aggravate rather than ameliorate psychotic tendencies. In the opinion of both Pearce and Martin, when the operation is carried out on mentally unstable women, 25 to 59 per cent are left with remorse and guilt. Even in the case of abortion for nonpsychiatric indications, Gebhard and associates found evidence of prolonged psychiatric trauma in 9 per cent of a sample of American women in whom the operation had been performed therapeutically or criminally. McCoy found that 27 percent of 62 women questioned at least one year after therapeutic abortion expressed varying degrees of regret. Seventy-three per cent of his patients were satisfied, and those for whom pregnancy was socially untenable rarely regretted the operation. Niswander and Patterson found that a similar percentage of their patients regretted the operation. Sim, an English psychiatrist, makes the sweeping statement: "There are no psychiatric grounds for termination of pregnancy." There is little information about the psychologic impact on the patient of refusal of her request for abortion. These women rarely commit suicide even though they may threaten to do so; however, among 249 Swedish women who were denied abortion, Hook found only 23 per cent who had accepted the situation and made a satisfactory adjustment.

Potential abnormality of the fetus as an indication for therapeutic abortion comes up most frequently in connection with maternal rubella. We believe that the operation is justified in selected cases (p. 808). As intrauterine diagnostic technics improve, the problem of serious fetal malformation will present more frequently. Valenti and colleagues have reported a therapeutic abortion performed on the basis of a firm diagnosis of Down's syndrome. Recently Schneck and colleagues have made an intrauterine diagnosis of Tay Sachs enzymatic disease. Other enzymatic disorders can be diagnosed with reasonable accuracy (Ch. 38, p. 1078).

It is impossible to predict what the future acceptable indications for therapeutic abortion will be. It is certain, however, that public opinion will not tolerate much longer the disregard of patients with unwanted pregnancies complicated by serious social problems. The new abortion policy of the American College of Obstetricians and Gynecologists succinctly states the matter as follows:

> Therapeutic abortion may be performed for the following established medical indications:
>
> 1. When continuation of the pregnancy may threaten the life of the woman or seriously impair her health. In determining whether or not there is such risk to health, account may be taken of the patient's total environment, actual or reasonably foreseeable.

2. When pregnancy has resulted from rape or incest: In this case the same medical criteria should be employed in the evaluation of the patient.
3. When continuation of the pregnancy is likely to result in the birth of a child with grave physical deformities or mental retardation.

Incidence. Tietze and Lewit estimate that about 8,000 therapeutic abortions per year were performed in hospitals in the United States from 1963 to 1965 (see also Rosen). This ratio of about 2 abortions per 1,000 live births contrasts with 79 per 1,000 live births in Sweden. In Hungary the number of abortions exceeds the number of live births. As the result of a sharp and continuing decline in traditional medical indications (heart disease, hypertension, pulmonary tuberculosis, and hyperemesis, for example), the number of operations performed on these grounds has fallen dramatically over the past two decades, with the result that interruption of pregnancy on physical indications is becoming rare.

Technic. Vaginal therapeutic abortion may be performed by the traditional dilatation and curettage or by the more recently introduced suction technic. The likelihood of uterine perforation, cervical laceration, hemorrhage, incomplete removal of the placenta, and infection increases sharply after the twelfth week, and perhaps somewhat earlier in primigravidas; for this reason neither dilatation and curettage nor suction curettage should be performed when the duration of pregnancy has exceeded that limit. If interruption of more advanced pregnancy is urgent, abdominal hysterotomy, hysterectomy, or intraamniotic injection of hypertonic saline are preferable.

There are other circumstances in which abdominal hysterotomy or hysterectomy is preferable to the vaginal operation. If, for example, sterilization is to be included in the procedure, combining hysterotomy with tubal ligation in a single operation or performing a hysterectomy is sometimes preferable to the two separate procedures. If the therapeutic abortion is done for medical or serious psychiatric indications, it is often carried out abdominally, because many of these indications for the operation are sound reasons for sterilization also. Still another advantage of abdominal hysterotomy is the greater likelihood of complete evacuation of the uterine contents, particularly if care is exercised in incising the uterine wall, so that the gestational sac may be delivered intact.

Light inhalation anesthesia with or without a muscle relaxant is usually satisfactory for the vaginal operation. The cervix is more easily dilatable if 1 per cent procaine or xylocaine is injected bilaterally into the paracervical tissues. Warming of the dilators is also helpful. To lessen the likelihood of uterine perforation an infusion of 10 units of oxytocin in 500 ml of saline or Ringer's lactate solution is sometimes given slowly during the operation. After the usual preparations for a vaginal operation, the cervix is grasped with a tenaculum and the depth of the uterine cavity is measured by a sound. Care is taken that no instrument be introduced into the uterus beyond that depth. The cervix is very gradually dilated with a series of Hegar dilators (Fig. 1). As shown in Figure 2, the fourth and fifth fingers of the hand introducing the Hegar dilators should rest on the patient's buttock as a further safeguard against uterine perforation. It is our opinion that a sharp curette is more efficacious and that its dangers are not greater than those of the dull instrument in the usual therapeutic abortion. Perforations of the uterus rarely occur on the downstroke of the curette but may occur when any instrument is introduced into the uterus; since the knife edge of a sharp curette is directed downward, it can have no bearing on this hazard. Any curette, however, is a

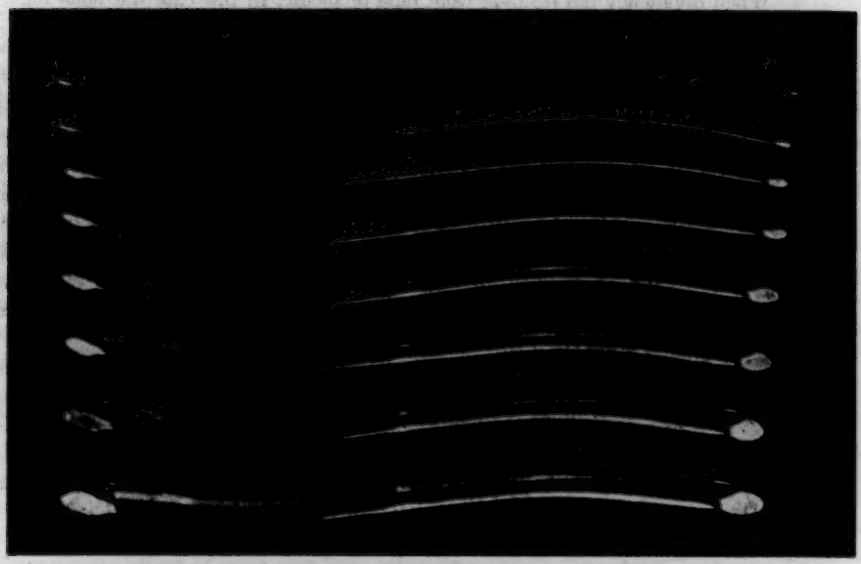


Fig. 1. Hegar graduated dilators.

Fig. 2. Dilatation of cervix with Hegar dilator. Note that the fourth and fifth fingers rest against the buttock. This maneuver is a most important safety measure because, if the cervix relaxes abruptly, these fingers prevent a sudden and uncontrolled thrust of the dilator, a common cause of perforation of the uterus.

dangerous instrument if injudicious force is applied to it. As shown in Figure 3 the necessary manipulations should be carried out with the thumb and forefingers only.

Suction curettage, introduced by Wu and Wu in China in 1958, has furnished

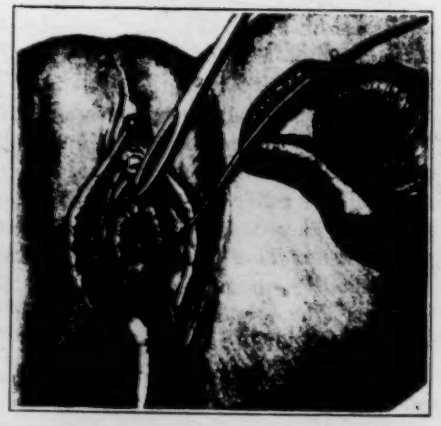


Fig. 3. Introduction of the curette. Note that the instrument is held merely with the thumb and forefinger; in the upward movement of the curette only the strength of these two fingers should be used. Moreover, just as soon as the curette has entered the cervical canal, the fourth and last fingers rest on the buttock as further protection against uterine perforation. Still another safeguard is the administration of 5 units of oxytocin 15 minutes before the operation and again as the patient is being draped.

a quick, nearly painless and almost completely safe method of performing therapeutic abortions before the twelfth week of gestation This technic is now the method of choice in the U.S.S.R. (Reid) and in other countries of eastern Europe. It is receiving increasing attention in Great Britain (Kerslake and Casey) and in the United States. The suction curettes are hollow tubes of different diameters, with a moderate-sized opening at or near the tip. A glass trap is interposed between the curette and a vacuum pump. Under paracervical block or light general anesthesia the cervix is dilated sufficiently to allow passage of the curette. Oxytocin is usually administered, and suction up to 760 mm Hg is obtained by covering the bypass at the base of the curette with the thumb. The curette is swept gently around the interior of the uterus until no further products of conception can be seen entering the trap. The entire procedure takes from two to three minutes. It is too soon to predict whether current enthusiasm for this method will be sustained. Perforation of the uterus is not unknown, however.

After the fourteenth week of pregnancy, when the fundus can be palpated through the abdominal wall, abortion may be brought about by the intraamniotic injection of hypertonic saline or 50 per cent glucose solution. The exact mechanism of action is still uncertain. Klopper has shown a rapid fall in estriol excretion after the injection of hypertonic saline. Pregnanediol remains at the same level, however, until the abortion is terminated. Such technics are not new, Boero having produced abortion with an intraamniotic injection of dilute formalin as early as 1935. In 1958, Brosset passed a needle through the abdominal wall into the uterine cavity, withdrew 50 ml of amniotic fluid, and injected an equivalent amount of 50 per cent dextrose in water. In his series, the interval between injection and abortion averaged 38 hours. Since then, articles by numerous authors (Jaffin and associates; Wood and colleagues; Weingold and co-workers; and Gochberg and Reid) have attested the efficacy of this method, using 50 to 200 ml of either 50 per cent dextrose or the even more effective 20 per cent saline. These technics may obviate the necessity for hysterotomy in therapeutic abortion. Although they are far safer than the original technic utilizing formalin, there is danger of infection, especially when dextrose solution is employed. Peel has reported a death from this

procedure, caused by the staphylococcus, and Briggs and MacDonald and colleagues have reported deaths caused by *Clostridium perfringens*.

Inadvertent introduction of hypertonic saline into the maternal circulation carries the likelihood of serious central nervous system and cardiopulmonary reactions. Cameron and Dayan have reported two new deaths as well as five others collected from the literature. All the patients had a high concentration of sodium in the blood and damage to the brain. Six patients showed extreme dehydration. Another reported complication following hypertonic saline is defective hemostasis caused by hypofibrinogenemia and related coagulation defects (Goldstein and also Quilligan). Between 1946 and 1950, more than 70 papers on this technic were published. There were 18 deaths between 1949 and 1952 alone (Wagatsuma). The method is no longer used in Japan. In contrast, both Goodlin and Schiffer report good results in moderately large series. Eastman comments on these studies as follows: "The intraamniotic injection of hypertonic saline for the induction of labor, if without substantial hazard, fills a real need in obstetrics; but only time will tell whether precautionary measures against hypernatremia will prevent such catastrophes as here reported."

In 22,179 cases, both gynecologic and obstetric, in which dilatation and curettage were performed for various reasons in two Baltimore hospitals, perforation of the uterus was recognized in 47, or once in about 500 operations, as reported by Radman and Korman. This figure agrees fairly well with that of Kushner and Dill, who report one known perforation in 700 operations. Although it is customary to regard the curette as the main offending instrument, Kushner and Dill point out that in their series of 21 perforations the curette caused less than one third. In the remainder a sponge stick, a sound, or dilators (both Hegar and Goodell) were the perforating instruments in about equal numbers.

The management of perforation of the uterus depends on the clinical events following the accident, particularly with regard to the extent of damage to other pelvic or abdominal viscera. Constant close observation of the patient for signs of peritoneal irritation or abdominal hemorrhage is therefore required. In the Baltimore series cited, abdominal exploration was deemed advisable in about one half the cases. In other series the comparable fraction has been somewhat smaller, averaging perhaps one third or less. In doubtful cases of perforation expectant treatment is the best course.

The morbidity and mortality rates from therapeutic abortion can be documented only from countries with permissive laws. In 23,666 therapeutic abortions performed in Denmark, the mortality rate was 0.7 per 1,000 operations, and serious but nonfatal sequelae ensued in 3.2 per cent (Berthelsen and Østergaard). These sequelae included 82 cases of perforation of the uterus and 122 cases of salpingitis, peritonitis, and septicemia. In addition, 113 cases of nonfatal but serious complications followed 5,320 abdominal hysterotomies, or 2.1 per cent.

The mortality rates appear to be correlated closely with the ease of obtaining abortion and the period in pregnancy when the operation is performed. Thus there is a mortality rate of about 4 per 100,000 abortions in the countries of eastern Europe and Japan, where abortion is not permitted after the third month of pregnancy and is entirely permissive. In contrast, the mortality rate is nearly 70 per 100,000 abortions in Denmark, where abortion may be performed later in pregnancy and is relatively more frequently done for serious medical disease.

Reprinted from *Studies in Family Planning* 45:6—8, September 1969

Mortality with Contraception and Induced Abortion

THE following paper was written by Christopher Tietze, M.D., Associate Director, Bio-Medical Division, The Population Council. We are pleased to be able to present it here.

AN unwanted pregnancy can be avoided by the use of contraception; an unwanted birth, by induced abortion. Since the ultimate objectives are identical, it is appropriate to compare the two approaches in terms of the risks to the woman's life associated with their use. This can be done by means of a statistical model, based on 100,000 women of reproductive age in fertile unions and exposed to the risk of pregnancy, assuming the following rates of mortality.

1. *Maternal Mortality* from complications of, or associated with, pregnancy, childbirth, and the puerperium, *excluding induced abortion: 20 deaths per 100,000 pregnancies*. This rate corresponds to the current level of maternal mortality in the white population in the United States. Official statistics of maternal mortality in the United States are based only on deaths attributed to complications of pregnancy, childbirth, and the puerperium. Thus defined, the rate of maternal mortality, excluding abortion, was 18 per 100,000 live births in 1964–66.

"Associated" deaths, related to pregnancy and childbirth, but attributed to other causes, e.g., heart disease, are not available for the United States. In England, where such associated deaths are identified and shown separately, they comprise about one-third of the number of deaths attributed to complications of pregnancy, childbirth, and the puerperium. Raising the maternal mortality rate for the U.S. by one-third brings it to 24 per 100,000 live births. Since the number of spontaneous fetal deaths appears to be on the order of one-sixth of all pregnancies and since very few deaths result from spontaneous abortion, an overall risk to life, excluding induced abortion, of 20 per 100,000 pregnancies would seem to be a reasonable approximation.

2. *Mortality* associated with *illegal abortion* induced out of hospital by persons without medical training: *100 deaths per 100,000 abortions*. This is a very rough estimate, and, almost certainly conservative, since it is lower than the maternal mortality rate, excluding abortion, per 100,000 live births for white women in the United States 25 years ago. Fortunately, the precise level of this rate is not relevant to the argument.

3. *Mortality* associated with *legal abortion* performed in hospital, at an early stage of gestation: *3 deaths per 100,000 abortions*, based on current statistics from eastern Europe (73 deaths among 2,567,000 legal abortions in Czechoslovakia, Hungary, and Slovenia, 1957–67).[1]

4. *Mortality* associated with *highly effective contraception: 3 deaths per 100,000 users per year*, based on the studies recently published in Great Britain, on *excess mortality from thromboembolic disease* attributable to the use of *oral contraceptives*. According to the report by Inman and Vessey,[2] the excess mortality from pulmonary embolism, cerebral thrombosis, and coronary thrombosis was 2.2 and 4.5 per 100,000 users for women 20–34 and 35–44 years of age, respectively. A weighted average of these two figures yields an annual excess risk to life of about 3 per 100,000 users.

Line 1 of Table 1 illustrates the reproductive behavior of a group of women neither using contraception nor having recourse to induced abortion.

The interval between two successive conceptions consists of three segments: the period of gestation (G), the anovulatory period following confinement (A), and the average number of ovulatory cycles required for a new conception to occur (O).[3] Of these three segments, the first (G) can be estimated within narrow limits as eight months, allowing for about 15 per cent spontaneous abortions. The anovulatory period (A) is known to vary widely, depending on the extent and average duration of breastfeeding. The present model allows for a range from 4 months without breastfeeding to 14 months with universal and prolonged breastfeeding. The mean value for the third segment (O), also estimated at eight months, may be too high.

The relationship between the number of pregnancies (P and P'), the number of women (W), the time factor (T), and the duration of the three segments of the in-

[1] C. Tietze, "Abortion Laws and Abortion Practices in Europe," *Advances in Planned Parenthood (v.5): Proceedings of the Seventh Annual Meeting of the American Association of Planned Parenthood Physicians, San Francisco, California. 9–10 April 1969.* (In press).

[2] W.H.W. Inman and M.P. Vessey, "Investigation of Deaths from Pulmonary and Cerebral Thrombosis and Embolism in Women of Child-bearing Age," *British Medical Journal*, 2:193–199. 27 April 1968.

[3] R.G. Potter, "Birth Intervals: Structure and Change," *Population Studies*, 17:155–166. November 1963.

TABLE 1. *Illustrative Annual Rates of Pregnancies and of Deaths Associated with Contraception, Pregnancy, and Induced Abortion per 100,000 Women of Reproductive Age in Fertile Unions*

	Pregnancies	Deaths
1. No contraception, no induced abortion	40,000–60,000	8–12
2. No contraception, all pregnancies aborted out of hospital	100,000	100
3. Ditto, aborted in hospital	100,000	3
4. Highly effective contraception	100	3
5. Moderately effective contraception, no induced abortion	11,800–13,000	2.5
6. Ditto, all pregnancies aborted out of hospital	14,300	14.3
7. Ditto, aborted in hospital	14,300	0.4

© THE POPULATION COUNCIL, INC., 1969

POOR COPY

terval between conceptions (G, A, and O) is defined by the following formula:

$$P = \frac{W \times T}{G + A + O}$$

In our model, T equals 12 months and G, A, and O are also expressed in months. The application of the formula to the estimate described in the preceding paragraph yields the following results:

$$P = \frac{100{,}000 \times 12}{8 + 4 + 8} = \frac{1{,}200{,}000}{20} = 60{,}000$$

$$P' = \frac{100{,}000 \times 12}{8 + 14 + 8} = \frac{1{,}200{,}000}{30} = 40{,}000$$

Thus, without contraception or induced abortion, 100,000 women experience in the course of one year between 40,000 and 60,000 pregnancies, corresponding to average intervals between conceptions ranging from 30 months to 20 months. Given the level of maternal mortality, excluding abortion, assumed for this model, of 20 per 100,000 pregnancies, the 100,000 women would experience between 8 and 12 deaths associated with the reproductive process.

Line 2 assumes no contraception, but all pregnancies are aborted out of hospital. Because gestation and the post-gestational anovulatory period are both substantially shorter than under the assumptions of the preceding line (G = 3 months, A = 1 month), the number of pregnancies rises to 100,000 with 100 deaths:

$$P = \frac{100{,}000 \times 12}{3 + 1 + 8} = \frac{1{,}200{,}000}{12} = 100{,}000$$

In line 3, the same number of abortions is performed legally in hospitals, resulting in 3 deaths instead of 100.

Line 4 assumes a highly effective method of contraception, such as the consistent use of oral anti-ovulants under the combined regimen. The expected number of pregnancies is on the order of 100.[4] Excess deaths from thromboembolic disease equal those resulting from legal abortions in hospitals, shown on the preceding line. Because of the small number of pregnancies, mortality associated with either pregnancy and childbirth or with abortion is insignificant.

A comparison of lines 3 and 4 shows that women regulating their fertility exclusively by means of abortions performed in hospitals are exposed to a risk to life of the same order of magnitude as an equal number of women using oral contraception consistently over the same period of time.

Lines 5, 6, and 7 each assumes a less effective but completely safe type of contraception which extends the average duration of ovulatory exposure required for conception from 8 to 80 months. This level of contraceptive effectiveness was approximately achieved by urban American couples in the 1950's, using the diaphragm or condoms, mainly for child spacing, and not for family limitation.[5]

Line 5 assumes no induced abortions and the number of conceptions is computed as follows:

$$P = \frac{100{,}000 \times 12}{8 + 4 + 80} = \frac{1{,}200{,}000}{92} \cong 13{,}000$$

$$P' = \frac{100{,}000 \times 12}{8 + 14 + 80} = \frac{1{,}200{,}000}{102} \cong 11{,}800$$

The corresponding number of deaths is on the order of 2.5 per 100,000 women per year.

Line 6 assumes that all pregnancies are aborted out of hospital by lay abortionists. The number of pregnancies increases slightly, owing to the shorter gestation and post-gestational anovulatory periods.

$$P = \frac{100{,}000 \times 12}{3 + 1 + 80} = \frac{1{,}200{,}000}{84} \cong 14{,}300$$

The expected number of deaths is 14.3 per 100,000 women per year.

In line 7, the same number of abortions is performed legally in hospitals and the number of deaths drops to 0.4 per 100,000 women or approximately one-seventh of the corresponding values shown in line 3 for no contraception but legal abortion, and in line 4, for oral contraception.

On the basis of this model, the following is my conclusion: In terms of the risk to life, the most rational procedure for regulating fertility is the use of a perfectly safe, although not 100 per cent effective, method of contraception and the termination of pregnancies resulting from contraceptive failure under the best possible circumstances, i.e., in the operating room of a hospital.

While comparable estimates of morbidity, associated with pregnancy and childbirth, abortion out of hospital and in hospital, and oral contraception, are not available, it is not unlikely that the pattern would be similar to that which has been demonstrated in terms of mortality.

---

[4] C. Tietze, "Oral and Intrauterine Contraception: Effectiveness and Safety," *International Journal of Fertility*, 13 (4):377–384. October–December 1968.

[5] P.C. Sagi, R.G. Potter, C.F. Westoff, "Contraceptive Effectiveness as a Function of Desired Family Size," *Population Studies*, 15:291–296. March 1962.

THE POPULATION COUNCIL

245 Park Avenue, New York, New York 10017

The Population Council is a foundation established in 1952 for scientific training and study in population matters. It endeavors to advance knowledge in the broad field of population by fostering research, training, and technical consultation and assistance in the social and biomedical sciences.

Item No. 52

ABORTION LAWS AND ABORTION PRACTICES IN EUROPE

CHRISTOPHER TIETZE*

Legislation regulating abortion in Europe runs the gamut from complete prohibition in Belgium and Ireland to abortion on request in Hungary and the U.S.S.R.[1] In a number of countries, *de facto* practice is more permissive than the indications recognized *de jure*. As shown in Table I, listing all countries with more than one million inhabitants and based in part on a compilation by Hubinont[2], the predominantly Catholic countries of western and southern Europe have the most restrictive legislation. Where artificial termination of pregnancy is not entirely prohibited, it is permitted for the single purpose of saving the woman's life or on narrowly interpreted medical indication, *i.e.*, to avert a serious threat to the woman's health, without consideration of the circumstances under which she has to live. In a few countries, eugenic and/or humanitarian indications are also recognized, at least *de facto*. Generally, therapeutic abortion is done rarely and with reluctance, but this is not universally true and in a few cities, notably in Switzerland, the practices of the medical profession are very liberal.[3, 4]

Northern Europe[5]

The first countries in Europe to take steps toward the liberalization of their abortion laws were Iceland, Sweden, and Denmark, during the 1930's. After World War II, Sweden in 1946 and again in 1963,[6] and Denmark in 1956,[7] further revised their abortion laws. Finland passed a liberal abortion statute in 1950[8] and Norway in 1960.[9] In the latter country, the new law merely codified what had long been accepted medical practice.

The range of acceptable indications is roughly the same in Sweden, Norway, Denmark and Finland. In each instance the law recognizes a medical indication, a eugenic indication, and a humanitarian indication. The scope of the medical indication has been explicitly extended to include considerations of a mixed socio-medical character. The wording of the Danish statute of 1956 will serve as an example. Under this statute, termination of pregnancy is permitted 'if the induction of an abortion is necessary to avert a serious danger to the life or health of the woman. In order to evaluate this danger, an appreciation shall be made of all the circumstances of the case, including the conditions under which the woman will have to live, and consideration shall be given not only to physical or mental illness, but also to any actual or potential state of physical or mental infirmity'.[7]

In regard to the eugenic indication, the older statutes mention only the hereditary transmission of mental disease, mental deficiency, and other severe illness or defect. Sweden's Royal Medical Board, however, has authorized the termination of pregnancy on psychiatric indication in many cases of German measles and in at least one celebrated case of thalidomide use.[10, 11] The 1963 amendment to the Swedish law and the new Danish and Norwegian statutes extend the traditional eugenic indication to cover damage or disease acquired during intra-

* Bio-Medical Division, The Population Council, New York, N. Y.

TABLE I

Abortion laws and abortion practices in Europe, 1969

	Recognized indications	De jure	De facto
I	Absolute prohibition	Belgium* Ireland	Ireland
II	Threat to woman's life	Albania Austria* Italy Netherlands* Portugal Spain	Albania Italy Portugal Spain
III	Medical	France German Fed. Rep. Switzerland*	Austria* France German Fed. Rep.
IV	Medical, eugenic, and/or humanitarian	German Dem. Rep.* Greece Rumania* (1)	Belgium* Greece Netherlands*
V	Medical-social and eugenic	Great Britain	Great Britain Switzerland*
VI	Medical-social, eugenic, and humanitarian	Denmark Finland Norway Sweden	Denmark Finland German Dem. Rep.* Norway Rumania* (1) Sweden
VII	Medical, eugenic, humanitarian, and social	Czechoslovakia Poland* Yugoslavia	Czechoslovakia Yugoslavia
VIII	On request	Bulgaria (2) Hungary U.S.S.R.	Bulgaria Hungary Poland* U.S.S.R.

* *De facto* practice more permissive than *de jure* indications.

1. The *de jure* position for women 45 years of age and over and those with four or more children is in Group VIII. Information on the *de facto* position is fragmentary but the reported number of abortions suggests Group VI.

2. For childless women the *de jure* position is Group VII.

uterine life. The humanitarian indication applies to pregnancies resulting from offenses against the penal code, such as forcible and statutory rape, as well as incest.

With minor exceptions, the maximum period of gestation at which abortion is permissible is five months in Sweden, four months in Denmark and Finland, and three months in Norway.

Examination of the administrative machinery implementing the abortion statutes in these four countries of northern Europe reveals important differences. The procedure is most centralized in Sweden, where, until 1965, more than 85 percent of all legal abortions were authorized by the Royal Medical Board in Stockholm, which makes its decision on the basis

of a written report from the physician who has examined the woman seeking abortion. The remaining 15 percent of the terminations were performed on the authority of a certificate signed by two physicians. The latter type of authorization accounted for one-fourth of all cases in 1966 and about one-third in 1967, possibly indicating a greater willingness on the part of Swedish doctors to accept responsibility for the decision.

In Denmark, most legal abortions require the unanimous authorization of a committee of three persons, attached to the local Mothers' Aid, a publicly supported organization, which conducts a thorough medical and social investigation. Twenty such committees have been established throughout the country, including five in Greater Copenhagen, each consisting of a psychiatrist, a gynecologist, and a social worker. Abortion on purely medical indications, where the threat to life and health results from a disease and not from the conditions under which the woman lives, may be performed on the sole authority of the appropriate chief of service. These cases represent about one-tenth of the total number of legal abortions in Denmark.

In Finland and Norway, the administrative machinery is relatively decentralized, with most legal abortions approved by two physicians, one of whom must be a gynecologist or surgeon on the permanent staff of a hospital. In Finland, the other physician is drawn from a roster of medical specialists established by the State Medical Board; in Norway, he is appointed by the county health officer and must be trained in psychiatry or social medicine.

In recent years, commissions of experts to re-evaluate the abortion question have been appointed in Sweden, Denmark, and Finland. The report of the Danish commission was published in early 1969.[12] A majority of its members rejected abortion on request, at least 'for the time being', but recommended four new indications for the interruption of pregnancy: Advanced age ('If the woman has completed her thirty-eighth year prior to the end of the twelfth week of pregnancy'), multiparity ('If the woman has given birth to at least four children who live at home and are under eighteen years of age'), immaturity ('If the woman, because of her youth or immaturity, cannot for the time being take care of the child in a responsible manner'), and social stress ('If pregnancy, childbirth, or care for the child may be assumed to result in severe stress on the woman, which cannot be averted in any other way, so that termination of pregnancy is considered necessary in consideration of the woman, the maintenance of the home, or the care of other children in the family'). H. Hoffmeyer, in a minority report, supported abortion on request for all women. The committee also recommended that the maximum period of gestation at which a pregnancy may be terminated be reduced from sixteen weeks to twelve weeks.

The reports of the Swedish and Finnish commissions are not yet available for analysis. Because it is known that the Swedish commission was given a mandate for a further liberalization of the indications for abortion, its recommendations and the resulting action of the legislature, if any, are expected with keen anticipation.

Legal abortions in Sweden increased from less than 0.1 per 1,000 population in 1939, following the enactment of a liberalized abortion law, to 0.9 per 1,000 in 1951, after which the trend was reversed, and the abortion rate dropped below 0.5 per 1,000 during the seven years 1957–63 (Table II and Figure 1), although the upward trend was resumed in 1961. Five years later the abortion rate surpassed the high point of the early 1950's and in 1967 it reached a peak of about 1.2 abortions per 1,000 population.[13] The course of events in Denmark was roughly parallel to that in Sweden, on a higher level, at least until 1966.[14]

In Sweden about 35 percent of the women undergoing legal abortion in 1964–65 were single, 55 percent were married, and 10 percent were widows or divorcees. About 75 percent had previously given birth, including 10 percent with five or more children.[15] In Denmark the proportions of married women (79 percent), parous women (89 percent), and mothers of five or more children (12 percent) were higher, but there were relatively fewer single women (14 percent) and previously married women (7 percent).[12a] These statistics are based, respec-

TABLE II

Legal abortions in Sweden, 1939–67, and Denmark, 1939–66

Year	Number		Rate per 1,000 population	
	Sweden	Denmark	Sweden	Denmark
1939	439	484	.07	.13
1940	506	522	.08	.14
1941	496	519	.08	.13
1942	568	824	.09	.21
1943	703	977	.11	.25
1944	1,088	1,286	.17	.32
1945	1,623	1,577	.24	.39
1946	2,378	1,930	.35	.47
1947	3,534	2,240	.52	.54
1948	4,585	2,543	.67	.61
1949	5,503	3,425	.79	.81
1950	5,889	3,909	.84	.92
1951	6,328	4,743	.90	1.10
1952	5,322	5,031	.75	1.16
1953	4,915	4,795	.69	1.10
1954	5,089	5,140	.71	1.17
1955	4,562	5,381	.63	1.21
1956	3,851	4,522	.53	1.01
1957	3,386	4,023	.46	.90
1958	2,823	3,895	.38	.86
1959	3,071	3,587	.41	.79
1960	2,792	3,918	.37	.86
1961	2,909	4,124	.39	.89
1962	3,205	3,996	.42	.86
1963	3,528	3,971	.46	.85
1964	4,671	4,527	.61	.96
1965	6,208	5,188	.80	1.09
1966	7,254	5,726	.93	1.19
1967	9,600*	NA	1.22	NA

* Preliminary.
NA = Not available.

tively, on abortions approved by the Royal Medical Board in Sweden and the Mothers' Aid organization in Denmark; abortions authorized by two physicians (Sweden) or by the chief of service (Denmark) are excluded.

In Norway, two special surveys established the numbers of abortions performed in hospitals at about 0.6 per 1,000 population in 1949 and 0.9 per 1,000 in 1954.[15] After the law of 1960 had become operative in February, 1964, the abortion rate increased to 1.2 per 1,000 population in 1966.[12b]

In Finland, legal abortions rose from about 0.7 per 1,000 population in 1951 to 1.4 per 1,000 in 1960. Over the next five years a decline to 1.0 per 1,000 was recorded.[16] In Iceland, according to unpublished data furnished by the Ministry of Health, legal abortions averaged slightly more than fifty per year during the decade 1954–63 without a discernible trend; this figure corresponds to 0.3 abortions per 1,000 population.

The overwhelming majority of legal abortions in northern Europe are performed on

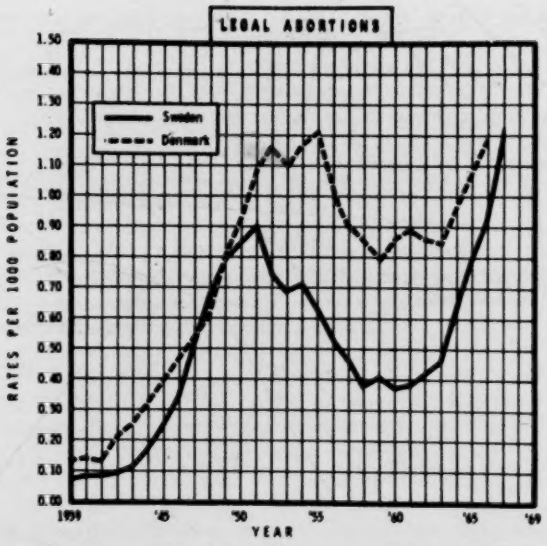


Fig. 1. Legal abortions per 1,000 population: Sweden and Denmark, 1939–67.

medical indication and, most often, on psychiatric grounds. The eugenic and humanitarian indications play very minor roles.

One of the major goals of the liberalization of abortion statutes in northern Europe was to reduce the incidence of illegal abortion. A further objective was to reduce the total number of abortions, legal and illegal combined, by establishing early contact with the pregnant woman and making available to her a broad range of social services. There is no agreement among Scandinavian authors as to what extent the first of these objectives has been achieved, and it is even less likely that the second goal has been realized in any of the countries concerned.[17–21] Whether the abortion laws have actually contributed to what has been referred to as 'abortion mentality' is a much debated question.

A by-product of the liberal laws of northern Europe has been the compilation of nation-wide statistics on mortality associated with legal abortion (Table III). The longest continuous

TABLE III

Mortality with legal abortion: Sweden, 1946–66 and Denmark, 1940–65

Country and period	Legal abortions	Deaths	Rate per 100,000
Sweden			
1946–48	10,500	27	257
1949–53	28,000	27	96
1954–59	22,800	15	66
1960–66	30,600	12	39
Denmark			
1940–50	19,500	38	195
1953–57	23,700	16	68
1961–65	21,700	9	41

series is available for Sweden, where there has occurred, over two decades, a marked and gratifying decline in mortality.[13, 23] A comparable series of statistics for Denmark extends over an even longer period but with two breaks in continuity.[23-25] Deaths attributable to pre-existing conditions, as well as those resulting from the operation, are included in these statistics. For Finland, eighteen deaths were reported among 27,100 legal abortions in 1950-57, corresponding to a rate of 66 per 100,000.[26]

Early complications of legal abortions reported in Denmark[25] during the period 1961-65 are shown in Table IV. Late somatic complications among women who had legal abortions

TABLE IV

Early complications of legal abortions: Denmark, 1961-65

	Number	Rate per 1,000
Bleeding*	243	11
Adnexitis**	201	9
Fever	199	9
Perforation of uterus	69	3
Rupture of wound	33	1.5
Phlebitis	33	1.5
Endometritis	27	1.2
Pneumonia	19	0.9
Pulmonary infarction	14	0.6
Injury to cervix	14	0.6
Ileus	12	0.6
Shock	8	0.4
Peritonitis	7	0.3
Sepsis	5	0.2
Other	7	0.3

* Including 91 cases of repeat evacuation presumably because of bleeding.

** Including oophoritis, salpingitis, and parametritis.

have been comprehensively surveyed by Lindahl.[27] Ekblad and others have studied the mental and emotional sequelae among women who had legal abortions,[28, 29] women whose abortion was approved but not carried out,[30] and those whose application was refused,[31] as well as among their children.[32]

United Kingdom

The most recent addition to the roster of countries with extended indications for legal abortion is Great Britain. According to the common law, which is the basis of the British legal system, abortion prior to quickening was not a crime, while abortion after quickening was considered a misdemeanor.[33] In 1803, abortion was made a statutory offense and a felony, although its performance was less severely punished prior to quickening than after quickening.

The Offenses Against the Person Act, enacted in 1861, made 'unlawfully' induced abortion a felony punishable by life imprisonment. The Act did not define 'unlawfully' and made no provision for the therapeutic termination of pregnancy. However, in 1938, in the famous case of *Rex* vs. *Bourne*, Mr. Justice Macnaughten ruled that abortion need not be unlawful if done in good faith to preserve the mother's life. He further instructed the jury as follows: 'If the doctor is of the opinion . . . that the probable consequences . . . will be to make the woman a

physical and mental wreck, the jury is quite entitled to take the view that the doctor . . . is operating for the purpose of preserving the life of the mother'. Bourne, who had aborted a young girl who had been the victim of a gang-rape attack, was acquitted and a legal precedent was set.[34]

Nevertheless, the official attitude and practice of the British medical profession remained basically conservative, especially in regard to non-private patients. About 1,570 therapeutic abortions were performed in the National Health Service (NHS) hospitals in England and Wales in 1958, rising to 2,830 in 1962 and to 6,380 in 1966. Over the same period, the abortion rate rose from 0.03 to 0.06 to 0.13 per 1,000 population. Women able to pay the customary fee of 100 guineas ($ 290) or more found it notably easier to obtain abortions, especially in London. The total number of therapeutic abortions, including a minimum estimate of those performed in private practice, increased to about 21,000 in 1966.[35] The latter figure corresponds to a rate of about 0.4 per 1,000 population.

In October, 1967, after a long and bitter legislative struggle,[36, 37] Parliament enacted a liberalized abortion statute, authorizing abortion if two physicians '. . . are of the opinion, formed in good faith: that the continuance of the pregnancy would involve risk to the life of the pregnant woman or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped'.[38] The Act provides further that 'in determining whether or not there is such risk of injury to health, account may be taken of the pregnant woman's environment both at the time when the child was born and thereafter so far as foreseeable.' Abortions may be performed in NHS hospitals or in facilities approved by the Minister of Health. The latter category includes private nursing homes. Conscientious objectors are specifically excused from participating in abortion procedures. The Act applies to England, Wales, and Scotland, but not to Northern Ireland; it came into force on April 27, 1968, after the appropriate regulations had been issued.[39] Guidelines for physicians in evaluating medical indications have been published by the British Medical Association.[40]

The British Abortion Act of 1967 contains a number of revolutionary innovations. Potentially most important are the words 'greater than if the pregnancy were terminated,' qualifying the 'risk to life or of injury to physical or mental health' of a continuing pregnancy. While this clause was inserted at a late stage of the legislative process, at the request of opponents of liberalization, it has been interpreted as justifying abortion in order to secure a relatively small improvement in the woman's medical condition, since at least the risk to life associated with early abortion under favorable conditions is substantially less than the risk normally associated with pregnancy and childbirth.[41]

Another important passage are the seven words 'or any existing children of her family'. Couched in medical terms, this phrase constitutes a recognition of the fact that not only the mother but her entire family may be adversely affected by the birth of an unwanted child. It should also be noted that the Act does not establish administrative machinery to authorize the termination of pregnancy. Any two physicians can make the determination if they feel that the required conditions are met.

A definitive evaluation of the new British abortion statute will not be possible for some time. During the first year of operation of the Act about 37,700 abortions were reported in England and Wales, including 22,500 in the NHS hospitals and about 15,200 in private practice. It would appear, then, that the number of therapeutic abortions under the NHS has more than tripled, as compared with 1966, while the total for England and Wales has increased to a level of 0.8 legal abortions per 1,000 population. Of the women undergoing abortion, about 48 percent were single, 44 percent were married, and 8 percent widowed, divorced, or separated.[42]

The trend of legal abortions in Britain in the years to come will depend largely on the

attitude of the medical profession. At present, resistance to abortion is often encountered, especially outside of London. One of the major centers of opposition is Birmingham. In one of the city's NHS hospitals, both consultants in obstetrics are Roman Catholics, who do not perform abortions. They are said to refer applicants to another hospital where the chief of the obstetric service has recently boasted that only one abortion was performed on his service in the course of a year. The psychiatrist at the same hospital is Dr. Myre Sim, who feels that 'there are no psychiatric grounds for the termination of pregnancy' and who moved the resolution against abortion reform at the conference of the British Medical Association in 1967.[43] In response to this situation, which makes it impossible for sympathetic general practitioners to refer their patients to local hospitals, a group of physicians and other professional workers have formed the Birmingham Pregnancy Advisory Service, which counsels women on whether they have lawful grounds for abortion, and if they have, tries to help them obtain it. The group hopes to start its own abortion center.[44] Similar groups may be organized in other cities.

Although statutes and practices relating to abortion are much more liberal in northern Europe and in Britain than in the majority of European countries or in the United States, abortion has, in fact, been 'legalized' on limited grounds only. Several of the socialist countries in eastern Europe have adopted far more radical policies.

Eastern Europe[45-48]

In eastern Europe, abortion policy has undergone several major changes since 1920, when interruption of pregnancy at the request of the pregnant woman was legalized in the U.S.S.R. by a joint decree of the Commissariats of Health and Justice. In 1936, another decree restricted legal abortion to a list of specified medical and eugenic indications. In 1955, the policy was once more reversed and the restrictive decree of 1936 repealed by the Presidium of the Supreme Soviet.[49]

Following the example of the U.S.S.R., all the socialist countries of eastern Europe, except East Germany and Albania, adopted similar liberalizing legislation.[50-51] In the words of the preamble to the Soviet decree, the aims of this legislation are 'the limitation of the harm caused to the health of women by abortions carried out outside hospitals', and to 'give women the possibility of deciding themselves the question of motherhood.'

Throughout eastern Europe, official concern with overpopulation or rapid population growth is proscribed by Marxist philosophy. Moreover, several of the countries concerned have very low birth rates, and none has a high birth rate by global standards. At least two countries, Czechoslovakia and Hungary, have long pursued an active population policy by means of family allowances for third and later children.

Within the overall pattern of legal abortion, considerable variation between individual countries is apparent. Abortion at the request of the pregnant woman was legalized in the U.S.S.R., Bulgaria, Hungary, and Rumania. In Poland, the law of 1956 stipulates a 'difficult social situation' as an acceptable reason for the termination of pregnancy. In Czechoslovakia, the law permits abortion for reasons 'which deserve special consideration', among which the Ministry of Health listed in 1957: *(a)* advanced age, *(b)* numerous children, *(c)* loss or disability of husband, *(d)* broken home, *(e)* predominant economic responsibility of the woman for the maintenance of the family or the child, *(f)* difficult circumstances of an unmarried woman resulting from her pregnancy, and *(g)* pregnancy due to rape or other offense. Late in 1961, a new regulation restricted voluntary abortions on the ground of multiparity to women with three or more living children, and also required a threat to the level of living in cases of predominant economic responsibility of the woman.[52] In Yugoslavia, termination of pregnancy may be authorized if the birth of the child would result in a serious personal, familial, or economic situation for the pregnant woman which cannot be averted in any other way.

Commissions for the authorization of abortion, consisting of physicians and representatives of the social services, have been established in Czechoslovakia and Yugoslavia. Medical boards also exist in Hungary, but their function has become purely formal since they must assent if the applicant insists on having her pregnancy terminated. In Poland, abortion is authorized by a certificate from a single physician.

Throughout eastern Europe abortion is prohibited in cases of pregnancy of more than three months' duration, except for medical reasons, and also if the applicant has undergone an induced abortion during the preceding six months. In some countries, such as Czechoslovakia and Hungary, the operation must be performed in an appropriately equipped and staffed hospital, where the typical period of stay is two or three days followed by sick leave if the woman is a wage earner. In Poland and Yugoslavia, however, many legal abortions are done on ambulatory patients. In recent years, suction curettage has been used on an increasing scale throughout eastern Europe because it is technically easier, faster, and less traumatic than the traditional 'D & C'.[56, 57]

The last few years have brought important changes in the abortion laws and practices of some countries in eastern Europe. These changes took place in East Germany, Rumania, and Bulgaria.

The German Democratic Republic did not participate in the general liberalization of abortion laws during the 1950's. After World War II the draconic regulations of the Third Reich were replaced by a series of State laws under which legal abortion could be performed on medical, eugenic, and humanitarian grounds, and to some extent on social or economic grounds also. These statutes were in turn superseded in 1950 by the Law for the Protection of the Mother and the Child, which permits abortion on medical and eugenic indication only. The decision lies with regional commissions which include among their members not only physicians but also representatives of the social services and the quasi-official Union of German Women.[58, 59] In 1965, these commissions were administratively authorized to extend the scope of the medical indication, taking into account the woman's social environment.[60] Since statistics on legal abortions in the German Democratic Republic have not been published since 1962,[61] the effect of this administrative action cannot be evaluated.

The changes in Rumania and Bulgaria were in the opposite direction. In both countries, abortion on request, to be performed without any formalities in any hospital, had been legalized in 1956–57. Rumania abruptly reversed this policy by a decree issued in October, 1966, restricting abortion to women over forty-five years of age and to mothers supporting four or more living children, in addition to the usual medical, eugenic, and humanitarian indications.[62] The medical indication is narrowly defined as a threat to the woman's life. The preamble to the decree of 1966 refers to the 'great prejudice to the birth rate and the rate of natural increase' resulting from the practice of abortion as well as to 'severe consequences to the health of the woman'. It would appear, however, that the primary reason for the repeal of the law of 1957 was concern over the decline in the birth rate, which by 1966 had dropped to 14.3 per 1,000 population, the second lowest in Europe.

In the case of Bulgaria, the change was far less drastic than in Rumania. According to a regulation issued in February, 1968, interruption of pregnancy is prohibited in the case of a woman without a living child, except in the presence of a serious medical or social indication, established by a women's health center.[63]

Women with one or two children must apply to a board which 'shall explain the harmfulness and dangers of abortion, the need to take the pregnancy to full term, the financial support which the family will receive after the birth of the child and, in general, shall make every effort to dissuade every woman who expresses the desire to have her pregnancy interrupted from doing so'. If, nevertheless, the woman persists in asking for the termination of her pregnancy, the board must give its approval. Women over forty-five years of age and those with three or more children do not require the approval of the above-mentioned board.

TABLE V

Births and abortions in Czechoslovakia, 1953–67, Hungary, 1950–67, and Slovenia, 1955–67: numbers and rates

Year	Number in 1,000's			Rate per 1,000 population		
	Live births	Legal abortions	Other abortions*	Live births	Legal abortions	Other abortions*
1953 *Czechoslovakia*	271.7	1.5	29.1	21.2	0.1	2.3
1954	266.7	2.8	30.6	20.6	0.2	2.4
1955	265.2	2.1	33.0	20.3	0.2	2.5
1956	262.0	3.1	31.0	19.8	0.2	2.3
1957	252.7	7.3	30.2	18.9	0.5	2.3
1958	235.0	61.4	27.7	17.4	4.6	2.1
1959	217.0	79.1	26.4	16.0	5.8	1.9
1960	217.3	88.3	26.3	15.9	6.5	1.9
1961	218.4	94.3	26.0	15.8	6.8	1.9
1962	217.5	89.8	26.1	15.7	6.5	1.9
1963	236.0	70.5	29.4	16.9	5.0	2.1
1964	241.1	70.7	28.5	17.1	5.0	2.0
1965	231.6	79.6	26.2	16.4	5.6	1.8
1966	222.5	90.3	25.5	15.6	6.3	1.8
1967	217.4	95.1	24.4	15.1	6.6	1.7
1950 *Hungary*	195.6	1.7	34.3	20.9	0.2	3.7
1951	190.6	1.7	36.1	20.2	0.2	3.8
1952	185.8	1.7	42.0	19.6	0.2	4.4
1953	206.9	2.8	39.9	21.6	0.3	4.2
1954	223.3	16.3	42.0	23.0	1.7	4.3
1955	210.4	35.4	43.1	21.4	3.6	4.4
1956	192.8	82.5	41.1	19.5	8.3	4.2
1957	167.2	123.4	39.5	17.0	12.5	4.0
1958	158.4	145.6	37.4	16.0	14.7	3.8
1959	151.2	152.4	35.3	15.2	15.3	3.5
1960	146.5	162.2	33.8	14.7	16.2	3.4
1961	140.4	170.0	33.7	14.0	17.0	3.4
1962	130.1	163.7	33.9	12.9	16.3	3.4
1963	132.3	173.8	34.1	13.1	17.2	3.4
1964	132.1	184.4	34.3	13.1	18.2	3.4
1965	133.0	180.3	33.7	13.1	17.8	3.3
1966	138.5	186.8	33.6	13.6	18.3	3.3
1967	148.9	187.5	34.9	14.6	18.4	3.4
1955 *Slovenia*	32.1	0.4	5.0	21.0	0.3	3.3
1956	31.5	0.8	4.6	20.4	0.5	3.0
1957	30.1	2.2	5.6	19.4	1.4	3.6
1958	28.2	4.7	6.0	18.1	3.0	3.8
1959	28.4	6.4	5.2	18.2	4.1	3.3
1960	27.8	8.2	5.5	17.6	5.2	3.5
1961	29.0	9.3	5.6	18.2	5.8	3.5
1962	29.0	9.5	5.6	18.1	5.9	3.5
1963	29.2	9.4	6.1	18.1	5.8	3.8
1964	29.2	9.4	6.0	17.9	5.8	3.7
1965	30.7	9.9	6.1	18.6	6.0	3.7
1966	30.9	9.5	5.4	18.5	5.7	3.2
1967	29.6	10.1	4.3	17.5	6.0	2.6

* Hospital admissions.

This regulation was issued on the basis of a governmental decree for the encouragement of the birth rate. There is no question, therefore, that the retreat from abortion on request was motivated primarily by demographic considerations. The birth rate in Bulgaria was 14.9 per 1,000 population in 1966.

The liberalization of abortion laws in the 1950's resulted in spectacular increases in the incidence of legal abortion throughout eastern Europe. The most comprehensive and trustworthy statistics are those for Czechoslovakia, Hungary, and Slovenia, the most developed among the constituent republics of Yugoslavia (Table V). The U.S.S.R. has not published any statistics on abortion. There are reasons to believe, however, that the number is very large and the rate very high.[64]

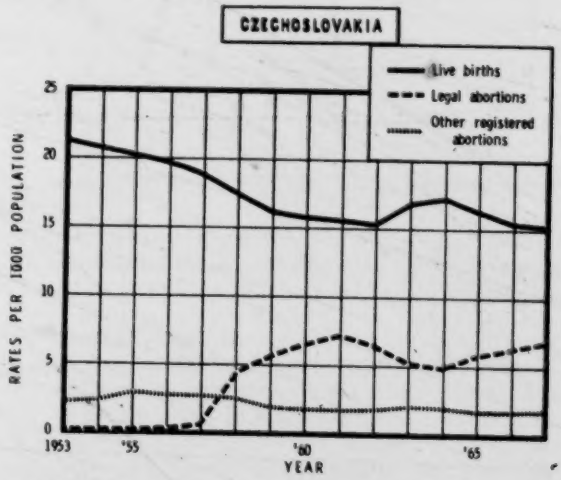


Fig. 2. Live births and abortions per 1,000 population: Czechoslovakia, 1953–67.

In Czechoslovakia (Figure 2), legalization of abortion for non-medical reasons was preceded by almost two years of public discussion. Moderate increases in the abortion rate in 1956 and 1957 reflect the changing attitude of the medical profession.[65] Promulgation of a new and liberalized abortion law in December, 1957, was followed by a steep rise in legal abortions in 1958, which continued at a decelerating pace until 1961, when the rate reached a peak of 6.8 per 1,000 population. The trend was then reversed with a drop to 5.0 per 1,000 in 1963, followed by a renewed upward movement two years later which has continued through 1967.[64, 67]

In Hungary (Figure 3), vigorous efforts to enforce existing laws against criminal abortion in 1952 and 1953 were followed by an increase in births in 1953 and 1954. At about the same time, medical boards for the authorization of therapeutic abortions were established. The growing numbers of legal abortions since 1953 indicate the progressive liberalization of the policies of these boards.[68] After the decree of June 3, 1956, had introduced termination of pregnancy on request, the rate of legal abortions increased rapidly until it reached 18.4 per 1,000 population in 1967, exceeding the birth rate by about one-fourth.[69]

In Slovenia, the rate of legal abortions approaches that found in Czechoslovakia; however, the decline seen in that country during the early 1960's is lacking.[70–72]

What has been the effect of legalization on the frequency of illegal abortions in Czecho-

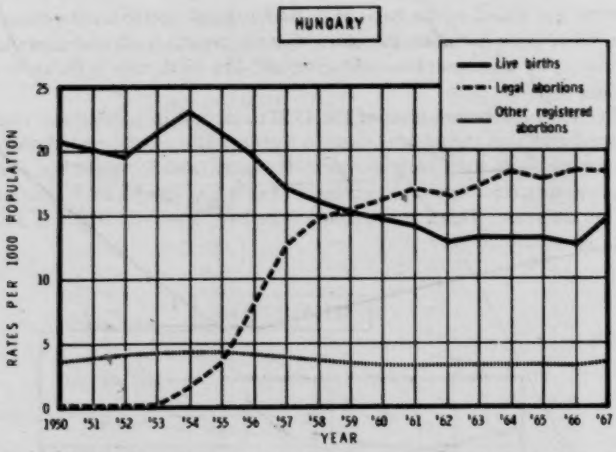


Fig. 3. Live births and abortions per 1,000 population: Hungary, 1950–67.

slovakia, Hungary, and Slovenia? This question cannot be answered with certainty since the number of illegal abortions is not known before the new legislation or at the present time. The reported numbers and rates of 'other abortions', limited to hospitalized cases, have declined moderately.

No firm conclusions can be drawn from this trend since these figures include spontaneous abortions as well as illegal abortions requiring hospitalization for aftercare or the treatment of complications. Moreover, neither the proportion reaching medical attention among all abortions, other than those legally performed in hospitals, nor the proportion hospitalized among those under medical care, may be assumed to have remained at constant levels. Deliveries in hospitals in Czechoslovakia increased from 79.4 percent of all deliveries in 1955 to 98.1 percent in 1966.[73] The corresponding proportions in Hungary were 67.0 percent in 1956 and 96.6 percent in 1965.[69a] To what extent this trend toward greater utilization of institutional facilities extends to the treatment of abortion is a matter of conjecture.

Mortality due to abortion, as reported in national cause-of-death statistics, declined rapidly in Czechoslovakia and Hungary after the enactment of liberal abortion statutes in the 1950's; such a change was not seen at that time in countries without new legislation, such as France or England (Figure 4). The declines are even more marked if the deaths associated with the rising numbers of legal abortions are excluded. It should be noted, however, that the level of abortion mortality in Hungary was still significantly higher, in spite of the downward trend, in the early 1960's than in western Europe, while in Czechoslovakia it was only slightly lower than in France or England.

In summary, then, there is little doubt that the number of criminal abortions has declined substantially but that these declines have been masked by increased hospitalization after spontaneous or illegal abortion, resulting in part from restrictions on the private practice of medicine and in part from the fact that women no longer fear prosecution or harassment by the police. Nevertheless, criminal abortion and/or self-abortion have not disappeared, even in Hungary, where abortion has been available on request for more than a decade. There is evidence that this stubborn survival of clandestine abortion is associated with the relative lack of privacy of the official procedure.[74]

'Other abortions' are reported more frequently in Hungary than in Czechoslovakia. According to Hirschler, the high rate reflects the practice of some gynecologists who admit

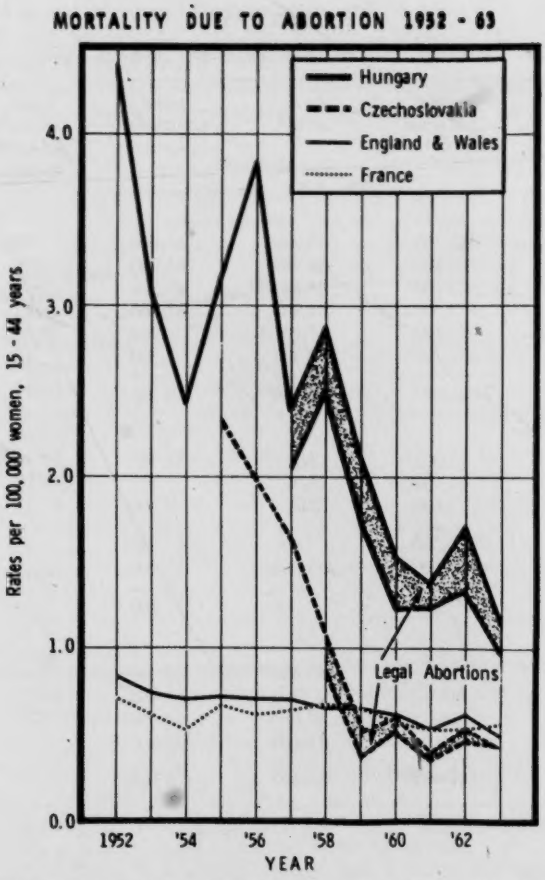


Fig. 4. Deaths attributed to abortion per 100,000 women, 15–44 years of age: Selected countries, 1952–63.

women to hospitals under the pretext of incomplete abortion in order to avoid charging the prescribed modest fee for abortion on request or because the women live outside the area from which the hospital may admit for this purpose.[75] There is no ready explanation for the relatively high rate of 'other abortions' in Slovenia.

According to the official statistics for 1965, two out of three women undergoing legal abortion in Czechoslovakia (67 percent) were between twenty and thirty-five years of age, compared with three out of four (74 percent) in Hungary.[67, 69] Even higher were the proportions of married women (82 percent in Czechoslovakia, 86 percent in Hungary) and of women who had one or more living children at the time of the abortion (88 percent in Czechoslovakia, 85 percent in Hungary). Table VI shows additional detail on these points for Hungary.

Rumanian statistics are fragmentary. According to reports in the literature, which could not be traced to an official source, 112,000 legal abortions were performed in 1958, the first full year after abortion on request was legalized, and 219,000 in 1959.[74] The corresponding

TABLE VI

Pattern of legal abortion by age, marital status and number of living children: Hungary, 1963–64

Age, marital status, and number of prior living children	Female population 15–49*	Live births*	Legal abortions*	Legal abortions per 1,000 females	Legal abortions per 1,000 live births
Age:					
15–19	382,700	16,300	11,400	30	700
20–24	364,100	52,900	44,000	121	830
25–29	349,100	35,300	49,500	142	1,400
30–34	370,700	17,900	41,800	113	2,300
35–39	383,100	7,700	23,900	62	3,100
40–49	631,300	2,200	8,500	13	3,900
15–49	2,481,000	132,300	179,100	72	1,350
Marital status:					
Single	585,000	NA	16,900	29	NA
Widowed	61,900	NA	1,100	18	NA
Divorced	73,600	NA	3,900	53	NA
Unmarried	720,500	7,000	21,900	30	3,100
Married	1,760,500	125,300	157,200	89	1,250
Total	2,481,000	132,300	179,100	72	1,350
Living children:					
None	NA	63,400	27,200	NA	430
1	NA	40,300	53,600	NA	1,330
2	NA	14,000	55,700	NA	4,000
3 or more	NA	14,600	42,600	NA	2,900
Total	2,481,000	132,300	179,100	72	1,350

* Female population: Estimate for 1/1/1964. Live births and legal abortions: Average of 1963 and 1964.
NA = Not available.

abortion rates were 6.2 and 12.0, respectively, per 1,000 population. For 1965, the Central Committee of the Rumanian Communist Party announced a total of 1,115,000 abortions, 58.6 per 1,000, but it is not clear whether this figure refers to legal abortions only or to all abortions.[77] No data are available for the intervening years, which makes it difficult to evaluate the truly extraordinary figure for 1965 which is four times the number of births.

Following the sudden reversal of policy in late 1966 the number of legal abortions in Rumania dropped precipitously. According to a report of a Danish mission visiting Rumania in late 1967, about 35,000 were performed during the first ten months under the new law.[13c] Over the same period, about 104,000 so-called spontaneous abortions were reported. The corresponding rates, computed for a full year, were 2.2 and 6.5, respectively, per 1,000 population. While the abortions reported as spontaneous doubtless include many that were illegally induced, the Rumanian authorities suggested that the high rate may reflect, at least in part, a true increase in incidence, resulting from anatomical damage by repeated induced abortions during the preceding years. It was stated that women admitted to hospitals from November 1966 through March 1967 had experienced, on the average, five prior abortions.

The Rumanian birth rate jumped from 14.3 per 1,000 population in 1966 to 38.4 in the third quarter of 1967, followed by a gradual decline, presumably reflecting increased recourse to contraception and/or illegal abortion.

Mortality associated with legal abortion has fallen to very low levels in eastern Europe (Table VII). In Czechoslovakia, thirteen deaths occurred among 413,000 abortions during

TABLE VII

Mortality with legal abortion: selected countries in Eastern Europe, 1957–67

Country and period	Legal abortions	Deaths	Rate per 100,000
Czechoslovakia			
1958–62	413,000	13	3.1
1963–67	406,000	10	2.5
Hungary			
1957–58	269,000	15	5.6
1960–63	670,000	22	3.3
1964–67	739,000	9	1.2
Slovenia			
1961–67	67,000	4	6.0
Total	2,564,000	73	2.8

the period 1958–62, corresponding to a rate of 3.1 deaths per 100,000 abortions. By 1963–67, mortality had dropped to 2.5 per 100,000.[78] Hungary reported a mortality rate of 5.6 per 100,000 abortions in 1957-58,[68] while the most recent figure is 1.2 deaths per 100,000 for 1964–67.[75] In Slovenia, which has the best statistical service among the constituent republics of Yugoslavia, four deaths were reported in 1961–67 among 67,000 legal abortions, corresponding to a rate of 6.0 per 100,000 cases.[79]

Mortality associated with legal abortion is substantially lower in eastern Europe than in northern Europe where rates of about 40 per 100,000 have been reported in recent years. The higher death rates in northern Europe may be attributed in part to the fact that a substantial proportion of legal abortions is performed after the third month of gestation.[25, 80-82] These late abortions contribute heavily to the total number of deaths; in eastern Europe almost all legal abortions are performed in the first trimester of pregnancy, with the majority in the second month. In addition, many women undergoing legal abortion in northern Europe are ill or at least in poor physical condition, while in eastern Europe the overwhelming majority are in good health.

Statistical information on morbidity associated with legal abortion is less complete than information on mortality, and it is very difficult to achieve comparability between countries and even between investigators in the same country.

One of the early studies from Czechoslovakia reported on 7,331 terminations of pregnancy performed in five hospitals, mainly by dilatation and curettage.[83] The rate of early complications was 34 per 1,000 abortions, including twenty cases of infection, ten cases of bleeding, and four injuries per 1,000 women. At about the same time, three Hungarian authors reported on 23,300 legal abortions in one county, including 13,458 in three large hospitals.[84] In the latter group, 32 per 1,000 women experienced early complications, mainly bleeding and fever, with rates in the three hospitals ranging from 7 to 54. In addition, twenty-one women per

1,000 had to be re-admitted within six weeks of the operation. Serious injury was reported in eleven cases per 1,000.

In recent years, the pattern of early morbidity appears to have improved, although serious problems of statistical comparability remain. Table VIII summarizes Hirschler's countrywide

TABLE VIII

Early complications of legal abortions: Hungary, 1960–67

Type of complication	Rate per 1,000	
	1960–63	1964–67
Perforation of uterus	1.3	1.0
Fever of gynecologic origin	4.8	4.0
Hemorrhage after the abortion	6.3	6.6
Readmission for fever*	5.0	4.5
Readmission for hemorrhage*	11.2	10.0

* Within four weeks after the abortion.

data on early complications in Hungary during the period 1960–67.[75] Černoch, in 1965, reported similar figures for Czechoslovakia, without specifying the coverage: Injuries—0.6 per 1,000 abortions, inflammation—5 per 1,000 abortions, 'more profuse bleeding'—3 per 1,000 abortions.[85]

Information on the sequelae of legal abortion in eastern Europe is scanty. In Hungary, premature birth tends to occur more frequently among women who have had induced abortions than among women who have not had them. This is true regardless of age, parity, employment, and other characteristics of the mother.[86–87] The frequency of prematurity tends to increase with the number of prior induced abortions. However, while prematurity is associated with high infant mortality, legal abortions preceding childbearing have not been numerous enough in Hungary to prevent a drop in infant mortality from 58.8 per 1,000 live births in 1956 to 38.4 per 1,000 in 1966.

In summary, then, abortion laws and abortion practices in Europe run the gamut from the traditional restrictions which prevail mainly in the West and South, through liberalization in the North and in Britain, to complete or almost complete legalization in a number of countries of the East. Whatever direction our own way of dealing with abortion takes, we can draw on the experience of Europe and learn from it.

REFERENCES

1. Heiss, H., *Die Abortsituation in Europa und den aussereuropäischen Ländern*, Stuttgart, 1967.
2. Hubinont, P. O., 'Abortion in western and southern Europe: a preliminary study,' *Paper presented at the International Conference on Abortion, Hot Springs, Virginia, Nov. 17–20, 1968.*
3. Geiser, M., 'Zahlen und Gedanken zur legalen Schwangerschaftsunterbrechung in der Schweiz und im Ausland,' *Schweizerische Medizinische Wochenschrift, 86:* 1006–1010, 8 Sept. 1956.
4. Marr, S., 'Abortion à la Suisse,' *New Statesman*, 7 Apr. 1967.
5. Tietze, C., 'Legal abortion in Scandinavia,' *Quarterly Review of Surgery, Obstetrics and Gynecology, 16:* 227–230, Oct.-Dec. 1959.
6. Sweden: Laws, Statutes, etc., 'Interruption of pregnancy,' *International Digest of Health Legislation, 17:* 152, 1966.
7. Denmark: Laws, Statutes, etc., 'Interruption of pregnancy,' *ibid., 8:* 377–381, 1957.
8. Finland: Laws, Statutes, etc., 'Interruption of pregnancy,' *ibid., 2:* 559–561, 1951.
9. Norway: Laws, Statutes, etc., 'Interruption of pregnancy,' *ibid., 16:* 148–154, 1965.

10. FINKBINE, S., 'The lesser of two evils,' *The Case for Legalized Abortion Now* (A. F. Guttmacher, ed.), pp. 15–25. Berkeley, 1967.
11. RAPOPORT, J. L., 'American abortion applicants in Sweden,' *Archives of General Psychiatry, 13:* 24–33, July 1965.
12. Denmark: Justitsministeriet, *Betaenkning om Adgang til Svangerskabsafbrydelse*. Copenhagen, 1969.
12a. *Op. cit.*, p. 49.
12b. *Op. cit.*, p. 24.
12c. *Op. cit.*, pp. 182–188.
13. Sweden. Medicinalstyrelsen, *Allmän Hälso-och Sjukvård*. Stockholm, various years.
14. Denmark. Sundhedsstyrelsen, *Medicinalberetning for Kongeriget Danmark*. Copenhagen, various years.
15. Norway: Justisdepartementet, *Innstilling fra Straffelovrådet om Adgangen til å Avbryte Svangerskap*, p. 74. Trondheim, 1956.
16. Finland: Laakintohallitus, *Yleinen terveyden- ja sairaanhoito*. (Suomen Virallinen Tilasto, XI; 67), pp. 154–156. Helsinki, 1966.
17. ALDÉN, T., 'Om de illegala aborternas antal och geografiska fördelning,' *Abortfrågan* (Sweden: Inrikesdepartementet), pp. 222–234. Stockholm, 1953.
18. INGELMAN-SUNDBERG, A., 'Om de illegala aborternas antal och geografiska fördelning,' *Svenska Läkartidningen, 50:* 2386–2392, 13 Nov. 1953.
19. QUENSEL, C. E. and GENELL, S., 'Ha de illegala aborterna minskat under de senare åren?,' *Svenska Läkartidningen, 50:* 2784–2792, 24 Dec. 1953.
20. WAHLÉN, T., 'De illegala aborternas antal: en kommentar till abortbetänkandets bilaga II,' *Svenska Läkartidningen, 51:* 248–250, 29 Jan. 1954.
21. HOFFMEYER, H. and NØRGAARD, M., 'Konceptionshyppighed og svangerskabsforløb: undersøgelser og beregninger af den illegale aborthyppighed siden 1940,' *Ugeskrift for Laeger, 126:* 355–371, 12 Mar. 1964.
22. KLINTSKOG, E., 'Operationsriskerna vid legal abort,' *Abortfrågan* (Sweden: Inrikesdepartementet), pp. 252–261. Stockholm, 1953.
23. ORAM, V., 'Dødsårsag og dødelighed ved legal svangerskabsafbrydelse i årene 1940–50 i Danmark,' *Ugeskrift for Laeger, 114:* 482–485, 17 Apr. 1952.
24. BERTHELSEN, H. G. and ØSTERGAARD, E., 'Komplikationer og mortalitet ved legal abortus provocatus baseret på 23,666 anmeldelser til sundhedsstyrelsen i årene 1953 til 1957,' *Ugeskrift for Laeger, 120:* 1005–1009, 31 July 1958.
25. OLSEN, C. E., NIELSEN, H. B. and ØSTERGAARD, E., 'Abortus provocatus legalis: en analyse af 21,730 anmeldelser til sundhedsstyrelsen 1961–1965,' *Ugeskrift for Laeger, 129:* 1341–1351, 12 Oct. 1967.
26. OLKI, M., 'Die Abortsituation in Finnland,' *Internationale Abortsituation, Abortbekämpfung, Antikonzeption* (K-H Mehlan, ed.), pp. 64–69. Leipzig, 1961.
27. LINDAHL, J. M., *Somatic Complications following Legal Abortion*, Stockholm, 1959.
28. EKBLAD, M., 'Induced abortion on psychiatric grounds: a follow-up study of 479 women,' *Acta Psychiatrica et Neurologica Scandinavica*, suppl. *99:* 1–238, 1955.
29. JANSSON, B., 'Mental disorders after abortion,' *Acta Psychiatrica Scandinavica, 41:* 87–110, 1965.
30. ARÉN, P. and ÅMARK, C., 'The prognosis in cases in which legal abortion has been granted but not carried out,' *Acta Psychiatrica et Neurologica Scandinavica, 36:* 203–278, 1961.
31. HÖÖK, K., 'Refused abortion: a follow-up study of 249 women whose applications were refused by the National Board of Health in Sweden,' *Acta Psychiatrica Scandinavica, 39* (suppl. 168): 1–156, 1963.
32. FORSSMAN, H. and THUWE, I., 'One hundred and twenty children born after application for therapeutic abortion refused: their mental health, social adjustment and educational level up to the age of 21,' *Acta Psychiatrica Scandinavica, 42:* 71–88, 1966.
33. WILLIAMS, G., *The Sanctity of Life and the Criminal Law*, p. 152. New York, 1957.
34. FERRIS, P., *The Nameless: Abortion in Britain Today*, pp. 42–48. London, 1966.
35. DIGGORY, P. L. C., 'Some experiences of therapeutic abortion,' *Lancet, 1:* 873–875, 26 Apr. 1969.
36. Abortion Law Reform Association, *Alra Newsletter No. 19*. Late Summer 1967.
37. HINDELL, K. and SIMMS, M., 'How the abortion lobby worked,' *Political Quarterly, 39:* 269–282, July–Sept. 1968.

38. United Kingdom: Laws, Statutes, etc., 'Interruption of pregnancy,' *International Digest of Health Legislation, 19:* 887–889, 1968.
39. United Kingdom: Laws, Statutes, etc., *The Abortion Regulations 1968*, London, 1968.
40. British Medical Association: Committee on Therapeutic Abortion, 'Indications for termination of pregnancy,' *British Medical Journal, 1:* 171–175, 20 Jan. 1968.
41. Abortion Law Reform Association, *A Guide to the Abortion Act 1967*, London, 1968.
42. PEEL, J. and POTTS, M., 'Demographic aspects of abortion in Britain,' *Paper presented at the Conference of the International Union for the Scientific Study of Population*, London, 3–11 Sept. 1969.
43. SIM, M., 'Abortion and the psychiatrist,' *British Medical Journal, 2:* 145–148, 20 July 1963.
44. Abortion Law Reform Association, *Alra Newsletter*, No. 21, Summer 1968.
45. MEHLAN, K-H. (ed.), *Internationale Abortsituation, Abortbekämpfung, Antikonzeption*, Leipzig, 1961.
46. TIETZE, C. and LEHFELDT, H., 'Legal abortion in Eastern Europe,' *Journal of the American Medical Association, 175:* 1149–1154, 1 Apr. 1961.
47. TIETZE, C., 'The demographic significance of legal abortion in Eastern Europe,' *Demography, 1:* 119–125, 1964.
48. POTTS, M., 'Legal abortion in Eastern Europe,' *Eugenics Review, 59:* 232–250, Dec. 1967.
49. FIELD, M. G., 'The re-legalization of abortion in Soviet Russia,' *New England Journal of Medicine, 255:* 421–427, 30 Aug. 1956.
50. Bulgaria: Laws, Statutes, etc., 'Interruption of pregnancy,' *International Digest of Health Legislation, 8:* 605–607, 1957.
51. Czechoslovakia: Laws, Statutes, etc., 'Interruption of pregnancy,' *ibid., 10:* 283–292, 1959.
52. Hungary: Laws, Statutes, etc., 'Interruption of pregnancy', *ibid., 9:* 536–540, 1958.
53. Poland: Laws, Statutes, etc., 'Interruption of pregnancy,' *ibid., 9:* 319–323, 1958.
54. Yugoslavia: Laws, Statutes, etc., 'Interruption of pregnancy,' *ibid., 12:* 619–622, 1961.
55. Czechoslovakia: Laws, Statutes, etc., 'Interruption of pregnancy,' *ibid., 13:* 491–492, 1962.
56. VOJTA, M., 'A critical view of vacuum aspiration: a new method for the termination of pregnancy,' *Obstetrics and Gynecology, 30:* 28–34, July 1967.
57. KERSLAKE, D. and CASEY, D., 'Abortion induced by means of the uterine aspirator,' *ibid., 30:* 35–45, July 1967.
58. MEHLAN, K-H., 'Die Abortsituation in der Deutschen Demokratischen Republik,' *Internationale Abortsituation, Abortbekämpfung, Antikonzeption* (K-H. Mehlan, ed.), pp. 52–63. Leipzig, 1961.
59. German Democratic Republic: Laws, Statutes, etc., 'Protection of the mother and the child,' *International Digest of Health Legislation, 4:* 58–61, 1952.
60. MEHLAN, K-H., 'Die Abortsituation im Weltmaßstab,' *Arzt und Familienplanung*, pp. 69–99. Berlin, 1968.
61. MEHLAN, K-H. and FALKENTHAL, S., 'Der legale Abort in der Deutschen Demokratischen Republik: Statistik der Jahre 1953–1962,' *Das Deutsche Gesundheitswesen, 20:* 1163–1167, 24 June 1965.
62. Romania: Laws, Statutes, etc., 'Interruption of pregnancy,' *International Digest of Health Legislation, 18:* 822–837, 1967.
63. Bulgaria: Laws, Statutes, etc., 'Interruption of pregnancy,' *ibid., 19:* 589–602, 1968.
64. MEHLAN, K-H., 'Combating illegal abortion in the socialist countries of Europe,' *World Medical Journal, 13:* 84–87, May–June 1966.
65. VOJTA, M., 'Die Abortsituation in der Tschechoslowakischen Sozialistischen Republik,' *Internationale Abortsituation, Abortbekämpfung, Antikonzeption* (K-H. Mehlan, ed.), pp.107–113. Leipzig, 1961.
66. SRB, V. and KUČERA, M., 'Potratovost v Československu v letech 1958–1962,' *Demografie, 5:* 289–307, 1963.
67. Czechoslovakia: Ministerstvo Zdravotnictvi, 'Potraty,' *Zdravotnická Statistika ČSSR*. Prague, various years.
68. HIRSCHLER, I., 'Die Abortsituation in der Volksrepublik Ungarn,' *Internationale Abortsituation, Abortbekämpfung, Antikonzeption* (K-H. Mehlan, ed.), pp. 114–122. Leipzig, 1961.
69. Hungary: Központi Statisztikai Hivatal, *Magyarország népesedése: demográfiai évkönyv* (Statisztikai idöszaki közlemenyek). Budapest, various years.
69a. *Op. cit.* for 1965, p. 102.

70. Yugoslavia. Slovenia: Zavod za Zdravstveno Varstvo, *Zgodnja Fetalna Smrtnost v SR Sloveniji, 1955–1964*. Ljubljana, 1966.
71. Yugoslavia. Slovenia: Zavod za Zdravstveno Varstvo, *Splav in Njegovo Preprecevanje v SRS v Letu 1965*. Ljubljana, 1966.
72. ANDOLSEK, L., Personal communication.
73. Czechoslovakia: Ministerstvo Zdravotnictvi, *ČSSR zdravotnictvi 1968 (1967)*, p. 26. Prague, 1968.
74. GÁL, G., NÉMETH, A. and FAZEKAS, S., 'Ein Beitrag zur Frage der septischen, kriminellen, postabortalen Nierenkomplikation,' *Zeitschrift für Ärztliche Fortbildung, 59:* 592–596, 1 June 1965.
75. HIRSCHLER, I., *Material presented at the International Conference on Abortion, Hot Springs, Virginia, Nov. 17–20, 1968.*
76. MEHLAN, K-H., 'Legal abortions in Roumania,' *Journal of Sex Research, 1:* 31–38, Mar. 1965.
77. Romanian Communist Party: Central Committee, 'Analiza starii de senatate a populatiei si masurile privind perfectionarea organizarii retelei sanitare si imbunatatirea asistentei medicale in Republica Socialista Romania,' *Scinteia*, 27 Oct. 1968.
78. ČERNOCH, A., *Material presented at the International Conference on Abortion, Hot Springs, Virginia, Nov. 17–20, 1968.*
79. NOVAK, F., *ibid.*
80. Sweden: Inrikesdepartementet, *Abortfrågan. Betänkande avgivet av 1950 års abortutredning* (Statens Offentliga Utredningar 1953: 29), p. 221, Stockholm, 1953.
81. FRANDSEN, E., MOSBECH, J. and MØLGAARD, B., 'Abortus provocatus i Danmark i 1955 og 1957,' *Ugeskrift for Laeger, 121:* 1538–1543, 1 Oct. 1959.
82. PETTERSON, F., *Epidemiology of Early Pregnancy Wastage*, p. 89, Stockholm, 1968.
83. HUDCOVIČ, A., 'Technika interrupcie,' *Československá Gynekologie, 25:* 650–657, Nov. 1960.
84. SZENDI, B., LAKATOS, I. and TÓTH, Z., '23,300 Schwangerschaftsunterbrechungen im Spiegelbild der Operationsmethode und der Frühkomplikationen,' *Zeitschrift für Ärztliche Fortbildung, 54:* 751–756, 1 July 1960.
85. ČERNOCH, A., 'Experiences in Czechoslovakia with the effects and consequences of legalized artificial termination of pregnancy,' *Paper Presented at United Nations World Population Conference, Belgrade, 30 Aug. to 10 Sept. 1965.*
86. BARSY, G. and SÁRKÁNY, J., 'A müvi vetélések hatása a születési mozgalomra és a csecsemöhalandóságra,' *Demográfia, 4:* 427–467, 1963.
87. MILTÉNYI, K., 'A müvi vetélések hatásainak kérdésehez,' *Demográfia, 7:* 73–87, 1964.

EDITORIAL

LEGAL ABORTION WITHOUT HOSPITALIZATION

ALAN J. MARGOLIS, MD, FACOG and
EDMUND W. OVERSTREET, MD, FACOG

OBSTETRICIANS TODAY are fearfully watching the rising numbers of legal abortions now being performed in various areas of the United States. Rates in some major hospitals have reached 300–500 abortions per 1000 births and continue to increase. In California, since the liberalized (but still moderately restrictive) law took effect in Nov 1967, the rate for the entire state has doubled for each 6-month period. Now it has reached about 60 per 1000 births.

From the Department of Obstetrics and Gynecology, University of California School of Medicine at San Francisco.

Submitted for publication May 22, 1970.

The illustration at the top of the page is from a 15th-century German woodcut. (The Bettmann Archive).

Now that Hawaii, Alaska and New York have repealed all restrictive statutes, those states may be expected rapidly to reach and, doubtlessly, to surpass California's experience. The widespread movement throughout the United States to remove abortion from the ambit of the law and return it to the physician-patient relationship is building enormous impetus and impact. If and when this occurs, the sheer numbers of abortions may well become overwhelming. For example, despite the 15,000-odd legal abortions performed in California in 1969, it is estimated fairly reliably that approximately 76,000 illegal abortions were performed upon California women during that time. Should abortion-on-request simply for the unwanted pregnancy soon become legal, the prospect of 90,000-odd abortions per year would be awesome indeed. Physicians in states in which repeal has already been accomplished are already fearful that the influx of patients from surrounding states may well approximate such a situation. Hence, it is the hope of many that when repeal does come it will be mediated by a major national judicial or legislative decision which will apply to *all* states uniformly, rather than being brought about by spotty, gradual repeal state by state.

Already, however, many hospitals and their staffs are encountering increasing problems in handling the present numbers of abortions. Encroachment on available hospital beds, limited operating room time, overwhelmed admissions personnel, preoccupation of hospital staff time, and the revolt of residents are only a few of the troubles which have developed. Since we may expect these problems to be compounded tremendously as liberalization of abortion proceeds, it is essential for us to plan ahead in organizing our abortion procedures to handle the expected load.

Various solutions to these problems have been proposed. All of them are ameliorative to some degree. It seems likely that for a

Reprinted from Vol. 36, No. 3, September 1970

OBSTETRICS
&
GYNECOLOGY

Published by the MEDICAL DEPARTMENT
HARPER AND ROW
Copyright © 1970 *by*
AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS
Printed in the U.S.A.

POOR COPY

period of time, at least, the performance of legal abortions will be reserved to licensed physicians and restricted to hospital premises. Hence, any methodology which spares hospital bed space, operating room time and hospital personnel deserves our serious consideration and our immediate attention in planning for the future.

For these reasons, we wish to draw attention to the experience of this department in the use of outpatient, come-and-go, first-trimester abortion by uterine suction evacuation, and to emphasize the simplicity and the safety of this procedure. Although this method has been used very extensively in Eastern European countries and in Japan, American physicians have been distrustful of it and reluctant to adopt the procedure. Our own preliminary experience in 55 outpatients was presented by one of us (AJM) at the annual meeting of the American Association of Planned Parenthood Physicians in Boston on April 10, 1970, and details of the results will be published elsewhere.* Since these details will not appear, however, for almost a year, and because the matter is so urgently important, we feel that a brief summary of the results should be presented here.

Fifty-five patients with pregnancies of no greater that 12 weeks' menstrual duration had initial work-ups and therapeutic abortion adjudication procedures as outpatients. Each patient presented herself at our regular come-and-go surgery suite approximately one hour before the scheduled procedure, having been prohibited any oral intake since the previous midnight. Aspiration abortion was then performed, either under light general anesthesia or intravenous analgesia plus paracervical block. A standard aspiration apparatus was used together with the vibrodilator.† The patient was then observed in the postanesthesia recovery room until fully ambulatory and then returned home—always accompanied by some relative or friend.

Significant aspects of this procedure are as follows. Mean time spent on the hospital premises for the 55 patients was 3.4 hr (range, 1.1–5.4 hr). Fifty patients with similarly conducted inhospital abortions had a mean hospital stay of 37 hr (range, 11–54 hr). Mean *measured* blood loss at operation was 25 ± 6 ml (range, 20–125 ml) under paracervical block, whereas under light general anesthesia it was 66 ± 15 ml (range, 20–350 ml). Earlier studies had shown that Fluothane tends to double the blood loss at aspiration abortion, so this gas was never used. The operative procedure for patients under general anesthesia required approximately 30 min, whereas for those under paracervical block, it increased to about 50 min because of the time required for the analgesia and for the block to "take." Moreover, the time required for the patient with a paracervical block to recover fully from the somewhat heavier analgesia tended to prolong her stay in the recovery room.

Of greatest interest, of course, is a consideration of complications incidental to this methodology. There were none at operation, although, in 3 patients, difficulty in accomplishing cervical dilatation dictated abandonment of the outpatient procedure and admission to hospital for the abortion. It seems advisable not to undertake come-and-go aspiration abortion in patients with very firm, tight cervices.

Eight of the 55 patients were seen later in the emergency room for postabortal complications: postabortal bleeding (5), mild endometritis (2), and subacute salpingitis (1). Of these, 3 were admitted to hospital for 2-day stays. Of 50 patients with inpatient abortions, 7 had comparable postabortal complications and 2 were similarly readmitted to hospital. Of greatest significance is the fact that none of these post-

* Advances in Planned Parenthood (Vol 6). Edited by AJ Sobrero, C McKee. New York, Excerpta Medica Foundation, (in press)

† Berkeley Tonometer Co, Berkeley, Calif.

460

BLEED THRO

abortal complications—all of which were handled with minimal therapy—developed earlier than 2 days after abortion, and most occurred from 3 to 30 days after the procedure. So, it is important to emphasize that the conventional 12- to 48-hour hospital admission for aspiration abortion patients serves no real purpose either in preventing or discovering postabortal complications. This fact alone speaks strongly for the feasibility and desirability of accomplishing early abortion as a come-and-go outpatient procedure—provided that the circumstances, auspices and skills brought to bear are of the highest quality.

In the light of our own experience, we feel that this methodology for legal abortion should be given extensive trial in the hope of minimizing the logistic problems created by our mounting abortion rates.

University of California Medical Center
San Francisco, Calif 94122

POOR COPY

Item No. 54

ON THE HEALTHINESS OF FOUR THOUSAND ABORTIONS IN A FREE STANDING ABORTION SERVICE

Horace Hale Harvey, III, M.D.

Barbara Yarnell Elizabeth Pyle

We would first like to thank the people of New York, their legislators, and the Public Health Board for a law and a policy that allows for improvement and self-correction. This is a great moral step necessary to remove the fear of abortion.

We would next like to thank the National Clergy Consultation Service on Abortion (especially Reverend Howard Moody and Arlene Carmen) and the five hundred clergymen throughout the United States who with their pioneering spirit have led the way in the concept of abortion reform. Planned Parenthood is likewise to be commended for its stand on this issue.

Lastly, we would like to offer a heartfelt thanks to the doctors working with us, the nurse-counselors, and to the entire staff of the Community Sex Information and Education Service. Our efforts and dreams would have come to nothing without your hard work and loyalty.

INTRODUCTION

New York is to be commended for leading the country in the repeal of abortion laws. The new law provides that a physician can perform an abortion under conditions that are healthy and safe on a consenting woman up to the twenty-fourth week of pregnancy. This law will inevitably become the model after which the rest of the country will pattern its laws when the reform becomes nationwide. As the New York law will become the model, so will New York's applications of this law. It is to the betterment of these future ends that we do hereby present this report.

The Community Sex Information and Education Service (hereinafter called CSI) is a not-for-profit incorporation devoted to developing nationwide sex education. In July of this year, the National Office of CSI recognized the need for there to be a quality control on the means whereby women in New York receive abortions. This conclusion was reached based upon the many phone calls that poured into our office and into the office of the Clergy and Lay Advocates for Hospital Abortion Performance complaining of the abusive treatment and the exploitive prices by many of the doctors, the profiteering referral agencies, and the hospitals performing abortions in the metropolitan area.

With the tripartite goal of safety, price control, and psychological health, CSI formed Women's Medical Group to act as a consumer control for women seeking abortions in the first ten weeks of pregnancy. Women's Medical Group is able to monitor the safety of the procedure by setting standards for the equipment and the methods, by supervising the participating doctors and by having a comprehensive follow up program consisting of a Women's Medical Group "hot line" telephone number making available to the women 24 hours a day, a doctor or a Registered nurse to answer any questions relating to the procedure or to their condition following the procedure. With these means, and a medical questionnaire completed and returned by the patient ten days later, Women's Medical Group is able to evaluate the participating doctors, and thereby offer the patients a safe procedure.

Women's Medical Group has been able to control abortion pricing since July 1, for slightly over 4,000 abortions by referring only to doctors who have agreed to charge a reasonable fair price, and who have also agreed to perform 25% of the procedures at no charge at all to welfare and indigent patients. The third goal of CSI, psychological health, is perhaps the factor that makes Women's Medical Group so unusual. To achieve this goal, the Group furnishes counselors who work closely with the doctors performing the abortions. The majority of these counselors are registered nurses who have had abortions themselves, and are therefore naturally sensitive to the complicated feelings and reactions that an abortion evokes in a woman. In addition, these nurses have received special training to enable them to deal with the varied psychological aspects and impacts of abortion.

To the furtherment of these three goals, and to the further help of the women of New York, we offer these statistics on the healthiness of 4,000 abortions performed by a free standing abortion service.

For operational details of Women's Medical Group, please see the attached appendix.

Abortion safety is usually measured by comparing the rates of the following medical complications which are often associated with abortions: death, shock, bleeding, infection, perforation, and incomplete abortion.

A) In four thousand abortions performed since July 1 using a local anesthetic, there have been no deaths and no cases of shock or cardiac arrest. This perfect record should be contrasted with the death rates ranging from two to five per one hundred thousand cases, which have occurred in the European and New York hospitals due to the use of general anesthesia for early abortions. The only abortion death in London last year was due to general anesthesia.

B) The bleeding varied from only a few drops in four to six week pregnancies to an average of about one ounce for cases eight to ten weeks pregnant. One ounce is the amount of blood loss a woman ordinarily has during a normal period. However, in our four thousand cases we also had three women who unexpectedly turned out to be ten to twelve weeks pregnant and who lost about a pint of blood during the abortion. This does not represent a serious blood loss, since one pint of blood is the usual amount of blood given during a blood donation to a blood bank. We also had one patient who was sixteen weeks pregnant and who lost about two pints of blood. No woman required a blood transfusion or intravenous fluids. It is important to note that all four of these women were found unexpectedly to be over ten weeks pregnant, thus we have every reason to believe that no woman who is less than ten weeks pregnant will bleed on an average more than she does with a normal period, and the earlier the abortion the less the blood loss. Independent research (*Obstetrics and Gynecology*, September-1970) has shown that abortions done in hospitals with general anesthesia result in about twice the blood loss of abortions done with local anesthesia. This is probably because general anesthesia prevents uterine contraction which normally would prevent bleeding.

C) Fever and Infection - We had four patients of the one thousand five hundred and sixty who returned our research form, who reported they had fever of 100.4 degrees or more for one day or more. In two of these cases the fever returned to normal in two days, while in two other cases the fever returned to normal in three days. None of these patients with fever required hospitalization.

D) Perforated Uterus - This is the condition resulting when an abortion instrument goes through the uterine muscle wall. We have had nine such cases in four thousand abortions. However, eight of these cases occurred during the first two thousand abortions, whereas only one of these nine cases occurred during the second two thousand cases. This indicates that as the physicians gain experience and become more skilled, they are less likely to perforate a uterus. In fact, the one later perforation was by one of the newer and less experienced physicians (and in a ten and one half week pregnancy).

Thus, we have every reason to believe that uterine perforation can be eliminated as doctors gain skill at doing early abortions. Of the first eight perforations, only three were hospitalized. Two of these hospitalizations were found to be fifteen weeks pregnant. There was only one out of seven perforations in pregnancies less than ten weeks which required hospitalization. Therefore, perforations of such early pregnancies are not as serious a complication as it has been thought to be in the past, since none of these had later complications. All three of our hospitalizations were discharged without complications within three or four days.

E) Incomplete Abortion - We have had one such case wherein the physician suspected in advance that he had not completed the abortion, because he found no pregnancy tissue when he examined the tissue removed from the uterus. (We require that physicians examine all tissues removed from the uterus to make certain that they have removed the entire pregnancy.) In this case, since the patient was only four or five weeks pregnant, the physician could not be sure that he completed the abortion, since in such an early pregnancy there is little or no tissue to be found. Thus, we asked this patient to have another pregnancy test done by us two weeks later. This test proved positive, so the abortion was completed immediately without complications. Let us now compare the complication rates of these 4,000 abortions with those rates of complications in New York hospitals' early abortions. This data is summarized as follows:

Complication	N.Y. Hospitals % Less Than 12 Weeks	WMG Gross % All Cases	WMG Correct % Less Than 12 Weeks
Hemorrhage	.2	.1	.0
Infection	.2	.2	.2
Perforation	.2	.2	.1
Others	.4	.025	.025
	1.0%	.525%	.325%

The third column above is corrected in the sense that in it we have removed all abortion cases of 12 week or more pregnancies, since this was done in the above hospital data. Comparing the above complication rates suggest that Women's Medical Group has had about one-third to one-half the overall complication rate of the New York hospitals. Since the number of these complications is so small in both Women's Medical Group and New York hospitals, the most important fact is that the New York hospitals have had deaths whereas Women's Medical Group has had none. Generally, from this data it can be concluded that early abortions (or abortions less than 12 week pregnancies) are very safe and free from serious medical complications, whether or not they are done in a free standing abortion service such as Women's Medical Group or in a hospital, just as long as no general anesthetic is used. In fact, from the point of view of medical techniques and safety, an early abortion is similar to having a tooth pulled - both usually involve the use of a local anesthetic, both usually involve very little loss of blood, both can easily be done relatively quickly on an ambulatory basis (*e.g.*, during a lunch hour), both have similar "non-fatal" complications and dangers which occur in the range of one per each thousand cases. Thus, in view of the new evidence of the safety of abortion done in free standing abortion services, it would seem hard to justify more medical precautions for an abortion than we require for having a tooth pulled.

CURRENT INVESTIGATION

Aspiration abortion without cervical dilation

SADJA GOLDSMITH, M.D.
ALAN J. MARGOLIS, M.D.
San Francisco, California

Aspiration abortions on 67 conscious patients with pregnancies of 10 weeks' duration or less were performed successfully without cervical dilation and with minimal risk of perforation, with the use of a 6 mm. diameter flexible plastic cannula. Four other women required slight dilation of the cervix to complete the abortion. There was no significant morbidity in any patient. This simple technique should be useful in future large-scale abortion programs in licensed clinics.

WHILE ASPIRATION ABORTION is accepted widely as a safe and effective technique, any modification is important which will make the procedure more simple, more safe, and less time-consuming without sacrificing completeness of uterine evacuation. Also, if performed without anesthesia or only with paracervical block, an anesthesiologist need not be in attendance and the morbidity of general anesthesia is not incurred.

Although it has been customary to use a cannula whose outside diameter in millimeters is equal to the duration of pregnancy in weeks,[1] evacuation can often be effected without dilation.[2] Such a technique shortens the procedure, decreases discomfort in the conscious patient, and decreases risk of cervical injury.

Our study was conducted to test the efficacy of a flexible 6 mm. diameter plastic aspiration cannula* (Fig. 1) developed by Harvey Karman to remove early first-trimester products of conception. This flexible cannula has two openings at its tip which permit bending without blockage if it is applied to the uterine fundus.

From the San Francisco Center for Legal Abortion; Planned Parenthood–World Population, Alameda-San Francisco; and the Department of Obstetrics and Gynecology, University of California.

Procedure

Seventy-two pregnant women whose last menses had occurred 10 weeks or less earlier were selected only on the basis of their willingness to be aborted while awake.

Preliminary procedures† included a medical and psychosocial history, physical examination, routine laboratory studies, Rh-antibody screening, and cervical culture for gonorrhea. The abortions were performed on a come-and-go basis at this medical center in a small surgical room attached to an op-

*Supplied as Vacurette F-6mm by Berkeley Bio-Engineering Company, Berkeley, California.

†Approval of patients for abortion was in accord with the revised California statute.

erating suite. Many patients received an oral analgesic one hour before the procedure, while others had no premedication.

A medium Graves speculum was used to expose the cervix, which was then fixed with a tenaculum. A paracervical block was performed by injecting 4 ml. of one per cent lidocaine at each of 4 sites (3, 5, 7, 9 o'clock) 1 cm. deep to the vaginal fornix. The operator cleansed the cervix and vagina with povidone-iodine solution while waiting for the block to become effective. The uterus was sounded to verify its depth and confirm its inclination. The 6 mm. cannula was then passed to the fundus and, while negative pressure (60 to 70 cm. Hg) was applied, it was moved within the uterus to aspirate all parts of the cavity. The duration of aspiration was timed and the procedure was concluded when the uterine walls seemed closely applied to the cannula.

Completeness of evacuation was checked by exploring the uterine cavity with a small curette. When aspiration through the 6 mm. cannula did not produce sufficient tissue, the cervix was dilated to 8 or 9 mm. and a larger aspirator was used to ensure total tissue removal. All specimens were examined to confirm the presence of the products of conception, then sent to the pathology laboratory. Aspirated blood and amniotic fluid were also measured. The patient was discharged within an hour, with an appointment for a 2 week postabortion visit.

During the procedure, each patient was attended by a counselor who explained the procedure and gave encouragement and support.

Results

Of the 72 women (Table I), aspiration abortion was completely successful in 67; 4 required cervical dilation and a larger cannula to empty the uterus. In 1 primigravida the internal os could not be identified by probe or small dilator. The procedure was stopped, and 2 weeks later abortion was performed without difficulty under general anesthesia. Mean aspiration time for the 67 successful cases was 3 minutes (range 1 to 7 minutes), and blood loss averaged 58 ml. (range 10 to 170 ml.).

Fig. 1. The 6 mm. flexible cannula with connecting tubing showing the double opening and a band marking 10 to 12 cm. from the tip.

No patient presented any evidence of a morbid, febrile postabortal course. One patient was observed in the hospital after abortion because products of conception were not positively identified in the pathology laboratory and a diagnosis of ectopic pregnancy was considered but not confirmed. Another patient was seen 7 days postabortion in the emergency ward with the sudden onset of uterine bleeding. She was sent home with a diagnosis of nonsignificant bleeding from the organizing placental site. Five patients telephoned with minor questions which required reassurance only.

Seventy of the 72 women were seen at the 2 week postabortion checkup; the other 2 verified by telephone that they had no problems.

Comment

Abortions performed on healthy women, many of whom are young primigravidas, require meticulous scrutiny and safeguards to minimize early as well as late morbidity and death. There are several obvious advantages in performing early abortions without general anesthesia or cervical dilation. By avoiding general anesthesia, a small but definite risk is eliminated and the procedure is more economical of medical personnel and cost. With-

FILED
AUG 14 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. 70-18

JANE ROE, JOHN DOE, and MARY DOE,
Appellants,

Supreme Court, U.S.
FILED
OCT 12 1971
ROBERT SEAVER, CLERK

JAMES HUBERT HALLFORD, M. D.,
Appellant-Intervenor,

v.

HENRY WADE,
Appellee.

On Appeal from the United States District Court for the Northern District of Texas

---

No. 70-40

MARY DOE, *et al.*,
Appellants,

v.

ARTHUR K. BOLTON, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

---

MOTION FOR LEAVE TO FILE A BRIEF WITH BRIEF AS *AMICI CURIAE* AND APPENDIX FOR STATE COMMUNITIES AID ASSOCIATION

MARTTIE L. THOMPSON
MARCIA LOWRY, *Of Counsel*

COMMUNITY ACTION FOR LEGAL SERVICES
335 Broadway
New York, New York 10013
(212) 966-6600
Attorney for Amicus Curiae
State Communities Aid Association

IN THE

Supreme Court of the United States

October Term, 1971

No. 70-18

JANE ROE, JOHN DOE, and MARY DOE,
Appellants,

JAMES HUBERT HALLFORD, M. D.,
Appellant-Intervenor,

v.

HENRY WADE,
Appellee.

On Appeal from the United States District Court for the Northern District of Texas

---

No. 70-40

MARY DOE, *et al.*,
Appellants,

v.

ARTHUR K. BOLTON, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

State Communities Aid Association hereby respectfully moves for leave to file a brief annexed hereto as *amicus curiae* in these cases.

State Communities Aid Association is a multifunction, statewide citizens' organization to encourage effective administration of health and welfare in New York State through fact-finding, public education and consultation to other agencies on development of state and community services. Recognizing the relationship of abortion to health, family stability, the unwanted child and the broad aspects of social justice, the State Communities Aid Association has been closely involved with the change in the law in New York and with the safe and effective implementation of the law after it was changed.

The appellants have consented to the filing of this *amici* brief. The states of Georgia and Texas have not consented.

Therefore, State Communities Aid Association respectfully requests that the Court grant this motion for leave to file the annexed brief *amicus curiae*.

Respectfully submitted,

Marttie L. Thompson
Marcia Lowry, *Of Counsel*

Community Action for Legal Services
335 Broadway
New York, New York 10013
(212) 966-6600

Attorney for Amicus Curiae
State Communities Aid Association

IN THE

Supreme Court of the United States

October Term, 1971

No. 70-18

JANE ROE, JOHN DOE, and MARY DOE,
Appellants,

JAMES HUBERT HALLFORD, M. D.,
Appellant-Intervenor,

v.

HENRY WADE,
Appellee.

On Appeal from the United States District Court for the Northern District of Texas

No. 70-40

MARY DOE, *et al.*,
Appellants,

v.

ARTHUR K. BOLTON, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

BRIEF FOR STATE COMMUNITIES AID ASSOCIATION AS *AMICI CURIAE*

MARTTIE L. THOMPSON
MARCIA LOWRY, *Of Counsel*

COMMUNITY ACTION FOR LEGAL SERVICES
335 Broadway
New York, New York 10013
(212) 966-6600

Attorney for Amicus Curiae
State Communities Aid Association

TABLE OF CONTENTS

PAGE

Summary of Argument 2

Interest of the *Amicus Curiae* 3

Argument

Point I—State statutes restricting the right to obtain an abortion place an unequal burden on the poor in violation of the equal protection clause of the Fourteenth Amendment 4

A. When legal abortions are performed under a state statute prohibiting abortion under most circumstances, overwhelmingly they are performed on women who are not poor and who are not members of minority groups 5

B. The alternative commonly available to poor women, unlike women of means, is continuation of the pregnancy or the grave risk of endangering life and health by attempts at self-abortion or by seeking the services of a low-priced abortionist 8

C. The operation and effect of state statutes prohibiting abortions denies equal protection of the law to low income women in violation of the equal protection clause of the Fourteenth Amendment 10

Point II—Women have a constitutional right to an abortion, guaranteed by the Ninth and Fourteenth Amendment 12

Conclusion 16

PAGE

Appendix:

Report from The City of New York Health Services Administration, 125 Worth Street, New York, N.Y. 10013 ..... 1a

Press Release from Health Services Administration, The City of New York 4a

TABLE OF AUTHORITIES

Cases:

Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970) 12
Boyd v. United States, 116 U.S. 616 (1886) 15

Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970), appeal docketed 39 U.S.L.W. 3227 12
Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971) 12
Douglas v. California, 372 U.S. 353 11

Edwards v. California, 314 U.S. 160 11

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 11
Griffin v. Illinois, 351 U.S. 12 (1956) 10, 11
Griswold v. Connecticut, 381 U.S. 479 (1965) 10, 14, 16

Harper v. Board of Elections, 383 U.S. 663 (1966) 11

Katz v. United States, 389 U.S. 347 (1967) 15
Korematsu v. United States, 323 U.S. 214 11

McLaughlin v. Florida, 379 U.S. 184 (1964) 10
Meyer v. Nebraska, 262 U.S. 390 (1923) 13

Olmstead v. United States, 277 U.S. 438 (1928) 15

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 13, 14
Prince v. Massachusetts, 321 U.S. 158 (1944) 13

PAGE

Reynolds v. Sims, 377 U.S. 533 (1964) 11
Roe v. Wade, 314 F. Supp. 1217 (N.D. Texas 1970), appeal docketed, 39 U.S.L.W. 3151 12

Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) 10
Skinner v. Oklahoma, 316 U.S. 535 (1942) 10, 13
Stanley v. Georgia, 394 U.S. 557 (1969) 15

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 10

Other Authorities:

Abortion and the Law, Smith, ed. (1967) 9

Erhardt, Tietze and Nelson, "Therapeutic Abortions in New York City" 5, 7

Hall, "Present Abortion Practices in Hospitals of New York State", 23 *New York Medicine* 124 (1967) 6

Moore, "Antiquated Abortion Laws", 20 *Wash. & Lee L. Rev.* 250 (1963) 9

The Case for Legalized Abortion Now, Guttmacher, ed. (1967) 6, 9

IN THE

Supreme Court of the United States

October Term, 1971

No. 70-18

JANE ROE, JOHN DOE, and MARY DOE,
Appellants,

JAMES HUBERT HALLFORD, M. D.,
Appellant-Intervenor,

v.

HENRY WADE,
Appellee.

On Appeal from the United States District Court for the Northern District of Texas

---

No. 70-40

MARY DOE, *et al.*,
Appellants,

v.

ARTHUR K. BOLTON, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

---

BRIEF FOR STATE COMMUNITIES AID ASSOCIATION AS *AMICI CURIAE*

Summary of Argument

The impact of state statutes which prohibit the performance of abortion is felt most heavily by the poor and the non-white. In those states where abortions are permitted only under very limited circumstances, it is the private patient of means and education who is able to persuade her physician that she qualifies for a legal abortion under those limited circumstances, usually on psychiatric grounds. When the woman of means cannot obtain a legal abortion in her own state, she buys a plane ticket to New York or London, and pays for an abortion there. The restrictive abortion laws can be and are evaded, but only by those with the money and education to do so.

For the poor woman, a restrictive abortion statute means either another baby she can't care for or the chance of death or maiming at the hands of a backroom abortionist whose low fee she can afford.

The unequal effect of laws prohibiting abortion violates the equal protection clause of the Fourteenth Amendment, even if the laws are not on their face discriminatory.

In addition, these restrictive abortion laws violate the rights of all women, rich or poor, to privacy in the conduct of their marriages and their lives. Such interference unconstitutionally invades a zone of privacy protected by the Ninth and Fourteenth Amendments, a right to be free of state interference basic to the concepts upon which this country was founded.

Interest of the *Amicus Curiae*

Amicus State Communities Aid Association (formerly State Charities Aid Association), 105 East 22nd Street, New York, New York, has, since its founding in 1872 sought to improve the health and welfare of the people of New York State.

It is a multifunction, statewide citizens' organization to encourage effective administration of health and welfare in New York State through fact-finding, public education, and consultation to other agencies on development of state and community services. Its staff includes specialists in public health, community organization, child welfare, legislation, public relations, and agency business management. It maintains local child welfare committees. It works with other groups in the field of social welfare, public and mental health, and community social planning.

Recognizing the relationship of abortion to health, family stability, the unwanted child and the broad aspects of social justice, the State Communities Aid Association has been closely involved with the change in the law in New York and with the safe and effective implementation of the law after it was changed. From the time that New York's amended abortion law went into effect in July 1970, through April, 1971, approximately 135,000 abortions had been performed. About one-fourth of these abortions performed on New York state residents were performed on poor women, according to New York City Health Services Administration statistics (see appendix, p. 1), the women

who traditionally have been denied access to medically safe abortions in states with restrictive abortion statutes.

As a result of the new law there has been a marked decrease in the number of botched, illegal abortions (called "incompletes") performed on women determined to terminate their pregnancy but too poor to pay a competent illegal abortionist (see appendix, pp. 1-2). The availability of abortions in New York has measurably improved the health and physical well-being of its residents, and of those women fortunate enough to be able to make their way into the state (see appendix, p. 3). The health benefits of readily available, safe abortions have been detailed by the New York City Health Services Administration in a report issued in the form of a press release on June 29, 1971, and included in the appendix, p. 4. For that reason, *amicus* joins in support of those parties urging this Court to declare unconstitutional any state statute interfering with the right of a woman to obtain a medically safe abortion.

POINT I

State statutes restricting the right to obtain an abortion place an unequal burden on the poor in violation of the equal protection clause of the Fourteenth Amendment.

The burden of state statutes which prohibit or greatly restrict the right to obtain an abortion is felt most acutely by the poor, who generally bear the burden of society's harsher laws. While legal, medically safe abortions are virtually unavailable to thousands of poor and uneducated women in states with laws prohibiting abortion, women of

greater economic means are able to evade the restrictions of such laws.

Where the law permits abortion only where necessary to preserve the mother's life or health, women with economic means obtain a proportionately greater number of abortions than the poor. And when legal abortions are not available at all the wealthy, unlike the poor, are able to pay the high cost of an illegal but medically safe abortion in their own state, or travel to other states or countries where abortions are more readily available.

A. When legal abortions are performed under a state statute prohibiting abortion under most circumstances, overwhelmingly they are performed on women who are not poor and who are not members of minority groups.

Until legislative reform in 1970, abortions were prohibited in the state of New York unless necessary to preserve the life of the mother. Studies made in New York during the years before abortion reform reflect the fact that legal abortions were primarily available to the white and the middle-class.[1]

1. "Therapeutic Abortions in New York City," a report prepared by Dr. Carl Erhardt, Director of Planning for Health Intelligence; Mrs. Frieda G. Nelson, Principal Statistician, at the New York City Department of Health; and Dr. Christopher Tietze, Associate Director, Bio-Medical Division of the Population Council, compiling and analyzing data on therapeutic abortions performed in New York from 1943 to 1967. The study shows that eighty per cent of all therapeutic abortions performed in New York City were performed on white women. The study also reports that in 1965-67, the ratio of 4.2 abortions per 1,000 live births for white women was more than twice the ratio of 1.8 per 1,000 for non-white women, which, in turn, was twice the ratio of 0.9 per 1,000 for Puerto Rican women.

The report also revealed that before the restrictive abortion law was amended most of the women obtaining abortions were of sufficient

There are many reasons why the few legal abortions performed in states with restrictive statutes are performed on white, middle-class women, rather than on the poor and the non-white. One reason has been advanced by a physician who has studied the problem:

> "The private patients of the voluntary hospitals have over three times as many abortions as the service patients in the same type institution and more than 20 times as many abortions as patients in municipal hospitals. * * * The infrequency of abortion in municipal hospitals * * * is largely due to the fact that physicians for patients in municipal hospitals still conservatively stick to the old organic disease triad [as the only justification for therapeutic abortion] * * * while physicians for private patients, frequently the very same physicians, alter their vision to be in clear focus with the social and philosophical changes in medicine."[2]

Those women of means who have a long-standing relationship with a private physician of some standing in his profession are more likely to be able to convince the physician to urge a hospital abortion board to broadly interpret a state statute which permits abortion only when necessary

means to be private patients. In 1960-62, proprietary hospitals, which have only private patients, had the highest ratio of therapeutic abortions, with 3.9 abortions per 1,000 live births, as compared to 0.1 abortions per 1,000 live births in municipal hospitals, which care only for ward patients. In 1965-67, the highest abortion per live birth ratio was on the private service in voluntary hospitals with 4.8 abortions per 1,000 live births, while municipal hospitals again had the lowest ratio, 1.3 abortions per 1,000 live births, as well as lowest absolute number of abortions performed. See also Hall, "Present Abortion Practices in Hospitals of New York State," 23 *New York Medicine* 124 (1967).

2. Guttmacher, "Abortion—Yesterday, Today and Tomorrow," in *The Case for Legalized Abortion Now,* Guttmacher, ed. (1967) at 9, 10.

to preserve the woman's life or health. Such a physician is more likely to succeed in convincing his colleagues on an abortion approval committee than is the young resident who usually treats the poor in city hospitals. In addition, affluent women are able to pay the high fees necessary, and are aware of the possibility of consulting a psychiatrist to certify that the woman is so emotionally overwrought by the pregnancy that she is a potential suicide and thus the abortion is "necessary to preserve the life of the woman."[3]

Poor women, whose reasons for not wanting to continue the pregnancy may often be far more compelling than those of a woman of means, have no long-standing relationship with a private physician. Preventive medical care is a luxury and those women usually see doctors infrequently. If they are clinic patients, they see a different doctor, often a resident or intern, on each visit. These women are usually poorly educated, are unaware that legal abortion might be available to them in a state which appears to prohibit abortion, and the clinic physician is usually too harried to discuss the question of abortion with them.

Thus, when a state prohibits the performance of abortions except in exceptional circumstances, it is chiefly the women of economic means and education who are able to establish those exceptional circumstances.

---

3. "'Mental disorders' was by far the highest indication for therapeutic abortions in both 1960-62 and 1965-67. * * * It was the highest among patients on private service in voluntary hospitals (3.22 per 1,000 live births) and lowest in municipal hospitals (0.60 per 1,000)." Erhardt, Tietze and Nelson, "Therapeutic Abortions in New York City," *supra*, fn. 1, at p. 5.

B. The alternative commonly available to poor women, unlike women of means, is continuation of the pregnancy or the grave risk of endangering life and health by attempts at self-abortion or by seeking the services of a low-priced abortionist.

Many of the women who seek abortions in the states with restrictive abortion statutes do so out of a sense of desperation; this desperation is all the more extreme if the woman seeks the abortion because she already has four children for whom she can barely provide food and clothing, or if the birth of another child will mean she must give up an opportunity to be self-supporting and must become a public charge.

If the woman is non-deterable by the fact that the abortion is illegal in her state and if she can raise $500 to $1,500 without too much difficulty, she can obtain an abortion with the emotional discomfort of disobeying the law. For a bit more money, she can get an abortion and vacation combined, by travelling to another state or country. But she does not have to risk her life or health.

If the woman does not have money and does not choose to have the baby, she has the choice of attempting to abort herself by a variety of shocking and dangerous methods, or of taking her chances at the hands of an unskilled neighborhood abortionist, working with unsterilized equipment in unsanitary conditions. The result to the woman is sometimes death and, more often, infection, hemorrhaging and permanent damage.

Even though the advent of antibiotics has substantially reduced the danger of death from infection,[4] it has been estimated that mishandled criminal abortions are the principal cause of maternal deaths in the United States, killing 5,000 women a year.[5]

And for every woman who dies as a result of an incompetently performed criminal abortion, several more are permanently disabled or rendered sterile.[6]

For poor women determined to attempt to control their own lives, states with restrictive abortion statutes have erected an obstacle course through which many white middle-class women, with the assistance of their trusted family physicians, are able to thread their way. These states have disregarded the fact that women with the price of a ticket to New York or London are terminating their pregnancies at will, while, for women in the ghettoes, abortion is still a life and death issue.

---

4. In New York City, according to Department of Health Statistics, only 17.4 percent of white maternal deaths over a one-year period were due to abortions, while 35.3 percent of nonwhite maternal deaths resulted from abortion and 52 percent of the maternal deaths among Puerto Ricans were caused by abortion. In absolute numbers, during the 1966-67 period, eight white women died in New York City as a result of abortions, 30 nonwhite women died, and 13 Puerto Rican women died.

5. Niswander, "Medical Abortion Practices in the United States," in *Abortion and the Law,* Smith ed. 53 (1967); Kummer, "A Psychiatrist Views Our Abortion Enigma," in *The Case for Legalized Abortion Now, supra,* fn. 2 at 124.

6. Moore, "Antiquated Abortion Laws," 20 *Wash. & Lee L. Rev.* 250, 252 (1963).

C. The operation and effect of state statutes prohibiting abortions denies equal protection of the law to low income women in violation of the equal protection clause of the Fourteenth Amendment.

The equal protection infirmity of a statute whose burden is felt more acutely by those too poor to find doctors willing to evade an unpopular law is pointed up in Mr. Justice White's concurring opinion in *Griswold* v. *Connecticut,* 381 U.S. 479, 503 (1965):

> "[T]he clear effect of these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control. * * * In my view, a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment."

See also *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886); *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942); *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957); *McLaughlin* v. *Florida,* 379 U.S. 184, 192 (1964).

The fact that these statutes were not intended by the legislature to be discriminatory in operation and effect does not preclude the Court from invalidating the statutes as a denial of equal protection of the law. "Law addresses itself to actualities."[7] The actuality is that the law operates in such a way that (1) white women of means get an overwhelmingly disproportionate share of the legal hospital abortions as compared to poor, non-white women; and (2) women of means are able to obtain illegal but medically safe

7. *Griffin* v. *Illinois,* 351 U.S. 12, 23 (1956), Frankfurter, J., concurring.

abortions while poorer women are forced to choose between bearing children they do not want and cannot afford to feed, or risking death or maiming at the hands of an inexpensive abortionist. This is clearly the kind of "ruthless consequence" the Supreme Court has condemned.[8] "The State is not free to produce such a squalid discrimination."[9]

In *Harper* v. *Board of Elections,* 383 U.S. 663 (1966), the Supreme Court said, at 668:

> "Lines drawn on the basis of wealth or property, like those of race (*Korematsu* v. *United States,* 323 U.S. 214, 216 * * *) are traditionally disfavored. See *Edwards* v. *California,* 314 U.S. 160, 184-185 * * *; *Griffin* v. *Illinois,* 351 U.S. 12 * * *; *Douglas* v. *California,* 372 U.S. 353. * * *"

The fact that the statutes at issue have the effect of imposing one law for the rich and one law for the poor seems determinative in light of *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960), a case involving a racial gerrymander. There the Court said:

> "It is difficult to appreciate what stands in the way of adjudging a statute having the *inevitable effect* [emphasis added] invalid in light of the principles by which this Court must judge, and uniformly has judged, statutes that, however speciously defined, obviously discriminate against colored citizens." *id.* at 342.

This position, that the discriminatory intent of a statute need not be demonstrated if the discriminatory effect is shown, is reinforced by *Reynolds* v. *Sims,* 377 U.S. 533 (1964), a reapportionment case, where the Court stated:

> "Judicial standards under the equal protection clause are well developed and familiar and it has been open

8. *Griffin* v. *Illinois,* fn. 8, *supra.*

9. *Id.* at 24.

> to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action. * * * [T]he concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." *id.* at 557, 565.

The fact that the challenged abortion statutes operate effectively against poor women, who are least able to bear the burden of unwanted children, is evidence of the great social hypocrisy involved; these states are willing to impose the prohibition against abortions only on those too poor or uninformed to be able to buy or talk their way out of compliance, in violation of the right to equal protection of the laws under the Fourteenth Amendment to the Constitution.

POINT II

Women have a constitutional right to an abortion, guaranteed by the Ninth and Fourteenth Amendments.

The majority of the federal circuits which have recognized that the Ninth Amendment creates a constitutional right to an abortion, and that such a right is a fundamental one,[10] have based their decisions on a line of Supreme Court cases carving out an area of privacy in the realm of family affairs.

---

10. *Roe* v. *Wade*, 314 F. Supp. 1217 (N.D. Texas 1970), appeal docketed, 39 U.S.L.W. 3151; *Doe* v. *Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970), appeal docketed 39 U.S.L.W. 3227; *Babbitz* v. *McCann*, 310 F. Supp. 293 (E.D. Wis. 1970); *Doe* v. *Scott*, 321 F. Supp. 1385 (N.D. Ill. 1971).

In a number of historic decisions, the Supreme Court has spoken regarding that area of privacy, and those activities which are specifically protected. In *Meyer* v. *Nebraska,* 262 U.S. 390 (1923), a statute prohibiting the teaching of German to children was declared an unconstitutional violation of a parent's right to control his child's education. The right "to marry, establish a home and bring up children" was found to be guaranteed by the Fourteenth Amendment, *id.* at 399.

The right to bring up children was recognized in *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), where an Oregon statute prohibiting parents from sending their children to private schools was struck down as a statute which "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[11] In *Prince* v. *Massachusetts,* 321 U.S. 158 (1944), in which a statute prohibited persons from encouraging minors to sell articles in public places, the *Meyer* and *Pierce* decisions were interpreted to "have respected the private realm of family life, which the state cannot enter.[12]

The right to privacy in the realm of family life was described in even more basic terms by Mr. Justice Douglas, writing for the court in *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942), where Oklahoma's compulsory sterilization law was declared invalid, when he called the right to have offspring "a right which is basic to the perpetuation of the race."[13] The Court continued, "Marriage and procreation

11. *Id.* at 534-535.

12. *Prince* v. *Massachusetts, supra,* 321 U.S. at 166.

13. *Id.* at 536.

are fundamental to the very existence and survival of the race."[14]

Since it is clear that there is a constitutionally protected right to have children, to control their upbringing and to govern their education, a necessary corollary to these rights is the right to determine when and whether to bear children.[15] The right to bear children necessarily implies the right not to bear children and this latter right and the right to "direct the upbringing of children" as provided for in *Pierce* v. *Society of Sisters, supra,* necessarily include the right to regulate the home environment of those children and the right to control the number of additional children to be added to the household.

This right not to bear children, as exercised by the use of contraceptives before conception has occurred, was upheld by the Supreme Court in *Griswold* v. *Connecticut, supra.* In that case, a prosecution of physicians for prescribing the use of contraceptives to married couples, Connecticut's statute prohibiting the use of contraceptives to prevent conception was declared an unconstitutional infringement of the rights surrounding the marital relationship. In discussing the constitutional support for a right to marital privacy, the Court explained:

> "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse * * * intimate to the degree of being sacred * * * it is an association for as noble a purpose as any involved in our prior decisions."[16]

14. *Id.* at 535, 541.

15. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965).

16. *Id.* at 486.

In enumerating the specific provisions in the Bill of Rights which form the right to privacy, the Court referred to the protection against all governmental invasions "of the sanctity of a man's home and the privacies of life."[17]

The right of the individual to be protected in the privacy of his home and his personal relationships has been bolstered in another context, by the Supreme Court's recent reversal of a Georgia conviction for possession of allegedly obscene matter, *Stanley* v. *Georgia,* 394 U.S. 557 (1969). The Court held that private possession of obscene matter could not constitutionally be made a crime. Writing for the Court, Mr. Justice Marshall said, "[F]undamental is the right to be free except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[18]

To illustrate the nature of the privacy which the Court found to be constitutionally protected from interference by the state, the decision quotes Mr. Justice Brandeis, dissenting in *Olmstead* v. *United States,* 277 U.S. 438, 478 (1928), as follows:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They know that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred,

17. *Griswold, supra,* at p. 484, quoting *Boyd* v. *United States,* 116 U.S. 616, 630 (1886).

18. *Stanley* v. *Georgia, supra,* at 574. See *Katz* v. *United States,* 389 U.S. 347, 351-352 (1967).

as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man."

Surely the right being violated by state statutes prohibiting abortion is a right of fundamental constitutional importance, an essential element of those concepts of privacy that were fundamental to the principles upon which this country was founded.

Conclusion

For the reasons stated above, the Court should conclude that state statutes which prohibit abortion deny equal protection of the laws and the right to privacy, in violation of the Ninth and Fourteenth Amendments.

Respectfully submitted,

MARTTIE L. THOMPSON
MARCIA LOWRY, *Of Counsel*

COMMUNITY ACTION FOR LEGAL SERVICES
335 Broadway
New York, New York 10013
(212) 966-6600

Attorney for Amicus Curiae
State Communities Aid Association

APPENDIX

Report from The City of New York
Health Services Administration
125 Worth Street, New York, N. Y. 10013

Dated, 5/17/71

About 135,000 abortions in the first ten months (through end of April).

Low Income: About 30,600 of these (close to 23%) were performed in municipal hospitals and wards of voluntary hospitals—traditional sources of care for low-income women.

Data from certificates of termination-of-pregnancy indicate (through end of February) that *half the City residents who got abortions were served in municipals or voluntary wards.*

Medicaid: Of the estimated 51,000 abortions to New York State residents in New York City in the first nine months, 16,000 were Medicaid-reimbursable—or 31%.

Deaths and criminal abortions: In the first ten months, there were 15 deaths: 7 in-hospital; 8 outside of hospital (including one in a doctor's office).

Hence: 8 deaths under legal auspices in over 134,000 abortions—a rate of 6.0 per 100,000.

Incompletes: In 10 reporting municipal hospitals altogether, "incompletes" averaged 480 per month from July 1-December 31. The trend is now down:

January: 391

Report from The City of New York

February: 415

March: 396

April: 282

Incompletes continued: **Where comparative data is available for the year before the law took effect, the decline in "incompletes" is very pronounced:**

At one municipal

263 incompletes from July 1-December 31, 1969

113 incompletes for the same six months of 1970

At another municipal

285 incompletes from July 1-December 31, 1969

180 for the same six months of 1970

Early vs. late abortions:

First-trimester abortions

68.6% of total in July and August

70.8% in September and October

73.7% in November and December

77.3% in January and February

85.8% in March

Post-20 week abortions

4.4% in first six months (July-December)

3.5% in January and February

1.2% in March

Report from The City of New York

TABLE COMPILED BY HEALTH SERVICES ADMINISTRATION, CITY OF NEW YORK

For Period July 1, 1970-May 31, 1971

Place of Residence (%)

Category of Provider	N.Y.C. Residents	N.Y. State	Out of State	Residence Not Stated
Municipal	95.0	0.6	0.9	3.6
Voluntary	61.9	5.4	30.3	2.4
Proprietary	16.7	2.8	79.4	1.1
Other	8.2	3.1	86.9	1.8
TOTAL	39.2	3.3	55.5	2.0

ETHNIC GROUP TOTAL		NEW YORK CITY RESIDENTS	
White	—73.8%	White	—47.7%
Non-White	—21.9%	Non-White	—42.3%
Puerto Rican	— 4.3%	Puerto Rican	—10.0%

AGE

TOTALS:

Under 15:	0.2%	30—34:	11.1%
15—19:	23.4%	35—39:	6.7%
20—24:	37.3%	40 +:	2.7%
25—29:	18.2%	Not Stated	0.5%

Press Release from Health Services Administration, The City of New York

GORDON CHASE CITES SUCCESS OF FIRST YEAR OF NEW YORK'S NEW ABORTION LAW IN TWELVE MONTH REPORT ON 165,000 ABORTIONS

In the first year of the new abortion law, close to 165,000 abortions will have been performed in New York City, Gordon Chase, Health Services Administrator, announced today. Under the liberalized New York State abortion law which took effect on July 1, 1970, over 150,000 abortions were performed in the City by May 31, with an additional 14,000 estimated for the month of June.

"New York City has accounted for the lion's share of abortions in the State and has been a resource for women all over the country," Mr. Chase said. "Nevertheless, the catastrophe many foresaw a year ago failed to materialize: we have been able to serve our residents as well as substantial numbers of out-of-State women, and, most important, we are serving women safely."

There have been no abortion-associated deaths reported in the past four months; the last reported death occurred in February. "We have a remarkable record of safety," Chase said, "compared to that of other countries, like Great Britain, where the rate was 17 per 100,000 in the first year of its abortion law, or Scandinavia, where the rate was 40 per 100,000."

There have been seven deaths here following abortions performed in hospitals and eight following abortions outside of hospitals, including one in a doctor's office before Article 42 of the N.Y.C. Health Code was enacted. The Code virtually prohibits abortions in doctor's offices. Calculating, as other countries do, on the basis of abortions performed under legal auspices, there were 8 deaths in over

Press Release from Health Services Administration

150,000 abortions during the first eleven months, a rate of 5.3 per 100,000.

Another index of increasing safety, Chase said, is the continuing decline in the rate of reported complications from abortions. In the first six months (through December 31, 1970), the overall rate was 12.4 per 1,000 abortions; by the end of March (nine months) this rate had declined to 10.0 per 1,000; and the most recent report (through June 11, 1971— . . . is down to 8.7 per 1,000.

"The safety record is improving, probably because doctors are gaining experience with the procedure, and certainly because the proportion of first trimester abortions (those within the first twelve weeks of pregnancy) has been increasing," Chase said. "Complications are decreasing steadily in both early and later abortions, but there is no question that early abortions are much, much safer. The complication rate for late abortions is almost six times as high as the first trimester abortions.

"Our most important educational task is to get across the message that early abortions carry much less risk," Chase said, "and we have evidence that we are succeeding." Analysis of certificates of termination-of-pregnancy for ten months (through April 30, 1971) reveals that 74.7% of abortions were performed in the first trimester. Trend data show that early abortions are increasing: they were 68.6% of the total in July and August; 70.8% in September and October; 73.7% in November and December; 77.3% in January and February; and 77.2% in March and April.

Similarly, very late abortions—those done after 20 weeks—are declining. Such abortions were 4.4% of the total for the first six months (through December 31), but 3.5% in January and February, and 3.6% in March and April. They are 3.9% of the cumulative total through April.

Press Release from Health Services Administration

"We will be watching these trends closely as we go into the second round of an intensive public education campaign utilizing all the media," Chase said. "We hope to duplicate or better experience in Japan where after ten years first-trimester abortions represent 94% of all the procedures."

Chase noted that although it is too early to reach definitive conclusions, there is evidence that the abortion law may be having a favorable effect on maternal and infant mortality, and numbers of out-of-wedlock births.

"Data analysis has to be undertaken cautiously," he said, "since it must be remembered that the first three months under the new law don't really count in looking at birth data; women whose pregnancies were advanced would not have had abortion as an available option in that period. Nevertheless, we see some hopeful signs." He cited the following evidence:

—Maternal mortality, inclusive of abortion-related deaths, has been declining steadily in the City over the past five years, due in part to the increased impact of family planning services. For a six-month period from October 1, 1968 through March, 1969, the rate was 5.4 maternal deaths per 10,000 live births; during October-March 1969-1970, the rate was 5.3; during October-March 1970-1971, with the new abortion law in effect, the rate dropped sharply to 2.6, an all-time low.

—Infant mortality has also dropped to a new low of 22.0 deaths per 1,000 live births from January 1 through April 30, 1971, compared to 22.5 for the same period in 1970; 25.2 during January-April 1969; and 24.5 during January-April 1968. Access to abortion "on demand" may account for some of this result, since abortion is now available to those women who are at greatest risk of giving

Press Release from Health Services Administration

birth to infants who may die: namely, very young women, unwed mothers (who generally get poorer pre-natal care), and women who have had many previous births and pregnancies, as well as women with medical handicaps.

—Out-of-wedlock births had shown a fairly steady increase over the years but, for the first time, there may be a decline in the actual numbers of these births. From January 1, 1970 through March 31, 1970, before the law was passed, there were 7,764 out-of-wedlock births, from January 1 through March 31, 1971, after the law, there were 7,581 such births. HSA will continue to watch closely to see if these figures constitute a meaningful trend for the future.

—"Incomplete" abortions—those cases that hospitals see after an abortion has begun elsewhere—seem to be declining, a possible indication that the abortion law is reducing the incidence of criminal abortions. In ten municipal hospitals taken together, incomplete and spontaneous abortions averaged 480 per month from July 1 through December 31, 1970. In January, the average was 391; in February, 415; in March, 396; in April 342; and in May, 323. Since there is reason to believe that most of this decline is due to fewer "incompletes" rather than fewer spontaneous abortions, it would appear that criminal abortions may be on the wane.

"When we started out, the greatest fear in the community was that we would not be able to serve the poor—and it is very gratifying to note that this simply has not happened," Chase said. "According to analysis of pregnancy termination certificates for the first ten months, 34.7% of City residents were served at municipal hospitals and 16.7% were patients in ward services of voluntary hospitals—the traditional source of care for low-income women."

Press Release from Health Services Administration

Chase stressed once more that at the municipal hospitals, no woman is turned away because she is unable to pay, even if she is not eligible for Medicaid. Medicaid-reimbursable abortions constitute an estimated 31% of the procedures for City residents, based on data from the first 9 months, and a recent court decision ruled that abortion will continue to be a reimbursable medical procedure.

"By and large, the proprietary (profit-making) hospitals and the out-of-hospital abortion clinics are the facilities that tend to serve-out-of-State residents. 79.4% of the proprietary caseload through April consisted of out-of-State women, as did 86.9% of the non-hospital clinic caseload." 82.4% of out-of-State residents were served in these facilities.

Of the estimated year-end projection of over 164,000 abortions, based on weekly reports from hospitals and clinics . . . 26,000 will be at municipal hospitals, 40,000 at voluntary hospitals; 50,000 at proprietary hospitals; and 48,000 at out-of-hospital clinics.

At present, there are 18 out-of-hospital abortion clinics known to be operating in New York City. Under Article 42 of the N.Y.C. Health Code, which was adopted on October 19, 1970, abortions are restricted either to hospitals, or to clinics affiliated with and located very close to hospitals that can provide emergency services if needed, or to free-standing clinics that are equipped to handle their own emergencies and are, in effect, "mini-hospitals."

The Board of Health proposed on June 24 a new amendment to Article 42 which would require all abortion clinics to register with the Department of Health, which inspects them and assists them in complying with the medical provisions of the Code. Under this amendment, if adopted, a clinic could be shut down on 48-hour notice if it failed

Press Release from Health Services Administration

to register or if it violated the Code so as to endanger the life or health of its patients, in the judgment of the Health Department. This proposed amendment will be published in the City Record this week, with public comment requested.

"There is no question," Chase said, "that New York City has proved this year that legal abortion on demand is feasible. While there are always going to be individual problems in initiating any massive new program such as this, the essential fact is that we have been able to provide prompt, dignified, and—most important—safe care to vast numbers of women who have sought this procedure. The success of the new law is due in great measure to the splendid cooperation of all sectors of the health care system in the City, and especially to the high standards of performance of the medical profession."

Mr. Chase particularly singled out for praise the Family Planning Information Service, the free counseling and referral agency operated on behalf of the City by Planned Parenthood of New York City, Inc., and the Health Department Abortion Clearing House which serves over 40 hospitals, enabling them to refer their patients quickly to other hospitals if they cannot meet the demand at a particular moment.

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 70-40

MARY DOE, *et al.*,

Appellants[1]

—against—

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; LEWIS R. SLATON, as District Attorney of Fulton County, Georgia; and HERBERT T. JENKINS, as Chief of Police of the City of Atlanta, Georgia,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

No. 70-18

JANE ROE, JOHN DOE, and MARY DOE,

Appellants,

JAMES HUBERT HALLFORD, M.D.,

Appellant-Intervenor,

—against—

HENRY WADE,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

---

[1] Appellants in No. 70-40 whose names do not appear in the caption are: PETER G. BOURNE; ROBERT HATCHER; LILLAS L. JAMES; JAMES WATERS; CORBETT TURNER; NEWTON LONG; EDWARD LEADER; WILLIAM H. BIGGERS; GEORGE VIOLIN; PATRICIA S. SMITH; JENNIE WILLIAMS; JUDITH BOURNE; SUZANNE DUNAWAY; JOYCE PARKS; LOU ANN IRION; MARY LONG; J. EMMETT HERNDON; SAMUEL L. WILLIAMS; EUGENE PICKETT; RICHARD DEVOR; DONALD DAUGHTRY; JUDITH ZORACH and KAREN WEAVER, residents of the State of Georgia; PLANNED PARENTHOOD ASSOCIATION OF ATLANTA, INC., a Georgia corporation; and GEORGIA CITIZENS FOR HOSPITAL ABORTION, INC., a Georgia corporation, for and on the behalf of all persons and organizations similarly situated.

Motion for Leave to File a Brief as *Amici Curiae*

American Ethical Union, American Friends Service Committee, American Humanist Association, American Jewish Congress, Episcopal Diocese of New York, New York State Council of Churches, Union of American Hebrew Congregations, Unitarian Universalist Association, United Church of Christ and The Board of Christian Social Concerns of the United Methodist Church move for leave to file a brief as *Amici Curiae* in support of the Appellants' position. The Appellants consent and the Appellees do not consent to the filing of the proposed brief.

The appeals involve the constitutionality of the abortion laws of the States of Georgia and Texas. The Georgia law limited the class of permitted abortions to those performed because the pregnant woman's life or health is endangered, or the foetus may have a grave defect or the pregnancy resulted from rape. The three-judge Court held the limitations unconstitutional. Under the remaining portions of the statute, abortion at any stage of pregnancy is a crime unless performed on a Georgia resident by a licensed physician "upon his best clinical judgment [in writing] that an abortion is necessary". The physician's judgment must be "concurred in [in writing] by at least two other physicians" and "approved in advance by a committee of the medical staff of the [accredited] hospital in which the operation is to be performed". Injunctive relief was denied and only Appellant Mary Doe was held to have standing.

The Texas law provided that abortion at any stage of pregnancy is a crime unless "procured or attempted by medical advice for the purpose of saving the life of the mother". It was declared unconstitutional by the three-judge Court but injunctive relief was denied. Only Appellant Jane Roe was held to have standing.

Neither statute permits abortion on the ground that the woman does not, or the woman and her husband do not, want a child.

Interest of Amici

The American Ethical Union is a membership corporation formed under the laws of New York. The Union represents 24 Ethical Culture Societies and Fellowships in the United States. The Union was founded to promote religious and philosophical purposes.

The American Friends Service Committee, Inc., is a nonprofit corporation chartered under the laws of the State of Delaware. The Committee's purpose and object is to engage in religious, charitable, social, philanthropic and relief work in the United States and in foreign countries on behalf of, and to promote the general purpose of, the several branches and divisions of the Religious Society of Friends in Ameica. A major program of the Committee concerns education about family planning, family living, population and demographic trends.

The American Humanist Association is incorporated as a religious corporation under California law to express a common concern with the dignity and rights of all human beings. The Association represents approximately 3,500 members in the United States.

The American Jewish Congress is a national organization of American Jews having approximately 30,000 members in the United States. The Congress was founded to protect fundamental freedoms of all Americans.

The Episcopal Diocese of New York is the central organization representing 225 Episcopal churches in southern New York State. The churches have approximately 122,000 individual members. The Diocese has resolved that "abortion is a matter of individual conscience to be exercised

within the context of one's own faith and established medical practice".

The New York State Council of Churches is a religious corporation formed under New York law to promote common interests among Protestant churches. The Council represents 5,000 churches of 29 denominations with a total membership of approximately 1,500,000 people. The Council made a public statement of its belief that "abortion is properly a matter of individual conscience to be exercised within the context of one's own faith and established medical practice".

The Union of American Hebrew Congregations is a religious corporation formed under Ohio law. The Union consists of approximately 700 Reform Jewish congregations in the United States with a membership of approximately 1,000,000 people. The Union has publicly stated its opposition to unreasonably restrictive abortion laws.

The Unitarian Universalist Association, a religious corporation incorporated under the laws of the Commonwealth of Massachusetts, represents 1,038 churches and fellowships in the United States and Canada having a membership of approximately 164,000 people. The Association has publicly stated its opposition to criminal abortion laws.

The United Church of Christ represents 7,000 churches in the United States with a membership of approximately 2,000,000 people. The United Church has publicly stated its opposition to criminal abortion laws.

The Board of Christian Social Concerns is an agency of the United Methodist Church. The United Methodist Church consists of 41,000 churches in the United States having a membership of approximately 11,000,000 people. The United Methodist Church has publicly stated its opposition to laws making abortion a crime.

All the *Amici* seek leave to file the attached proposed brief in support of the Appellants' position on the merits in these cases because they oppose legislation that inter-

feres with the liberty of an individual to exercise his or her own conscience in the conduct of his or her personal life, free of unwarranted governmental interference. The *Amici* believe the Georgia and Texas abortion laws interfere with that liberty.

The *Amici* do not advocate abortion. They do advocate the right of an individual to be free from State interference in the conduct of his or her private life. That freedom includes the determination whether or not to have a child. If an individual does not want a child, the *Amici* believe he or she should be free to use means to that end consistent with the woman's health and safety.

The *Amici* believe that the brief attached addresses the merits differently than will Appellants' briefs as evidenced by the outlines in the Jurisdictional Statements. The brief of the *Amici* stresses that the States may not unreasonably interfere with the constitutional right of an individual to determine the course of his or her own life and that the Georgia and Texas abortion laws constitute such an interference. The *Amici* present related issues that Appellants have not discussed in their Jurisdictional Statements—namely that there is no constitutional right of birth and that the States may not justify the abortion laws' interference with the personal liberty of all persons on the ground of moral precepts not shared by all. It is believed that a contribution is made by the brief of the *Amici Curiae* and the Court is respectfully requested to accept and consider it.

Respectfully submitted,

HELEN L. BUTTENWIESER
Attorney for Amici Curiae
575 Madison Avenue
New York, New York 10022

BONNIE P. WINAWER
Of Counsel

INDEX

PAGE

The Constitutional Provisions and Statutes Involved 2

Statement of the Case 9

ARGUMENT:

The Georgia and Texas abortion laws unjustifiably restrict the reserved constitutional liberty of all persons to conduct their private lives without unwarranted governmental interference 14

A. The abortion laws at issue, touching on personal and private aspects of marriage, sex, the family, and family size, invade the right of privacy 14

B. The Georgia and Texas abortion laws may not be sustained as a valid exercise of the police power 20

1. The States may enact safety measures to protect the public from dangerous abortions but the protection of the public health is not served, indeed the opposite effect is achieved, by the laws under consideration that make criminal virtually all abortions, or all abortions judged not "necessary", or all abortions performed on non-residents .. 21

2. The laws cannot be justified as a restriction on "immoral" sexual behavior, because the laws also penalize marital sexual relations 25

PAGE

3. The States' claimed duty to preserve the right of a foetus to be born is not a valid justification for encroaching on personal liberties, for:

   a. A foetus doesn't have a "right" to be born; but if it did, that right would be outweighed by the liberty of women, or women and their husbands, to determine whether or not to have children 25

   b. The need to encourage population growth, if it ever was a legitimate end of government, is not now a valid justification for invading personal liberties 31

   c. The religious view that the product of every conception is sacred may not validly be urged by the States as a justification for limiting the exercise of constitutional liberties, for that would be an establishment of religion 31

CONCLUSION 35

TABLE OF CASES AND OTHER AUTHORITIES

Cases:

Aptheker v. Secretary of State, 378 U.S. 500 25

Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wisc), appeal dismissed *sub nom.* McCann v. Babbitz, 400 U.S. 1 ..... 18, 25, 29

PAGE

Bates v. City of Little Rock, 361 U.S. 516 .....14, 17, 20
Bolton v. Doe, —— U.S. ——, 29 L. Ed.2d 104 10-11

Corkey v. Edwards, 322 F. Supp. 1248 (W.D. N. Car.) 24, 30

Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga.) question of jurisdiction postponed —— U.S. ——, 91 S. Ct. 1614, 20 L. Ed.2d 109 .....4, 9, 19, 21-22, 26, 29, 31, 33
Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill.) appeals docketed *sub nom.* Hanrahan v. Doe (No. 70-105, Oct. 1971 Term) and Heffernan v. Doe, (No. 70-106, Oct. 1971 Term) 18, 23, 28
Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 299 28

Endresz v. Friedberg, 24 N.Y.2d 478, 301 N.Y.S.2d 65, 248 N.E.2d 901 27

Fondren v. State, 74 Tex. Crim. Rep. 552, 169 S.W. 411 26

Griswold v. Connecticut, 381 U.S. 479 .....14, 15, 16, 17, 18, 20, 21, 25, 29, 30, 31, 33, 34

Hammett v. State, 84 Tex. Crim. Rep. 635, 209 S.W. 661 26-27
Hill v. Lang, 211 Ga. 484, 86 S.E.2d 498 27

In re Peabody, 5 N.Y.2d 541, 186 N.Y.S.2d 265, 158 N.E.2d 841 .....27, 28

PAGE

Leal v. Pitts Sand & Gravel, Inc., 419 S.W.2d 820 (Tex. Sup. Ct.) 27
Loving v. Virginia, 388 U.S. 1 ..... 18, 19

Matter of Roberts, 158 Misc. 698, 286 N.Y. Supp. 476 27
McGowan v. Maryland, 366 U.S. 420 33
McLaughlin v. Florida, 379 U.S. 184 25
Meyer v. Nebraska, 262 U.S. 390 ..... 18, 19, 29
Montana v. Rogers, 278 F.2d 68 (7th Cir.), aff'd *sub nom.* Montana v. Kennedy, 366 U.S. 308 26

NAACP v. Alabama, 377 U.S. 288 ..... 17, 20, 21, 25

Palko v. Connecticut, 302 U.S. 319 15
Passley v. State, 194 Ga. 327, 21 S.E.2d 230 26
People v. Barksdale, —— Cal. App.2d ——, —— P.2d —— (Docket No. 1 Crim. 9526, Ct. App., 1st App. Dist., July 22, 1971) 18, 21, 23
People v. Belous, 71 Cal.2d 954, 80 Cal. Rptr. 354, 458 P.2d 194, cert. denied 397 U.S. 915 ..... 18, 23, 28
Poe v. Ullman, 367 U.S. 497 15

Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex.) question of jurisdiction postponed —— U.S. ——, 91 S. Ct. 1610, 29 L. Ed.2d 108 ..... 10, 18, 24, 28, 29
Rosen v. Louisiana, 318 F. Supp. 1217 (E.D. La.), appeal docketed (No. 70-42 Oct. 1971 Term) 18-19, 23, 30, 32, 33

Shapiro v. Thompson, 394 U.S. 618 ..... 17, 18, 24, 29
Sherbert v. Verner, 374 U.S. 398 17
Skinner v. Oklahoma, 316 U.S. 535 ..... 18, 19, 31

PAGE

State v. Munson, unreported (S.D. Cir. Ct. Pennington County April 6, 1970) (portions appended to dissenting opinion in Rosen v. Louisiana, 318 F. Supp. 1217, at 1245) 18-19
Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio) 30

Unborn Child of Mary Doe v. Doe, —— U.S. ——, 29 L. Ed.2d 104 26
United States v. Guest, 383 U.S. 745 ..... 18, 24
United States v. Vuitch, 402 U.S. 62 ..... 17, 32
United States v. Vuitch, 305 F. Supp. 1032 (D.C. Cir.), rev'd, 402 U.S. 62 29
United States ex rel. Williams v. Follette, 313 F. Supp. 269 (S.D.N.Y.) 19

Wolcott v. Gaines, 225 Ga. 373, 169 S.E.2d 165 27

Statutes:

Constitution of the United States

First Amendment 2, 32, 33, 34
Third Amendment 34
Fourth Amendment 34
Fifth Amendment 2, 25, 34
Ninth Amendment 3, 15, 34
Fourteenth Amendment 3, 15, 16, 19, 25, 34

Georgia Code

Section 26-1201 ..... 3, 26
Section 26-1202 ..... 3-7, 9, 24, 26
Section 26-1203 ..... 7, 26
Section 26-9921a 26

PAGE

2A Texas Penal Code

Article 1191 ..... 7, 26
Article 1192 ..... 8, 26
Article 1193 ..... 8, 26
Article 1194 ..... 8, 26
Article 1195 26
Article 1196 ..... 8, 10, 26

Other Authorities:

Clark, "Religion, Morality and Abortion", 2 Loyola (L.A.) L. Rev. 1 ..... 31, 32
Comment, 23 Vand. L. Rev. 1346 32
Dachs, "Liability for Wrongful Harm to the Unborn", 166 N.Y. Law Journal No. 22, p. 1, col. 4 (August 2, 1971), part 1 27
166 N.Y. Law Journal No. 23, p. 1, col. 4 (August 3, 1971), part 2 27
Holmes, The Common Law 32
Note, "Legal Analysis and Population Control: The Problem of Coercion", 84 Harv. L. Rev. 1856 ..... 31, 34
"Supreme Court, 1964 Term", 79 Harv. L. Rev. 56 33
The Federalist, No. 84 (Hamilton) (Mod. Lib. Ed. 1937) 16
The New York Times, June 30, 1971, p. 43, cols. 4-8 23
Tietze and Lewitt, "Abortion", 220 Scientific American No. 1, p. 21 (January 1969) 32

BLEED THROUGH POOR COPY

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 70-40

MARY DOE, *et al.*,

Appellants,

—against—

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; LEWIS R. SLATON, as District Attorney of Fulton County, Georgia; and HERBERT T. JENKINS, as Chief of Police of the City of Atlanta, Georgia,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

No. 70-18

JANE ROE, JOHN DOE, and MARY DOE,

Appellants,

JAMES HUBERT HALLFORD, M.D.,

Appellant-Intervenor,

—against—

HENRY WADE,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

CPOY BOUND CLOSE IN CENTER

BRIEF OF AMERICAN ETHICAL UNION, AMERICAN FRIENDS SERVICE COMMITTEE, AMERICAN HUMANIST ASSOCIATION, AMERICAN JEWISH CONGRESS, EPISCOPAL DIOCESE OF NEW YORK, NEW YORK STATE COUNCIL OF CHURCHES, UNION OF AMERICAN HEBREW CONGREGATIONS, UNITARIAN UNIVERSALIST ASSOCIATION, UNITED CHURCH OF CHRIST AND THE BOARD OF CHRISTIAN SOCIAL CONCERNS OF THE UNITED METHODIST CHURCH AS *AMICI CURIAE* IN SUPPORT OF THE APPELLANTS'[1] POSITION

The Constitutional Provisions and Statutes Involved

The First Amendment to the Constitution of the United States:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . .

The Fifth Amendment to the Constitution of the United States:

> . . . nor shall any person . . . be deprived of life, liberty or property, without due process of law. . . .

---

[1] Appellants in No. 70-40 whose names do not appear in the caption are: PETER G. BOURNE; ROBERT HATCHER; LILLAS L. JAMES; JAMES WATERS; CORBETT TURNER; NEWTON LONG; EDWARD LEADER; WILLIAM H. BIGGERS; GEORGE VIOLIN; PATRICIA S. SMITH; JENNIE WILLIAMS; JUDITH BOURNE; SUZANNE DUNAWAY; JOYCE PARKS; LOU ANN IRION; MARY LONG; J. EMMETT HERNDON; SAMUEL L. WILLIAMS; EUGENE PICKETT; RICHARD DEVOR; DONALD DAUGHTRY; JUDITH ZORACH and KAREN WEAVER, residents of the State of Georgia; PLANNED PARENTHOOD ASSOCIATION OF ATLANTA, INC., a Georgia corporation; and GEORGIA CITIZENS FOR HOSPITAL ABORTION, INC., a Georgia corporation, for and on the behalf of all persons and organizations similarly situated.

The Ninth Amendment to the Constitution of the United States:

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

The Fourteenth Amendment to the Constitution of the United States:

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The Georgia abortion laws:

> Georgia Code § 26-1201. Criminal Abortion
>
> Except as otherwise provided in Section 26-1202, a person commits criminal abortion when he administers any medicine, drug or other substance whatever to any woman or when he uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion. (Acts 1968, pp. 1249, 1277.)
>
> Georgia Code § 26-1202. Exception
>
> (a) Section 26-1201 shall not apply to an abortion performed by a physician duly licensed to practice medicine and surgery pursuant to Chapter 84-9 or 84-12 of the Code of Georgia of 1933, as amended,

based upon his best clinical judgment that an abortion is necessary *because*:

(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or

(2) The fetus would be very likely to be born with a grave, permanent, and irremediable mental or physical defect; or

(3) The pregnancy resulted from forcible or statutory rape.[2]

(b) No abortion is authorized or shall be performed under this section unless each of the following conditions is met:

(1) The pregnant woman requesting the abortion certifies in writing under oath and subject to the penalties of false swearing to the physician who proposes to perform the abortion that she is a bona fide legal resident of the State of Georgia.

(2) The physician certifies that he believes the woman is a bona fide resident of this State and that he has no information which should lead him to believe otherwise.

(3) Such physician's judgment is reduced to writing and concurred in by at least two other physicians duly licensed to practice medicine and surgery pursuant to Chapter 84-9 of the Code of Georgia of 1933, as amended, who certify in writing that based upon their separate personal medical examinations of the pregnant woman, the abortion is, in their

[2] The italicized portions were held unconstitutional by the District Court in *Doe* v. *Bolton*, 319 F. Supp. 1048 (N.D. Ga.).

BLEED THROUGH POOR COPY

judgment necessary *because of one or more of the reasons enumerated above.*

(4) Such abortion is performed in a hospital licensed by the State Board of Health and accredited by the Joint Commission on Accreditation of Hospitals.

(5) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose.

(6) If the proposed abortion is considered necessary because the woman has been raped, the woman makes a written statement under oath, and subject to the penalties of false swearing, of the date, time and place of the rape and the name of the rapist, if known. There must be attached to this statement a certified copy of any report of the rape made to any law enforcement officer or agency and a statement by the solicitor general of the judicial circuit where the rape occurred or allegedly occurred that, according to his best information, there is probable cause to believe that the rape did occur.

(7) Such written opinions, statements, certificates, and concurrences are maintained in the permanent

files of such hospital and are available at all reasonable times to the solicitor general of the judicial circuit in which the hospital is located.

(8) A copy of such written opinions, statements, certificates, and concurrences is filed with the Director of the State Department of Public Health within ten (10) days after such operation is performed.

(9) All written opinions, statements, certificates, and concurrences filed and maintained pursuant to Paragraphs (7) and (8) of this subsection shall be confidential records and shall not be made available for public inspection at any time.

(c) Any solicitor general of the judicial circuit in which an abortion is to be performed under this section, or any person who would be a relative of the child within the second degree of consanguinity, may petition the superior court of the county in which the abortion is to be performed for a declaratory judgment whether the performance of such abortion would violate any constitutional or other legal rights of the fetus. Such solicitor general may also petition such court for the purpose of taking issue with compliance with the requirements of this section. The physician who proposes to perform the abortion and the pregnant woman shall be respondents. The petition shall be heard expeditiously and if the court adjudges that such abortion would violate the constitutional or other legal rights of the fetus, the court shall so declare and shall restrain the physician from performing the abortion.

(d) If an abortion is performed in compliance with this section, the death of the fetus shall not give rise to any claim for wrongful death.

(e) Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b) (5). A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person. (Acts 1968, pp. 1249, 1280)

Georgia Code § 26-1203. Punishment

A person convicted of criminal abortion shall be punished by imprisonment for not less than one nor more than 10 years. (Acts 1968, pp. 1249, 1280.)

The Texas Abortion Laws:

2A Texas Penal Code, Article 1191. Abortion.

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an

abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth be caused. Acts 1907, p. 55.

2A Texas Penal Code, Article 1192. Furnishing the means.

Whoever furnishes the means for procuring an abortion knowing the purpose intended is an accomplice.

2A Texas Penal Code, Article 1193. Attempt at abortion.

If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

2A Texas Penal Code, Article 1194. Murder in producing abortion.

If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

2A Texas Penal Code, Article 1196. By medical advice.

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

BLEED THROUGH POOR COPY

Statement of the Case

The Appellants in these cases are representatives of the classes of married and unmarried pregnant women who want but cannot obtain lawful abortions, married couples for whom abortions may become necessary because they cannot use effective contraceptive devices, and physicians, nurses, social workers and ministers who are regularly consulted about abortion. The Appellants sought judgments declaring the abortion laws of Georgia and Texas to be unconstitutional and restraining the enforcement of the laws.

In the Georgia case, *Doe* v. *Bolton*, 319 F. Supp. 1048 (N.D. Ga.), the District Court held unconstitutional the portion of the Georgia abortion law that limited the class of permitted abortions to those performed because the pregnant woman's life or health is endangered, or the foetus may have a grave defect or the pregnancy resulted from rape. The Court also struck down the provision for an action on behalf of the foetus to complain of contemplated abortion. The Court held that those portions of the statute "unduly [restrict] a decision sheltered by the Constitutional right of privacy." 319 F. Supp. at 1056. Under the remaining portions of the Georgia statute, abortion at any stage of pregnancy is a crime unless performed in an "accredited" hospital on a Georgia resident by a licensed physician "upon his best clinical judgment [in writing] that an abortion is necessary". The physician's judgment must be "concurred in [in writing] by at least two other physicians" and "approved in advance by a committee of the medical staff of the [accredited] hospital in which the operation is to be performed". The *Amici* support the

decision of the Georgia District Court to the extent it holds portions of the abortion law unconstitutional.

In the Texas case, *Roe* v. *Wade*, 314 F. Supp. 1217 (N.D. Texas), the three-judge District Court declared the Texas abortion laws unconstitutional because they "deprive single women and married couples of . . . the right of choice over events which, by their character and consequence, bear in a fundamental manner on the privacy of individuals". 314 F. Supp. at 1221. The statute provided that abortion at any stage of pregnancy was a crime unless "procured or attempted by medical advice for the purpose of saving the life of the mother". 2A Texas Penal Code Article 1196. The *Amici* support the decision of the Texas District Court.

Neither statute permits an abortion on the ground the woman does not want, or the woman and her husband do not want, a child.

Injunctive relief was denied in both cases. In the Georgia case standing was denied to all Appellants except Mary Doe, a married pregnant woman, as representative of her class, and in the Texas case to all Appellants except Jane Roe, an unmarried pregnant woman, as representative of her class.

Appellants in both cases appealed to this Court from the denial of injunctive relief, the denial of standing, and in the Georgia case also from the declaratory judgment. On May 3, 1971, the Court granted review of both cases but postponed the question of jurisdiction to the hearing on the merits.[3]

---

[3] There are no cross-appeals. The appeal of the State of Georgia was dismissed for want of jurisdiction. *Bolton* v. *Doe*, —— U.S.

The *Amici* address only the substantive constitutional issues raised by both appeals. The appeal in the Texas case is only from the denial of injunctive relief and of standing to certain Appellants. Nevertheless, the *Amici* consider it their duty to brief the merits of the Texas case in the event the Court grants Texas' application for a review of the merits. Reply to Jurisdictional Statement, at 6-7.

Interest of Amici

The American Ethical Union is a membership corporation formed under the laws of New York. The Union represents 24 Ethical Culture Societies and Fellowships in the United States. The Union was founded to promote religious and philosophical purposes.

The American Friends Service Committee, Inc., is a nonprofit corporation chartered under the laws of the State of Delaware. The Committee's purpose and object is to engage in religious, charitable, social, philanthropic and relief work in the United States and in foreign countries on behalf of, and to promote the general purpose of, the several branches and divisions of the Religious Society of Friends in America. A major program of the Committee concerns education about family planning, family living, population and demographic trends.

The American Humanist Association is incorporated as a religious corporation under California law to express a common concern with the dignity and rights of all human

---

—, 29 L. Ed.2d 104. The State of Texas noticed an appeal to this Court but never docketed it. The State wrote in its Reply to Jurisdictional Statement (at 6): "Since the filing of its Notice of Appeal to this Court (Appendix D), Appellees herein have determined that the only forum available to them for appeal from the judgment below is to the Fifth Circuit".

beings. The Association represents approximately 3,500 members in the United States.

The American Jewish Congress is a national organization of American Jews having approximately 30,000 members in the United States. The Congress was founded to protect fundamental freedoms of all Americans.

The Episcopal Diocese of New York is the central organization representing 225 Episcopal churches in southern New York State. The churches have approximately 122,000 individual members. The Diocese has resolved that "abortion is a matter of individual conscience to be exercised within the context of one's own faith and established medical practice".

The New York State Council of Churches is a religious corporation formed under New York law to promote common interest among Protestant churches. The Council represents 5,000 churches of 29 denominations with a total membership of approximately 1,500,000 people. The Council made a public statement of its belief that "abortion is properly a matter of individual conscience to be exercised within the context of one's own faith and established medical practice".

The Union of American Hebrew Congregations is a religious corporation formed under Ohio law. The Union consists of approximately 700 Reform Jewish congregations in the United States with a membership of approximately 1,000,000 people. The Union has publicly stated its opposition to unreasonably restrictive abortion laws.

The Unitarian Universalist Association, a religious corporation incorporated under the laws of the Commonwealth of Massachusetts, represents 1,038 churches and fellow-

ships in the United States and Canada having a membership of approximately 164,000 people. The Association has publicly stated its opposition to criminal abortion laws.

The United Church of Christ represents 7,000 churches in the United States with a membership of approximately 2,000,000 people. The United Church has publicly stated its opposition to criminal abortion laws.

The Board of Christian Social Concerns is an agency of the United Methodist Church. The United Methodist Church consists of 41,000 churches in the United States having a membership of approximately 11,000,000 people. The United Methodist Church has publicly stated its opposition to laws making abortion a crime.

All the *Amici* seek leave to file this brief in support of the Appellants' position on the merits in these cases because they oppose legislation that interferes with the liberty of an individual to exercise his or her own conscience in the conduct of his or her personal life, free of unwarranted governmental interference. The *Amici* believe the Georgia and Texas abortion laws interfere with that liberty.

The *Amici* do not advocate abortion. They do advocate the right of individuals to be free from State interference in the conduct of their private lives. That freedom includes the determination whether or not to have a child. If an individual does not want a child, the *Amici* believe he or she should be free to use means to that end consistent with the woman's health and safety.

ARGUMENT

The Georgia and Texas abortion laws unjustifiably restrict the reserved constitutional liberty of all persons to conduct their private lives without unwarranted governmental interference.

A. *The abortion laws at issue, touching on personal and private aspects of marriage, sex, the family, and family size, invade the right of privacy.*

The Constitution of the United States guarantees that citizens shall retain the liberty—that has come to be known as the "right of privacy"—to conduct their personal lives with dignity and without unwarranted State interference. The States may not infringe personal liberty unless the States demonstrate that the statute narrowly serves "a subordinating interest which is compelling". *Bates* v. *City of Little Rock*, 361 U.S. 516, 524; *Griswold* v. *Connecticut*, 381 U.S. 479, 485.

In *Griswold* v. *Connecticut*, 381 U.S. 479, seven Justices of the Court agreed, albeit on varying constitutional grounds, that a law forbidding the use of contraceptives as a birth control measure was an unwarranted interference with individual liberty because it prevented married and unmarried individuals from determining for themselves the personal question whether or not or when to have children. The Georgia and Texas abortion laws also invade the fundamental right of privacy because they prevent married and unmarried individuals from taking steps necessary to limit the number of children they shall have.

The opinion of the Court in *Griswold*, 381 U.S. at 479-486, traced the development of the constitutional concept of the

sanctity of the individual and determined that the right of privacy is derived from the "penumbras" of the "specific guarantees in the Bill of Rights . . . formed by emanations from those guarantees that help give them life and substance." 381 U.S. at 484. The concurring opinions in *Griswold* stressed that the Ninth and Fourteenth Amendments to the Constitution contemplate a reservoir of unspecified personal rights now encompassed in the term "right of privacy" that the people had not delegated, and should never be compelled to delegate, to a State or the Federal Government.

> "The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments." 381 U.S. at 492 (concurring opinion of Mr. Justice Goldberg, joined in by Mr. Chief Justice Warren, and Mr. Justice Brennan).

Mr. Justice Harlan, concurring in the judgment, wrote (381 U.S. at 500):

> "In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty,' Palko v. Connecticut, 302 U.S. 319, 325. For reasons stated at length in my dissenting opinion in Poe v. Ullman, supra [367 U.S. 497, 522, at 539-545], I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not depen-

> dent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom."

Mr. Justice White also concurred in the judgment on the ground that the Fourteenth Amendment protected personal liberties not enumerated in the Constitution. 381 U.S. at 502.

Indeed, *Publius*, author of The Federalist, observed that the Constitution as originally drafted, before the adoption of the first ten Amendments, "is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS." The Federalist, No. 84 (Hamilton) at 561, Mod. Lib. Ed., 1937 (capitals in the original).

> "Here, in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservations. 'WE THE PEOPLE of the United States, to secure the blessing of liberty to ourselves and our posterity, do *ordain* and *establish* this Constitution for the United States of America.' Here is a better recognition of popular rights, than volumes of . . . aphorisms . . . which would sound much better in a treatise of ethics than in a constitution of government.
>
> "But a minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns." *Ibid.* at pp. 558-559 (Emphasis in the original).

The same considerations stressed in *Griswold* govern the constitutionality of the Georgia and Texas laws that make

abortion a criminal act unless performed for State-approved reasons. The abortion laws' direct encroachment on the constitutional right of privacy cannot be countenanced. The laws are invalid on their face, for their reach is broader than any compelling governmental interest.[4] *Griswold* v. *Connecticut*, 381 U.S. 479, 485; *Shapiro* v. *Thompson*, 394 U.S. 618, *passim*; *NAACP* v. *Alabama*, 377 U.S. 288, 307; *Sherbert* v. *Verner*, 374 U.S. 398, 407; *Bates* v. *City of Little Rock*, 361 U.S. 516, 524. The abortion laws interfere no less with married and unmarried persons' decisions whether to have children than did the Connecticut law prohibiting the use of contraceptives that this Court struck down in *Griswold* v. *Connecticut*, 381 U.S. 479.

> "Abortion touches intimate affairs of the family, of marriage, of sex, which in Griswold v. Connecticut, 381 U.S. 479, we held to involve rights associated with several express constitutional rights and which are summed up in 'the right of privacy.'" *United States* v. *Vuitch*, 402 U.S. 62, at 78 (dissenting opinion of Mr. Justice Douglas).[5]

Several lower Federal and State Courts recognized that, like laws restricting the use of contraceptives,[6] laws

---

[4] See Subdivision B of this Brief, at p. 20.

[5] In *United States* v. *Vuitch*, the majority of the Court expressly did not reach the issue of the constitutional right of privacy presented on these appeals. The District Court held the District of Columbia abortion law unconstitutional on the sole ground that the statute was unconstitutionally vague. On the appeal, this Court disagreed and reversed the decision, but did not pass upon "arguments . . . based on this Court's decision in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). . . . Since that question of vagueness was the only issue passed upon by the District Court it is the only issue we reach here." 402 U.S. at 72-73.

[6] *Griswold* v. *Connecticut*, 381 U.S. 479.

limiting a parent's right to teach his children,[7] laws requiring that individuals be sterilized,[8] laws preventing interracial marriages[9] and laws that restrict the right to travel,[10] restrictive criminal abortion laws also

> "[constitute] an intrusion on constitutionally protected areas too sweeping to be justified as necessary to accomplish any compelling state interest. . . . ¶ We cannot distinguish the interests asserted by the plaintiffs in this case from those asserted in *Griswold*. . . . We believe that *Griswold* and related cases establish that matters pertaining to procreation, as well as to marriage, the family, and sex are surrounded by a zone of privacy which protects activities concerning such matters from unjustified governmental intrusion." *Doe* v. *Scott*, 321 F. Supp. 1385, 1389-90 (N.D. Ill.), appeals docketed (Nos. 70-105 and 70-106, Oct. 1971 Term).

Accord, *Roe* v. *Wade*, 314 F. Supp. 1217, 1222-23 (N.D. Tex.); *Babbitz* v. *McCann*, 310 F. Supp. 293, 299 (E.D. Wisc.), appeal dismissed *sub nom. McCann* v. *Babbitz*, 400 U.S. 1; *People* v. *Belous*, 71 Cal.2d 954, 963; 80 Cal. Reptr. 354, 359; 458 P.2d 194, 199, cert. denied, 397 U.S. 915; *People* v. *Barksdale*, —— Cal. App.2d ——, —— P.2d —— (Docket No. 1 Crim. 9526, Ct. App., 1st App. Dist., July 22, 1971, slip opinion p. 16); and *State* v. *Munson*, unreported (S.D. Cir. Ct., Pennington Co., April 6, 1970), (portions appended to dissenting opinion in *Rosen* v. *Loui-*

---

[7] *Meyer* v. *Nebraska*, 262 U.S. 390.

[8] *Skinner* v. *Oklahoma*, 316 U.S. 535.

[9] *Loving* v. *Virginia*, 388 U.S. 1.

[10] *Shapiro* v. *Thompson*, 394 U.S. 618; *United States* v. *Guest*, 383 U.S. 745.

POOR COPY

siana, 318 F. Supp. 1217, at 1245). *Cf., United States ex rel. Williams* v. *Follette,* 313 F. Supp. 269, 273 (S.D.N.Y.). The District Court in the Georgia case held the statute in part unconstitutional "because such action [by the State] unduly restricts a decision sheltered by the Constitutional right to privacy." *Doe* v. *Bolton,* 319 F. Supp. 1048, at 1056 (N.D. Ga.).

The recognition that the Constitution protects an individual's private life from becoming an affair of state is not new. In *Skinner* v. *Oklahoma,* 316 U.S. 535, 541, the Court struck down a compulsory sterilization law stating, "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race". An anti-miscegenation statute was held unconstitutional in *Loving* v. *Virginia,* 388 U.S. 1, 12, because it deprived the defendants

> "of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment . . . . Under our Constitution the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."

In *Meyer* v. *Nebraska,* 262 U.S. 390, 399, the Court held that a state may not intrude on a parent's decision to teach a foreign language to his child because the guaranty of liberty in the Fourteenth Amendment protects

> "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates

> of his own conscience, and generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

Fundamental personal liberties are also infringed by abortion laws that are not limited to the protection of health and safety.

B. *The Georgia and Texas abortion laws may not be sustained as a valid exercise of the police power.*

The exercise of personal constitutional liberties may not be abridged by State law unless the State demonstrates that the statute narrowly serves an overriding and compelling State interest. *Griswold* v. *Connecticut,* 381 U.S. 479, 485; *Bates* v. *City of Little Rock,* 361 U.S. 516, 524; *NAACP* v. *Alabama,* 377 U.S. 288, 307.

It cannot seriously be questioned that the Georgia and Texas abortion laws encroach on the liberty to conduct one's private life. The States urge, however, that the "police power" justifies the abortion laws' restriction of that liberty. The justification does not meet the constitutional test, for the statutes are not limited to a legitimate exercise of the police power. They do not merely regulate by whom or when abortions may safely be performed but they limit the very use of abortion as a therapeutic measure by married and unmarried persons. The statute struck down in *Griswold* forbade (381 U.S. 479, at 485):

> "the *use* of contraceptives rather than regulating their manufacture or sale, . . . [and sought] to achieve its goals by means having a maximum destructive impact upon that relationship [marriage]. Such a law cannot stand in the light of the familiar principle, so often

applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms'. NAACP v. Alabama, 377 U.S. 288, 307" [emphasis in the original].

1. The States may enact safety measures to protect the public from dangerous abortions but the protection of the public health is not served, indeed the opposite effect is achieved, by the laws under consideration that make criminal virtually all abortions, or all abortions judged not "necessary", or all abortions performed on non-residents.

The abortion laws cannot stand as health measures. The Georgia statute's elaborate structure requiring three successive concurring approvals in writing by doctors and committees of doctors and a patient's sworn statement of residence within the State before an abortion may lawfully be performed, does not serve any proper concern for the public health. See *People* v. *Barksdale,* —— Cal. App.2d ——, —— P.2d ——, (Docket No. 1 Crim. 9526, Ct. App., 1st App. Dist. July 22, 1961), slip opinion at 20. Indeed, this cumbersome procedure creates a health hazard. The inevitable delay almost ensures that approved abortions will not be performed in the "safe" twelve-week period following conception. See Appellants' Jurisdictional Statement in the Georgia case, at pp. 10-11.

The District Court intended to broaden women's access to abortion under the Georgia statute, for it found the State may not constitutionally limit the reasons for which abortions may be performed. *Doe* v. *Bolton,* 319 F. Supp.

1048, at 1056. The decision has the opposite effect, for it transfers to doctors the unfettered power to determine why or when an abortion is "necessary".

As modified by the District Court, the Georgia statute makes all abortions criminal except those doctors judge to be "necessary". This formulation does not set any standard at all, least of all a standard relating to the public health, for the doctors' exercise of their judgment. Certainly it does not call for medical judgment alone. The questions doctors are competent to answer about abortion are whether the woman is, in fact, pregnant, whether her health will be impaired by the operation, whether the stage or character of the pregnancy indicates undue risk in performing the operation, etc. The question whether the abortion is "necessary" calls for a "moral" as well as a medical decision about a patient's personal life by a team of doctors who are likely to be strangers to the woman, or the woman and her husband, and to their private plans about family size or whether to have children at all. The statute as construed substitutes the doctors' several consciences for the patient's in a critical personal decision.

As originally drafted the statute's standards for permitted abortions also did not serve any State interest in public health. The law prohibited a doctor from performing and a patient from having an abortion the doctor would otherwise approve as medically sound; that is, an abortion sought early in pregnancy on the ground that the woman does not want a child. The denial to a patient of access to medically approved treatment injures rather than promotes public health.

It is commonly recognized that the unavailability of or severely limited access to lawful, safe abortions results in

women submitting to criminal abortionists. The public health problem due to the after-effects of criminal abortion is near epidemic. See, *e.g.*, authorities referred to in *People* v. *Belous*, text and fns. 7, 9 and 10, 71 Cal.2d 954, 965-66, 80 Cal. Rptr. 354, 361, 458 P.2d 194, 201, cert. denied 397 U.S. 915. A woman risks serious physical injury, sterility or even death at the hands of criminal abortionists. "Far from protecting human life . . . [the statutes] tend in practice to destroy it." *Rosen* v. *Louisiana*, 318 F. Supp. 1217, at 1223 (E.D. La.) appeal docketed (No. 70-42, Oct. 1971 Term) (dissenting opinion). Accord, *Doe* v. *Scott*, 321 F. Supp. 1385, 1390-1391 (N.D. Ill.).

Health considerations do not justify the requirement in the Georgia law that abortions be performed in "accredited" hospitals. Medical experience with abortions performed in adequately staffed out-patient clinics has been favorable. See statistics reported in *The New York Times*, June 30, 1971, p. 43, cols. 4-8. There certainly isn't any compelling reason to limit abortions to the relatively few "accredited" hospitals in Georgia. Appellants' Jurisdictional Statement, pp. 18-19. The medical profession has recognized that termination of an early pregnancy is a relatively simple and safe procedure with fewer risks to health than pregnancy itself. See *People* v. *Belous*, text and authorities cited at fn. 7, 71 Cal.2d 954, at 965, 80 Cal. Rptr. 354, at 361, 458 P.2d 194, at 201, cert. denied 397 U.S. 915. Abortions like other simple surgical procedures can safely be performed in licensed hospitals (or clinics) that do not meet "accreditation" standards. In *People* v. *Barksdale*, —— Cal. App.2d —— (Docket No. 1 Crim. 9526, Ct. App. 1st App. Dist. July 22, 1961), a requirement that abortions be performed only in "accredited" hospitals was struck down as "an unnecessary and unrea-

sonable restraint upon the constitutionally guaranteed right under discussion" (slip opinion pp. 19-20).

Similarly, the requirements that the prospective patient prove (Georgia Code §26-1202(b)(1)) and that her physician certify (Georgia Code §26-1202(b)(2)) that she is a Georgia resident, do not accomplish any legitimate state purpose in protecting the public health. The obvious purpose of the requirements is to prevent non-resident patients from seeking abortions. Such a rationale does not justify limiting the federally guaranteed liberties of women who do not reside in Georgia.

The provisions regarding residency may also violate another fundamental constitutional right of all citizens: namely, the right to travel. In *Corkey* v. *Edwards*, 322 F. Supp. 1248, 1254 (W.D. N. Car.) a three-judge Court held a four-month residency requirement in the state abortion law an unconstitutional invasion of the right to travel. The Court relied on *Shapiro* v. *Thompson*, 394 U.S. 618 (in which a one-year residency requirement for welfare benefits was held a violation of the right to travel); and *United States* v. *Guest*, 383 U.S. 745 (in which the right to travel was declared a fundamental constitutional liberty). The Court in *Corkey* indicated that even if the waiting period were deleted, "flat exclusion of non-residents" (such as that in the Georgia abortion law) would still offend the Constitution. 322 F. Supp., at 1254-1255.

The Texas statutes do not remotely resemble health legislation for they do not contain any medical standards for the performance of the narrowly drawn class of permitted abortions. There isn't even a requirement that permitted abortions be performed by licensed doctors. See opinion of the District Court below in *Roe* v. *Wade*, 314 F. Supp. 1217, at 1223, fn. 15.

2. The laws cannot be justified as a restriction on "immoral" sexual behavior, because the laws also penalize marital sexual relations.

The power to regulate immoral sexual conduct cannot responsibly be urged by the Appellees as a justification for the statutes in question. Here, as in *Griswold* v. *Connecticut* (381 U.S. 479, 498, concurring opinion):

> "...it is clear that the state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples. See Aptheker v. Secretary of State, 378 U.S. 500, 514; NAACP v. Alabama, 377 U.S. 288, 307-308; McLaughlin v. Florida, supra, 379 U.S. [184] at 196."

Accord, *Babbitz* v. *McCann,* 310 F. Supp. 293, 301 (E.D. Wisc.), appeal dismissed *sub nom. McCann* v. *Babbitz,* 400 U.S. 1.

3. The States' claimed duty to preserve the right of a foetus to be born is not a valid justification for encroaching on personal liberties, for:

a. A foetus doesn't have a "right" to be born; but if it did, that right would be outweighed by the liberty of women, or women and their husbands, to determine whether or not to have children.

The States claim the abortion laws are justified by a compelling state interest in the foetus. The claim cannot legitimately be based on a foetus' right to birth for there is no such "right". The constitutional guarantees of the Fifth and Fourteenth Amendments apply only to "per-

sons" and "citizens." Citizenship, of course, is accorded only on birth, and not at conception: *Montana* v. *Rogers*, 278 F.2d 68, 72 (7th Cir.), aff'd *sub nom. Montana* v. *Kennedy*, 366 U.S. 308.

The Georgia District Court expressly declined to rule that the foetus has a civil right to birth, holding: "the Court does not postulate the existence of a new being with federal constitutional rights at any time during gestation," *Doe* v. *Bolton*, 319 F. Supp. 1048 at 1055, fn. 3.[11] The Court also declared unconstitutional Georgia Code §26-1202(c) that purported to create a right of action in an unborn foetus to complain of contemplated abortion. 319 F. Supp. at 1056.

Criminal abortion laws are not designed to protect rights of a foetus. In neither Georgia nor Texas is the destruction of a foetus at any state of pregnancy a homicide. *Passley* v. *State*, 194 Ga. 327, 329-330, 21 S.E.2d 230, 232; and see the statutes at issue on these appeals, Georgia Code §§26-1201, 26-1202, 26-1203; 2A Texas Penal Code Articles 1191-1194, 1196.[12] In Texas "a woman who commits an abortion on herself is guilty of no crime, she being regarded rather as the victim than the perpetrator of the crime." *Fondren* v. *State*, 74 Crim. Rep. 552, 557, 169 S.W. 411, 414. See also *Hammett* v. *State*, 84 Tex. Crim. Rep.

---

[11] An appeal to this Court from the District Court's denial of a motion to intervene to assert the foetus' constitutional rights was dismissed for want of jurisdiction *sub nom. Unborn Child of Mary Doe* v. *Doe*, —— U.S. ——, 29 L. Ed.2d 104.

[12] The crime of foeticide, defined as the "willful killing of an unborn child so far developed as to be ordinarily called 'quick', formerly recognized in Georgia (Georgia Code §26-9921a), was apparently superseded by the new statute that is before the Court. 2A Texas Penal Code Article 1195 makes it a crime but not a homicide to destroy a live child who is in the process of being born.

BLEED THROUGH POOR COPY

635, 638, 209 S.W. 661, at 661, holding that the woman upon whom an abortion is performed is not an accomplice in the crime; and Texas' Reply to Jurisdictional Statement at 5. The rule is the same in Georgia. *Wolcott* v. *Gaines*, 225 Ga. 373, 374, 169 S.E.2d 165, 166.

Other purported rights of the unborn, such as the right to inheritance and the right of action in tort, do not vest unless there is a live birth. *Hill* v. *Lang*, 211 Ga. 484, 489, 86 S.E.2d 498, 502; *Leal* v. *Pitts Sand & Gravel, Inc.*, 419 S.W.2d 820, 821 (Tex. Sup. Ct.). See also discussion in Dachs, "Liability for Wrongful Harm to the Unborn," 166 N.Y. Law Journal No. 22, p. 1, col. 4 (August 2, 1971) part 1, at p. 4, cols. 3-4, and 166 N.Y. Law Journal No. 23, p. 1, col. 4 (August 3, 1971), part 2. Dachs concluded (166 N.Y. Law Journal No. 23, at p. 4, col. 4): "The unborn, as such, has no legal standing and its complete destruction prior to birth brings into being no rights in its favor. This is so because in legal contemplation it is nothing."

In *In re Peabody*, 5 N.Y.2d 541, 547, 186 N.Y.S.2d 265, 270, 158 N.E.2d 841, 844, the Court of Appeals of New York held that in trust, estate and tort cases, "a child *en ventre sa mere* is not regarded as a person until it sees the light of day." More recently in *Endresz* v. *Friedberg*, 24 N.Y.2d 478, 485, 301 N.Y.S.2d 65, 70, 248 N.E.2d 901, 904, the Court of Appeals reaffirmed its holding in *Peabody* and stated:

> "... even if, as science and theology teach, the child begins a separate 'life' from the moment of conception, it is clear that, 'except in so far as is necessary to protect the *child's* own rights' (Matter of Roberts, 158 Misc. 698, 699, 286 N.Y.S. 476, 477, *supra*), the law has never considered the *unborn foetus* as having a

> separate 'juridical existence' (Drabbels v. Skelly Oil Co., 155 Neb. 17, 22, 50 N.W.2d 299) or a legal personality or identity 'until it sees the light of day.' (Matter of Peabody, 5 N.Y.2d 541, 547, 186 N.Y.S.2d 265, 270, 158 N.E.2d 841, 844, 845 *supra*)" (emphasis ours).

See also *People* v. *Belous*, 71 Cal.2d 954, 80 Cal. Rptr. 354, 362, 458 P.2d 194, 202, cert. denied 397 U.S. 915.

The States may argue that the foetus nevertheless has some claim to State protection. The State of Texas tried to convince the District Court that the statute is justified by the State's duty to protect the "quickened foetus". The District Court disagreed and held the statute overly broad to serve the alleged interest, because *all* abortions were prohibited regardless of the foetal term. *Roe* v. *Wade*, 314 F. Supp. 1217, at 1223 (N.D. Tex.). The Georgia statute is similarly broad, for it, too, does not distinguish abortions before "quickening" from those performed afterward.

Apart from the objection of overbreadth, the argument must fall, for if the foetus has a right to protection, it is outweighed by the greater constitutional liberty of persons to determine whether they shall have children. As the three-judge Court in Illinois wrote, *Doe* v. *Scott*, 321 F. Supp. 1385 (N.D. Ill.) at 1391:

> "a statute which forces the birth of every fetus, no matter how defective or how intensely unwanted by its future parents, displays no legitimately compelling state interest in fetal life, especially when viewed with regard for the countervailing rights of pregnant women. We do not believe that the state has a compelling interest in preserving all fetal life which justi-

POOR COPY

fies the gross intrusion on a woman's privacy which is involved in forcing her to bear an unwanted child."

Other Courts have also refused to recognize the claimed supremacy of the foetal entity over the constitutional freedom of people. See *Roe* v. *Wade,* 314 F. Supp. 1217, 1223 (N.D. Tex.); *Babbitz* v. *McCann,* 310 F. Supp. 293, 301 (E.D. Wisc.) appeal dismissed *sub nom. McCann* v. *Babbitz,* 400 U.S. 1; *cf., United States* v. *Vuitch,* 305 F. Supp. 1032, 1035 (D.C. Cir.), rev'd on other grounds, 402 U.S. 62.

In *Babbitz* v. *McCann,* the Court held (310 F. Supp. 293 at 301):

> "The defendants urge that the state's interest in protecting the embryo is a sufficient basis to sustain the statute. Upon a balance of the relevant interests, we hold that a woman's right to refuse to carry an embryo during the early months of pregnancy may not be invaded by the state without a more compelling public necessity than is reflected in the statute in question."

The argument in *Doe* v. *Bolton,* 319 F. Supp. 1048, at 1055, that foetal rights predominate because after conception, "the decision to abort its [the foetus'] development cannot be considered a purely private one affecting only husband and wife, man and woman," betrays a limited understanding of the right of privacy. The "privacy" guaranteed by the Constitution and recognized in *Griswold* v. *Connecticut,* 381 U.S. 479, 483, 485, is not limited to activities in the home or between husband and wife, but includes all personal conduct that does not interfere with the rights of others. See also *Meyer* v. *Nebraska,* 262 U.S. 390, 399; *Shapiro* v. *Thompson,* 394 U.S. 618, *passim.* Such

conduct is protected whether undertaken in or out of the home, whether alone or in association with others. A patient's treatment by a physician is not an affair of state. The State may not compel persons to become parents.

It cannot responsibly be argued that the right of privacy does not outweigh a foetus' purported claim to protection because the right of privacy is "only implied or deduced", *i.e.* not enumerated in the Constitution. *Steinberg* v. *Brown,* 321 F. Supp. 741, 748 (N.D. Ohio). The right of privacy does not have inferior status because it is not enumerated. On the contrary, "the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights." *Griswold* v. *Connecticut,* 381 U.S. 479, at 486 (concurring opinion of Mr. Justice Goldberg).

It has been suggested that Courts should not interfere with state legislative decisions relating to abortion. See *Corkey* v. *Edwards,* 322 F. Supp. 1248, 1253-54 (W.D. N. Car.), *Steinberg* v. *Brown,* 321 F. Supp. 741, 748 (N.D. Ohio), and *Rosen* v. *Louisiana,* 318 F. Supp. 1217, 1223, 1224, 1230 (E.D. La.). But no rational explanation was offered why a State legislature should be free to set the extent and limits of federally guaranteed liberties without judicial scrutiny.

> "The vice of . . . [such] views is that it would permit such experimentation by the States in the area of the fundamental personal rights of its citizens. I cannot agree that the Constitution grants such power either to the States or to the Federal Government." *Griswold* v. *Connecticut,* 381 U.S. 479, at 496 (concurring opinion of Mr. Justice Goldberg).

BLEED THROUGH POOR COPY

b. The need to encourage population growth, if it ever was a legitimate end of government, is not now a valid justification for invading personal liberties.

The States may argue their interest in the foetus—a potential being—is a legitimate expression of concern in encouraging population growth. Assuming *arguendo* that a government may encourage population growth by persuasion, population growth may not be *compelled* by laws that can be obeyed only at the expense of individual liberties. *Cf., Griswold* v. *Connecticut,* 381 U.S. 479, 496-497 (concurring opinion of Mr. Justice Goldberg); *Skinner* v. *Oklahoma,* 316 U.S. 535, at 536, 541.

Moreover, as Mr. Justice Clark wrote: "procreation is certainly no longer a legitimate or compelling State interest in these days of burgeoning populations." "Religion, Morality and Abortion," 2 Loyola L. Rev. (L.A.) 1, at 9. Indeed, the current debate underscores the necessity for governmental action to *reduce* population growth. See Note, "Legal Analysis and Population Control: The Problem of Coercion", 84 Harv. L. Rev. 1856, 1865, et seq.

c. The religious view that the product of every conception is sacred may not validly be urged by the States as a justification for limiting the exercise of constitutional liberties, for that would be an establishment of religion.

The real basis of the claim of state interest in the foetus is a doctrinaire "moral" concern for the *"potential* of independent human existence". *Doe* v. *Bolton,* 319 F. Supp. 1048 at 1055 (emphasis in the original). The theoretical moral concern is effected only by permitting a greater moral outrage: the deep human suffering of adults and children alike, that results from compelling one to continue

CPOY BOUND CLOSE IN CENTER

an unwanted pregnancy, to give birth to an unwanted child, and to assume the burdens of unwanted parenthood.

To many minds the "moral" concern for the foetus is misplaced. Reflective judges, scholars and commentators have perceived and deplored the fact that religious beliefs underly the retention of abortion laws. Mr. Justice Clark, wrote in his article "Religion, Morality and Abortion," 2 Loyola L. Rev. (L.A.) 1, at 6:

> "Despite the fact that religious belief continues to permeate our attitude toward abortion, most people today agree with Justice Holmes that 'moral predilections must not be allowed to influence our minds in settling legal distinctions.' [O.W. Holmes, The Common Law]."

In "Abortion" 220 Scientific American No. 1, p. 21, at 21 (January 1969) the scholars Christopher Tietze and Sarah Lewitt traced opposition to abortion to the rise of Jewish and Christian religions. See also *Rosen* v. *Louisiana*, 318 F. Supp. 1217, 1233 (E.D. La.), appeal docketed (No. 70-42, Oct. 1971 Term) (dissenting opinion); and Comment, 23 Vand. L. Rev. 1346, at 1351:

> "The American Law Institute has determined that objections to abortion reform are not primarily grounded on legal considerations but rather on religious beliefs which deem abortion sinful because it cheapens the value of human life."

See also discussion in *United States* v. *Vuitch*, 402 U.S. 62, at 78-79 (dissenting opinion of Mr. Justice Douglas).

No argument is needed to show that the police power cannot be employed in the service of sectarian moral views

BLEED THROUGH POOR COPY

without violating the Establishment Clause of the First Amendment. Yet the Georgia District Court recognized a compelling State interest in controlling[13] what it discreetly called "the quality and soundness of the decision" and would have approved a state requirement that women desiring abortions "[consult] with a licensed minister". *Doe* v. *Bolton*, 319 F. Supp. 1048, at 1056.

In *Rosen* v. *Louisiana*, 318 F. Supp. 1217 (E.D. La.), appeal docketed (No. 70-42 Oct. 1971 Term), the majority recognized that the Louisiana abortion laws in effect codified "the official Roman Catholic view" that assigns an undefined value to foetal life from the moment of conception. 318 F. Supp. at 1223, fn. 2, and 1231, fn. 18. The Louisiana District Court, however, characterizing the crime of abortion as a "moral offense" and a "moral wrong", claimed it was powerless to interfere with the State's moral decision. As District Judge Cassibry said in dissent (318 F. Supp. at 1233): "the [abortion] law rather seems to be an effort to enforce certain views of private morality against those not sharing those views".

The writer of "Supreme Court, 1964 Term", 79 Harv. L. Rev. 56, 165, commenting on *Griswold* v. *Connecticut*, 381 U.S. 479, questioned the assumption that particular views of morality are of state concern:

> ". . . the close relationship of moral to religious principles suggests that the first amendment might be taken to forbid governmental regulation of issues of personal conscience unless such regulation has pragmatic justification. (McGowan v. Maryland, 366 U.S.

[13] By giving doctors the power and burden to judge whether an abortion is "necessary" and should be performed.

COPY BOUND CLOSE IN CENTER

> 420, at 422-445). The establishment clause does seem to express the judgment that freedom of conscience for the individual is preferable to the possible benefits of enforced uniformity. And the free exercise clause suggests that one should be permitted to act on personal principles as long as his actions do not threaten to disrupt the social order."

See also discussion in Note, "Legal Analysis and Population Control: The Problem of Coercion," 84 Harv. L. Rev. 1856, at 1885-1888, tracing "courts' and legislatures' deepening skepticism toward laws regulating the 'morality' of consensual sexual or sex-related behavior". 84 Harv. L. Rev. at 1887.

In *Griswold* v. *Connecticut,* 381 U.S. 479, the Court held that the right of privacy, whether drawn from the penumbras of the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments, or protected by the Due Process Clause of the Fourteenth Amendment, protects the free exercise of one's views (whether of religious or secular origin) on birth control. State laws such as the abortion laws at issue cannot be justified on the ground that they comport with one group's "moral" condemnation of the exercise of the guaranteed freedom by others.

BLEED THROUGH POOR COPY

CONCLUSION

The abortion laws invade the fundamental individual liberty reserved by the Constitution to conduct one's personal life without unwarranted governmental interference, and the laws' infringement of that liberty is not warranted by any overriding valid state interest. For the reasons outlined, (1) the declaratory judgment of the Georgia District Court should be affirmed only to the extent that it held unconstitutional portions of the Georgia abortion law; (2) the remainder of the law should be declared unconstitutional, except that the provision of the Georgia abortion law that requires abortions to be performed by physicians should be sustained; and (3) the declaratory judgment of the Texas Court holding the Texas abortion laws unconstitutional should be affirmed.

Respectfully submitted,

HELEN L. BUTTENWIESER
Attorney for Amici

BONNIE P. WINAWER
Of Counsel

On the Brief:

HELEN L. BUTTENWIESER
BONNIE P. WINAWER

CPOY BOUND CLOSE IN CENTER

FILE COPY

Supreme Court, U.S.
FILED
AUG 16 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 70-40

MARY DOE; Peter G. Bourne; Robert Hatcher; Lillas L. James; James Waters; Corbett Turner; Newton Long; Edward Leader; William H. Biggers; George Violin; Patricia S. Smith; Jennie Williams; Judith Bourne; Susanne Dunaway; Joyce Parks; Lou Ann Irion; Mary Long; J. Emmett Herndon; Samuel L. Williams; Eugene Pickett; Richard Devor; Donald Daughtry; Judith Zorach and Karen Weaver; residents of the State of Georgia; Planned Parenthood Association of Atlanta, Inc., a Georgia corporation; and Georgia Citizens for Hospital Abortion, Inc., a Georgia corporation, for and on behalf of all persons and organizations similarly situated,

Appellants,

VS.

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; Lewis R. Slaton, as District Attorney of Fulton County, Georgia; and Herbert T. Jenkins, as Chief of Police of the City of Atlanta,

Appellees.

On Appeal from the United States District Court For the Northern District of Georgia

BRIEF OF THE APPELLANTS

Attorneys for Appellants:

MARGIE PITTS HAMES
Suite 822, 15 Peachtree St., N.E.
Atlanta, Georgia 30303

REBER F. BOULT, JR.
CHARLES MORGAN, JR.
American Civil Liberties Union Foundation, Inc.
5 Forsyth Street, N.W.
Atlanta, Georgia 30303

Of Counsel:

ELIZABETH ROEDIGER RINDSKOPF
GALE M. SIEGEL
185 Central Avenue, S.W.
Atlanta, Georgia 30303

TOBIANE SCHWARTZ
153 Pryor Street, S.W.
Atlanta, Georgia 30303

INDEX

Page

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTION 2

STATUTE INVOLVED 3

QUESTIONS PRESENTED 7

STATEMENT OF THE CASE 8

SUMMARY OF THE ARGUMENT 10

ARGUMENT 17

I. This Court Has Jurisdiction of this "Appeal . . . from an Order Denying . . . an Interlocutory or Permanent Injunction . . . " 28 U.S.C. § 1253. 17

A. The statutory jurisdictional requirements are clearly met. 17

B. Ancillary jurisdictional considerations. 18

1. The controversy is justiciable. 18

2. The district court's reasons for denying an injunction do not affect this Court's jurisdiction of the appeal. 21

II. The District Court Should Have Declared the Procedural, Residence, and Accreditation Provisions of the Georgia Abortion Statute Unconstitutional. 22

INDEX (Continued)

Page

A. The district court correctly held that the Georgia abortion statute unduly restricts a fundamental, constitutionally protected right to personal and marital privacy. 22

B. The statutory standard resulting from the decision below is vague and ambiguous and gives no guidance by which proscribed conduct may be judged and thereby violates the due process guarantee of the Fourteenth Amendment. 28

C. The procedure left intact by the district court denies due process to a woman seeking an abortion. 31

1. The abortion applicant has no opportunity to be heard, to know the reasons an abortion is denied her, or to appeal an adverse decision. 31

2. The procedure is so cumbersome, time consuming, and restrictive by reason of the requirement that abortions be performed only in accredited hospitals that it effectively manipulates out of existence plaintiffs' constitutional rights. 35

D. The limitation of abortions to residents of the state is unconstitutional. 42

Page

E. The sanctions and restrictions of the Georgia abortion statute unreasonably interfere with the right of physicians to practice their profession and thereby deny them "liberty" and "property" in violation of the fourteenth amendment. . . 44

F. The Georgia abortion statute results in discrimination against poor and Negro citizens, denying them equal protection of the law. 46

III. This Court Should Order an Injunction against Enforcement of the Georgia Abortion Statute, or Alternatively, Remand to the District Court with Instructions to Consider, Under Correct Legal Standards, Whether an Injunction Should Issue. 51

CONCLUSION 56

CERTIFICATE OF SERVICE 57

TABLE OF AUTHORITIES

CASES:

Aptheker v. Secretary of State, 378 U.S. 500 (1964) 43

Ashton v. Kentucky, 384 U.S. 195 (1966) 31

Babbitz v. McCann (I), 310 F. Supp. 293 (E.D. Wis.), *appeal dismissed*, 400 U.S. 1 (1970) (per curiam) 18, 23

INDEX (Continued)

Page

Babbitz v. McCann (II), 320 F. Supp. 219 (E.D. Wis. 1970), *vacated and remanded*, 91 S. Ct. 1375 (1971) 53, 55

Bantam Books v. Sullivan, 372 U.S. 58 (1963) 32

Barksdale v. California, ____ Cal. App. 2d ____ (1st Div. July 22, 1971) 30

Bell v. Burson, 401 U.S. 971 (1971) 31, 33

Boyd v. United States, 116 U.S. 616 (1886) 22

Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) 31, 32

California v. Barksdale, No. 3323C (Calif. Mun. Ct., Alameda County, Mar. 24, 1970) (Foley, J.), *aff'd on appeal*, ____ Cal. App. 2d ____ (1st Div. July 22, 1971) 23

California v. Belous, 71 Cal. 2d 996, 458 P. 2d 194 (1969), *cert. denied*, 397 U.S. 915 (1970) 23, 26

California v. Gwynne, No. 173309 (Calif. Mun. Ct., Orange County, June 16, 1970) (Thomson, J.) 23

California v. Robb, Nos. 149005 & 159061 (Cal. Mun. Ct., Orange County, Jan. 9, 1970) (Mast, J.) 23

Corfield v. Coryell, 6 Fed. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1825) 43

Corkey v. Edwards, 322 F. Supp. 1248 (W.D. N.C. 1971), *appeal docketed*, U.S.L.W. ____ (U.S. ____, 1971) (No. _____) 23

INDEX (Continued)

Page

Crossen v. Breckenridge, 40 U.S.L.W. 2016 (6th Cir. June 23, 1971) 21

Dandridge v. Williams, 397 U.S. 471 (1970) ... 15, 50

Doe v. Bolton, 319 F. Supp. 1048, *supplemental opinion*, 319 F. Supp. 1057 (N.D. Ga. 1970) 2

Doe v. General Hospital, 313 F. Supp. 1170 (D.D.C. 1970) 30

Doe v. Randall, 314 F. Supp. 32 (D. Minn. 1970), *appeal docketed sub nom., Hodgson v. Randall*, 39 U.S.L.W. 3115 (U.S. Sept. 29, 1970) (No. 728), *on appeal from* No. 42652 (Minn. Sup. Ct., July 20, 1970), *denying prohibition to* No. 23789 (Minn. Dist. Ct., Ramsey County, June 29, 1970) 24

Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971), *appeals docketed sub nom., Hanrahan v. Doe*, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (Nos. 1522, 1523) 23

Dombrowski v. Pfister, 380 U.S. 479, 484 n. 2 (1965) 54

Douglas v. California, 372 U.S. 353 (1963) 47

Edwards v. California, 314 U.S. 160 (1941) 43

Epperson v. Arkansas, 393 U.S. 97 (1968) 11, 20

Flast v. Cohen, 392 U.S. 83 (1968) 21

Goldberg v. Kelly, 397 U.S. 254 (1970) 31, 33

Golden v. Zwickler, 394 U.S. 103 (1969) 21

INDEX (Continued)

Page

Goldstein v. Cox, 396 U.S. 471 (1970) 18

Greene v. McElroy, 360 U.S. 474 (1959) 46

Greenwood, City of v. Peacock, 384 U.S. 808 (1968) 16, 54

Griffin v. Illinois, 351 U.S. 12 (1956) 46

Griswold v. Connecticut, 381 U.S. 479 (1965) ... 12, 22

Gunn v. University Committee to End the War, 399 U.S. 383 (1970) 18

Harman v. Forssenius, 380 U.S. 528 (1965) 35

Harper v. Virginia Board of Elections, 383 U.S. 662 (1966) 47

Herndon v. Lowry, 301 U.S. 242 (1936) 31

Illinois v. Anast, No. 69-3429 (Ill. Cir. Ct., Cook County, 1970) (Dolezal, J.) 23

Kent v. Dulles, 357 U.S. 116 (1958) 43

Kramer v. Union Free School District, 395 U.S. 621 (1969) 25, 43, 50

Loving v. Virginia, 388 U.S. 1 (1967) 22

McGautha v. California, 91 S.Ct. 1454 (1971) 41

McLaughlin v. Florida, 379 U.S. 184 (1964) 50

Meyer v. Nebraska, 262 U.S. 390 (1923) 22

Michigan v. Ketchum (Mich. Dist. Ct., Mar. 30, 1970) (Reid, J.) 23

Page

NAACP v. Alabama, 377 U.S. 288 (1964).....31

New Jersey v. Murphy, 27 N.J.L. 112 (1849).....26

Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869)....43

Pennsylvania v. Page, Centre County Leg. J. at 285 (Pa. Ct. Comm. Pl., Centre County, July 23, 1970) (Campbell, P. J.).....23

Perez v. Ledesma, 401 U.S. 82 (1971).....18, 20

Pierce v. Society of Sisters, 268 U.S. 510 (1925)...22

Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970), *juris. postponed*, 91 S. Ct. 1610 (1971)...23

Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970), *appeal docketed*, 39 U.S.L.W. 3247 (U.S. Nov. 27, 1970) (No. 1010).....23

Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).....46

Shapiro v. Thompson, 394 U.S. 618 (1969).....43, 44, 47, 50

Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), *cert. denied* 376 U.S. 938 (1964).....51

Skinner v. Oklahoma, 316 U.S. 535 (1952).....22

Slochower v. Board of Higher Education, 350 U.S. 551 (1956).....46

Smith v. Texas, 233 U.S. 630 (1914).....46

INDEX (Continued)

Page

South Dakota v. Munson (S.D. 7th Jud. Cir., Pennington County, Apr. 6, 1970), (Clarence P. Cooper, J.) 23

Staub v. City of Baxley, 355 U.S. 313 (1958) 34

Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970) 23

Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) 44

Truax v. Raich, 239 U.S. 33 (1915) 46

Union Pacific Ry. v. Batsford, 114 U.S. 250 (1891) 22

United States v. Grimaud, 220 U.S. 506 (1911) 41

United States v. Vuitch, 400 U.S. 813 (1971) 28, 30

United States ex rel. Williams v. Follette, 313 F. Supp. 269 (S.D. N.Y. 1970) 23

Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1871) 43

Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) 46

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 19, 31, 33

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 41

Young, ex parte, 209 U.S. 123 (1907) 51

Younger v. Harris, 401 U.S. 37 (1971) 16, 51, 54, 56

Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926) 28

Zwickler v. Koota, 389 U.S. 241 (1967) 55

STATUTORY AND QUASI-STATUTORY AUTHORITY:

	Page
28 U.S.C. §1253	2, 10, 11, 12, 17, 18, 22
28 U.S.C. §1343	2
28 U.S.C. §2201	2
28 U.S.C. §2202	2
28 U.S.C. §2281	2, 17, 55
28 U.S.C. §2283	55
28 U.S.C. §2284	2
42 U.S.C. §1983	2
Alaska Stat. §11.15.060 (1970)	39
Ga. Code §26-801	54
Ga. Code §26-1201	3
Ga. Code §§26-1202 *et seq.*	2
Ga. Code §26-1202	3
Ga. Code §26-1202 (b) (1), (b) (2)	42
Ga. Code §26-1202 (b) (5)	30
Ga. Code §26-1202 (e)	50
Ga. Code §26-1203	6
Ga. Code §26-3201	19, 54
Ga. Code §40-1614	21
Ga. Code §§99-3101 *et seq.*	27

Page

Ga. Laws, 1865-66 at 233 Cobb.....25

Ga. Laws, 1876 at 113.....25

Ga. Laws, 1966 at 228.....27

Hawaii Rev. Stat. §453-16 (1970 Supp.).....39

N.Y. Penal Law §125.05(3) (McKinney 1970 Supp.).....39

Rev. Code of Wash. §9.02.060, 9.02.070, 9.02.080 (1970 Supp.).....39

AMERICAN LAW INSTITUTE, MODEL PENAL CODE (Tentative Draft No. 2, 1962).....25, 29

COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM ABORTION ACT (2d Tentative Draft, 1970).....39

MISCELLANEOUS:

Abortion Mortality, 20 MORBIDITY AND MORTALITY 208 (July 12, 1971) (U.S. Department of Health, Education and Welfare, Public Health Service).....26, 39

14 A.C.O.G. NEWSLETTER 2 (Sept. 1970).....29

Andros, *Intrauterine Contraceptive Devices*, 40 POSTGRADUATE MEDICINE 739 (1966).....27

Baker, L., and M. Freeman, *Abortion Surveillance at Grady Memorial Hospital*, Center for Disease Control, U.S. Department of Health, Education and Welfare, Public Health Service, June and July, 1971....34, 36, 37

INDEX (Continued)

Page

Clark, T., *Religion, Morality and Abortion: A Constitutional Approach*, 2 LOYOLA U. (L.A.) L. REV. 1 (April, 1969) 24

Committee on Human Reproduction, *Evaluation of Intrauterine Contraceptive Devices*, 199 J. AM. MED. ASSN. 647 (1967) 27

Hall, R., *Therapeutic Abortion, Sterilization and Contraception*, 91 AM. J. OBST. & GYN. 518 (1965) 48

Joint Commission on the Accreditation of Hospitals, List of Accredited Hospitals (Jan. 1970) 41

Joint Commission on the Accreditation of Hospitals, Standards for Hospital Accreditation, Jan. 1, 1970 ..... 30, 38

Kahn, J., *Legalized Abortion in New York City*, U.S. Department of Health, Education and Welfare, Public Health Service (Paper delivered at annual EDS Conference, April, 1971) 41

Krotoski, W. A., letter from, in 157 SCIENCE 1465 (1967) 27

Leavy and Charles, *California's New Therapeutic Abortion Act*, 15 U.C.L.A. L. REV. 1 (1967) ... 38

MCH MEMO, Georgia Department of Public Health (June 1970) 27

INDEX (Continued)

Page

Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968).....26

MODERN HOSPITAL, Oct. 1970, p. 43.....26

N. Y. Abortions Are Easier, Georgia Women Discover—Less Costly Too, Atlanta Journal and Constitution, July 11, 1971 at 12-A, col. 1...48

N. Y. Health Department, *Report of Selected Characteristics on Induced Abortions Recorded in New York State*, July 1-December 31, 1970.....41

Perkins, CRIMINAL LAW (1957).....26

Peretz, *Evacuation of the Gravid Uterus by Negative Pressure (Suction Evacuation)*, 98 AM. J. OBST. & GYNEC. 18 (1967).....26

Rochat, R., C. Tyler and A. Schoenbucher, *An Epidemiological Analysis of Abortion in Georgia*, 61 AM. J. OF PUBLIC HEALTH 543 (1971).....27, 48, 49

Steuart, G. and P. Goldstein, *Therapeutic Abortion in California*, 37 OBSTETRICS & GYNECOLOGY 510 (1971).....39

Tietze, C., address by, Conference on Abortion Techniques, June 3, 1971, New York, *Early Complications of Abortions Under Medical Auspices: A Preliminary Report* (paper published by The Population Council, 160 E. 88th St., N. Y., N. Y.).....36

INDEX (Continued)

Page

Tietze, C., *Mortality with Contraception and Induced Abortion*, 45 STUDIES IN FAMILY PLANNING 6 (1969) 27, 52

Tyler, C., J. Bourne, S. Conger, J. Kahn, *Reporting and Surveillance of Legal Abortions in the United States, 1970* (U.S. Department of Health, Education and Welfare, Public Health Service) 36, 41, 48, 52

Vojta, *A Critical View of Vacuum Aspiration: A New Method for the Termination of Pregnancy*, 30 OBSTETRICS AND GYNECOLOGY 28 (1967) 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 70-40

MARY DOE; Peter G. Bourne; Robert Hatcher; Lillas L. James; James Waters; Corbett Turner; Newton Long; Edward Leader; William H. Biggers; George Violin; Patricia S. Smith; Jennie Williams; Judith Bourne; Susanne Dunaway; Joyce Parks; Lou Ann Irion; Mary Long; J. Emmett Herndon; Samuel L. Williams; Eugene Pickett; Richard Devor; Donald Daughtry; Judith Zorach and Karen Weaver; residents of the State of Georgia; Planned Parenthood Association of Atlanta, Inc., a Georgia corporation; and Georgia Citizens for Hospital Abortion, Inc., a Georgia corporation, for and on behalf of all persons and organizations similarly situated,

Appellants,

VS.

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; Lewis R. Slaton, as District Attorney of Fulton County, Georgia; and Herbert T. Jenkins, as Chief of Police of the City of Atlanta,

Appellees.

On Appeal from the United States District Court For the Northern District of Georgia

Filed November 14, 1970
Jurisdiction Postponed May 3, 1971

BRIEF OF THE APPELLANTS

OPINIONS BELOW

The decision in this case was rendered July 31, 1970 and is reported as *Mary Doe, et al, v. Arthur K. Bolton, et al*, 319 F. Supp. 1048 (N.D. Ga. 1970) (A. 71-86). A supplemental opinion was issued October 13, 1970, and is reported at 319 F. Supp. 1057 (N.D. Ga. 1970) (A. 161-164).

JURISDICTION

This Court has jurisdiction by direct appeal to review the decision below because this is an "appeal . . . from an order denying . . . an interlocutory or permanent injunction. . . ." 28 U.S.C. § 1253. The action was brought under the first, ninth and fourteenth amendments to the Constitution of the United States and 42 U.S.C. § 1983. Jurisdiction of the district court was conferred by 28 U.S.C. §§ 1343, 2201, 2202, 2281 and 2284.

Appellants brought this class action on April 16, 1970, seeking a declaratory judgment that the Georgia abortion statute, *Ga. Code* §§ 26-1202 *et seq.*, was unconstitutional and seeking injunctive relief against its enforcement. A Motion for Temporary Restraining Order was denied on May 4, 1970. A statutory three-judge district court was convened and heard oral argument on June 15, 1970. By opinion dated July 31, 1970, judgment dated August 24, 1970, and amended opinion dated October 13, 1970, portions of *Ga. Code* § 1202 were declared unconstitutional. The court, however, refused to enjoin future enforcement of said Code sections. In its original opinion, judgment, and amended opinion the court denied declaratory and injunctive relief as to the remainder of said statute, holding it to be a valid exercise of state authority; additionally, the

district court granted a motion to dismiss all plaintiffs except Mary Doe, thereby denying any declaratory and injunctive relief to doctors, nurses, social workers, ministers, and counsellors. This appeal is from the denial of injunctive relief and denial of relief from the remainder of the statute and to the dismissed plaintiffs. Notice of Appeal was filed in the United States District Court for the Northern District of Georgia on September 18, 1970. An Amended Notice of Appeal was filed November 3, 1970.

STATUTE INVOLVED

The statute in question is *Ga. Code* §§ 26-1201-03, hereafter referred to as the Georgia abortion statute. The statute is set forth below; those sections declared unconstitutional by the district court are italicized.

Ga. Code § 26-1201. Criminal Abortion

Except as otherwise provided in Section 26-1202, a person commits criminal abortion when he administers any medicine, drug or other substance whatever to any woman or when he uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion. (Acts 1968, pp. 1249, 1277.)

26-1202. Exception

(a) Section 26-1201 shall not apply to an abortion performed by a physician duly licensed to practice medicine and surgery pursuant to Chapter 84-9 or 84-12 of the Code of Georgia of 1933, as amended, based upon his best clinical judgment that an abortion is necessary *because:*

(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or

(2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or

(3) The pregnancy resulted from forcible or statutory rape.

(b) No abortion is authorized or shall be performed under this section unless each of the following conditions is met:

(1) The pregnant woman requesting the abortion certifies in writing under oath and subject to the penalties of false swearing to the physician who proposes to perform the abortion that she is a bona fide legal resident of the State of Georgia.

(2) The physician certifies that he believes the woman is a bona fide resident of this State and that he has no information which should lead him to believe otherwise.

(3) Such physician's judgment is reduced to writing and concurred in by at least two other physicians duly licensed to practice medicine and surgery pursuant to Chapter 84-9 of the Code of Georgia of 1933, as amended, who certify in writing that based upon their separate personal medical examinations of the pregnant woman, the abortion is, in their judgment necessary *because of one or more of the reasons enumerated above.*

(4) Such abortion is performed in a hospital licensed by the State Board of Health and accredited by the Joint Commission on Accreditation of Hospitals.

(5) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission

POOR COPY

on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose.

(6) *If the proposed abortion is considered necessary because the woman has been raped, the woman makes a written statement under oath, and subject to the penalties of false swearing, of the date, time and place of the rape and the name of the rapist, if known. There must be attached to this statement a certified copy of any report of the rape made to any law enforcement officer or agency and a statement by the solicitor general of the judicial circuit where the rape occurred or allegedly occurred that, according to his best information, there is probable cause to believe that the rape did occur.*

(7) Such written opinions, statements, certificates, and concurrences are maintained in the permanent files of such hospital and are available at all reasonable times to the solicitor general of the judicial circuit in which the hospital is located.

(8) A copy of such written opinions, statements, certificates, and concurrences is filed with the Director of the State Department of Public Health within ten (10) days after such operation is performed.

(9) All written opinions, statements, certificates, and concurrences filed and maintained pursuant to Paragraphs (7) and (8) of this subsection shall be confidential records and shall not be made available for public inspection at any time.

(c) *Any solicitor general of the judicial circuit in which an abortion is to be performed under this section, or any person who would be a relative of the child within the second degree of consanguinity, may petition the superior*

court of the county in which the abortion is to be performed for a declaratory judgment whether the performance of such abortion would violate any constitutional or other legal rights of the fetus. Such solicitor general may also petition such court for the purpose of taking issue with compliance with the requirements of this section. The physician who proposes to perform the abortion and the pregnant woman shall be respondents. The petition shall be heard expeditiously and if the court adjudges that such abortion would violate the constitutional or other legal rights of the fetus, the court shall so declare and shall restrain the physician from performing the abortion.

(d) If an abortion is performed in compliance with this section, the death of the fetus shall not give rise to any claim for wrongful death.

(e) Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b) (5). A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person.

26-1203. Punishment

A person convicted of criminal abortion shall be pun-

ished by imprisonment for not less than one nor more than 10 years. (Acts 1968, pp. 1249-1280.)

QUESTIONS PRESENTED

1. Whether the claim of the unconstitutionality of the Georgia abortion statute made by appellant physicians, nurses, social workers, ministers, and family planning and abortion counselling organizations presents a justiciable case or controversy.

2. Whether the provisions of the Georgia abortion statute, as to which the district court refused declaratory relief, deny appellants due process of law in one or more of the following respects:

(a) by being so vague and ambiguous as to give no guidance by which proscribed conduct may be judged,

(b) by denying an abortion applicant an opportunity to be heard by the statutory hospital abortion committee, to know the reasons on which such committee bases an adverse decision, or to appeal an adverse decision,

(c) by creating a procedure so cumbersome, time consuming, and restrictive as to manipulate out of existence the rights of an abortion applicant,

(d) by unreasonably infringing upon the right of non-residents to freely travel to Georgia through the statutory limitation that legal therapeutic abortions be performed only on Georgia residents, and

(e) by denying physicians the "liberty" and "property" to practice their professions free from unreasonable state interference.

3. Whether the procedural requirements and restrictions of the Georgia abortion statute result in a denial

of equal protection of the law to poor, rural, and Negro citizens.

4. Whether the district court should have enjoined future enforcement of those provisions of the Georgia abortion statute which it declared unconstitutional in the absence of a pending state criminal prosecution.

STATEMENT OF THE CASE

The facts set forth herein are taken from the complaint (unless otherwise specified) which was taken as true (A. 87). The court allowed this action to be prosecuted in the fictitious name of Mary Doe so as to avoid embarrassment to the plaintiff.

Mary Doe was a 22 year old woman who was approximately eleven weeks pregnant at the time the complaint was filed in this case. Mrs. Doe and her husband were unemployed, their marriage had been unstable, and during the pendency of this suit, her husband abandoned her. Mrs. Doe sought to terminate her pregnancy because she was emotionally and economically unable to care for and support another child. She is the mother of three other children; her third child was placed with adoptive parents at birth and the other two children were removed from her custody by state authorities because of her inability to care for them.

Mrs. Doe applied for an abortion at Grady Memorial Hospital in Atlanta. After a period of twenty-five days, she was notified that her application had been denied by the hospital's abortion committee because she did not come within one of the three reasons specified in the Georgia abortion statute. This class action was filed in the United States District Court on April 16, 1970,

POOR COPY

seeking injunctive and declaratory relief based on the unconstitutionality of the statute. Mrs. Doe's application for temporary relief was denied by order dated May 4, 1970. A subsequent application for an abortion through private physicians to a private hospital was approved, but Mrs. Doe did not have funds with which to pay her hospital bill in advance so she was unable to obtain an abortion at the private hospital. (Answers to interrogatories A. 63-64). Also, she was financially unable to travel to some other state which has less restrictive interpretation of abortion limitations. Her remaining alternatives were to continue her pregnancy or risk her life and health at the hands of a non-medical criminal abortionist.

Appellant-physicians who are obstetricians, gynecologists, psychiatrists, medical school professors, and general practitioners of medicine, brought this action on their behalf and on behalf of members of their profession, seeking to declare the statute an unconstitutional infringement on the practice of their profession and the physician-patient relationship, and further asserted the statute unconstitutionally vague in violation of due process requirements. Appellant-physicians are regularly called upon by their patients to perform or arrange for medically induced abortions. Appellants desired to perform or arrange this medical service for their patients, but felt constrained from doing so because of the lack of clarity of the Georgia abortion statute, its criminal sanctions against abortions not authorized by its terms, and the related threat of revocation or suspension of their license to practice medicine.

Defendants below raised the issue of "standing" and "justiciability" of the controversy as to the physicians,

nurses, ministers, social workers, and organizations. The court found that all plaintiffs had standing, but that only Mary Doe had sufficient "collision of interest" to present a justiciable controversy.

As to the merits of Mary Doe's class action, the three-judge court held that "the concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy." (A. 81). The court ruled that "reasons for an abortion may not be proscribed, but that the quality of the decision as well as the manner of its execution are properly within the realm of state control . . ." (A. 84). Thus, the portion of the statute which allowed only three reasons for abortion (impairment of health of the woman, rape, or fetal malformation) was declared unconstitutional but the remainder of the statute was declared to be a "proper exercise of state power." The remainder of the statute is basically the procedural steps for obtaining an abortion and provisions as to who can perform abortions and where abortions may be performed.

Appellants assert here that the statute as revised by the court below remains as a barrier to the constitutional rights asserted and will obstruct and interfere with such rights unless declaratory and injunctive relief is granted.

SUMMARY OF THE ARGUMENT

I. *JURISDICTION OF THIS COURT.*

A. Appellants argue that 28 U.S.C. § 1253 gives the party aggrieved by the denial of a prayed for injunction, in a civil action required to be heard by a district court of three judges, a right of direct appeal to the

POOR COPY

Supreme Court and that these jurisdictional requisites are met in this case. A three judge court was convened to consider the alleged unconstitutionality of a statute of statewide applicability and, while it granted a judgment declaring portions of the statute unconstitutional, it sustained the balance and denied all injunctive relief.

B. The justiciability of the claim asserted by Mary Doe lies in the fact that she was denied an abortion by reason of the Georgia abortion statute. Although Mary Doe's physician and two concurring physicians advised an abortion as the best medical treatment for her, a hospital abortion committee, created under the statute as an agency of the state and controlled as to legal matters by defendant Bolton, denied her the right to have an abortion because she did not come within one of the three reasons specified by the statute. Because the criminal sanctions of the statute apply against doctors rather than pregnant women, Mary Doe's controversy as to the constitutionality of the statute cannot be resolved by her through a criminal action.

The daily action of hospital abortion committees in refusing physicians, under authority of the Georgia abortion statute, the right to perform abortions which they desire to perform in the conduct of their professional practice creates a substantial, immediate, real, and continuing controversy between such physicians and the state authorities responsible for the enforcement of the statute. And, as to both Mary Doe and appellant physicians, *Epperson v. Arkansas*, 393 U.S. 97 (1968), allows an overbroad statute prohibiting constitutionally protected conduct to be challenged without risking criminal prosecution.

This Court's jurisdiction of an appeal under 28 U.S.C.

§ 1253 from an order denying an injunction is not affected by the correctness of the district court's exercise of discretion in granting or denying the injunction.

II. *THE PROCEDURAL, RESIDENCE, AND ACCREDITATION PROVISIONS OF THE GEORGIA ABORTION STATUTE ARE UNCONSTITUTIONAL.*

A. This Court held in *Griswold v. Connecticut*, 381 U.S. 479 (1965) that the right of a married couple to use contraceptives for family planning is an aspect of a constitutionally protected right of privacy. Such right of familial privacy also includes the right to determine family size by terminating an unwanted pregnancy resulting from contraceptive failure, which right can not be unduly restricted by state statute without a showing of countervailing, compelling state interest. No such state interest was shown to justify the Georgia abortion statute. The asserted interest in fetal life, on the one hand, disregards the historical intent of Georgia abortion laws to preserve the health of women, and on the other, is refuted by the provisions of the statute itself which expressly allows abortions in the case of danger to the mother's health, possible malformation of the fetus, and rape. Maternal health is an irrational justification for the absolute prohibition of the statute because advances in medical science have made early abortions safer than bearing a child and because the existence of criminal restrictions on therapeutic abortions have resulted in illegal abortions on a scale sufficient to be a major health problem.

B. The initial defect in the Georgia abortion statute as construed by the district court is its vagueness. A statute that makes an abortion legal or criminal based

upon whether it was "necessary" in light of "the totality of circumstances," including the patient's emotional, economic, psychological, familial, and physical situation, is without a standard capable of objective determination and is therefore too indefinite to warn persons of the conduct proscribed. Additionally, the statute's incorporation by reference of purported "standards" promulgated by the Joint Commission on the Accreditation of Hospitals is an unlawful delegation of authority and further compounds the vagueness since no such standards dealing with abortions exist.

C. The procedure upheld by the district court is wholly lacking in adequate safeguards required by minimal due process requirements. The statutory hospital abortion committee is the decision maker as to whether a woman will receive an abortion, yet the woman has no right to make any presentation to the committee, to know the reasons on which the committee's decision is based, or to appeal an adverse decision. While this procedure lacks fundamental fairness as to all applicants, it further exposes to public opprobrium unmarried, pregnant women without any opportunity for a fair hearing.

Further, the time consuming and cumbersome procedures of the statute and its requirement that abortions be performed only in accredited hospitals effectively manipulate out of existence plaintiff's rights. Time is a critical factor for a woman asserting a right to terminate a pregnancy since only about four or five weeks are usually available for the safest methods. Despite this need for a prompt determination of rights, the statutory procedure requires action by no less than six doctors. This has resulted in the denial of some ap-

plicants' rights simply because of administrative delays in considering their cases.

The requirement that abortions be performed only in accredited hospitals is an overbroad restriction insofar as it is intended to promote public health because it eliminates all facilities, however well equipped they may be to perform safe abortion procedures, if they have not been in operation for one year, or do not maintain a radiology department, or nuclear medicine facilities or facilities for treatment of mass casualties. The irrational overbreadth of this accredited hospital requirement is shown not only by the safe experience in other states with clinic (as opposed to hospital) abortions but also by the absence in Georgia of any comparable limitation on much more dangerous operations such as open-heart surgery which can be performed in any licensed hospital whether or not accredited. The effect of this statutory overbreadth as a subtle means of restricting the right to abortion can only be appreciated by realizing that 105 of Georgia's 159 counties have no accredited hospital at all.

D. The limitation in the Georgia abortion statute that only residents may receive legal abortions in the state violates the freedom to travel of all citizens of the United States. The concern expressed by the district court that Georgia might become the site of specialized abortion clinics (characterized as "abortion mills") is an inadequate answer to the statute's overbreadth since the rights of all travellers in the state are restricted regardless of their motives for being in the state.

E. Physicians who desire to recommend and perform abortions as dictated by their best professional judgment are denied the "liberty" to practice their profes-

POOR COPY

sions and their "property" therein without due process of law. The possibility of criminal sanctions and loss of license prevents a physician from making an impartial medical decision as to the advisability of an abortion. This legally induced conflict of interest also exists to preclude a fair judgment by the hospital abortion committee. Such bias in making a medical decision and the requirement of concurrence by at least four other physicians are arbitrary restrictions since they apply to no other medical procedure however dangerous.

F. Statistical information shows that the Georgia abortion statute has had an invidiously discriminatory effect against poor, Negro, and rural citizens. The cost of a procedure requiring the services of at least six doctors and the limitation of abortion services to accredited hospitals available in only about a third of the counties in the state have heavily weighted the statute in favor of the well-to-do. Studies of the operation of the Georgia abortion statute by the Georgia Department of Health and the United States Public Health Service indicate that eight white women have received an abortion for every Negro woman despite the fact that abortion mortality from illegal abortions is "increasingly a black health problem." In one category—unmarried women—the statistical likelihood of white women receiving abortions is 25 times higher than black women. The district court's summary dismissal of plaintiff's claim of unequal protection of the law in reliance on *Dandridge v. Williams*, 397 U.S. 471 (1970), was incorrect, since the rights asserted were not merely economic interests but involve basic constitutional freedoms.

III. *THIS COURT SHOULD ORDER AN INJUNCTION AGAINST ENFORCEMENT OF THE GEORGIA ABORTION STATUTE OR REMAND TO THE DISTRICT COURT FOR A PROPER DETERMINATION OF THE INJUNCTION ISSUE.*

The rights of Mary Doe and persons in her class are denied them without their having any adequate remedy through defense of a criminal action. They are, therefore, without an adequate remedy at law. The very limited time available to any individual pregnant woman in which to assert her right to an abortion and the irreparable injury she will suffer represent special circumstances justifying injunctive relief against future prosecution under the statute.

A declaratory judgment in favor of only Mary Doe is inadequate since it leaves in operation the deterrent effect of the statute on doctors by allowing future state prosecutions.

The district court's reliance on *City of Greenwood v. Peacock*, 384 U.S. 808 (1968) in abstaining from considering the propriety of an injunction was in error, because that case, like this Court's recent case of *Younger v. Harris*, 401 U.S. 37 (1971), involved pending or immediately threatened prosecutions in state court. This case presents the situation in which potential federal-state frictions are at a minimum, and injunctive relief would actually prevent such friction.

ARGUMENT

I.

THIS COURT HAS JURISDICTION OF THIS "APPEAL . . . FROM AN ORDER DENYING . . . AN INTERLOCUTORY OR PERMANENT INJUNCTION . . ." 28 U.S.C. § 1253.

A. *The statutory jurisdictional requirements are clearly met.*

This appeal is based upon 28 U.S.C. § 1253 which provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges.

The complaint sought a declaratory judgment as to the constitutionality of the Georgia abortion statute, a law of general statewide application, and an interlocutory and permanent injunction restraining the enforcement, operation, and execution thereof. Thus, it was a "proceeding required by [28 U.S.C. § 2281] to be heard and determined by a district court of three judges." The district court by its order of August 24, 1970 (A. 71-86), expressly denied all injunctive relief (A. 85), denied all relief to all plaintiffs except Mary Doe (A. 80), and denied all relief as to the procedural provisions of the statute (A. 85). Thus this is an appeal "from an order denying, after notice and hearing, an interlocutory [and] permanent injunction. . . ."

Jurisdiction of this appeal is consistent with the recent cases defining the Court's jurisdiction under 28

U.S.C. § 1253. See, *e.g.*, *Perez v. Ledesma*, 401 U.S. 82, 84 n. 1 (1971). Unlike a situation in which no order granting or denying an injunction is involved, *Gunn v. University Committee to End the War*, 399 U.S. 383 (1970), or one in which the party seeking appeal is not aggrieved as to the injunction issue, *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis.), *appeal dismissed*, 400 U.S. 1 (1970), plaintiffs' appeal is properly brought to this Court because their prayer for injunctive relief was expressly denied. *Cf. Goldstein v. Cox*, 396 U.S. 471, 478-79 (1970).

B. *Ancillary jurisdictional considerations.*

1) *The controversy is justiciable.*

The existence and the actual or potential application of the Georgia abortion statute has effectively denied Mary Doe and plaintiff doctors, nurses, social workers, ministers, and counselors and the classes they represent the free exercise of their constitutionally protected rights so that as to each of these parties a real controversy exists.

In the case of Mary Doe, the abortion statute exercises its restraints through third parties. Although women who wish to terminate their pregnancies may not be prosecuted under the statute, they are the persons who are irreparably injured when doctors and counselors are inhibited by its criminal sanction. This happened to Mary Doe when she was denied an abortion by a hospital abortion committee acting under the authority of the Georgia abortion statute. Such denial of asserted constitutional rights occurs daily to women in the class represented by Mary Doe.[1] Their rights

[1] Appellants offered to substitute as additional parties plaintiff other pregnant women who had been denied abortions, but the district court held this unnecessary.

cannot be vindicated by asserting them as a defense in a state court criminal case, and it would be absurd to require the women to find and depend on a courageous doctor to assert her constitutional right as a defense to his criminal prosecution.

The situation here is similar to that in *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), where a Wisconsin statute made it a crime for bartenders to sell alcohol to a person that had been "posted" by the police as an alcoholic. This Court had no difficulty finding a justiciable controversy between the plaintiff who had thus been stigmatized by being posted and the Chief of Police, although the plaintiff had not been threatened with prosecution. As in *Constantineau*, the power of the state here has in fact been asserted against Mary Doe by actions of a statutory hospital abortion committee in denying her an abortion.

The substantive constitutional rights asserted by appellant doctors, nurses, social workers, ministers, and counselors are more fully developed in a subsequent section of this brief. For purposes of considering justiciability, however, it is sufficient to note that these are the parties against whom the criminal sanctions of the Georgia abortion statute operate, either directly in the case of doctors and nurses or indirectly in the case of counselors through Georgia's conspiracy statutes, *Ga. Code* § 26-3201. While the district court correctly accorded all of the plaintiffs standing to challenge the Georgia abortion statute because of its alleged restriction on their right to practice their professions (A. 76), it found an insufficient "collision of interest" in the claims of all plaintiffs other than Mary Doe to make them justiciable, presumably because of the absence of

threatened prosecution of these parties (A. 80). This result, however, ignores two factors. As the district court noted in dealing with Mary Doe's claim, this Court has recognized the justiciability of a case involving an unconstitutional restraint upon fundamental liberties even though there has been no pending or threatened prosecution. *Epperson v. Arkansas*, 393 U.S. 97 (1968).

By concentrating on criminal sanctions, the district court failed to properly evaluate the restraining effects of actions by the statutory hospital abortion committees on the rights asserted by plaintiff doctors and, to a more attenuated degree, on the rights of the other plaintiffs. Plaintiff Peter G. Bourne was one of the doctors who proposed the abortion for Mary Doe which was denied by the hospital abortion committee. (See Answers to Interrogatories to Mary Doe, A. 63). Every time a hospital committee exerts the power given it by the state to deny an abortion, its action not only deprives the applicant of her rights but also denies the rights asserted here by physicians and nurses—their right to practice their professions through the exercise of their best professional judgment free from the threat of criminal prosecution. The Georgia abortion statute is a clear example of the kind of situation discussed by Mr. Justice Brennan in his opinion in *Perez v. Ledesma, supra:*

> [W]here a criminal statute prohibits or seems to prohibit constitutionally protected conduct, and to that extent is unconstitutionally vague or overbroad . . . the opportunity to raise constitutional defenses at a criminal trial is inadequate to protect the underlying constitutional rights, since in that situation a substantial number of people may well avoid the risk of criminal prosecution by abstain-

> ing from conduct thought to be proscribed by the statute. Even persons confident that their contemplated conduct would be held to be constitutionally protected and that accordingly any state conviction would be overturned may be deterred from engaging in such conduct by the prospect of becoming enmeshed in protracted criminal litigation, and by the risk that in the end, years later, their confidence will prove to have been misplaced and their resources wasted. This deterrence is magnified by the scope that vagueness or overbreadth gives for discriminatory or capricious enforcement. Federal anticipatory relief is justified here because it is a principal function of the federal courts to vindicate the constitutional rights of all persons—those who want to obey state laws as well as those prepared to defy them. 401 U.S. at 118 (concurring in part and dissenting in part).

The statutory hospital abortion committees are agencies of the state, controlled as to legal matters by appellee Bolton. *Ga. Code* § 40-1614. See also the district court's opinion at (A. 73). Their daily determination of the rights of members of the appellants' classes alone creates a "substantial controversy . . . of sufficient immediacy and reality," *Golden v. Zwickler*, 394 U.S. 103, 108 (1969), the requisite "exigent adversity" for justiciability, *Flast v. Cohen*, 392 U.S. 83, 99 (1968). *Cf. Crossen v. Breckenridge*, 40 U.S.L.W. 2016 (6th Cir. June 23, 1971).

> 2) *The district court's reasons for denying an injunction do not affect this Court's jurisdiction of the appeal.*

Normally whether to grant an injunction to effectuate a trial court's underlying holding involves an element of discretion. If the appellate court decides to

leave that exercise of discretion undisturbed, this does not affect the appellate court's jurisdiction. Therefore, consideration here of whether the declaratory judgment granted and the further declarations sought should be supported by injunctions is not properly jurisdictional. If an injunction is denied, § 1253 brings the appeal here without further ado. Appellants will discuss in a subsequent section of this brief the reasons the district court's denial of injunctive relief was error.

II.

THE DISTRICT COURT SHOULD HAVE DECLARED THE PROCEDURAL, RESIDENCE, AND ACCREDITATION PROVISIONS OF THE GEORGIA ABORTION STATUTE UNCONSTITUTIONAL.

A. *The district court correctly held that the Georgia abortion statute unduly restricts a fundamental, constitutionally protected right to personal and marital privacy.*

This Court recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965) that the right of a married couple to use contraceptives for family planning is an aspect of a constitutionally protected "right of privacy older than the Bill of Rights . . ." 381 U.S. at 486. As the various opinions elaborately documented, a right of privacy has long been recognized, *Boyd v. United States*, 116 U.S. 616 (1886); *Union Pacific Ry. v. Batsford*, 114 U.S. 250 (1891), especially with regard to matters involving marriage, family, and sex, *Loving v. Virginia*, 388 U.S. 1 (1967) (freedom to marry a person of one's choosing); *Skinner v. Oklahoma*, 316 U.S. 535 (1952) (the right to have and rear children); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390

(1923) (the right to direct the education of one's children).

Beginning with *California v. Belous*, 71 Cal. 2d 996, 458 P.2d 194 (1969), *cert. denied*, 397 U.S. 915 (1970), a number of state and federal courts [2] have found the right of privacy to include the decision to terminate an unwanted pregnancy.

[2] The federal cases include: *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970), *appeal dismissed*, 400 U.S. 1 (1970) (per curiam); *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970), *juris. postponed*, 91 S. Ct. 1610 (1971); *Doe v. Scott*, 321 F. Supp. 1385 (N.D. Ill. 1971), *appeals docketed sub nom., Hanrahan v. Doe*, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (Nos. 1522, 1523). State trial court cases which have declared the abortion statutes of their states unconstitutional in criminal proceedings against doctors because of infringement on the woman's right of privacy include: *South Dakota v. Munson* (S.D. 7th Jud. Cir., Pennington County, Apr. 6, 1970) (Clarence P. Cooper, J.) (recognizing the woman's "private decision whether to bear her unquickened child"); *Michigan v. Ketchum* (Mich. Dist. Ct., Mar. 30, 1970) (Reid, J.) ("the statute as written infringes on the right of privacy in the physician-patient relationship, and may violate the patient's right to safe and adequate medical advice and treatment"); *Pennsylvania v. Page*, Centre County Leg. J. at 285 (Pa. Ct. Comm. Pl., Centre County, July 23, 1970) (Campbell, P. J.) ("the abortion statute interferes with the individual's private right to have or not to have children"); *California v. Gwynne*, No. 173309 (Calif. Mun. Ct., Orange County, June 16, 1970) (Thomson, J.); *California v. Barksdale*, No. 3323C (Calif. Mun. Ct., Alameda County, Mar. 24, 1970) (Foley, J.) *aff'd on appeal*, ____ Cal. App. 2d ____ (1st Div. July 22, 1971); *California v. Robb*, Nos. 149005 & 159061 (Calif. Mun. Ct., Orange County, Jan. 9, 1970) (Mast, J.); *Illinois v. Anast*, No. 69-3429 (Ill. Cir. Ct., Cook County, 1970) (Dolezal, J.) (holding the Illinois abortion statute "unconstitutional (1) for vagueness; and (2) for infringing upon a woman's right to control her body"). *Contra, Corkey v. Edwards*, 322. F. Supp. 1248 (W.D. N.C. 1971), *appeal docketed*, ____ U.S.L.W. ____ (U.S. ____, 1971) (No. ____); *Steinberg v. Brown*, 321 F. Supp. 741 (N.D. Ohio 1970); *Rosen v. Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217 (E.D. La. 1970), *appeal docketed*, 39 U.S.L.W. 3247 (U.S. Nov. 27, 1970) (No. 1010); *United States ex rel. Williams v. Follette*, 313 F. Supp. 269, 272-73 (S.D.

(continued on page 24)

As discussed by Mr. Justice Clark in *Religion, Morality and Abortion: A Constitutional Approach*, 2 LOYOLA U. (L.A.) L. REV. 1 (April, 1969), if the right of familial privacy protects a decision to limit one's family by use of contraceptives from state interference, it must equally protect the right to determine family size by terminating an unplanned or unwanted pregnancy resulting from contraceptive failure.

The district court reached this conclusion with respect to Mary Doe, stating that the "concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy" and that insofar as the Georgia abortion statute limited the reasons for abortion, it "unduly restricts a decision sheltered by the constitutional right of privacy." (A. 84)

The state never disputed the existence of this fundamental right of privacy but urged that it had a countervailing compelling interest in regulating the right arising from its concern for the "legal rights" of the fetus, including the "right of the fetus to be born." [3] This po-

---

(continued from page 23)

N.Y. 1970) (questions substantial, but habeas corpus petitioner-physician remitted to state courts); *Doe v. Randall*, 314 F. Supp. 32 (D. Minn. 1970), *appeal docketed sub nom., Hodgson v. Randall*, 39 U.S.L.W. 3115 (U.S. Sept. 29, 1970) (No. 728), *on appeal from* No. 42652 (Minn. Sup. Ct., July 20, 1970), *denying prohibition to* No. 23789 (Minn. Dist. Ct., Ramsey County, June 29, 1970).

[3] The state relied primarily on property and tort cases which hold that an unborn child may recover for torts inflicted prior to birth if born alive or may inherit property if born alive. These cases show a purpose to protect property interests *if the child is born alive* but really have little relevance to the claim of a right to be born. Unlike many states, Georgia has no statute which defers the execution of a death sentence in order that a convicted pregnant woman may deliver.

sition of the state, however, conveniently ignores the historical context from which the statute developed and is logically inconsistent with the provisions of the statute dealing with the asserted "rights" of some fetuses. Under the 1865 predecessor [4] of the Georgia abortion statute, abortions were not criminal if performed to "preserve the life" of the mother. The present Georgia abortion statute,[5] passed in 1968, added more grounds for legal abortion, *e.g.*, health, rape, fetal malformation.

Thus, throughout the history of Georgia's legal control over abortions, the "rights" of the fetus which the state now asserts have not been given first consideration.

Even assuming a compelling state interest, the state's statute does not attempt to accomplish it with the requisite "precision," see, *e.g.*, *Kramer v. Union Free School District*, 395 U.S. 621, 632 (1969). If the interest is limited to preservation of life, including fetal life, then the 1968 statute, with its non-life considerations would not have been passed. If the state is attempting to protect the *quality* of life, then the statute is woefully inadequate. It is more physically and emotionally damaging to bring a child into Mary Doe's family—poverty-stricken, fatherless, children not cared for or desired—than into a comfortable (albeit somewhat strained) family as a result of a consensual statutory rape.

Nor can the state find a compelling reason to justify its restriction of a fundamental right in consideration of the mother's health. Although abortions were un-

[4] *Ga. Laws* 1865-66 at 233 Cobb, and *Ga. Laws* 1876 at 113.

[5] The 1968 statute is modeled after the AMERICAN LAW INSTITUTE, MODEL PENAL CODE (Tentative Draft No. 2, 1962).

doubtedly dangerous operations in the mid-1800's when Georgia's first abortion statute was enacted,[6] statistical information conclusively establishes that advancements in medicines and medical techniques [7] now actually make it safer for a woman to have a medically induced abortion than to bear a child.[8] Considering the shock-

[6] See *California v. Belous, supra,* for a discussion of the historical development of the law; see also Perkins, CRIMINAL LAW p. 101 (1957); Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality,* 14 N.Y.L.F. 411, 419-22 (1968). That the early abortion statutes had a "health of the woman" history can best be seen by early court interpretations, *e.g., New Jersey v. Murphy,* 27 N.J.L. 112, 114 (1849), where it was stated that the purpose of the statute ". . . was not to prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts."

[7] Conditions today for performing an abortion are vastly different from those prevailing in 1865. In addition to the availability of antibiotics developed in the 1940's, perfection of the curettage method of early abortion (dilation curettage) and other recent advances in medical techniques have increased the safety of the procedure. A device was only recently developed for use in abortions during the first trimester of pregnancy; it is called a suction curettage or vacuum aspirator. The device dilates the cervix by vibration and aspirates the contents of the uterus. It has been further improved by the addition of the flexible plastic cannula which does not require dilation of the cervix for aspiration. The procedure takes about three minutes and is done on an outpatient basis either in hospitals or in "free standing" clinics. Patients are able to leave the clinic about one hour after the procedure. Peretz, *Evacuation of the Gravid Uterus by Negative Pressure (Suction Evacuation),* 98 AM. J. OBST. & GYNEC. 18 (1967); Vojta, *A Critical View of Vacuum Aspiration: A New Method for the Termination of Pregnancy,* 30 OBSTETRICS AND GYNECOLOGY 28 (1967); MODERN HOSPITAL, Oct. 1970 p. 43.

[8] Mortality associated with medically induced abortion for New York City for the first eleven months under its new law was 6.0 per 100,000 abortions, *Abortion Mortality,* 20 MORBIDITY AND MORTALITY 208, 209 (July 12, 1971) (U.S. Department of Health, Education and Welfare, Public Health Service). This is only slightly higher than the rates of Japan, 4.1; Czechoslovakia, 2.5; and Hungary, 1.2, where abortion has been legal and prac-

(continued on page 27)

ing number of deaths and complications resulting from the illegal "coathanger" abortions which are the necessary corollary of the existence of legal restrictions on therapeutic abortions, the state can hardly argue that the health of its citizens is promoted by the Georgia abortion statute.[9] In light of the comparative mortality resulting from modern abortion techniques and that of maternity, a statute which requires a woman to carry an unwanted pregnancy to term infringes not only on a fundamental right of privacy but on the right to life itself.[10]

(continued from page 26)
ticed for several years. C. Tietze, *Mortality with Contraception and Induced Abortion*, 45 STUDIES IN FAMILY PLANNING 6 (1969). "Maternal mortality from complications of or associated with pregnancy, childbirth, and the puerperious, excluding induced abortion 20 deaths per 100,000 pregnancies, based on the United States rate of maternal mortality, excluding abortion, [which] was 18 per 100,000 live births in 1964-66." *Id.*

[9] In Georgia alone there were 205 reported deaths from 1950 to 1969 resulting from illegal abortions; the extent of unreported deaths is unknown. R. Rochat, C. Tyler and A. Schoenbucher, *An Epidemiological Analysis of Abortion in Georgia*, 61 AM. J. OF PUBLIC HEALTH 543 (1971) (hereafter Rochat).

[10] The state did not contend that it had an interest in promoting a population increase. Nor could it easily do so in view of the Family Planning Services Act (*Ga. Laws* 1966, at 228; *Ga. Code* §§ 99-8101 *et seq.*) which directs state agencies not only to give family planning services, but also to distribute rhythm charts, drugs, contraceptives, and similar products for birth control and family planning. One of the products distributed by state agencies under the auspices of the act is the intrauterine device ("IUD"); the June 1971 issue of MCH MEMO published by the Georgia Department of Public Health states that 25,538 women have received IUD's under the Family Planning Services Act. Substantial medical opinion holds that the IUD may not be a contraceptive (an agent that prevents fertilization of the ovum) but an abortifacient (an agent that interferes with and prevents the growth of or implantation of a fertilized ovum). Andros, *Intrauterine Contraceptive Devices*, 40 POSTGRADUATE MEDICINE 739 (1966); Committee on Human Reproduction, *Evaluation of Intrauterine Contraceptive Devices*, 199 J. AM. MED. ASSN. 647 (1967); letter from W. A. Krotoski in 157 SCIENCE 1465 (1967).

B. *The statutory standard resulting from the decision below is vague and ambiguous and gives no guidance by which proscribed conduct may be judged and thereby violates the due process guarantee of the Fourteenth Amendment.*

After the district court's deletion of the statutory reasons for abortion, it remains a crime for a physician to perform an abortion except when "based upon his best clinical judgment that an abortion is necessary." By its supplemental decision the district court indicated that the hospital abortion committee must also decide whether an abortion is "necessary" on the broader medical basis, namely, the totality of circumstances surrounding each patient. (A. 163)

The "necessary" in light of "the totality of circumstances" test is so vague and indefinite that it does not warn physicians of what conduct is proscribed. The statute is wholly without objective standards and, therefore, susceptible to diverse and arbitrary interpretation. Assuming the doctors will choose to err on the side of caution, the availability of abortions will be arbitrarily circumscribed.

The Court has characterized the term "necessary" standing alone as an indefinite standard. *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 517-18 (1926). In the recent decision of *United States v. Vuitch*, 400 U.S. 813 (1971), "necessary" was given constitutionally adequate meaning by being limited by a relationship to an abortion applicant's "health." Here, however, the district court has characterized the decision to terminate a pregnancy as a "personal-medical" decision to be based on all relevant factors, emotional, economic, psychological, familial, or physical. Note that of these, only one, *i.e.*,

physical, relates directly to health. The six doctors involved in any abortion decision are supposed to balance not only the health factor but such intangibles as whether a woman has had enough children, whether she is economically able to rear another child, whether another child will disrupt her familial situation, and what emotional response the woman will have toward an unwanted child. Obviously, a number of the now added factors in the decision-making equation are purely personal to the woman and inherently incapable of evaluation by a doctor's "best clinical judgment."

Appellants urge that a standard in a criminal statute based on *all* factors, including such intangibles as economic, emotional, and familial considerations, is equivalent to no standard at all and impossible of objective determination. The imprecision of "necessary" in light of "the totality of circumstances" standard is shown by the district court's own supplemental decision (A. 161) to prevent hospital abortion committees from adopting reasons or standards of the American College of Obstetricians and Gynecologists [11] as their standards. While such a standard as the district court's might be sufficient in the abstract for a course in medical ethics, the court below made it a test for determining criminal conduct, and for this purpose it is unconstitutionally vague.

---

[11] The American College of Obstetricians and Gynecologists standards previously permitted abortions for reasons similar to the Model Penal Code. In August 1970, the Executive Committee of the College adopted a more liberal policy of permitting the performance of an abortion based on the decision of a physician's recommendation or his patient's request. If the decision is based on the physician's recommendation then another physician is to be consulted; if based on patient request, then nothing more than a written request is necessary under the new policy, 14 A.C.O.G. NEWSLETTER 2 (Sept. 1970).

Another ambiguity involves what appears to be an attempt to incorporate, by reference, purported "standards" to regulate the abortion committee. The statute, *Ga. Code* § 26-1202 (b) (5), provides that the hospital abortion committee is to be "established and maintained in accordance with standards promulgated by the Joint Commission on the Accreditation of Hospitals. . . ." However, there are no such standards.[11] J.C.A.H. has adopted general hospital standards which regulate large hospitals' services and facilities, but they do not purport to establish any standards or guidelines on when an abortion may be performed. Thus the non-existence of standards purportedly incorporated in the statute creates another ambiguity.

Assuming, as one must, that the statutes will be applied in a criminal prosecution, there will be substantial difficulty for the doctor in convincing a jury that an abortion was "necessary." The jury may well second guess the doctor's judgment and weighing of factors (otherwise the statute would be meaningless). Presumably under authority of *Vuitch*, the burden would be on the state to prove that an abortion was not necessary.[12] Even though at first blush this would appear to be an

[11] See footnote 1 of the district court's supplemental opinion (A. 163); and Standards for Hospital Accreditation, J.C.A.H., Jan. 1, 1970. See also discussion of adoption of standards in *Doe v. General Hospital*, 313 F. Supp. 1170, 1172 (D.D.C. 1970). This delegation of authority is not unlike the delegation to the hospital abortion committee held to be unlawful in *Barksdale v. California*, ____ Cal. App. 2d ____ (1st Div. July 22, 1971).

[12] Consider additionally, how does a woman desiring an abortion go about convincing her doctor, two consultants and the hospital abortion committee that an abortion is necessary. This places on her an unwarranted burden of proof as a prerequisite to the exercise of a constitutional right. From the woman's standpoint, it can certainly be said that the statutory standard is now more restrictive than before the decision.

onerous burden, one cannot help but see that a jury would decide the question of the necessity of the abortion in the context of their own religious, social, and moral convictions. This statute, like the unconstitutionally vague inciting to insurrection statute in *Herndon v. Lowry*, 301 U.S. 242 (1936), permits the situation where "[t]he law, as thus construed, licenses the jury to create its own standard in each case." 301 U.S. at 261.

Here, as in the long line of first amendment vagueness-overbreadth cases, the doubly strict standard of specificity should apply, because the state is regulating in an area of fundamental rights. See, *e.g.*, *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966).

C. *The procedure left intact by the district court denies due process to a woman seeking an abortion.*

1) *The abortion applicant has no opportunity to be heard, to know the reasons an abortion is denied her, or to appeal an adverse decision.*

This Court has reiterated many times in diverse situations that state action adversely affecting the life, liberty, or property of citizens cannot be accomplished by arbitrary fiat, but only in accordance with a procedural process appropriate to the rights and circumstances involved. *Bell v. Burson*, 401 U.S. 971 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961). Due process must be afforded whether the power of the state is exerted directly by its officers, by its courts, *NAACP v. Alabama*, 377 U.S. 288 (1964); by local police officers acting under its statutes, *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); or by a committee which, while non-regulatory in form, acted in substance

as a repressor of protected rights, *Bantam Books v. Sullivan*, 372 U.S. 58 (1963).

These constitutional tenets were overlooked by the district court in its upholding of the procedural scheme contained in the Georgia abortion statute.[14] Such an omission is especially inexplicable in light of the district court's unanimous finding that the decision to abort a pregnancy was included in a fundamental constitutional right of privacy. As was said in the dissent in *Cafeteria Workers:*

> Such a result in effect nullifies the substantive right—not to be arbitrarily injured by Government—which the Court purports to recognize. What sort of right is it which enjoys absolutely no procedural protection? 367 U.S. at 900.

Women seeking abortions under the Georgia statute have an opportunity to talk with their own physicians and the two consulting physicians (if they have time and can afford it and if they don't insist on dealing solely with the physician of their choice), but no right to make any presentation, oral or written, to the ultimate decision maker—the statutory hospital abortion committee. Applicants cannot present facts or arguments on the issues which this decision maker may consider relevant and which, under the interpretation given the statute by the district court, now includes "all relevant factors, whether they be emotional, economic, psychological, familial or physical." (A. 83) Indeed, applicants never see the committee or know the basis on which they are denied abortions even though the committee may have based its decision on a factor which is particularly within the knowledge of

[14] The district court noted its concern over the Due Process issues (A. 85, n. 5), but chose to ignore them.

the applicant, *e.g.*, her economic or family situation. Nor does the applicant have any right under the statute to have an adverse decision of the abortion committee judicially reviewed. Considering the inexorable time requirements for safe abortions, it is difficult to imagine a procedure less suited for a fair determination of the fundamental constitutional right the district court recognized, especially for the indigent applicant financially unable to make the failsafe but expensive trip to New York if an abortion is denied her.

Goldberg v. Kelly, 397 U.S. 254 (1970), does not allow the scheme of the Georgia abortion statute. It teaches that while due process allows an informal procedure in appropriate circumstances, certain rights must be afforded the affected citizen—an opportunity to be heard by the decision maker directly and not merely through a written statement or secondhand presentation, to know and have an opportunity to counter the adverse facts against her, and to know the reasons on which the decision maker bases his judgment. If such fundamental rules must be observed before a driver's license may be revoked [15] or before denying temporarily an indigent's "entitlement" to welfare payments, this Court cannot recognize less stringent rules for a woman's "entitlement" to the exercise of a recognized constitutional right.

Wisconsin v. Constantineau, supra, is also relevant to the issue of an opportunity to be heard since there this Court held:

> Where a person's good name, reputation, honor, or integrity are at stake because of what the gov-

[15] *Bell v. Burson, supra.*

> ernment is doing to him, notice and an opportunity to be heard are essential. 400 U.S. at 437.

While society's values have changed somewhat since Hawthorne's *Scarlet Letter*, it is still "a badge of infamy" in many minds to bear an illegitimate child. Under the procedures provided by the Georgia abortion statute, however, a hospital committee is free to deny an abortion for unstated reasons without explanation to anyone. There is no safeguard against the possibility of an abortion being denied principally on the basis of the personal views of the committee's members as to the appropriate punishment for extra-marital sex relations. A recent statistical study suggests that such undisclosed motivations may well be at play.[16] *Cf.* the intimation by defendants that they believe a criminal record to be relevant to a woman's right to an abortion. (A. 56) The unwed woman, thus made to bear her badge of infamy, has received no process at all under the Georgia law. As was said in *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958), in a different but analogous context:

> An ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of these freedoms.

---

[16] L. Baker and M. Freeman, *Abortion Surveillance at Grady Memorial Hospital*, Center for Disease Control (U.S. Department of Health, Education and Welfare, Public Health Service), p. 11, June and July, 1971 (hereafter Baker and Freeman). This and other studies published by the Center for Disease Control may not be readily available to the Court. Accordingly, copies of these studies are being delivered to the Clerk and to opposing counsel with copies of this brief.

While the district court's opinion attempted (unsuccessfully) to give a standard so that abortions in theory are not granted or denied purely in the discretion of the abortion committee, it left intact a procedure which allows just such arbitrary discretion to be used in fact, since no one is allowed to know the reasons, if any, which motivate the committee. Indeed the district court itself felt compelled to admonish the abortion committee against the use of secret standards. (A. 163, n. 1) Appellants urge that the protection of fundamental liberties cannot be left to a procedural scheme so dependent on the unchallengeable integrity and subjective motivations of the decision makers.

2) *The procedure is so cumbersome, time consuming, and restrictive by reason of the requirement that abortions be performed only in accredited hospitals that it effectively manipulates out of existence plaintiffs' constitutional rights.*

The observation of this Court in *Harman v. Forssenius*, 380 U.S. 528, 540 (1965), that "Constitutional rights would be of little value if they could be . . . indirectly denied . . . [or] manipulated out of existence," should have been considered by the district court in evaluating the procedural scheme of the Georgia abortion statute as a whole. Any procedure regulating in the area of a fundamental constitutional right must be tailored carefully to fit the nature of the right and the circumstances surrounding its exercise. In the case of a woman seeking an abortion the principal factors which must be considered are time and availability of adequate medical facilities and personnel. But the Georgia abortion statute, as enacted and as interpreted by the district court, imposes substantial and irrational roadblocks with respect to both these crucial factors and

thereby effectively manipulates out of existence the constitutional rights of many Georgia citizens.

Time is critical in abortions because of its direct relationship to the risks involved to the mother's life. While abortions during the first trimester of pregnancy (first twelve weeks) involve a lower risk of mortality than does childbirth, every week that passes thereafter increases the risk of death. Mortality and complications from legal abortions are three times greater in abortions performed after the twelfth week of gestation.[17] On its face, the Georgia requirement of consultation and concurrence of two doctors in addition to the woman's own physician, followed by approval of a three doctor hospital abortion committee is patently unsuited to the kind of prompt determination required to assure a safe exercise of the right involved. It makes a mockery of any attempt to justify Georgia's abortion statute as preservative of the life or death of women.

A recent study conducted by the United States Department of Health, Education and Welfare and the Georgia State Department of Health at Grady Memorial Hospital (the hospital which treats indigent residents of Fulton and DeKalb Counties, Atlanta area) substantiates the cumbersomeness of the procedure and its effect in denying women safe abortions to which they otherwise are entitled. This study [18] showed that

[17] Address by C. Tietze, Conference on Abortion Techniques, June 3, 1971, New York, *Early Complications of Abortions under Medical Auspices: A Preliminary Report* (paper published by The Population Council, 160 E. 88th St., N.Y., N.Y.); C. Tyler, J. Bourne, S. Conger, J. Kahn, *Reporting and Surveillance of Legal Abortions in the United States, 1970* (U.S. Department of Health, Education and Welfare, Public Health Service), Table 8 (hereafter Tyler).

[18] Baker and Freeman, supra, n. 16 at 13.

for 54 percent of the abortion candidates the mechanics of the system itself forced their discontinuance of the abortion process. The median time for work-up was reported at 15 days. (Mary Doe waited 25 days for the Grady abortion committee to act on her requ.... See Answers to Interrogatories (A. 63-64)). At application 27 percent of the candidates were at least 13 weeks pregnant, but by the end of the work-up time a total of 56 percent of the applicants had become second trimester pregnancies requiring the higher risk saline injection technique.[19] Since the committee's decision at Grady is in part based upon gestational age of the fetus,[20] some women were denied abortions simply because a decision was not reached early enough in their cases. In short, they were victims of a system over which they have no control. Their request for an early stage, safe abortion was denied because of administrative delays and, even if approved, their life and health were jeopardized by a second trimester, more complicated surgical procedure.

The statutory limitation of legal abortions to licensed, accredited hospitals is a further irrational requirement which effectively limits and in some cases prevents the exercise of the constitutional right of privacy. The accreditation referred to in the statute is that conferred by the Joint Commission on the Accreditation of Hospitals, a private non-governmental agency in Chicago, Illinois. This organization has "standards" by which it evaluates a hospital's facilities, services, administration, etc. Although there is no reference in the standards to abortion facilities or services, the Georgia statute requires all abortions to be performed in an "ac-

[19] *Id*, at 12.
[20] *Id*, at 9.

credited" facility. Only a cursory perusal of the standards by which hospitals are accredited will reveal that they are wholly inapposite in determining whether a particular facility is capable of performing safe abortion services. First a hospital must have been in operation a year before it is eligible for accreditation. Thus new hospital facilities, regardless of how well equipped or staffed they may be for performing abortion services, are precluded. Further, the requirements for nuclear medicine facilities, radiology department, and mass casualty treatment facilities [21] have no reasonable relationship to the service of an abortion facility. The accreditation requirement effectively eliminates the possibility of establishing specialized clinics in Georgia designed specifically to provide safe, inexpensive therapeutic abortions.

There is no rational basis for limiting abortion services, which in early pregnancy is a very simple, safe procedure, to accredited hospitals, particularly in view of the fact that there is no comparable statutory limitation applicable to more complicated and dangerous procedures such as neurosurgery, open-heart surgery, etc., which may be performed in any licensed hospital, whether accredited or not. Formerly the method in most common use for abortion was dilation and curettage (sharp curette), a surgical procedure requiring anesthesia. Today abortions by the suction curettage or vacuum aspirator device are widely available. This development in safe abortion technique together with revised, updated professional standards led the Commisioners on Uniform State Laws to draft a Uniform

[21] Standards for Hospital Accreditation, J.C.A.H., Jan. 1, 1970. See also Leavy and Charles, *California's New Therapeutic Abortion Act*, 15, U.C.L.A. L. REV. 1, 5 (1967).

Abortion Statute [22] which does not contain the accredited hospital limitation. The "reform laws," patterned after the Uniform Abortion Act, adopted by Alaska, Hawaii, New York, and Washington [23] embody the concept of clinical services; the Washington statute provides for an accredited hospital or other medical facility approved for abortion by the State Board of Health. The other three states do not adopt the accredited hospital requirement. The experience in New York with clinical (as opposed to hospital) abortions illustrates the irrationality of the accredited hospital requirement in terms of protecting health. During the first eleven months of services under the new statute 150,269 abortions were performed in New York City alone. Of that number, 44,216 were non-hospital abortions, and there were no deaths from clinical abortions.[24]

The district court found that the state had an ade-

---

[22] Commissioners on Uniform State Laws, UNIFORM ABORTION ACT (2nd Tentative Draft, 1970).

[23] *Alaska Stat.* § 11.15.060 (1970); *Hawaii Rev. Stat.* § 453-16 (1970 Supp.); *N.Y. Penal Law* § 125.05(3) (McKinney 1970 Supp.); *Rev. Code of Wash.* § 9.02.060, 9.02.070, 9.02.080 (1970 Supp.).

[24] *Abortion Mortality*, 20 MORBIDITY AND MORTALITY 208 (1971). (U.S. Department of Health, Education and Welfare, Public Health Service). Another interesting lesson of the New York experience is that as legal abortions increase, deaths from illegal abortions decrease. There were seven deaths from illegal abortions after the new statute where there were 24 reported for the twelve months preceding the reform law. See also the study of two metropolitan areas in California: in the San Francisco Bay area where many abortions are performed (172 per 1000 live births in 1969), abortion related deaths decreased to none for 1969. In Los Angeles where relatively few abortions are performed (20 per 1000 live births) there were six abortion related deaths per 100,000 live births. G. Steuart & P. Goldstein, *Therapeutic Abortion in California*, 37 OBSTETRICS & GYNECOLOGY 510, 513 (1971). Again, any life-or-health-of-the-woman justification for the Georgia abortion law fails.

quate interest in guarding against the "establishment of transient 'abortion mills' " (A. 83) to justify the accredited hospital requirement, but it failed to indicate any reason why such facilities are different in kind from transient "tuberculosis mills," or "psychiatric mills" or any other clinic or hospital facilities directed toward the efficient performance of a limited range of medical procedures.

Plaintiffs do not suggest that Georgia cannot or should not adopt standards for licensing all medical facilities including those rendering abortion services. But plaintiffs do urge that the use of the accreditation standard has no rational relationship to the proper objectives the state seeks to accomplish, but instead simply adds an additional, irrational deterrent to the exercise by Georgia women of their constitutional rights. Even the least stringent of equal protection standards cannot support the nonsensical result of merely requiring a state license for a hospital that does open-heart surgery but requiring "accreditation" for a hospital to do an essentially non-surgical vacuum aspiration procedure.

Plaintiffs urge that the accreditation requirement goes beyond assuring quality of medical facilities, it delegates authority to select facilities in which abortions may be performed to a private organization, J.C.A.H., an organization not subject to any state controls or statutory objectives of the legislature. The state has no review power over J.C.A.H.'s adoption of standards which might apply to abortion. For example, J.C.A.H. could adopt a series of reasons or conditions precedent for abortions; these could even be contrary to the district court's decision below, however, under

the statute as presently written there would be no control over such legislative authority delegated to J.C.A.H. Plaintiffs contend that such is an unlawful delegation of state authority and a violation of due process. *McGautha v. California*, 91 S.Ct. 1454 (1971), *U.S. v. Grimaud*, 220 U.S. 506 (1911), *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

The significance of the requirement that abortions be performed only in accredited hospitals lies in the fact that 105 of Georgia's 159 counties have no accredited hospital at all.[25] For many women in these counties, especially the indigent who are dependent on public health facilities, this "procedural" requirement effectively nullifies such rights as are purported to be given by Georgia and recognized by the district court.

That the procedural and accreditation requirements actually result in denial of access to legal abortions in Georgia can best be demonstrated by the number of women who go out of state for this health service. In 1970, 705 legal abortions were performed on Georgia residents in the state.[26] After the New York abortion law went into effect, from July 1, 1970 to December 31, 1970, 445 Georgia women received abortions in New York City [27] and 217 received abortions in upstate New York.[28] Thus, in the last six months of 1970 almost as many Georgia women received abortion services *in New*

[25] J.C.A.H. List of Accredited Hospitals (Jan. 1970).

[26] Tyler, *supra*, n. 17, Table 1.

[27] J. Kahn, *Legalized Abortion in New York City*, U.S. Department of Health, Education and Welfare, Public Health Service (Paper delivered at annual EDS Conference, April, 1971), Table 6. See n. 16, *supra*.

[28] *Report of Selected Characteristics on Induced Abortions Recorded in New York State*, July 1-December 31, 1970, N. Y. Health Department, Table 5. See n. 16, *supra*.

York as were rendered in the entire state of Georgia for the full year, *i.e.*, 662 to 705.[11] No information is available as to the additional Georgia women who received legal abortions in Washington, D. C., California, Kansas, England, and elsewhere.

When considered as a whole, the cumbersome and restrictive procedural scheme of the Georgia abortion statute is wholly inconsistent with the exercise of a fundamental constitutional right, even after granting due regard to such interests as the state asserts in limiting such right. If, instead of abortion, the right involved was that of a married couple to use contraceptives for family planning, this Court surely would not allow Georgia to require consultation with three doctors and submission to a committee of three more doctors before the right could be legally exercised. Add to this the additional requirement that contraceptives be obtained only by prescription from certain licensed physicians in certain cities in the state and the analogy to the Georgia abortion statute is complete. Such a procedure could not constitutionally be allowed to encumber and manipulate out of existence the right of privacy of married couples to plan their families. A comparable device cannot be allowed to have the same effect on the equally important right of privacy to plan families by terminating unwanted pregnancies.

D. *The limitation of abortions to residents of the state is unconstitutional.*

Ga. Code §§ 26-1202(b) (1) and (b) (2) require, as a condition precedent to abortion services, that the wom-

[11] The district court's decision in this case was on July 31, 1970, so for five of those six months there were no substantive limitations on Georgia abortions.

an and her physician certify that she is a "bona fide resident of the state of Georgia." There is no exception permitting emergency treatment for a non-resident.

This Court recently restated its long-standing recognition of the right to travel as a fundamental constitutional right, stating that ". . . the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement . . ." *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969).[30] Consistent with this articulation, it could hardly be questioned that one has a right to travel to Maryland for medical services and residents of Maryland have the right to travel to Georgia for all medical services. Abortion services should be no exception. Or, if an exception is allowed, the burden is on the state to show that this inherently suspect classification serves some compelling state interest.[31] The state has carried no such burden, although the district court did articulate an "undifferentiated fear or

---

[30] Some of the other positions and bases for the right to freely move about are in *Aptheker v. Secretary of State*, 378 U.S. 500, 505-06 (1964) (due process rationale); *Kent v. Dulles*, 357 U.S. 116 (1958) (due process); *Edwards v. California*, 314 U.S. 160 (1941) (commerce clause); *id.* at 181-85 (Douglas and Jackson, JJ. concurring) (fourteenth amendment privileges and immunities); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1871) and *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869) (art. IV § 2 privileges and immunities). Also there is Mr. Justice Washington's famous statement concerning the privileges and immunities clause in *Corfield v. Coryell*, 6 Fed. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1825).

[31] That the burden is on the state to "offer . . . justification," see *Kramer v. Union Free School District*, 395 U.S. 621, 633 (1969).

apprehension"[11] that Georgia would become the site of specialized abortion clinics (termed abortion mills) providing specialized medical services to out of state people. Underlying this line of reasoning is a precept that there is something evil about this health service, but since the state has actually sanctioned this service in *some* circumstances, it must not be evil *per se*. The state might argue that the purpose of the statute is to discourage those who would enter solely to obtain abortion services. In *Shapiro*, this Court noted that the statute there was not that narrowly drawn since it also resulted in denial of welfare benefits to other indigents. A statute designed to fence out indigents seeking higher welfare benefits was held to enforce an invidious distinction between claims of its citizens and violative of equal protection guarantees. The statute here is not narrowly drawn to fence out only those coming for abortion services and must be found constitutionally overbroad.

E. *The sanctions and restrictions of the Georgia abortion statute unreasonably interfere with the right of physicians to practice their profession and thereby deny them "liberty" and "property" in violation of the fourteenth amendment.*

Plaintiff physicians are obstetricians, gynecologists, psychiatrists, and general practitioners of medicine who assert that the Georgia abortion statute violates their fundamental right to practice medicine in accordance with their best professional judgment free from unreasonable state interference. These physicians allege that they are regularly called upon by patients seeking therapeutic abortions, that they have in a number of in-

[11] *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 508 (1969).

stances determined that an abortion is the correct medical treatment, but that they have been restrained from performing or recommending such treatment by the penalties and procedural requirements of the Georgia abortion statute.

The restrictions of the statute operate at two levels against physicians. The threat of criminal penalties and loss of license prevent the physician from making an impartial medical decision as to the advisability of an abortion. If a doctor decides an abortion is necessary, he personally risks a great deal; if his decision is against an abortion, however unjustified such decision may be medically, no criminal penalties are involved. Thus the sanctions of the Georgia abortion statute deny the individual physician the right to give medical advice and perform medical procedures based only on his concern for the health and life of his patient. In no other area of medical practice is the physician's decision making process so infected by conflict of interest as a result of a state statute.

If a physician initially decides that an abortion is advisable, he meets the second level of restrictions of the Georgia abortion statute, namely, the requirement that two other physicians concur with his judgment and that a hospital abortion committee of three other doctors approve the abortion. As in the case of the individual physician, conflicts of interest make an impartial determination by the committee difficult since it is not clear under the statute whether the committee members are criminally liable if their judgment about the advisability of an abortion is subsequently challenged as being unauthorized by law. Whatever the motivations of the abortion committee members, the indi-

vidual physician desiring to perform an abortion in the exercise of his profession can be denied the right to do so without knowing the reasons for such denial.

In cases involving railroad conductors,[13] cooks,[14] lawyers,[15] teachers [16] and scientists,[17] the right to conduct one's calling or profession free from arbitrary restrictions has been recognized as being an aspect of the "liberty" and "property" guaranteed by the fourteenth amendment. The threat of criminal penalties and the requirement of prior concurrence and unchallengeable approval contained in the Georgia abortion statute are such arbitrary restrictions since they are imposed on no other medical procedure, however dangerous, and are unrelated to any other rationally discernible state interest. As such they deny physicians their liberty and property without due process of law.

F. *The Georgia abortion statute results in discrimination against poor and Negro citizens, denying them equal protection of the law.*

Providing equal justice for poor and rich, weak and powerful alike is an age old problem. People have never ceased to hope and strive to move closer to that goal. *Griffin v. Illinois*, 351 U.S. 12, 16 (1956).

In considering whether equal justice has been afforded all citizens, this Court has recognized that invidious discriminations can occur by subtle means as well as by gross and that, however occurring, classifications which invade or restrain fundamental rights and lib-

[13] *Smith v. Texas*, 233 U.S. 630 (1914).

[14] *Truax v. Raich*, 239 U.S. 33 (1915).

[15] *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957).

[16] *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956).

[17] *Greene v. McElroy*, 360 U.S. 474 (1959).

erties cannot be sustained under the equal protection clause unless justified by compelling state reasons to which the classifications are reasonably related. *Shapiro v. Thompson, supra; Harper v. Virginia Bd. of Elections,* 383 U.S. 662 (1966); *Douglas v. California,* 372 U.S. 353 (1963).

Appellants contend that, although non-discriminatory in its express terms, the statutory procedures and restrictions and the administrative application of the Georgia abortion statute have produced invidious discriminations between rich and poor, black and white, and urban and rural citizens without rational justification. Appellants offered to present evidence in proof of such allegations but were denied an opportunity to do so by the district court. (A. 87, 129-132).

When read in the light of published facts and statistical studies, however, the discriminatory effects of the procedures and restrictions of the Georgia abortion statute are shown in clear relief. In theory any of Georgia's female citizens may obtain an abortion; but this is conditioned on a requirement of examination by three physicians and approval by a majority of a committee of at least three other physicians. It requires no evidence to show that such a procedure is initially weighted heavily in favor of those citizens capable of paying the fees of three physicians and the costs of a private hospital as compared to indigent citizens dependent on public health facilities, or even the wage-earner who is able to afford a single doctor, but not three of them.[38]

[38] Scholarly commentary has reiterated the fact of extraordinary socio-economic discrimination inherent in the implementation of state abortion laws. For example a 1965 study by Robert E. Hall, M.D., of sixty major hospitals revealed that

(continued on page 48)

vidual physician desiring to perform an abortion in the exercise of his profession can be denied the right to do so without knowing the reasons for such denial.

In cases involving railroad conductors,[13] cooks,[14] lawyers,[15] teachers [16] and scientists,[17] the right to conduct one's calling or profession free from arbitrary restrictions has been recognized as being an aspect of the "liberty" and "property" guaranteed by the fourteenth amendment. The threat of criminal penalties and the requirement of prior concurrence and unchallengeable approval contained in the Georgia abortion statute are such arbitrary restrictions since they are imposed on no other medical procedure, however dangerous, and are unrelated to any other rationally discernible state interest. As such they deny physicians their liberty and property without due process of law.

F. *The Georgia abortion statute results in discrimination against poor and Negro citizens, denying them equal protection of the law.*

> Providing equal justice for poor and rich, weak and powerful alike is an age old problem. People have never ceased to hope and strive to move closer to that goal. *Griffin v. Illinois*, 351 U.S. 12, 16 (1956).

In considering whether equal justice has been afforded all citizens, this Court has recognized that invidious discriminations can occur by subtle means as well as by gross and that, however occurring, classifications which invade or restrain fundamental rights and lib-

---

[13] *Smith v. Texas*, 233 U.S. 630 (1914).

[14] *Truax v. Raich*, 239 U.S. 33 (1915).

[15] *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957).

[16] *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956).

[17] *Greene v. McElroy*, 360 U.S. 474 (1959).

erties cannot be sustained under the equal protection clause unless justified by compelling state reasons to which the classifications are reasonably related. *Shapiro v. Thompson, supra; Harper v. Virginia Bd. of Elections,* 383 U.S. 662 (1966); *Douglas v. California,* 372 U.S. 353 (1963).

Appellants contend that, although non-discriminatory in its express terms, the statutory procedures and restrictions and the administrative application of the Georgia abortion statute have produced invidious discriminations between rich and poor, black and white, and urban and rural citizens without rational justification. Appellants offered to present evidence in proof of such allegations but were denied an opportunity to do so by the district court. (A. 87, 129-132).

When read in the light of published facts and statistical studies, however, the discriminatory effects of the procedures and restrictions of the Georgia abortion statute are shown in clear relief. In theory any of Georgia's female citizens may obtain an abortion; but this is conditioned on a requirement of examination by three physicians and approval by a majority of a committee of at least three other physicians. It requires no evidence to show that such a procedure is initially weighted heavily in favor of those citizens capable of paying the fees of three physicians and the costs of a private hospital as compared to indigent citizens dependent on public health facilities, or even the wage-earner who is able to afford a single doctor, but not three of them.[38]

[38] Scholarly commentary has reiterated the fact of extraordinary socio-economic discrimination inherent in the implementation of state abortion laws. For example a 1965 study by Robert E. Hall, M.D., of sixty major hospitals revealed that

(continued on page 48)

The statute's further limitation that abortions be performed only in accredited hospitals is an additional deterrent to the poor, particularly in the rural areas of the state, since 105 of Georgia's 159 counties have no accredited hospital at all.[39] Thus, the exercise of the "right" afforded by Georgia to have an abortion may well depend upon a citizen having the price of a bus ticket to a neighboring county.[40]

Not surprisingly, a system so weighted in favor of those able to pay for the exercise of their rights has had a racially discriminatory effect in Georgia. A study by the Division of Maternal Health, Georgia Department of Public Health, and the United States Depart-

---

(continued from page 47)

the abortion/delivery ratio for private patients was 3.6 times higher than that for ward or poor patients. R. Hall, *Therapeutic Abortion, Sterilization and Contraception*, 91 AM. J. OBST. & GYNEC. 518, Table VI (1965).

[39] A statistical study of the operation of the Georgia abortion statute during its first two years indicates that hospital abortions were in fact performed only in 22 of Georgia's 159 counties, suggesting to the authors that "hospital abortions are most available to women residing within 100 miles of metropolitan Atlanta." R. Rochat, *supra* n. 9, at 547.

[40] Appellants do not suggest that Georgia is constitutionally required to make its law with respect to abortions as liberal as those of any other state. In considering the equal protection aspects of this case, however, plaintiffs think it not inappropriate to point out that abortion services have for some time been available to Georgia citizens who can afford the price of travel to New York or a number of other states and countries with less restrictive abortion statutes. More Georgia women had abortions performed out of state during 1970 than were performed in Georgia. Tyler, *supra* n. 17 at Figure I. The extent of the discrimination against the poor is dramatically illustrated by a report that it is actually cheaper to fly to New York for an abortion than to obtain one locally in Atlanta. See *N. Y. Abortions Are Easier, Georgia Women Discover—Less Costly, Too*, Atlanta Journal & Constitution, July 11, 1971 at 12-A, col. 1.

ment of Health, Education and Welfare, Public Health Service[41] as to the operation of the Georgia abortion statute from its adoption in 1968 through June 1970, shows that hospital abortions were performed for 408 white women but only for 53 Negro women in the state.[42] This ratio hardly reflects relative needs for therapeutic abortion services because during the period 1965-69 Negro abortion mortality (from illegal non-hospital abortions) was 14 times greater than white abortion mortality.[43] In the words of the authors, "Abortion mortality from non-hospital abortions in Georgia is becoming increasingly a black health problem: presumably, this reflects the lower socio-economic status of blacks in Georgia." If the more limited category of *unmarried* women is considered, this survey shows that "unmarried pregnant whites are 25 times more likely to receive a hospital abortion than unmarried pregnant blacks," although the latter group has had the highest abortion mortality over the years.[44]

As discussed in another section of this brief, appellants can find no rational relationship between the requirement that abortions be performed only in accredited hospitals and a state interest in promoting health since the state allows major surgery of all kinds to be performed in its licensed hospitals whether or not accredited. Presumably the district court's conclusion that the state has an interest in protecting its citizens from the establishment of what it defined as dangerous "abortion mills" was founded on health considerations. But the district court failed to consider whether some al-

[41] Rochat, *supra* n. 9.
[42] *Id.* at 548, Table 7.
[43] *Id.* at 543.
[44] *Id.* at 548.

ternative device, short of limiting abortions to accredited hospitals, might not accomplish this health objective without having a discriminatory effect on poor and Negro citizens. Appellants challenged the existing Georgia abortion statute as being unconstitutional; it is no answer to this challenge to say that Georgia could establish some other procedure which would meet equal protection requirements. Yet this is exactly the answer the district court gave in reliance on *Dandridge v. Williams*, 397 U.S. 471 (1970). The rights appellants assert, however, are not in the area of economics and social welfare, but arise under the freedoms guaranteed by the Bill of Rights and the Fourteenth Amendment. And appellants contended that the Georgia regulatory scheme is infected with a racially discriminatory effect. *Cf. McLaughlin v. Florida*, 379 U.S. 184 (1964).

In these circumstances, statutory requirements which have effectively fenced out poor and black citizens from the exercise of the right can be justified only by a showing that they are essential to the achievement of a compelling state interest. *Shapiro v. Thompson, supra; Kramer v. Union Free School District, supra.* By this test, the tenuous relationship between the statute's cumbersome, costly procedures and restrictions of abortions to accredited hospitals and a state health interest cannot be justification for the invidious discrimination it has produced.[44]

[44] Other equal protection considerations are involved in *Ga. Code* § 26-1202(e) which permits a hospital to elect not to perform abortions. It is recognized that individual doctors should have this right, as a matter of conscience, but hospitals are fictitious legal entities and not having a conscience as such can lay no claim to exemption for that reason. Public or quasi-public hospitals occupy "state action" status and have an equal pro-

(continued on page 51)

III.

THIS COURT SHOULD ORDER AN INJUNCTION AGAINST ENFORCEMENT OF THE GEORGIA ABORTION STATUTE, OR, ALTERNATIVELY, REMAND TO THE DISTRICT COURT WITH INSTRUCTIONS TO CONSIDER, UNDER CORRECT LEGAL STANDARDS, WHETHER AN INJUNCTION SHOULD ISSUE.

At least since *Ex parte Young*, 209 U.S. 123 (1907), there has been no doubt of the propriety of federal courts exercising the equitable remedy of injunction to prevent the future enforcement of state criminal statutes. While in *Younger v. Harris*, 401 U.S. 37 (1971), this Court emphasized the kind of great and immediate, irreparable injury which must be shown before a federal court will intervene with equity powers in a *pending* state criminal prosecution, the majority opinion expressly stated no views "about the circumstances under which federal courts may act when there is no prosecution pending . . ." 401 U.S. at 41.

The operations of the Georgia abortion statute on plaintiffs and persons in the classes they represent create the kind of unusual situation and irreparable injury which justify an injunction. First, this regulatory scheme is self-operative against appellants without any need to

---

(continued from page 50)

tection "duty." Private hospitals receiving Hill-Burton or Medicaid funds would likewise be subject to equal protection responsibilities, *cf. Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), *cert. denied* 376 U.S. 938 (1964). Further discussion of the hospital option provision is contained in the Amici Curiae Brief, pp. 48-52, filed in this case by National Legal Program on Health Problems of the Poor, National Welfare Rights Organization, and American Public Health Association.

impose its criminal sanctions in fact. The rights of persons in the class represented by Mary Doe are denied them, not because of any act on their part for which they could be subjected to criminal prosecution, but because they cannot find the magic combination of five doctors (the applicant's own physician, two consultants, and a majority of a three-doctor committee) willing to risk the criminal penalties of the statute. Indeed, even without the risk of criminal penalty, it is unlikely that in those counties with low population (and hence few doctors) that five doctors could be found to approve an abortion. In fact, not all counties even have five doctors. Thus as to persons in the class represented by Mary Doe, there is no meaningful way to test the constitutionality of the Georgia abortion statutes through state court criminal proceedings.

Second, the ephemeral time space in which the rights of pregnant women must be asserted, if they are to have any meaning for the specific individual involved, is another special circumstance justifying a remedy beyond declaratory judgment. Typically, pregnancy cannot be definitely established prior to the eighth week. The safest abortion techniques, however, are those used during the first twelve weeks of pregnancy.[44] Therefore, a woman has only about a month in which to complete the cumbersome and time consuming procedure required by the Georgia abortion statute if she is to be able to use the safest techniques. If, after following the procedure, a woman is aggrieved by an adverse decision of a hospital abortion committee, the possibility of seeking relief from any court, state or federal, is cold comfort; the time frame for judicial determination of

[44] Tietze, *supra* n. 8; Tyler, *supra* n. 17, Table 8.

rights simply does not allow ultimate resolution of the individual's rights in time to afford her an opportunity to exercise them.

These special circumstances—inadequate remedy at law and irreparable injury to the individual women represented by Mary Doe—justify, and appellants urge, demand injunctive relief against future application of the Georgia abortion statute to deny women in the class represented by Mary Doe abortions performed by qualified physicians.

The declaratory judgment granted by the district court, while correct insofar as it declared unconstitutionally overbroad the statutory reasons for abortion, is, standing alone, inadequate to protect the rights asserted by Mary Doe. The binding effect of the judgment on state enforcement officials in future cases is not certain. Therefore, the third party deterrent effect of the statute—criminal sanctions against doctors who participate in the exercise of the rights asserted by persons in the class represented by plaintiff Doe—remains in effect. *Babbitz v. McCann* (II), 320 F. Supp. 219 (E.D. Wis. 1970), *vacated and remanded*, 91 S.C. 1375 (1971), and other state criminal prosecutions set out above certainly illustrate that such a deterrent is not illusory. In *Babbitz*, the district court gave declaratory relief against the Wisconsin abortion statute, 310 F. Supp. 293 (1970), but denied injunctive relief upon the court's "expectation that the state courts would fully vindicate [a doctor's] federal constitutional rights. . . ." Thereafter, state authorities instituted criminal proceedings against Dr. Babbitz despite the declaratory judgment. The district court enjoined the state court proceedings; however, this Court vacated the judgment and remand-

ed the case for reconsideration in light of *Younger v. Harris, supra.*

The district court here did not make a determination as to the necessity for an injunction in light of the irreparable injury alleged by appellants, but, under the heading "ABSTENTION," denied an injunction, "on the same basis as such a prayer would be denied a state proceeding actually in progress. . . ." (A. 85) The court relied upon *City of Greenwood v. Peacock*, 384 U.S. 808, 828 (1968), quoting:

> the vindication of defendant's federal rights is left to the state courts except in the rare situation where it can be clearly predicted . . . that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court.

Even ignoring the fact that *Peacock* is concerned with the totally inapposite remedy of removal, reliance on it was still misplaced, however, because it, like the *Younger* set of cases, deals with a situation in which state criminal prosecutions are pending and potential disruptions of the fine balance of the policies of federalism are the greatest. As this Court has recognized,[e]

---

[e] *Dombrowski v. Pfister*, 380 U.S. 479, 484 n. 2 (1965). It should be pointed out that, as in *Dombrowski*, first amendment rights of free speech and expression are involved in this case in addition to a more broadly based and even more fragile right of privacy. Plaintiff physicians, nurses, ministers, social workers and counseling organizations alleged that the abortion statute interfered with their counseling women who sought their professional help in obtaining safe, speedy, and adequate medical abortions. Since abortions for economic, social and many physical and emotional reasons were prohibited by Georgia law, counseling persons as to where such an abortion could be obtained and assisting in arrangements were possible violations of the criminal conspiracy statute, *Ga. Code* § 26-3201, or such actions could make these plaintiffs accessories under *Ga. Code* § 26-801.

these policy considerations and the scope of 28 U.S.C. §2283 are not directly involved where there is no pending state court proceeding.

Congress clearly intended the federal courts to have general power to declare state statutes unconstitutional and to enjoin "the enforcement, operation or execution" thereof, 28 U.S.C. § 2281. And this Court has recognized that "Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims."[48]

In view of this duty and the fact that the three-judge court did honor appellants' choice of a forum to the extent of granting declaratory relief on the merits of their asserted constitutional rights, it is inconsistent with sound judicial policy for the court to have stopped short of the injunction leaving the federal rights of persons in the classes represented by plaintiffs to be resolved piecemeal. If, despite all reasonable expectations, state officials undertake to prosecute a physician for violation of those portions of the Georgia abortion statute declared unconstitutional by the federal court, the court cannot then leave the matter to resolution by the state courts without demeaning its own judgment. Where, as here, no state criminal prosecution is pending or immediately threatened, potential friction in federal-state relations is at a minimum. Where the federal court has, in a novel and complex area of constitutional adjudication, declared a state statute unconstitutional, its failure to enjoin enforcement of the invalid statute simply invites friction. The tortuous progress of *Babbitz v. McCann*, *supra*, illustrates the potential

[48] *Zwickler v. Koota*, 389 U.S. 241, 248 (1967).

for needless trouble in *not* issuing the injunction. By the time the belated injunction issued, there was a pending state prosecution, casting doubt under *Younger* on the validity of the injunction.

CONCLUSION

The judgment of the district court should be reversed insofar as it found no justiciable controversy in the claim of appellant physicians, nurses, social workers, ministers, and family planning and abortion counselling organizations, and the opinion of this court should expressly declare invalid the Georgia abortion statute and direct the district court to enjoin the future enforcement thereof with respect to abortions performed by physicians duly licensed to practice medicine by Georgia law.

Respectfully submitted,

MARGIE PITTS HAMES
Suite 822, 15 Peachtree St., N.E.
Atlanta, Georgia 30303

REBER F. BOULT, JR.
CHARLES MORGAN, JR.
American Civil Liberties Union
Foundation, Inc.
5 Forsyth Street
Atlanta, Georgia 30303

Of Counsel:

ELIZABETH ROEDIGER RINDSKOPF
GALE M. SIEGEL
185 Central Avenue, S.W.
Atlanta, Georgia 30303

TOBIANE SCHWARTZ
153 Pryor Street, S.W.
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

I, Margie Pitts Hames, one of the attorneys for Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, and on behalf of all Appellants, I served the foregoing Brief of Appellants on the Appellees by depositing copies of the same in a United States mail box, with first class postage prepaid addressed to counsel of record at their post office addresses:

Harold N. Hill, Jr.
Marion O. Gordon
Dorothy T. Beasley
Attorneys for Arthur K. Bolton
132 Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

Joel Feldman
Attorney for Lewis R. Slaton
Fulton County Courthouse
Atlanta, Georgia 30303

Henry L. Bowden
Ralph H. Witt
Attorneys for Herbert T. Jenkins
2614 First National Bank Building
Atlanta, Georgia 30303

This ____ day of August, 1971.

MARGIE PITTS HAMES
Attorney for Appellant

FILED
AUG 18 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

No. 70-18, 1971 Term

JANE ROE, JOHN DOE, MARY DOE, and
JAMES HUBERT HALLFORD, M.D.,

Appellants,

—v.—

HENRY WADE, DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR APPELLANTS

ROY LUCAS
James Madison Constitutional
Law Institute
Four Patchin Place
New York, New York 10011

SARAH WEDDINGTON
JAMES R. WEDDINGTON
709 West 14th
Austin, Texas 78701

LINDA N. COFFEE
2130 First Nat'l Bank Bldg.
Dallas, Texas 75202

FRED BRUNER
ROY L. MERRILL, JR.
Daugherty, Bruner, Lastelick &
Anderson
1130 Mercantile Bank Bldg.
Dallas, Texas 75201

Attorneys for Appellants

Counsel:

NORMAN DORSEN
School of Law
New York University
Washington Square
New York, N.Y. 10003

INDEX

	PAGE
Citation to Opinion Below	2
Jurisdiction	3
Statutes Involved	4
Questions Presented	7
Statements of the Case	8
I. Facts Regarding Appellants Which Gave Rise to Actions	8
A. Jane Roe	9
B. Mary and John Doe	10
C. James H. Hallford	12
II. Decision by the District Court	13
III. Impact of the Denial of Injunctive Relief	16
Relevant Background and Medical Facts	18
I. The Medical Nature of Abortion	18
A. Spontaneous and Induced Rejection of Pregnancy	18
B. Frequency of Medically Induced Abortion in the United States and Texas	22
C. Medical Safety Aspects of Induced Abortion in Surgical Practice	23

PAGE

1. Induced Abortion in 19th Century Medicine 23

2. Induced Abortion in Contemporary Surgery 30

II. Legal and Medical Standards of Practice Regarding Induced Abortion in Texas and the United States 34

A. Induced Abortion at Common Law 34

B. Legislative History of the Texas Abortion Law 35

C. Contemporary Legislation on Induced Abortion 38

D. Contemporary Standards of Medical Practice Regarding Induced Abortion 39

1. National Medical Organizations 39

2. The Texas Medical Association 41

III. Relationship Between Contraception and the Medical Procedure of Induced Abortion 43

A. Lack of Public Access to Information and Medical Services for Family Limitation by Use of Contraceptives 44

B. Ineffectiveness of Contraceptives Due to Significant Degree of Failure in Method and Use 46

Summary of Argument 48

PAGE

ARGUMENT AND AUTHORITIES:

I. The Statutory Three-Judge District Court Was Properly Convened and Had Jurisdiction to Grant Declaratory Relief to the Three Complaining Classes of Party Plaintiffs 52

A. The Class of Adversely Affected Married Couples: Mary and John Doe 52

1. Standing of Mary and John Doe 52

2. Case or Controversy Between the Does and Defendant-Appellee 53

B. The Class of Adversely Affected Pregnant Women Denied Medical Care: Jane Roe 54

1. Standing of Jane Roe 54

2. Case or Controversy Between the Jane Roes and Defendant-Appellee 54

C. The Class of Adversely Affected Physicians Prohibited on a Regular and Recurring Basis From Providing Necessary Medical Care for Their Patients: James H. Hallford, M.D. 55

1. Standing of Dr. Hallford 55

2. Standing of the Physician-Class to Assert the Rights of Patients to Seek the Medical Care of Induced Abortion 56

3. The Recurring Case or Controversy Between the Physician-Class and Defendant-Appellee 58

PAGE

II. The Three-Judge Court Should Have Granted Injunctive Relief to the Three Complaining Classes of Plaintiffs 63

A. Injunctions Against Future Enforcement of State Criminal Statutes Are Proper Absent a Showing of Bad-Faith Enforcement for the Purpose of Discouraging Protected Rights 63

B. The Question of Relief by Injunction Against the Texas Abortion Statute Is Not foreclosed by the Decisions in *Younger* v. *Harris* and Companion Cases 70

C. No Effective State Remedy Was Available to Appellants Roe and Doe 75

D. The Existence of a Pending Prosecution Against One of the Plaintiffs Below Does Not Foreclose Equitable Relief Against Future Prosecutions 78

E. The Special Considerations Underlying the Doctrine of Comity Are Inapplicable to the Present Case 81

F. Having Decided That the Texas Abortion Statute Unconstitutionally Infringes Upon Plaintiffs' Rights, the Three Judge Court by Failing to Grant an Injunction Against Future Prosecution Effectively Failed to Protect Those Rights 84

PAGE

III. The Appeals Were Properly Taken Directly to This Court and Represent the Entire Case for Plenary Review by This Court 87

IV. The Provisions in the Texas Penal Code, Articles 1191-1194 and 1196, Which Prohibit the Medical Procedure of Induced Abortion Unless "procured or attempted by medical advice for the purpose of saving the life of the mother," Abridge Fundamental Personal Rights of Appellants Secured by the First, Fourth, Ninth, and Fourteenth Amendments, and Do Not Advance a Narrowly Drawn, Compelling State Interest 91

A. The Right to Seek and Receive Medical Care for the Protection of Health and Well-Being Is a Fundamental Personal Liberty Recognized by Decisions of This Court and by International and National Understanding 94

B. The Fundamental Rights to Marital and Personal Privacy Are Acknowledged in Decisions of This Court as Protected by the First, Fourth, Ninth, and Fourteenth Amendments 99

1. The Right to Marital Privacy 99

2. The Related Rights to Personal Privacy and Physical Integrity 103

3. The Right to Terminate Unwanted Pregnancy Is an Integral Part of Privacy Rights 105

PAGE

4. Physicians Have a Fundamental Right to Administer Health Care Without Arbitrary State Interference 110

C. Appellants' Rights to Seek Medical Care, and to Marital and Individual Privacy May Not Be Abridged Unless the State Can Establish a Compelling Interest Which Can Not Be Protected By Less Restrictive Means 113

D. The Texas Statute Does Not Advance Any State Interest of Compelling Importance in a Manner Which is Narrowly Drawn 115

1. The Statute Is Not Rationally Related to Any Legitimate Public Health Interest 115

2. The Statute Is Not Rationally Related to Any Legitimate Interest in Regulating Private Sexual Conduct 117

3. The Statute Does Not Advance Any Public Interest in Protecting Human Life 118

V. The Provisions in Articles 1191-1194 and 1196 of the Texas Penal Code, Which Prohibit Medically Induced Abortions Unless Undertaken "by medical advice for the purpose of saving the life of the mother" Are Unconstitutionally Vague and Indefinite, Facially and In Application, Because the Language Is Not Meaningful in Medical Practice, and Provides Wholly In-

POOR COPY

PAGE

adequate Warning to Physicians, Their Counsel, Judges, and Jurors, of Which Physical, Mental, and Personal Factors May be Taken Into Consideration When Assessing Necessity .. 125

VI. Texas Penal Code Articles 1191-1194 and 1196, as Applied to Impose Upon a Physician the Burden of Pleading and Proving That a Medical Abortion Procedure Was "procured or attempted by medical advice for the purpose of saving the life of the mother," Reverses the Due Process Guarantees of Presumed Innocence and Invades the Privilege Against Self-Incrimination 140

CONCLUSION 145

APPENDICES:

Appendix A. Statement By John B. Tolle, Assistant District Attorney, Dallas County, Texas A-1

Appendix B. Affidavit of Paul C. MacDonald, M.D., Chairman, Department of Obstetrics and Gynecology, The University of Texas Southwestern Medical School, Dallas, Texas B-1

Appendix C. Affidavit of Joseph Seitchik, M.D., Professor and Chairman, Department of Obstetrics and Gynecology, The University of Texas Medical School at San Antonio C-1

PAGE

Appendix D. Affidavit of William J. McGanity, M.D., Professor and Chairman, Department of Obstetrics and Gynecology, The University of Texas Medical Branch, San Antonio, Texas D-1

Appendix E. Indictments Alleging the Offense of Abortion Handed Down June 8, 1971 E-1

Table of Authorities

Constitutional Provisions:

United States Constitution—

Amendment I ..... *passim*
Amendment IV ..... *passim*
Amendment V 93
Amendment VIII 93
Amendment IX ..... *passim*
Amendment XIV ..... *passim*

Texas Constitution—

Article 5 ..... 75, 77, 83

Statutes:

Texas Statutes—

12 Texas Civ. Stat. art. 4505, at 541 (1966) .. 12
12 Texas Civ. Stat. art. 4506, at 132 (Supp. 1969-70) 12
12 Texas Civ. Stat. art. 4437f, §9, at 216 (1966) 12
Texas Code Crim. Appls., art. 44.01 82
Texas Code Crim. Proc., art. 44.02 75

PAGE

TEXAS LAWS OF 1854, ch. 49, §1, at 58, in 3 GAMMEL, LAWS OF TEXAS 1502 (1898) 30, 35

TEXAS PENAL CODE ch. VII, arts. 531-536 (1857) 36

2A TEXAS PENAL CODE art. 1191, at 429 (1961) *passim*

2A TEXAS PENAL CODE art. 1192, at 433 (1961) *passim*

2A TEXAS PENAL CODE art. 1193, at 434 (1961) *passim*

2A TEXAS PENAL CODE art. 1194, at 435 (1961) *passim*

2A TEXAS PENAL CODE art. 1196, at 436 (1961) *passim*

TEXAS REV. CIV. STAT., art. 2524-1 76

Other Statutes and Rules:

Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572 (Dec. 24, 1970) 44

N.J. LAWS, 266 (1849) 35

Public Law, U.S. Congress 89-749 98

6 Revisers' Notes, pt. IV, ch. 1, tit. 6 §28, at 75 (1828) 37-38

SUP. CT. RULES 11, 34 (July 1, 1970 ed.), 398 U.S. 1015, 1021, 1045 (1970) 3-4

28 U.S.C. §1253 (1964 ed.) 4, 6

28 U.S.C. §1343(3) (1964 ed.) 3, 5

28 U.S.C. §2101(b) (1964 ed.) 3

28 U.S.C. §2201 (1964 ed.) 3, 6

28 U.S.C. §§2281, 2284 (1964 ed.) 3

28 U.S.C. §2283 (1964 ed.) 71

42 U.S.C. §1983 (1964 ed.) 3, 5

PAGE

Cases:

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) .. 59, 86
Application of Georgetown College, Inc., 331 F.2d 1010 (D.C. Cir.) (en banc), *cert. denied,* 377 U.S. 978 (1964) 105
Arnold Tours v. Camp, 400 U.S. 45 (1970) (per curiam) 53
Ashton v. Kentucky, 384 U.S. 195 (1966) 126

Baggett v. Bullitt, 377 U.S. 360 (1964) 54, 59, 126
Baird v. Eisenstadt, 429 F.2d 1398 (1st Cir. 1970), *prob. juris. noted,* 401 U.S. 934 (U.S. No. 70-17, 1971 Term) 106, 117
Baker v. Carr, 369 U.S. 186 (1962) 56
Barnes v. State, 170 S.W. 548 (Tex. Crim. App. 1914) 77
Barrows v. Jackson, 346 U.S. 249 (1953) 57
Beal v. Missouri Pac. R.R. Corporation, 312 U.S. 45 (1941) 66, 67
Bean v. Town of Vidor, 440 S.W.2d 676 (Tex. Civ. App. 1969) 76
Bell v. Waterfront Commission of New York, 279 F.2d 853 (2d Cir. 1960) 87
Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966) 56
Boddie v. Connecticut, 401 U.S. 371 (1971) 100, 113
Bokulich v. Jury Commission of Green County, Alabama, 394 U.S. 97 (1969) 86
Boyle v. Landry, 401 U.S. 77 (1971) .....*passim*
Brillhart v. Excess Ins. Co. of America, 316 U.S. 491 (1942) 72
Brockington v. Rhodes, 396 U.S. 41 (1969) (per curiam) 60
Byrne v. Karalexis, 401 U.S. 216 (1971) 70

PAGE

California v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969) *cert. denied*, 397 U.S. 915 (1970) ..... *passim*
Cameron v. Johnson, 390 U.S. 611 (1968) 81
Carter v. Jury Commission of Greene County, 396 U.S. 320 (1970) 87
Cave v. State, 33 Cr. R. 335, 26 S.W. 503 (1894) 119
Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210 (1932) 126
Chrisman v. Sisters of St. Joseph of Newark, Civ. No. 70-430 (D. Ore., July 22, 1971) 96-97
City of Austin v. Austin City Cemetery Assn., 28 S.W. 528 (Tex. 1894) 76
City of Dayton v. Borchers, 13 Ohio Misc. 273, 232 N.E.2d 437, 441, 42 O.O.2d 193 (Ohio Com. Pl. 1967) .. 138
City of Richardson v. Kaplan, 438 S.W.2d 366 (Tex. 1969) 76
Cleary v. Bolger, 371 U.S. 392 (1963) 80
Coleman v. Johnson, 247 F.2d 273 (7th Cir. 1957) 96
Connally v. General Construction Co., 269 U.S. 385 (1926) 126
Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C.), *appeal docketed*, 40 U.S.L.W. 3048 (U.S. July 17, 1971) (No. 71-92, 1971 Term) 59, 90
Crossen v. Breckenridge, —— F.2d ——, No. 20852 (6th Cir. June 23, 1971) 57
Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866) .. 143

Dandridge v. Williams, 397 U.S. 471 (1970) 89
Dent v. West Virginia, 129 U.S. 114 (1889) ..... *passim*
Deutch v. United States, 367 U.S. 456 (1961) 143

PAGE

Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970) (per Curiam), *ques. of juris. postponed to merits*, 91 S. Ct. 1614 (1971) (No. 971, 1970 Term; renumbered No. 70-40, 1971 Term) 90, 109
Doe v. Dunbar, 320 F. Supp. 1297 (D. Colo. 1970) 59
Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill.) *appeal docketed sub nom.* Hanrahan v. Doe, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (No. 70-105, 1971 Term) *passim*
Dombrowski v. Pfister, 380 U.S. 479 (1965) ..... *passim*
Douglas v. City of Jeanette, 319 U.S. 157 (1943) 68
Douglas v. Noble, 261 U.S. 165 (1923) 112
Dyson v. Stein, 401 U.S. 200 (1971) 70

EDF v. Hoerner Waldorf, 1 E.R. 1960 (D. Mont. 1970) 97
Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966) 96
Epperson v. Arkansas, 393 U.S. 97 (1968) 53, 59
Ex parte Young, 290 U.S. 123 (1908) ..... *passim*

Fenner v. Boykin, 271 U.S. 240 (1926) 66, 67
Flast v. Cohen, 392 U.S. 83 (1968) 49, 53, 56
Florida Lime and Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960) 88

Gaddis v. Wyman, 304 F. Supp. 713 (S.D.N.Y. 1969), *aff'd mem. sub nom.* Goldberg v. Kelly, 397 U.S. 49 (1970) 54-55
Giaccio v. Pennsylvania, 382 U.S. 399 (1966) 126
Graves v. Minnesota, 272 U.S. 425 (1926) 97, 112
Gray v. State, 77 Tex. Cr. R. 221, 178 S.W. 411 (1915) 34, 73
Greene v. McElroy, 360 U.S. 474 (1959) 56
Griswold v. Connecticut, 381 U.S. 479 (1965) ..... *passim*

PAGE

Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939) 68
Hale v. Bimco Trading, Inc., 306 U.S. 375 (1939) 71
Hall v. Beals, 396 U.S. 45 (1969) 60
Haynes v. United States, 390 U.S. 85 (1968) 143
Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424 (1963) 112
Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925) 66

Investment Co. Institute v. Camp, 401 U.S. 617 (1971) 49, 53
Irving v. Dowd, 366 U.S. 717 (1961) 144

Jackson v. State, 55 Tex. Crim. 79, 115 S.W. 262 (1908) 127
Jacobson v. Massachusetts, 197 U.S. 11 (1904) ....*passim*

Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 662, 87 Cal. Rptr. 481 (1970) 119
Keyishian v. Regents, 385 U.S. 589 (1967) 126
King v. Smith, 392 U.S. 309 (1968) 117

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 126
Leary v. United States, 395 U.S. 6 (1969) 142
Loving v. Commonwealth, 388 U.S. 1 (1967) 92, 100, 104
LSCRRC v. Wadmond, 401 U.S. 154 (1971) 54, 59

Marchetti v. United States, 390 U.S. 39 (1968) 142
Maynard v. Hill, 125 U.S. 190 (1888) 99
McCann v. Babbitz, 310 F. Supp. 293 (E.D. Wis. Mar. 5, 1970) (per curiam) *appeal dismissed,* 400 U.S. 1 (1970) (per curiam) .....*passim*

PAGE

McCollum v. Mayfield, 130 F. Supp. 112 (N.D. Cal. 1955) 96
Mercer v. Theriot, 377 U.S. 152 (1964) 89
Meyer v. Nebraska, 262 U.S. 390 (1923) 14, 92-93, 101
Moore v. Ogilvie, 394 U.S. 814 (1969) 54
Moore v. State, 37 Tex. Cr. R. 552, 40 S.W. 287 (1897) 73, 119
Morissette v. United States, 342 U.S. 246 (1952) 143
Morrison v. California, 291 U.S. 82 (1934) 143

N.A.A.C.P. v. Button, 371 U.S. 415 (1963) .....,113, 127

Olmstead v. United States, 277 U.S. 438 (1928) 104-105

Passel v. Fort Worth Independent School District, 440 S.W.2d 61 (1969) 76-77
People v. Barksdale, Docket No. 1 Crim. 9526 (Calif. Ct. of Appeals, First App. Dist., Division 1, July 22, 1971) 90
Perez v. Ledesma, 401 U.S. 82 (1971) 70, 79, 85
Perlman v. U. S., 247 U.S. 7 (1918) 72
Pierce v. Society of Sisters, 268 U.S. 510 (1925) ....*passim*
Poe v. Ullman, 367 U.S. 497 (1961) .....*passim*
Pope v. Ferguson, 445 S.W.2d 950 (Tex. 1969) 77
Prince v. Massachusetts, 321 U.S. 158 (1944) 14, 97

Reece v. Georgia, 350 U.S. 85 (1955) 89
Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970) (per curiam), *juris. postponed*, 402 U.S. —— (May 3, 1971) (No. 70-18, 1971 Term) .....*passim*

PAGE

Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970), *appeal docketed*, 39 U.S.L.W. 3247 (U.S. Nov. 27, 1970) (No. 1010, 1970 Term; renumbered No. 70-42, 1971 Term) 90, 122, 138

Samuels v. Mackell, 401 U.S. 66 (1971) 70, 78, 79
Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) 110
Shapiro v. Thompson, 394 U.S. 618 (1968) 113
Shaw v. State, 73 Cr. R. 337, 165 S.W. 930 (1914) 119
Sherbert v. Verner, 374 U.S. 398 (1963) 113
Skinner v. Oklahoma, 316 U.S. 535 (1942) ..... *passim*
Slochower v. Board of Higher Education, 350 U.S. 551 (1956) 55
Smith v. Texas, 233 U.S. 630 (1914) 110
Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 54
Speiser v. Randall, 357 U.S. 513 (1958) 143
Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935) 66, 67, 87
Stanley v. Georgia, 394 U.S. 557 (1969) 14, 104
State v. Baird, 50 N.J.L. 376, 235 A.2d 673 (1967) 117
State v. Murphy, 27 N.J.L. (3 Dutcher) 112 (Sup. Ct. 1858) 36
State v. Parr, 293 S.W.2d 62 (Tex. Crim. App. 1956) 76
State ex rel. Flowers v. Woodruff, 200 S.W.2d 178 (Tex. Crim. App. 1947) 77
Stefanelli v. Minard, 342 U.S. 117 (1951) 69, 80, 81
Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970) ..... *passim*

PAGE

Terrace v. Thompson, 263 U.S. 197 (1923) 62, 66
Terry v. Ohio, 392 U.S. 1 (1968) 104
Tileston v. Ullman, 318 U.S. 44 (1943) (per curiam) 56
Tolbert v. Eyman, 434 F.2d 625 (9th Cir. 1970) 96
Tot v. United States, 319 U.S. 463 (1943) 143
Truax v. Raich, 239 U.S. 33 (1915) ..... *passim*

Union Pac. Ry. v. Botsford, 141 U.S. 250 (1891) 104
United States v. Evans, 333 U.S. 483 (1948) 126
United States v. Freund, 290 Fed. 411 (D. Mont. 1923) 111
United States v. W. T. Grant, 345 U.S. 629 (1953) 55
United States v. Guest, 383 U.S. 745 (1966) 92
United States v. Reese, 92 U.S. 214, 221 (1875) 126
United States v. Romano, 382 U.S. 136 (1965) 143
United States v. Vuitch, 305 F. Supp. 1035 (D.D.C. Nov. 10, 1969), *modified and reversed*, 402 U.S. 62 (1971) ..... *passim*
United States *ex rel.* Dr. Jesse Williams, II v. Zelker, —— F.2d ——, No. 35381 (2d Cir. July 2, 1971) 57
Urie v. Thompson, 337 U.S. 163 (1939) 89

Veevers v. State, 354 S.W.2d 161 (Tex. Ct. Crim. App. 1962) ..... *passim*

Watson v. Buck, 313 U.S. 387 (1941) 66, 67, 68
West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) 97
West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) 62
Westphal v. Westphal, 122 Cal. App. 379, 10 P.2d 119 .. 135
Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955) 112
Willingham v. State, 33 Cr. R. 98, 25 S.W. 424 (1894) 119

POOR COPY

PAGE

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 70
Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) 55
Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971) 96

Younger v. Harris, 401 U.S. 37 (1971) .....*passim*

Zwickler v. Koota, 389 U.S. 241 (1967) 14

Medical Literature and Commentary:

Appendectomy Profile, 1968, 7 PAS REPORTER No. 16, at 1-4 (Dec. 22, 1969) 31
AREY, L., DEVELOPMENTAL ANATOMY (7th ed. 1965) 21, 34
Baird, *The Obstetrician and Society*, 60 AM. J. PUBLIC HEALTH 628 (1970) 131
Berelson, *et al., Family Planning and Population Programs*, University of Chicago Press (1966) 47
Bumpass & Westoff, *The "Perfect Contraceptive" Population*, 169 SCIENCE 1177 (1970) .....*passim*
CALDERONE, M. (ed.), ABORTION IN THE UNITED STATES (1958) 22, 129
Carr, *Chromosome Studies in Selected Spontaneous Abortions*, 37 OBSTETRICS & GYNECOLOGY 750 (1971) 20
Cholecystectomy Mortality, 8 PAS REPORTER No. 8, at 1 (Apr. 20, 1970) 31
CLAPESATTLE, H., THE DOCTORS MAYO (1941) 29
Curran, *The Right to Health in National and International Law*, 284 NEW ENG. J. OF MEDICINE 1258 (1971) 97
Dryfoos, *et al., Eighteen Months Later: Family Planning Services in the United States, 1969*, 3 FAMILY PLANNING PERSPECTIVES No. 2, at 29 (Apr. 1971) 45

PAGE

Fleck, *Some Psychiatric Aspects of Abortion*, 151 J. Nerv. & Ment. Dis. 42 (1970) 34

Gebhard, P., *et al.*, Pregnancy, Birth and Abortion (1958) 22

Group for the Advancement of Psychiatry, The Right to Abortion: A Psychiatric View 40 (Comm. on Law & Psychiatry, 1970) 130

Guttmacher, *Therapeutic Abortion: The Doctor's Dilemma*, 21 J. Mt. Sinai Hosp. 111 (1954) 129

Haagensen, C. & Lloyd, W., A Hundred Years of Medicine (1943) 26

Hall, *Abortion in American Hospitals*, 57 Am. J. Pub. Health 1933 (1967) 115, 128

Hall, *Therapeutic Abortion, Sterilization, and Contraception*, 91 Am. J. Obstetrics & Gynecology 518 (1965) 141

Hardin, *Abortion or Compulsory Pregnancy?* 30 J. Mar. & Fam. No. 2 (May, 1968) 122

Hellman, L., & Pritchard, J., Williams Obstetrics (14th ed. 1971) 18, 20

Holmes, *The Contagiousness of Puerperal Fever*, 1 New Eng. Quarterly J. of Medicine 503 (1842-43) 24

Lee, F. S., Scientific Features of Modern Medicine (1911) 26

Lister, *On An New Method of Treating Compound Fractures, Abscess, etc.*, 1 The Lancet (Mar. 16, 1867) 25

Margolis, *et al.*, *Therapeutic Abortion Follow-up Study*, 110 Am. J. Ob. Gyn. 243 (1971) 34

POOR COPY

PAGE

McKelvey, *Ninety Years of Obstetrics and Gynecology,* THE LANCET 242 (May 1960) 24, 25

McKelvey, *The Abortion Problem,* 50 MINN. MED. 119 (1967) 30

Notman, *et al., "Psychological Outcome in Patients Having Therapeutic Abortions,"* paper at Third International Congress of Psychosomatic Problems in Obstetrics and Gynecology, London (1970) 34

NOVAK, E., *et al.,* TEXTBOOK OF GYNECOLOGY (8th ed. 1970) 46

PARK, R., AN EPITOME OF THE HISTORY OF MEDICINE 326 (1898) 28

PAS Hospitals, 8 PAS REPORTER No. 1, at 1 (Jan. 12, 1970) 31

PATTEN, B., HUMAN EMBRYOLOGY (3d ed. 1968) 21

PEEL, J., & POTTS, M., CONTRACEPTIVE PRACTICE (1969) .. 46

Pike, *Therapeutic Abortion and Mental Health,* 111 CALIF. MED. 318 (Oct. 1969) 130-131

Potts, *Postconceptive Control of Fertility,* 8 INTERNATIONAL J. OF GYNECOLOGY & OBSTETRICS 957 (1970) 19, 20, 21

Potts, *The Problem of Abortion,* BIOLOGY & ETHICS 3 (1969) 19, 20, 21

Regine, *A Study of Pregnancy Wastage,* 13 MILBANK MEM. FUND QUART. No. 4, at 347-65 (1935) 22

RICCI, J., DEVELOPMENT OF GYNECOLOGICAL SURGERY AND INSTRUMENTS 279 (1949) 27-28

ROBB, H., ASCEPTIC SURGICAL TECHNIQUE WITH ESPECIAL REFERENCE TO GYNECOLOGICAL OPERATIONS (1875) 26

SCHWARZ, B., SEPTIC ABORTION 11 (1968) 130

PAGE

SEMMELWEIS, I. P., ETIOLOGY, CONCEPT AND PROPHYLAXIS OF CHILDBED FEVER (1861), transl. in 5 MEDICAL CLASSICS 339 (1941) 25

Shettles, *Fertilization and Early Development From the Inner Cell Mass,* SCIENTIFIC FOUNDATIONS OF OBSTETRICS AND GYNECOLOGY 154 (E. E. Phillipp, *et al.,* eds. 1970) 20-21

Simon, *Psychological and Emotional Indications for Therapeutic Abortion,* 2 SEM'RS. IN PSYCH. 283 (1970) 34

T & A Profile, 8 PAS REPORTER No. 5 (Mar. 9, 1970) ..31, 116

Talbott, *Ignaz Phillip Semmelweis (1818-1865),* in A BIOGRAPHICAL HISTORY OF MEDICINE 660 (1970) 25

Talbott, *Lord Lister (1827-1912),* in A BIOGRAPHICAL HISTORY OF MEDICINE 755 (1970) 25-26

TAUSSIG, F., ABORTION: SPONTANEOUS AND INDUCED (1936) 22

Thompson, *et al., Therapeutic Abortion: A Two-Year Experience in One Hospital,* 213 J. AM. MED. ASS'N 991 (1970) 131

Tietze, *Abortion Laws and Abortion Practices in Europe,* in V ADVANCES IN PLANNED PARENTHOOD 194 (1969) (Proceedings of the Seventh Annual Meeting of the American Ass'n of Planned Parenthood Physicians) 33

Tietze, *Maternal Mortality Associated With Legal Abortion,* Proceedings of the Fifth International Conference on Planned Parenthood 24 (Oct. 1955) 128

Tietze, *et al., Teaching of Fertility Regulation in Medical Schools,* 196 J. AMERICAN MEDICAL ASS'N 20 (1966) 45

PAGE

Tietze, *United States: Therapeutic Abortions, 1963-1968*, 59 STUDIES IN FAMILY PLANNING 5 (1970) 22, 31
White, *Induced Abortions: A Survey of Their Psychiatric Implications, Complications, and Indications*, 24 TEX. REPS. OF BIOLOGY & MEDICINE 531 (1966) 129-130
Whittington, *Evaluation of Therapeutic Abortion as an Element of Preventive Psychiatry*, 126 AM. J. PSYCH. 1224 (1970) 34

Legal Commentary:

BICKEL, A., THE LEAST DANGEROUS BRANCH (1962) 61, 63
Brodie, *Marital Procreation*, 49 ORE. L. REV. 245, 256 (1970) 103
Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOYOLA UNIV. (L.A.) L. REV. 1 (1969) .....*passim*
Comment, 50 CALIF. L. REV. 137 (1962) 61
Declaratory Relief in the Criminal Law, 80 HARV. L. REV. 1490, note (1967) 61
Fisher, *Criminal Abortion*, in ABORTION IN AMERICA 3-6 (H. Rosen ed. 1967) 22
George, *Current Abortion Laws: Proposals and Movements for Reform*, 17 W. RES. L. REV. 371 (1965) 141
Gordon, *The Unborn Plaintiff*, 63 MICH L. REV. 579 (1965) 120
Lamm & Davison, *Abortion Reform*, 1 YALE REV. L. & SOC'L ACTION, No. 4, at 55 (Spring 1971) 106, 120
Moyers, *Abortion Laws: A Study in Social Change*, 7 SAN DIEGO L. REV. 237 (1970) 131
Packer & Gampell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417 (1959) ..128, 134-135
PROSSER, TORTS §§105, 715 (2nd ed. 1955) 120

PAGE

Roemer, *Abortion Law Reform and Repeal: Legislative and Judicial Developments*, 61 AM. J. PUBLIC HEALTH 500 (1971) 22

Ryan, *Humane Abortion Laws and the Health Needs of Society*, 17 W. RES. L. REV. 424 (1965) 21-22, 118, 130

Sedler, *Standing to Assert Constitutional Jus Tertii*, 71 YALE L.J. 599 (1962) 57

WILLIAMS, G., THE SANCTITY OF LIFE AND THE CRIMINAL LAW (1966) 58

WRIGHT, C., HANDBOOK OF THE LAW OF FEDERAL COURTS 431 (1963) 89

Other Authorities:

Chase, *Twelve Month Report on Abortions in New York City* (June 29, 1971) (Report by Health Services Administration, City of New York) ..... *passim*

Constitution of the World Health Organization, in BASIC DOCUMENTS OF THE WORLD HEALTH ORGANIZATION 1 (Geneva 1969 ed.) 97, 132

Model Penal Code §230.3(2) (Proposed Official Draft, 1962) 22

Need For Subsidized Family Planning Services: United States, Each State and County, 1968 Table I, at 92 (Office of Economic Opportunity, 1968) 45

Pius IX, *Apostolicae Sedis* 38

Report of Executive Board, TRANSACTIONS OF THE HOUSE OF DELEGATES, TEXAS MEDICAL ASSOCIATION 43 (1967) 41

Report of the Executive Board, TRANSACTION OF THE HOUSE OF DELEGATES, TEXAS MEDICAL ASSOCIATION (1970) 43

PAGE

Report of the Special Committee on Abortion Laws in Texas, TRANSACTIONS OF THE HOUSE OF DELEGATES, TEXAS MEDICAL ASSOCIATION 79 (1968) 41

Report of the Special Committee on Abortion Laws in Texas, TRANSACTIONS OF THE HOUSE OF DELEGATES, TEXAS MEDICAL ASSOCIATION 96 (1969) 42

UNIFORM ABORTION ACT (2d Tent. Draft 1970) 39

U.S. Bureau of the Census: *Statistical Abstracts of the United States: 1970*, Table 57, at 49 (91st ed.) 11, 141

U.S. Bureau of the Census: *Statistical Abstracts of the United States: 1970*, Table 58, at 50 (91st ed.) 9

U.S. Bureau of the Census: *Statistical Abstracts of the United States: 1970*, Table 69, at 55 (91st ed.) 31

IN THE

Supreme Court of the United States

No. 70-18, 1971 Term

JANE ROE, JOHN DOE, MARY DOE, and
JAMES HUBERT HALLFORD, M.D.,

Appellants,

—v.—

HENRY WADE, DISTRICT ATTORNEY
OF DALLAS COUNTY, TEXAS,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR APPELLANTS

Appellants bring this direct appeal from a June 17, 1970 judgment (A. 124-126)[1] of the United States District Court for the Northern District of Texas, Goldberg, Cir. J., and Hughes & Taylor, D.JJ. The judgment related to two separate actions and an action commenced by an intervening plaintiff.[2] As to the action by Appellants John and Mary Doe, the Court found the Does lacked standing and so dismissed their complaint (A. 124, 126), denying declaratory

[1] Citations are to the Single Appendix.

[2] James Hubert Hallford, M.D., filed his Application for Leave to Intervene in the *Roe* case March 19, 1970 (A. 22).

and injunctive relief against enforcement of the Texas abortion law, which prohibits the medical procedure of induced abortion unless undertaken "by medical advice for the purpose of saving the life of the mother." 2A TEXAS PENAL CODE art. 1196, at 436 (1961) (A. 126). As to the action by Jane Roe and the complaint of Intervenor Dr. Hallford, the court granted the declaratory relief prayed for, declaring the Texas abortion law unconstitutional, but denied injunctive relief against future enforcement of the statute (A. 124-126). Plaintiffs John and Mary Doe appeal from the dismissal of their complaint and the denial of injunctive relief (A. 127). Plaintiff Jane Roe and Intervenor-Plaintiff Dr. Hallford also appeal from the denial of injunctive relief (A. 127).

Appellants submit this brief to show that this is a direct appeal over which the Court has jurisdiction, and that the lower court should have granted declaratory and injunctive relief to the plaintiffs in each of the three actions below.

Citation to Opinion Below

The June 17, 1970 opinion of the statutory three-judge United States District Court for the Northern District of Texas is reported as *Roe* v. *Wade,* 314 F. Supp. 1217 (N.D. Tex. 1970) (per curiam), and set out at A. 111-123.

Jurisdiction

(i) On March 3, 1970, Appellant Jane Roe filed her original complaint, basing jurisdiction on 28 U.S.C. §1343(3) (1964 ed.), and complementary remedial statutes, 28 U.S.C. §2201 (1964); 42 U.S.C. §1983 (1964). On the same day Appellants John and Mary Doe filed a complaint predicating federal jurisdiction on the same statutes. On March 23, 1970, the District Court granted leave for Appellant James H. Hallford, M.D., to intervene as a party-plaintiff, on the same jurisdictional grounds set out above (A. 22-36). Subsequently, on April 22, 1970, Appellant Jane Roe amended her complaint to sue "on behalf of herself and all others similarly situated" (A. 10). Appellants John and Mary Doe also amended their complaints to assert a class action (A. 15). All appellants, from their respective positions as married couples, pregnant single women, and practicing physicians asked that the Texas abortion law[3] which restricts the medical procedure of induced abortion be declared unconstitutional, and that future enforcement be enjoined. A statutory three-judge United States District Court was requested and convened (A. 6, 8) pursuant to 28 U.S.C. §§2281, 2284 (1964).

(ii) The final judgment of the statutory three-judge District Court was entered on June 17, 1970 (A. 124). On Monday, August 17, 1970, all appellants filed with the United States District Court for the Northern District of Texas notices of appeal to this Court (A. 127), pursuant to 28 U.S.C. §2101(b) (1964), and SUP. CT. RULES 11,

---

[3] The law, 2A TEXAS PENAL CODE arts. 1191-1194, 1196, at 429-36 (1961), are set out verbatim, *infra*, at 4-5.

34 (July 1, 1970 ed.), 398 U.S. 1015, 1021, 1045 (1970). Protective appeals to the United States Court of Appeals for the Fifth Circuit were noticed on July 23, 1970, by Appellant Hallford (A. 134), and on July 24, 1970, by Appellant Jane Roe (A. 133).

(iii) Jurisdiction of this Court to review by direct appeal the three-judge District Court's final judgment denying a permanent injunction is conferred by 28 U.S.C. §1253 (1964). The question of jurisdiction was postponed to the hearing on the merits by this Court's order of May 3, 1971, 402 U.S. ——.

Statutes Involved

2A Texas Penal Code art. 1196, at 436 (1961):

> "Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

2A Texas Penal Code art. 1191, at 429 (1961):

> "If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused."

2A TEXAS PENAL CODE art. 1192, at 433 (1961):

"Whoever furnishes the means for procuring an abortion knowing the purpose intended is an accomplice."

2A TEXAS PENAL CODE art. 1193, at 434 (1961):

"If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars."

2A TEXAS PENAL CODE art. 1194, at 435 (1961):

"If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder."

UNITED STATES CODE, Title 28, §1343(3) (1964):

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: • • •

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States . . . ."

UNITED STATES CODE, Title 42, §1983 (1964):

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any

citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

UNITED STATES CODE, Title 28, §2201 (1964):

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

UNITED STATES CODE, Title 28, §1253 (1964):

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Questions Presented

I. Whether the Statutory Three-Judge Court Improperly Denied Standing, and Declaratory and Injunctive Relief, to the Class of Married Couple Plaintiffs, Who Were Damaged in Their Marital Relations by the Impact of the Statutes in Question, Unable to Utilize Effective Means of Contraception, at Risk of Serious Injury to Health in the Event of Pregnancy, and Without a Remedy at Law or Equity in the Event of Unplanned Pregnancy?

II. Whether the District Court Should Have Enjoined Future Enforcement of the Texas Abortion Laws on Behalf of the Classes of Pregnant Women Plaintiffs and Physician Plaintiffs, After Having Granted Declaratory Relief, Where an Injunction Was Necessary to Prevent Continuing Grave and Irreparable Injury and to Effectuate the Judgment by Clarifying the Status of the Statute Pending Appeal?

III. Whether These Three Appeals from the District Court Necessitate Plenary Review of Both Jurisdictional and Substantive Features of the Decision Below?

IV. Whether the Provisions in the Texas Penal Code, Articles 1191-1194 and 1196, Which Prohibit the Medical Procedure of Induced Abortion Unless "procured or attempted by medical advice for the purpose of saving the life of the mother," Abridge Fundamental Personal Rights of Appellants Secured by the First, Ninth, and Fourteenth Amendments?

V. Whether the Texas Abortion Law Is Unconstitutionally Vague and Indefinite, in That the Statutory Language Is Not Meaningfully Correlated With Medical Practice, and Provides Wholly Inadequate Warning to Physicians, Their Counsel, Judges, and Jurors, of the Physical, Mental, and Personal Factors Which May Be Considered When Assessing the Applicability of the Statutory Exception?

VI. Whether the Texas Abortion Law, as Applied to Impose Upon a Physician the Burden of Pleading and Proving That a Medical Abortion Procedure Was "procured or attempted by medical advice for the purpose of saving the life of the mother," Violates the Due Process Guarantee of Presumed Innocence and Invades the Privilege Against Self-Incrimination?

Statement of the Case

This appeal was taken by the parties in three independent civil actions heard and decided by a statutory three-judge United States District Court for the Northern District of Texas. *Roe* v. *Wade,* Civ. No. CA-3-3690-B (N.D. Tex., filed Mar. 3, 1970); *Doe* v. *Wade,* Civ. No. CA-3-3691-C (N.D. Tex., filed Mar. 3, 1970); *Hallford, Intervenor* v. *Wade,* Civ. No. CA-3-3690-B (N.D. Tex., filed Mar. 23, 1970).

I. *Facts Regarding Appellants Which Gave Rise to the Actions*

The facts which gave rise to these three actions will be considered in the context of each class of Appellant-Plaintiffs.

A. Jane Roe

Appellant Jane Roe sued as an unmarried pregnant adult woman on behalf of herself "and all other women who have sought, are seeking, or in the future will seek to obtain a legal, medically safe abortion but whose lives are not critically threatened by the pregnancy" (A. 12). At the time the action was filed, Jane Roe had been "unable to secure a legal abortion in Dallas County because of the existence of the Texas Abortion Laws" (A. 11). She had sought this medical procedure "because of the economic hardship which pregnancy entailed and because of the social stigma attached to the bearing of illegitimate children in our society" (A. 57).[4] Miss Roe admitted that insofar as her own interpretation of Texas law was concerned, her "life [did] not appear to be threatened by the continuation of her pregnancy" (A. 11), other than in a qualitative sense, and in the "extreme difficulty in securing employment of any kind" (A. 57) because of her pregnant condition.

Jane Roe suffered emotional trauma when unable to obtain a legal abortion in Texas (A. 11). She regarded herself as a law-abiding citizen and did not want to participate in a felony offense by obtaining an illegal abortion (A. 57). Also, she had only a tenth grade education and no well-paying job which might provide sufficient funds to travel to another jurisdiction for a legal abortion in a safe, clinical setting (A. 58).

---

[4] Over 339,200 out-of-wedlock children were born during 1968 in the United States. U.S. BUREAU OF THE CENSUS, *Statistical Abstract of the United States: 1970*, Table 58, at 50 (91st ed.). 80.5% (273,600) of these children were born to women between the ages of 11 and 24 years.

In her complaint filed in federal court, Jane Roe alleged that the Texas abortion law deprived her of various fundamental personal rights protected by decisions of this Court and Amendments to the Constitution, including the "right to safe and adequate medical advice pertaining to the decision of whether to carry a given pregnancy to term." [5]

B. Mary and John Doe

Appellants in the second action are a childless married couple, suing on behalf of all married couples at risk of unwanted pregnancy, and fearful of adverse health consequences. Mary Doe presents the frequent case of a married woman whose health, but not life, would be seriously affected by unwanted pregnancy (A. 17). She has been so advised by her physician (A. 16), and this fact is not contradicted nor challenged in the record. Although her physician has told her to avoid pregnancy for these health reasons, he has also advised her, in light of a neural-chemical disorder, not to use the highly effective oral contraceptives (A. 16). Alternate methods of contraception present significant risks of failure, as detailed on pp. 43-44, *infra,* of this brief.

Mary and John Doe face a realistic risk of unwanted pregnancy which presently injures the harmony of their marital relationship. It was uncontradicted that they "face the choice of refraining from normal sexual relations or of endangering Mary Doe's health through a possible

[5] Other rights asserted by Jane Roe were: "the fundamental right of all women to choose whether and when to bear children"; "[the] right to privacy in the physician-patient relationship"; and the "right to personal privacy" (A. 13). The origin and extent of these rights are discussed *infra.*

pregnancy" (A. 18). When the class action feature of the Doe claim is taken into account, it is clear not only that a large number of married couples faced a similar dilemma, but also that many of the class would become pregnant during the litigation and be unable to obtain legal abortions in Texas because of the delays involved in securing adequate judicial relief.

According to the 1965 National Fertility Study (NFS), among *married* couples in the United States, nearly 20 percent of all recent births were unwanted. Bumpass & Westoff, *The "Perfect Contraceptive" Population,* 169 SCIENCE 1177, 1180 (1970); Supp. App. 340, 342.[6] Of the 220,000 births in Texas in 1969,[7] 20% would equal 44,000 births resulting from an unwanted pregnancy. Not one of these 44,000 women, however, would have been adequately protected by a judicial proceeding brought *after* pregnancy had begun. A full fifteen weeks passed between the March 3, 1970, filing date of Mary Doe's complaint, and the June 17, 1970, date of the decision on the merits. The medical procedure of induced abortion after the twelfth week of pregnancy poses continually increasing hazards to the patient, as contrasted with the exceptionally safe procedures available in early pregnancy (A. 52; *see also* pp. 30-34, *infra*). For these sensible reasons, Mary and John Doe sought judicial relief to prevent the present injury caused by a realistic fear of unwanted pregnancy shared by the class. The Does raised constitutional claims similar to those of Jane Roe (A. 19-21).

---

[6] "Supp. App." hereinafter refers to the ***Supplementary Appendix to Brief of Appellants,*** the offset bound volume filed with this brief.

[7] U.S. BUREAU OF THE CENSUS, ***Statistical Abstract of the United States: 1970,*** Table 57, at 49 (91st ed.).

C. James H. Hallford, M.D.

The third separate action was commenced by a complaint filed on behalf of Dr. Hallford as an intervening plaintiff (A. 24-35).[8] Dr. Hallford is a licensed physician in Dallas who complained of the regular and recurring effect of the statute. He pointed out that the statute's terminology gave no guidance as to how it should be applied in the common types of situations wherein a patient requested the medical procedure of induced abortion (A. 27-29, 33, 63-70). The verified complaint and affidavit of Dr. Hallford explain carefully how he and his patients were injured by the statute and the precise manner in which the statute affected his and their conduct in recurring types of instances (*Id.*). For example, his patients had included those seeking medical abortions because of rape, incest, cancer, uncertain or slight danger of suicide, and recent infection with German measles (rubella) (A. 64-65).

No administrative mechanism exists for interpreting the law; the language of the statute does not correlate with the regular and recurring medical indications of patients; and other physicians and hospital committees are extremely reluctant to implicate themselves in a definitive opinion, according to the experience of Dr. Hallford (A. 64-70). Moreover, the enforcement practices of police officers were devoid of any effort to seek an explanation from a physi-

---

[8] While Texas does not punish the woman who persuades a physician to abort her, the anti-abortion statute imposes a felony sanction of up to five years for the physician. 2A TEXAS PENAL CODE art. 1191, at 429 (1961). Moreover, the physician risks cancellation of his license to practice. 12B TEXAS CIV. STAT. art. 4505, at 541 (1966); *id.* art. 4506, at 132 (Supp. 1969-70). Also, the hospital can lose its operating license for permitting an illegal abortion within its facilities. 12B TEXAS CIV. STAT. art. 4437f, §9, at 216 (1966).

cian of the reasons for a given abortion (A. 62). The burden of pleading and proving that an abortion was lawful rests with the physician in Texas. Law enforcement authorities and the courts assume that *all* medical abortion procedures are felonious unless the physician proves the contrary. See *Veevers* v. *State*, 354 S.W.2d 161 (Tex. Crim. App. 1962).

To rectify this on-going governmental invasion of the physician-patient relationship, Dr. Hallford brought this action. No relief was requested against the two indictments then pending against him (A. 73, 74). Dr. Hallford's claim was primarily against the continuing impact of the statute upon him, other members of the medical profession, and their patients.

II. *Decision by the District Court*

Argument was heard from the plaintiffs in each action at a single hearing before the three-judge court (A. 75-110). On June 17, 1970, the court entered judgment and issued an opinion dealing with the substantive and procedural questions at issue (A. 111-126).

As to Mary and John Doe, the three-judge court refused to grant either declaratory or injunctive relief, and dismissed the complaint for lack of standing (A. 124). However, Jane Roe and Dr. Hallford were held to have standing to contest the statute.[9] Both presented a "ripe" case

[9] Jane Roe and Dr. Hallford had standing because they "occupy positions *vis-à-vis* the Texas Abortion Laws sufficient to differentiate them from the general public" (A. 113). Also, Dr. Hallford had standing to raise the "rights of his patients, single women and married couples, as well as rights of his own" (A. 113, n. 3).

or controversy.[10] Abstention was deemed unjustifiable because no reasonably foreseeable state law interpretation would resolve the federal questions.[11]

On the merits, the three-judge court accepted the claims of plaintiffs that "the Texas Abortion Laws must be declared unconstitutional because they deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children" (A. 116). Reliance was placed on decisions by this Court establishing "[r]elative sanctuaries for such 'fundamental' interests [as] the family,[12] the marital couple,[13] and the individual."[14] Further precedent was found in similar decisions by other federal and state courts,[15] as well as in a major treatment of the abortion question by Retired Justice Tom C. Clark, *see* Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal,* 2 Loyola Univ. (L.A.) L. Rev. 1 (1969); reprinted in Supp. App. at 315-326.

---

[10] The district court was "satisfied that there presently exists a degree of contentiousness between Roe and Hallford and the defendant to establish a 'case of actual controversy' . . . ." (A. 114).

[11] Zwickler v. Koota, 389 U.S. 241, 248-49 (1967), was sufficient authority to preclude abstention.

[12] *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); Prince v. Massachusetts, 321 U.S. 158 (1944), all cited by the district court.

[13] *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

[14] *See* Skinner v. Oklahoma, 316 U.S. 535 (1942); Stanley v. Georgia, 394 U.S. 557 (1969).

[15] *See, e.g.,* McCann v. Babbitz, 310 F. Supp. 293 (E.D. Wis. 1970) (per curiam); United States v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969); California v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied,* 397 U.S. 915 (1970).

Not only were the statutes overbroad, and not justified by a narrowly drawn compelling State interest, but the language of the statutes was unconstitutionally vague. Although a physician might lawfully perform an abortion "for the purpose of saving the life of the [pregnant woman]," [16] the circumstances giving rise to such necessity were far from clear. The district court detailed a few of the more apparent ambiguities:

> "How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How *imminent* must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years? These questions simply cannot be answered" (A. 121).

After finding the Texas statute unconstitutional on two grounds, the district court considered the propriety of injunctive relief. Without noticing that no criminal prosecutions were pending against appellants Jane Roe, John and Mary Doe, and that Dr. Hallford had not requested specific relief from outstanding indictments, the court declined to enforce the declaratory judgments, citing *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965) (A. 122). The result, which might reasonably have been foreseen by the lower court, was the issuance of a judgment without meaningful effect.

---

[16] 2A Texas Penal Code art. 1196, at 436 (1961).

III. *Impact of the Denial of Injunctive Relief*

In assessing the district court's judgment denying an injunction, it is necessary to look both to facts preceding the decision and those which followed. These will establish beyond a reasonable doubt that the bare declaratory judgment was ignored and was without force or effect.

Over one year after the declaratory judgment was rendered, Appellee-Defendant Wade's office openly avowed to "continue to enforce Articles 1191, 1192, 1193, 1194, and 1196 of the Texas Penal Code in all abortion cases in which indictments are returned by the Dallas County Grand Jury." A copy of the letter to that effect from District Attorney Wade's office to counsel for appellants is included as Appendix A to this brief, *infra,* at A-1.

As verified by Dr. Paul C. MacDonald, Chairman of the Department of Obstetrics and Gynecology, The University of Texas Southwestern Medical School at Dallas, the declaratory judgment had no effect at that institution which "is virtually the only source of medical services available to the medically indigent of Dallas and Dallas County . . . ." Affidavit of Paul C. MacDonald, M.D. Appendix B, *infra,* at B-1. "[T]he only marked impact of the *Roe* v. *Wade* decision was to increase the frustration felt by many of the faculty members . . . regarding the matter of abortion." *Id.* Appellee Henry Wade, District Attorney, is also the official legal counsel for the hospital staffed by members of the medical school faculty. A representative of Wade's office had communicated the decision to ignore the declaratory judgment to Mr. C. J. Price, hospital administrator, who had in turn conveyed the decision to Dr. MacDonald as follows:

"[P]ertinent points which the District Attorney's Office considers of importance are:

1. The law is still what it has been,
2. The Statutes pertaining to abortion are still on the books,
3. The District Attorney's Office has ruling [*sic*] by the Federal judges under appeal.
4. The Federal judges did not issue any injunctions against the District Attorney to preclude prosecution or following the state law . . . ." Appendix B, at B-4 to B-5.

Since but minimal respect for the federal declaratory judgment was shown by appellees, the medical profession had no choice but to yield to the official law enforcement policy. Otherwise, indictments would have been forthcoming.

Dr. Joseph Seitchik, Chairman of the Department of Obstetrics and Gynecology, The University of Texas Medical School at San Antonio, verified that the District Attorney of Bexar County considered that "the Texas law still stood and that it would still be enforced." Appendix C, at C-4. A similar understanding prevailed at The University of Texas Medical Branch, Galveston. According to Dr. William J. McGanity, Chairman of the Department of Obstetrics and Gynecology there,

"The situation regarding when, under what circumstances, and after what administrative procedures an abortion may be performed in John Sealy Hospital is exactly what it was prior to the June 17, 1970 decision of the three-judge court in *Roe* v. *Wade*.

The decision has had no impact on medical practice in the Medical Branch hospitals." Appendix D, at D-3 to D-4.

Not only have the medical centers in Texas continued to fear prosecution after the June 17, 1970 declaratory judgment, but this fear has been realistic. Appendix E to this brief includes an indictment on abortion charges against a physician filed on June 8, 1971, almost a year after the federal decision, and illustrates the basis for anxiety. It is not difficult to understand why 728 Texas women travelled to New York City from July 1, 1970 to March 31, 1971, to obtain legal abortions. Chase, *Abortions to Out-of-State Residents* (June 29, 1971) (Report of the Health Services Administration, City of New York).

Relevant Background and Medical Facts

I. *The Medical Nature of Abortion*

A. Spontaneous and Induced Rejection of Pregnancy

The standard text on obstetrics and gynecology defines abortion, both *spontaneous* and *induced,* as follows:

> "Abortion is the termination of a pregnancy at any time before the fetus has attained a stage of viability. Interpretations of the word 'viability' have varied between fetal weights of 400 g (about 20 weeks of gestation) and 1,000 g (about 28 weeks of gestation) . . . . Although our smallest surviving infant weighed 540 g at birth, survival even at 700 or 800 g is unusual." L. HELLMAN & J. PRITCHARD, WILLIAMS OBSTETRICS 493 (14th ed. 1971).

Both *induced* and *spontaneous* abortions amount to a rejection of pregnancy. The procedure of *induced* abortion differs from *spontaneous* not in the result, nor in the underlying reason for the abortion but primarily in its being conscious and volitional. For example, a patient infected with rubella (German measles) may abort spontaneously, because her *body* rejects a badly damaged embryo. Another similarly situated patient may seek an *induced* abortion as part of a reasoned *mental* judgment to reject a damaged embryo in favor of a subsequent normal pregnancy. From this perspective, "spontaneous abortion can be regarded as an important biologic mechanism which has evolved in viviparous animals to deal with the numerous embryologic errors arising during development." Potts, *Postconceptive Control of Fertility*, 8 INT'L J. GYN. & OBST. 957 (1970).

The importance and biologic necessity of spontaneous abortion cannot be denied:

> "If spontaneous abortion did not occur, life as we know it would be impossible. At present approximately 1 in 50 of the population is congenitally abnormal, but fortunately most defects are minor. If all the abnormal embryos that were conceived survived, then 1 in 10 to 1 in 5 of the population would be abnormal and most of the defects would be gross and incapacitating. Potts, *The Problem of Abortion*, in BIOLOGY AND ETHICS 3 (1969).

Spontaneous abortions cannot be brought about, under current technology, solely by the will of the patient. Yet, the bio-chemical systems of patients play an increasing role in what had previously been regarded as an accidental

phenomenon. One recent study of spontaneously aborted embryos showed that 38% "had a chromosomal abnormality." Carr, *Chromosome Studies in Selected Spontaneous Abortions,* 37 OBSTETRICS & GYNECOLOGY 750 (1971). Not only do fetal defects frequently cause spontaneous abortion, but numerous other causes beyond the patient's control, and often working in her favor, appear to be involved. In fact, "[w]hen pregnancy is defined as beginning at fertilization or implantation, then the rate of spontaneous wastage is even higher and may approach 50%." Potts, *supra.*

No law requires that a patient seek or a physician provide treatment to prevent *spontaneous* abortion. Neither nature nor the law values an embryo which the patient's bio-chemical system rejects. In such cases the needs of the patient and the treatment provided by the physician are committed by law in every state to the discretion of the physician and patient. No hospital committees interfere with this relationship; no government programs seek to promote confinement and treatment in cases of threatened spontaneous abortion.

Indeed, spontaneous abortions before the fourth week of pregnancy are "perceived by the patient as delayed menstruation or may not be recognized at all." L. HELLMAN & J. PRITCHARD, WILLIAMS OBSTETRICS 496 (14th ed. 1971). This is perhaps the case because in early pregnancy, when the overwhelming number of all abortions take place, embryonic development has scarcely begun. "The 4 weeks old embryo measures 5 mm. [1/5 in.]. . . ." Shettles, *Fertilization and Early Development From the Inner Cell Mass,* in SCIENTIFIC FOUNDATIONS OF OBSTETRICS AND

GYNECOLOGY 154 (E. E. Philipp, *et al.*, eds. 1970). As noted in standard embryology texts,

> "during these early stages, the development of all mammals is fundamentally the same. The specific characteristics of any form emerge but slowly, and relatively late. . . . The illustrations of sections of 5-mm human embryos are quite applicable, for example, to similarly located sections of 5-mm pig embryos. The basic plan of early body structure is amazingly similar." B. PATTEN, HUMAN EMBRYOLOGY 5 (3d ed. 1968).

The 5-mm embryo, for example, still has "a conspicuous *tail* . . . ." L. AREY, DEVELOPMENTAL ANATOMY 98 (7th ed. 1965) (italics in original). Indeed, "[f]or the first week of development the human embryo is invisible to the naked eye . . . ." Potts, *The Problem of Abortion*, in BIOLOGY AND ETHICS 1 (1969).

Neither the medical profession nor state health authorities treat spontaneous or induced abortions prior to 20 weeks of development as events which in any way are comparable to the loss of human life. As one prominent physician recently stated:

> "To the medical profession operating within its present framework, the conceptus, prior to twenty weeks of age, does not have the same legal status as one after that time. Should there be an untimely birth before twenty weeks, the act is considered an abortion, not a delivery, and is not listed on the mother's parity record. A birth or death certificate is not required and the body is handled as a pathological specimen without requiring legal interment." Ryan,

Humane Abortion Laws and the Health Needs of Society, 17 W. RES. L. REV. 424, 427 (1965).

B. Frequency of Medically Induced Abortion in the United States and Texas

In the United States on the whole, induced abortion under medical auspices was relatively restricted until 1967, when the first of twelve states, Colorado, enacted the American Law Institute abortion law proposal in the Model Penal Code.[17]

Only 5,000 therapeutic abortions were estimated to have been done in United States medical facilities in 1963,[18] as contrasted with 200,000 to 1,000,000 unwanted pregnancies thought to be terminated annually outside of the clinical setting.[19] These are over and above the "nearly 20 percent of all recent births [which] were unwanted," according to the 1965 National Fertility Study (NFS). Bumpass & Westoff, *The "Perfect Contraceptive" Population*, 169 SCIENCE 1177, 1180 (1970).

---

[17] MODEL PENAL CODE §230.3(2) (Proposed Official Draft, 1962). The twelve states are Arkansas, California, Colorado, Delaware, Georgia, Kansas, Maryland, New Mexico, North Carolina, Oregon, South Carolina, and Virginia. *See generally* Roemer, *Abortion Law Reform and Repeal: Legislative and Judicial Developments*, 61 AM. J. PUBLIC HEALTH 500 (1971); Supp. App. at 329.

[18] Tietze, *United States: Therapeutic Abortions, 1963-1968*, 59 STUDIES IN FAMILY PLANNING 5 (1970).

[19] Secret induced abortions are inherently incapable of quantification. Nonetheless, one can be certain that the number is very high. For estimates, see Fisher, *Criminal Abortion*, in ABORTION IN AMERICA 3-6 (H. Rosen ed. 1967); M. CALDERONE (ed.), ABORTION IN THE UNITED STATES 180 (1958); P. GEBHARD *et al.*, PREGNANCY, BIRTH AND ABORTION 136-37 (1958); F. TAUSSIG, ABORTION: SPONTANEOUS AND INDUCED 25 (1936); Regine, *A Study of Pregnancy Wastage*, 13 MILBANK MEM. FUND QUART. No. 4, at 347-65 (1935).

Since 1967, the incidence of abortions in medical facilities has risen substantially, but only in the few states which have removed virtually all restrictions that previously differentiated abortion from other forms of medical treatment. In New York City alone, for example, approximately 120,000 abortions were performed between July 1, 1970 and March 31, 1971.[20] Nearly 40,500 of these women were not residents of New York State![21] 728 were from Texas, and a total of 36,006 were from states with the Texas-type restrictive law.[22] It goes without saying that only the well-informed and financed women from out-of-state were able to undertake the expense and effort to travel to New York.

C. Medical Safety Aspects of Induced Abortion in Surgical Practice

The law on abortion cannot be understood without reviewing the pertinent aspects of medical and legal history which gave rise to the law. When this is done, it becomes abundantly clear that public health considerations motivated this type of legislation, and that these factors no longer justify maintaining such stringent restrictions in the criminal code.

1. *Induced Abortion in 19th Century Medicine*

In the 1820's when the first American abortion statutes were enacted, there was no medical profession as we know it. Physicians and quacks alike advertised their treatments and potions in the same marketplace. Both had little to offer the public.

---

[20] Chase, *Twelve Month Report on Abortions in New York City* (Health Services Administration, City of New York, June 29, 1971).

[21] *Id.*

[22] *Id.*

Medical science, an infant branch of learning in the 1800's, did not uncover the need for clean hands in gynecological examinations until the 1840's. Even then,

> "[d]uring the period 1850-70, there was no gynecology worthy of the name. This had to wait for the twentieth century and the development of an understanding of ovarian function, recognition of the details of the menstrual cycle, establishment of safe surgery, and a host of other things. Obstetrics was, of course, old, but it was still in the hands of midwives whose only interest lay in practical problems." McKelvey, *Ninety Years of Obstetrics and Gynecology,* THE LANCET 242 (May 1960).

The first work published in this area was produced by none other than Oliver Wendell Holmes (Sr.), a physician who was better known as a writer and father of the great jurist. Holmes discovered that puerperal fever was spread by physicians who attended infected patients and corpses, and then went into the maternity wards without washing or changing clothes. These findings were first presented to the Boston Society for Medical Improvement on February 13, 1843. Holmes, *The Contagiousness of Puerperal Fever,* 1 NEW ENG. QUARTERLY J. OF MEDICINE 503 (1842-43).

Virtually simultaneous discoveries along the same lines were made by I. P. Semmelweis, working in Vienna:

> "The story of Semmelweis is more generally known. His main work was done in the first Women's Clinic in Vienna, where he recognized that the horrible mortality rates from puerperal infection were

the result of something which was introduced by the hands of the physicians who examined the women in labor. . . . The average mortality rate in this clinic for the year 1846 was 13.7 per cent, and almost all of this was due to puerperal infection. In May 1847, Semmelweis introduced careful hand washing with various compounds, and for the year 1848, the mortality rate dropped to 1.27 per cent."[23] McKelvey, *Ninety Years of Obstetrics and Gynecology,* THE LANCET 242, 243 (May 1960).

Not until 1867, however, did Joseph Lister put forth the novel concept that *in all surgery* antiseptic techniques were necessary to prevent infection and death. *See* Lister, *On A New Method of Treating Compound Fracture, Abscess, etc.,* 1 THE LANCET 328 (Mar. 16, 1867):

"In 1867, Lister published the first series of cases on the virtue of carbolic acid in the management of compound fractures. Of the 11 consecutive cases, one required amputation, and another died of secondary hemorrhage several months later. The remaining 9

[23] Dr. McKelvey's basic point about the dangers of pre-Lister "medical" care is well taken, although his figures here are somewhat inaccurate. The clinic was known as the "First Obstetric Clinic at the Allgemeines Krankenhaus [General Hospital]," not the Women's Clinic. J. TALBOTT, *Ignaz Phillip Semmelweis (1818-1865),* in A BIOGRAPHICAL HISTORY OF MEDICINE 660 (1970). The mortality rate in 1846 "was 11.4% in the First Division [physicians] and 2.7% in the Second Division [midwives]." *Id.* at 661. Chlorine disinfection was used in 1848 to reduce the First Division mortality rate to "slightly less than the mortality in the Second Division," *id.,* which had been 2.7%. It was 1861, however, before Dr. Semmelweis published his findings in German. I. P. SEMMELWEIS, ETIOLOGY, CONCEPT AND PROPHYLAXIS OF CHILDBED FEVER (1861), *transl. in* 5 MEDICAL CLASSICS 339-715 (1941).

recovered, a remarkable percentage in that era." J. TALBOTT, *Lord Lister (1827-1912)*, in A BIOGRAPHICAL HISTORY OF MEDICINE 755, 756 (1970).

Data on pre-Listerian mortality rates from simple, not to mention complex, surgery present a frightening spectacle.[24] A review of 19th century operations reported the following:

"There were the almost inevitable suppuration of the wound, the putrefaction and sloughing off of tissue, the sickening odor, the high fever, the danger of hemorrhage, the slow healing, the complications of blood poisoning, erysipelas, gangrene and tetanus, the physical and mental anguish, and the uncertainty of the final outcome. *The mortality from major operations was from 50 to 100 per cent.*" F. S. LEE, SCIENTIFIC FEATURES OF MODERN MEDICINE (1911) (emphasis added).

Reports on gynecological surgery revealed a recurring theme. Relatively external surgery was undertaken cautiously and rarely. Internal surgery was frowned upon unless death were imminent. As an early history of gynecological surgery pointed out:

"General surgery in the first part of the nineteenth century was in the hands of more skillful surgeons, but it was the surgery of amputations, disarticulations, ligations of large vascular trunks and removal of superficial tumors. Gynecological surgery was limited to the removal of polyps, excision of a hyper-

[24] *See generally* H. ROBB, ASEPTIC SURGICAL TECHNIQUE WITH ESPECIAL REFERENCE TO GYNAECOLOGICAL OPERATIONS (1875); C. HAAGENSEN & W. LLOYD, A HUNDRED YEARS OF MEDICINE (1943).

trophied clitoris, incision of an imperforate hymen and attempts at repair of a third degree perineal laceration. The more daring undertook repair of a vesco- or recto-vaginal fistula, an occasional ovariotomy, a cervical amputation, or vaginal hysterectomy for malignancy, an abdominal hysterectomy for fibroids or an operation for abdominal pregnancy, amputation of an inverted uterus, drainage of a pelvic abscess and a rare extraction of an extra-foetal mass or even a full term living foetus, either by vaginotomy or abdominal incision. For the greater part of the century, no one ventured a laparotomy for removal of a tubal pregnancy or a tubo-ovarian inflammatory mass. But success and popularization of all these major therapeutic measures awaited the three fundamentals—anaesthesia, asepsis, and haemostatis which ushered in the golden age of surgery and operative gynecology." J. Ricci, Development of Gynecological Surgery and Instruments 279 (1949).

The author emphasized not only the dangers of routine external surgery, but the near impossibility of a patient's recovery from any operation which involved entry into the abdominal cavity. With respect to this contrast in gynecological surgery, Dr. Ricci states:

> "If ovariotomy was considered a dangerous operation during the greater part of the nineteenth century, prior to antiseptic decades, intra-abdominal uterine surgery was looked upon as almost impossible. While the most common cause of death in ovariotomy was peritonitis, in uterine surgery the added facts of shock and hemorrhage increased the mortality rate.

> Thus 7/8 of the attempts to remove a fibroid uterus prior to 1863 were either abandoned or ended fatally. The voices of medical practioners rose in unison against this phase of surgery. C. D. Meigs (*Females and Their Diseases,* Phila., p. 266, 1848) stated that doing anything about those fibroids was hopeless. He detested all abdominal surgery save that which was clearly warranted 'by the otherwise imminent death of the patient.'" *Id.* at 501-502.

This did not end after 1867. Lister's techniques were slow to reach the United States, and even slower of acceptance. One American physician, Roswell Park, reported with horror his earliest experience in hospitals in this country:

> "[W]hen I began my work, in 1876 . . . in one of the largest hospitals in this country, it happened that during my first winter's experience—with but one or two exceptions—every patient operated upon in that hospital, and that by men who were esteemed the peers of anyone in their day, died of blood poisoning, while I myself nearly perished from the same disease. This was in an absolutely new building, where expenditures had been lavish; one whose walls were not reeking with germs, as is the case yet in many of the old and well-established institutions." R. Park, An Epitome of the History of Medicine 326 (1898).

The same experience was reported everywhere in the United States. A significant chapter in this history is the contribution made by the Mayo Brothers, who brought antisepsis and safe surgery to Minnesota, and the midwest, and then made improvements from which the remainder

of the American medical profession could benefit and learn.

H. CLAPESATTLE, THE DOCTORS MAYO (1941), details this experience. The significant facts are as follows:

(1) By 1874 "only five attempts at ovariotomy[25] had been made in the entire state [of Minnesota]. . . . All five patients had died." *Id.* at 140.

(2) The Senior "Dr. Mayo piled up a record of thirty-six ovariotomies during the decade [1870-1879], with . . . [a] mortality of twenty-five per cent. . . ." *Id.* at 214.

(3) In the mid-1890's Drs. Will and Charlie Mayo began to perform appendectomies. "Although their mortality rate was not the thirty per cent admitted by some city hospitals, it was still twelve to fifteen per cent, too high to justify operation if the patient had a chance without it." *Id.* at 305.

(4) "Word of the work of Pasteur and Lister was getting around by 1880, but more as the story of an outlandish new fad than as the report of scientific truth." *Id.* at 143.

It was only after a tour of hospitals on the continent of Europe, in 1889, that the Mayo brothers could envision "the prospect of a surgery of expediency, of operating that would not be just a last desperate throw of the dice with death but a means of restoring health . . . ." *Id.* at 269.

The year 1890 was separated by a continent and almost four decades from the 1854 enactment of abortion legisla-

[25] "Ovariotomy" is the abdominal operation for removal of an ovarian tumor.

tion in Texas.[26] Still, surgical dangers warned against any medical procedure. Induced abortion, in particular, involved internal use of surgical instruments, and the inevitable introduction of infection into the womb. Far better, the legislature obviously deemed, that a woman risk childbirth, than death on the operating table. Only when the risks cancelled themselves out did she have an option.

Today the comparative risks weigh heavily in favor of permitting induced abortion, not as an emergency matter as in 1851, but as an elective medical procedure. Surgery in those times was almost always fatal. As the next section shows, medicine is a different science today.

2. *Induced Abortion in Contemporary Surgery*

Induced abortion, in medical practice today, is a relatively minor surgical procedure, insofar as risks to the patient's physical or mental well-being are concerned. This exceptional safety consideration was noted by Dr. John McKelvey, former head of obstetrics and gynecology at the University of Minnesota:

> "Under ideal circumstances, abortions can be done with very little vital risk. The procedures which are open to the poor on the contrary can be very risky not only to the life of the individual but to her future health." McKelvey, *The Abortion Problem,* 50 MINN. MED. 119, 124 (1967).

The degree of safety can be readily seen by comparing patient mortality rates for induced abortion with those of childbirth and other typical medical procedures.

---

[26] TEXAS LAWS OF 1854, ch. 49, §1, at 58, in 3 GAMMEL, LAWS OF TEXAS 1502 (1898).

The maternal mortality rate in the United States for 1967 averaged 28.0 deaths per 100,000 live births. For nonwhites the rate was almost three times as high, 69.5 deaths per 100,000 live births.[27] The comparable mortality rates for various surgical procedures in the United States, per 100,000 operations, have been as follows:[28] Appendectomy[29] —400 per 100,000; Cholecystectomy[30] (gall bladder operation)—1,600 per 100,000; Tonsillectomy/adenoidectomy[31]—5.2 per 100,000.

In the years 1963 to 1968, therapeutic abortions were unavailable in the United States on any large scale. Most patients had to show serious physical or mental disease to obtain the procedure. Of the 9,722 therapeutic abortions in the 1963-68 survey by the Commission on Professional and Hospital Activities only a single death "unequivocally resulted from the operation."[32] This death represents the equivalent of a mortality rate of 10.3 per 100,000 therapeutic abortions. Even this figure is misleadingly high in that the abortion was induced by an abdominal operation

---

[27] U.S. Bureau of the Census: *Statistical Abstracts of the United States: 1970*, Table 69, at 55 (91st ed.).

[28] The data are derived from surveys by the Commission on Professional and Hospital Activities, in Ann Arbor, Michigan, which are published in the Professional Activities Survey (PAS) Reporter. Over 1,200 hospitals provide the Commission with data for more than 10 million patients per year. *See PAS Hospitals*, 8 PAS Reporter No. 1, at 1 (Jan. 12, 1970).

[29] *Appendectomy Profile, 1968*, 7 PAS Reporter No. 16, at 1-4 (Dec. 22, 1969).

[30] *Cholecystectomy Mortality*, 8 PAS Reporter No. 8, at 1 (Apr. 20, 1970).

[31] *T & A Profile*, 8 PAS Reporter No. 5 (Mar. 9, 1970).

[32] Tietze, *United States: Therapeutic Abortions, 1963-1968*, 59 Studies in Family Planning 5, 7 (1970).

(hysterotomy) which poses substantial hazards of its own. Nonetheless, a 10.3 rate is 2.7 times safer than childbirth, 38.8 times safer than appendectomy, and 155 times safer than cholecystectomy, all other factors being equal.

A more correct estimation of the surgical risks from induced abortion can be made by examining the induced abortion mortality rates from jurisdictions in which abortion is available as an elective procedure in cases of contraceptive failure.

The experience in New York City following the amending of the New York State abortion statute to permit elective abortion, the first such experience with abortion on a large scale in the United States, further demonstrates the safety of the procedure. 165,000 abortions were performed in New York City in the first eleven months under the new law. The mortality rate for legal abortion during this period was only 5.3 per 100,000.[33] New York City health officials expect this low rate to decline even further with time. According to City Health Administrator Gordon Chase, "the safety record is improving, probably because doctors are gaining experience with the procedure, and certainly because the proportion of first trimester abortions . . . has been increasing." "Complications are decreasing steadily in both early and later abortions. . . . "[34] That the mortality rate has already declined is evidenced by the fact that not one abortion related mortality occurred in the last four months of this eleven month period.

---

[33] Chase, *Twelve Month Report on Abortions in New York City* (Health Services Administration, City of New York, June 29, 1971).

[34] *Id.* at 2.

In New York City the percentage of second trimester abortions, which in the City's experience entailed a six times higher complication rate than for first trimester abortions, has fallen to below 25%.[35] Only in eastern Europe, where "almost all legal abortions are performed in the first trimester of pregnancy with the majority in the second month,"[36] have mortality rates dropped to as few as 1.2 per 100,000 operations (Hungary: 1964-67, 9 deaths, 739,000 legal abortions).

The extent to which elective induced abortion for healthy women is enormously safer than childbirth and various other medical procedures can be seen by tabulating the figures given above:

Medical Procedure or Event	Mortality (per 100,000 procedures)
Elective induced abortion (Hungary: 1964-67)	1.2
Tonsillectomy (U. S.: PAS 1969)	5.2
Elective induced abortion (N.Y.C.: 1970-1971)	5.3
Therapeutic induced abortion (U. S.: 1963-68)	10.3
Childbirth (U. S.: 1967)	28.0
Appendectomy (U. S.: PAS 1968)	400
Cholecystectomy (U. S.: PAS 1968)	1,600

On another level as well, abortion is a safe procedure: it is without clinically significant psychiatric sequellae. A number of recent studies confirm that abortion does not

---

[35] *Id.*

[36] Tietze, *Abortion Laws and Abortion Practices in Europe,* in V Advances in Planned Parenthood 194, 208 (1969) (Proceedings of the Seventh Annual Meeting of the American Ass'n of Planned Parenthood Physicians).

produce serious psychological side-effects damaging to the mental well-being of the patient.[37]

In sum, the medical procedure of induced abortion, which is severely restricted by the statute involved in this case, is potentially 23.3 (28/1.2) times as safe as the process of going through ordinary childbirth and without psychiatric side-effects.

II. *Legal and Medical Standards of Practice Regarding Induced Abortion in Texas and the United States.*

A. Induced Abortion at Common Law

At common law, abortion could be induced by a physician, midwife, or anyone without penalty, prior to the period of pregnancy called "quickening," *i.e.*, 16-18 weeks. *See* L. Arey, Developmental Anatomy 106-07 (Reference Table of Correlated Human Development) (1965 ed.). This principle was accepted in the overwhelming majority of American jurisdictions.[38] From 1828 onward, however,

---

[37] Fleck, *Some Psychiatric Aspects of Abortion*, 151 J. Nerv. & Ment. Dis. 42 (1970); Simon, *Psychological and Emotional Indications for Therapeutic Abortion*, 2 Sem'rs in Psych. 283, 295 (1970); Margolis, et al., *Therapeutic Abortion Follow-up Study*, 110 Am. J. Ob. Gyn. 243 (1971); Notman, et al., *Psychological Outcome in Patients Having Therapeutic Abortions*, Paper presented at Third International Congress of Psychosomatic Problems in Obstetrics and Gynecology, London, April, 1970 (Available at Beth Israel Hosp., Boston, Mass.); Whittington, *Evaluation of Therapeutic Abortion as an Element of Preventive Psychiatry*, 126 Am. J. Psych. 1224 (1970).

[38] *See* Gray v. State, 77 Tex. Crim. 221, 178 S.W. 337 (1915); Smith v. Gaffard, 31 Ala. 45 (1857); Hunter v. Wheate, 53 App. D.C. 206 (D.C. Cir. 1923); Eggart v. Florida, 40 Fla. 527, 25 So. 144 (1898); State v. Alcorn, 7 Idaho 599, 64 Pac. 1014 (1901); Abrams v. Foshee, 3 Iowa 274, 66 Am. Dec. 77 (1856); Mitchell v. Commonwealth, 78 Ky. 204, 39 Am. Rep. 227 (1879); Lamp v. Maryland, 67 Md. 524, 10 Atl. 298 (1887); Smith v. State, 33 Me. 48, 54 Am. Dec. 607 (1851); Commonwealth v. Bangs, 9 Mass. 387 (1812); Evans v. People, 49 N.Y. 86 (1872); Edwards v. State, 79 Neb. 251, 112 N.W. 511 (1907); State v. Cooper, 22

states began to modify the common law rule by legislation which prohibited all forms of abortion (other than spontaneous) at all stages of pregnancy.[39]

B. Legislative History of the Texas Abortion Law

The first Texas law deviating from the common law on abortion was approved February 8, 1854. TEXAS LAWS OF 1854, ch. 49, §1, at 58, in 3 GAMMEL, LAWS OF TEXAS 1502 (1898). The text is set out in the note below.[40] Two

---

N.J.L. (2 Zab.) 52, 51 Am. Dec. 248 (1849); State v. Tippie, 89 Ohio St. 35, 105 N.E. 75 (1913); State v. Ousplund, 86 Ore. 121, 167 Pac. 1019 (1917), *appeal dismissed per stip.*, 251 U.S. 563 (1919); Miller v. Bennet, 190 Va. 162, 56 S.E.2d 217 (1949); State v. Dickinson, 41 Wis. 299 (1877). *See generally* Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968) [hereinafter Means]. *Contra*: Mills v. Commonwealth, 13 Pa. St. 631 (1850); Willis v. O'Brien, 151 W.Va. 628, 153 S.E.2d 178, *cert. denied*, 389 U.S. 848 (1967); State v. Slagle, 83 N.C. 630 (1880).

[39] *See, e.g.*, N.Y. REV. STAT., pt. IV, ch. 1, tit. 6, §§20-22 (1829); ILL. REV. CODE, §46 (1827); *see generally* George, *Current Abortion Laws: Proposals and Movements for Reform*, 17 W. RES. L. REV. 371 (1966); Lucas, *Laws of the United States*, in 1 ABORTION IN A CHANGING WORLD 127 (R. Hall ed. 1970); Roemer, *Abortion Law Reform and Repeal: Legislative and Judicial Developments*, 61 AM. J. PUBLIC HEALTH 500 (1971).

[40] Setting out the New Jersey abortion law of 1849 beside the 1854 Texas law is instructive:

"If any person, with the intent to procure the miscarriage of any woman being with child, unlawfully and maliciously shall administer to her or cause to be taken by her any poison or other noxious thing, or shall use any instrument or any means whatever, with like intent . . . shall be punished . . . ." TEXAS LAWS of 1854, Ch. 49, §1, at 58.

"[I]f any person or persons, maliciously or without lawful justification, with intent to cause and procure the miscarriage of a woman then pregnant with child, shall administer to her, prescribe for her, or advise or direct her to take or swallow any poison, drug, medicine or noxious thing . . . ." N.J. LAWS at 266 (1849).

years later, the law on abortion was modified[41] into language which is substantially the same as that of the statute currently in force, 2A TEXAS PENAL CODE arts. 1191-1194, 1196, at 429-36 (1961). Intervening revisions and codifications made no changes of any significance.

The sole evidence of statutory intent is found in the circumstances under which the 1854 Act was passed, and its derivation. As shown earlier in this brief, at pp. 26-29, the dangers of internal surgery in the mid-1800's were formidable. Public health justifications were readily available for outlawing all or most surgery, and intra-abdominal surgery in particular. Indeed, because of the demand for drugs and procedures for interrupting unwanted pregnancy, this area in particular required surveillance to protect the health of women from backroom practitioners, offering drugs and noxious things for bringing about a miscarriage.

Contemporaneous judicial explication of 19th century American abortion legislation can be found in an 1858 decision interpreting the 1849 New Jersey statute, which from all appearances was the likely model for the Texas statute. As stated by the highest court of New Jersey in *State* v. *Murphy*, 27 N.J.L. (3 Dutcher) 112, 114-15 (Sup. Ct. 1858):

> "The design of the statute was not to prevent the procuring of abortions, so much as *to guard the health and life of the mother against the consequences of such attempts* . . . . It is immaterial whether the foetus is destroyed, or whether it has quickened or not. • • •
>
> "*The offense of third persons,* under the statute, is *mainly against her life and health.* The statute regards

[41] TEXAS PENAL CODE, ch. VII, arts. 531-536 (1857).

her as the victim of crime, not as the criminal; as the object of protection, rather than of punishment." (Emphasis added.)

The Reviser's Notes to 1829 New York legislation plainly show the same purpose. A section was proposed, but not enacted, to prohibit all major surgical procedures:

"Every person who shall perform any surgical operation, by which human life shall be destroyed or endangered, such as the amputation of a limb, or of the breast, trepanning, cutting for the stone, or for hernia, unless it appear that the same was necessary for the preservation of life, or was advised, by at least two physicians, shall be adjudged guilty of a misdemeanor." [42]

The purpose of this bill was stated by the Revisers:

"Reviser's Note: The rashness of many young practitioners in performing the most important surgical operations for the mere purpose of distinguishing themselves, has been a subject of much complaint, and we are advised by old and experienced surgeons, that the loss of life occasioned by the practice, is alarming. The above section furnishes the means of indemnity [impunity], by a consultation, or leaves the propriety of the operation to be determined by the testimony of competent men. This offense is not included among the mal-practices in manslaughter, because, there may be cases in which the severest punishments ought not to be inflicted. By making it a misdemeanor,

[42] 6 Revisers' Notes, pt. IV, ch. 1, tit. 6, §28, at 75 (1828).

and leaving the punishment discretionary, a just medium seems to be preserved." [43]

Even religious doctrine with respect to abortion was unavailable in 1851 to support the law. Pope Pius IX's *Apostolicae Sedis* in 1869 was the first enduring break from the theory that an embryo had life at 40 days if male and 80 days if female. In 1854 induced abortion was not an excommunicable offense when undertaken in the early stages.

Today, only abortions performed in non-medical environments present significant risks of morbidity and mortality; with proper medical supervision, abortions are safe and simple procedures. In keeping with modern medical practice, this Court would reinforce the purpose of early abortion legislation if it invalidated the statute. This would permit abortions to be done by licensed physicians in adequate medical facilities and discourage abortions by unskilled practitioners. Moreover, it would preserve the 117-year-old purpose of the law, and the common law.

C. Contemporary Legislation on Induced Abortion

Item No. 1, p. 1 of the Supplementary Appendix to this brief contains an accurate chart on the current status of laws in the United States regulating the medical procedure of induced abortion. The statutes vary in restrictiveness. Those in Texas and thirty-one other states sharply limit the justifications for abortion to instances wherein the woman's life would otherwise be sacrificed.[44]

---

[43] *Id.* This significant historical evidence was first disclosed in Means, *supra* note 39, at 451-453.

[44] *See* ALA. CODE tit. 14, §9 (1958) ("... unless the same is necessary to preserve her life or health ...."); ARIZ. REV. STAT. ANN. §13-211 (1956) ("... unless it is necessary to save her life ...."); CONN. GEN. STAT. ANN. §53-29 (1960) ("... unless the same is

Others, patterned after the UNIFORM ABORTION ACT (2d Tent. Draft 1970), follow the American Medical Association's position and that of the American College of Obstetricians, by treating induced abortion the same as spontaneous abortion—a medical procedure to be considered in light of the patient's overall life situation.

D. Contemporary Standards of Medical Practice Regarding Induced Abortion

1. *National Medical Organizations*

Evidence of American standards of medical practice respecting induced abortion is found in the policy statements of professional organizations. Both the American

---

necessary to preserve her life or that of her unborn child . . . ."); FLA. STAT. ANN. §782.10 (1965) (". . . unless the same shall have been necessary to preserve the life of the mother . . . ."); IDAHO CODE ANN. tit. 18, §601 (1948) (". . . necessary to preserve her life . . . ."); ILL. ANN. STAT. ch. 38, §23-1 (1970) (". . . necessary for the preservation of the woman's life."); IND. ANN. STAT. §10-105 (1956) (". . . necessary to preserve her life . . . ."); IOWA CODE ANN. §701.1 (1950) (". . . necessary to save her life . . . ."); KY. REV. STAT. ANN. §436.020 (1970) (". . . necessary to preserve her life . . . ."); LA. REV. STAT. §14:87 (1951) (". . . unless done for the relief of a woman whose life appears in peril . . ."); ME. REV. STAT. ANN. tit. 17, §51 (1965) (". . . necessary for the preservation of the mother's life . . . ."); MASS. GEN. LAWS ANN. ch. 272, §19 (1970) (prohibits unlawful abortions, interpreted by court to allow abortions by a surgeon if, ". . . necessary for the preservation of the life or health of the woman." Kudish v. Bd. of Registration, 248 N.E.2d 264 (1969)); MICH. STAT. ANN. §28.209 (1967) (". . . necessary to preserve the life of such woman . . . ."); MINN. STAT. ANN. §617.18 (1964) (". . . unless the same is necessary to preserve her life or that of the child with which she is pregnant . . . ."); MISS. CODE ANN. §2223 (1966) (". . . necessary for the preservation of the mother's life . . . ."); MO. REV. STAT. §559:100 (1953) (". . . unless the same is necessary to preserve her life or that of an unborn child . . . ."); MONT. REV. CODES ANN. §94-401 (1969) (". . . necessary to preserve her life . . ."); NEB. REV. STAT. §28-405 (1965) (". . . necessary to preserve the life of such woman . . . ."); NEV. REV. STAT. ch. 201.120 (1967) (". . .

Medical Association and the American College of Obstetricians and Gynecologists have set standards of professional practice in recent years.

ACOG policy sanctions therapeutic and elective abortion "to safeguard the patient's health or improve her family life situation." ACOG recognizes that "abortion may be performed at the patient's request . . . ." Supp. App. at 23. A very similar position was taken by the American Medical Association. The AMA at one time had followed the A.L.I. model, listing four or five vaguely defined situations for sanctioned abortion. This proved unworkable, and the policy was changed in order not to limit the physicians' traditional responsibility for evaluating "the merits of each individual case. . . . " Supp. App. at 33.

---

necessary to preserve her life or that of the child with which she is pregnant . . . ."); N.H. REV. STAT. ANN. §585.13 (1955) (". . . unless by reason of some malformation or of difficult or protracted labor, it shall have been necessary, to preserve the life of the woman . . . ."); N.J. STAT. ANN. §2A:87-1 (1969) (prohibits abortions when done maliciously or without lawful justification; lawful justification has been interpreted as perhaps being limited to the preservation of the mother's life. State v. Moretti, 52 N.J. 182, 244 A.2d 499, *cert. denied*, 393 U.S. 952 (1968); *compare* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967)); N.D. CENT. CODE ANN. §12-25-01 (1960) (". . . necessary to preserve her life . . . ."); OHIO REV. CODE ANN. §2901.16 (1954) ("necessary to preserve her life . . . ."); OKLA. STAT. tit. 21, §861 (1958) (". . . necessary . . . to preserve her life . . . ."); P.R. LAWS ANN. tit. 33, §1053 (1969) (". . . necessary to preserve her life . . . ."); R.I. GEN. LAWS ANN. §11-3-1 (1970) (". . . necessary to preserve her life . . . ."); S.D. COM. LAWS ANN. §22-17-1 (1969) (". . . necessary to preserve her life . . . ."); TENN. CODE ANN. §39-301 (1955) (". . . to preserve the life of the mother . . . ."); UTAH CODE ANN. §76-2-1 (1953) (". . . necessary to preserve her life . . . ."); VT. STAT. ANN. tit. 13, §101 (1958) (". . . necessary to preserve her life . . . ."); W. VA. CODE §61-2-8 (1966) (". . . with the intention of saving the life of such woman or child . . . ."); WIS. STAT. ANN. §940.04 (1958) (". . . necessary . . . to save the life of the mother . . . ."); WYO. STAT. ANN. §6-77 (1959) (". . . necessary to preserve her life . . . .").

From this it is clear that the Texas law sharply interferes with professional medical practice.

2. *The Texas Medical Association*

On May 6, 1966, a special committee to study and consider the modernization of abortion law in Texas was appointed as a result of a resolution adopted by the Texas Medical Association's House of Delegates, meeting in annual convention. This action was prompted by a resolution previously adopted by the Texas Association of Obstetricians and Gynecologists under the leadership of Dr. Hugh Savage calling for the T.M.A. to give serious study to determine the need for modernizing the Texas abortion law.

The Special Committee's report called for the amendment of the Texas law to allow abortion in cases of rape, incest, impairment of the physical or mental health of the woman, or substantial risk of a child born with a grave physical or mental defect. The report was approved by the Executive Board of the Association on October 2, 1966. *Report of Executive Board,* TRANSACTIONS OF THE HOUSE OF DELEGATES, TEXAS MEDICAL ASSOCIATION 43 (1967).

The 1968 Report of the Special Committee on Abortion Laws in Texas, TRANSACTIONS OF THE HOUSE OF DELEGATES, TEXAS MEDICAL ASSOCIATION 79 (1968), included the results of a survey of Texas hospitals covering the years 1965-1967. The results indicated that 81 abortions had been done in Texas hospitals for fetal indications, 1 for rape, and 1 for incest, even though such abortions were illegal. It again concluded that the Texas abortion law should be changed.

Further studies were undertaken, and in 1968 a written poll was taken in which the Association's members were

asked to state whether they felt the current Texas abortion law should be amended. Of the 9,338 doctors polled, 53% responded. 4,435 physicians stated that they desired a change in the present statute, while 536 responded negatively. Members were also asked to indicate the reasons for which an abortion should be performed. Maternal indications approved by those voting included physical health, mental health, socio-economic factors, and cases of criminal incest and rape. Fetal indications of viral diseases, drug-induced deformities, and diagnosed intrauterine abnormalities were approved. All of the maternal and fetal indications except socio-economic factors were approved by margins ranging from 10 to 1 to 100 to 1. Socio-economic factors were approved by a 3 to 2 margin. *Report of Special Committee on Abortion Laws in Texas*, TRANSACTIONS OF THE HOUSE OF DELEGATES, TEXAS MEDICAL ASSOCIATION 96 (1969).

On September 20, 1970, the Association's Executive Board adopted as policy the recommendation that:

> "WHEREAS, Abortion, like any other medical procedure, should not be performed when contrary to the best interests of the patient since good medical practice requires due consideration for the patient's welfare and not mere acquiescence to the patient's demands; and
>
> "WHEREAS, The standards of sound clinical judgment, which, together with informed patient consent should be determined according to the merits of each individual case; therefore be it
>
> "RESOLVED, That abortion is a medical procedure and should be performed only by a duly licensed physician

and surgeon in a licensed hospital acting only in conformance with standards of good medical practice, and after proper medical consultation; be it further

"RESOLVED, That no physician or other professional personnel shall be compelled to perform any act which violates his good medical judgment. Neither physician, hospital, nor personnel shall be required to perform any act which violates moral principles which they might hold." *Report of Executive Board,* TRANSACTION OF THE HOUSE OF DELEGATES, TEXAS MEDICAL ASSOCIATION (1970).

This resolution was adopted by the Association's House of Delegates at its 1971 annual convention with the following addition:

"RESOLVED, This definition of position shall not be interpreted as endorsement of abortion on demand or request; further, it shall not be interpreted as endorsement of the use of abortion as a part of a social movement."

III. *Relationship Between Contraception and the Medical Procedure of Induced Abortion*

Widespread lack of information about contraception, and significant contraceptive failure rates are two of the many factors which must be understood in assessing the impact of abortion laws on families and individuals in Texas and the United States.

A. Lack of Public Access to Information and Medical Services for Family Limitation by Use of Contraceptives

All too frequently it is presumed that people have access to and are able to use highly effective contraceptives, and are themselves at fault in cases of unwanted or unplanned pregnancy. This assumption could not be further from medical reality. Contraception is not widely available in the United States. In fact, Congress passed the *Family Planning Services and Population Research Act of 1970*, Pub. L. No. 91-572 (Dec. 24, 1970), with an overall appropriation exceeding $380 million "to assist in making comprehensive voluntary family planning services readily available to all persons. . . ." National studies on the magnitude of unwanted births, such as data from HEW's 1965 National Fertility Study, for example, showed:

> "[In] the period 1960 to 1965 there were 4.7 million births that would have been prevented by 'perfect contraception.' These births represent one fifth of all births during the period. Approximately two million of these births occurred among the poor and the near-poor and half of these among Negro poor and near-poor." [45]

The most recent studies identify as a principal problem the absence of adequate information and services for people with a need to know about contraception, and when that fails, medically induced abortion. As late as the close of 1969,

> "some 4.3 million women in need of subsidized family planning services were not receiving them insofar as

[45] Bumpass & Westoff, *The "Perfect Contraceptive" Population*, 169 SCIENCE 1177, 1179 (1970).

could be determined from reports of organized programs; no programs at all could be identified in 1,636 counties—53 percent of all counties—containing one-fourth of the unmet need. Services continue to be concentrated in relatively few populous counties. . . ." [46]

The basic 1968 study covered each State by county. In Texas a total of 355,120 medically indigent women in need of family planning information were shown to be unserved. This amounted to 89% of such women.[47] These individuals can hardly be thought to be able to protect their marital and personal privacy through contraception, when that is altogether unavailable to them.

This deficiency is not confined to patients. Only a few short years ago, a review of texts used in medical schools revealed that "[t]wo thirds of the texts (25 texts) contained either no mention of contraception or only isolated reference to it, with no complete discussion." Tietze, *et al., Teaching of Fertility Regulation in Medical Schools,* 196 J. AMERICAN MEDICAL ASS'N 20, 23 (1966).

Patients have limited access to contraceptive methods and information. Physicians have limited willingness to prescribe contraception. As if this were not enough, contraceptive devices, techniques, and use are far from effective as a means whereby a family can determine how many children they will have and no more.

---

[46] Dryfoos, *et al., Eighteen Months Later: Family Planning Services in the United States, 1969,* 3 FAMILY PLANNING PERSPECTIVES No. 2, at 29 (Apr. 1971).

[47] *Need for Subsidized Family Planning Services: United States, Each State and County, 1968,* Table I, p. 92, cols. 10 & 11 (OEO, 1968).

B. Ineffectiveness of Contraceptives Due to Significant Degree of Failure in Method and Use

The most effective contraceptive known, "the pill" or oral contraceptive, has in practice produced side effects "disagreeable enough to cause a 20 to 40 per cent drop-out rate" among those patients who were informed of and chose to use the method in the first place. E. NOVAK, *et al.*, TEXTBOOK OF GYNECOLOGY 647 (8th ed. 1970). The vast proportion of the population not receiving family planning services never reach that option, of course. Other methods are less effective in practice than the 99% effective oral contraceptive. *Id.* These range from the intrauterine devices, which pose problems of their own and vary in effectiveness, to abstention and rhythm, which are not seriously regarded by the medical profession in this century.[48]

The chart on the following page illustrates the contraceptive failure problem.

[48] For discussion of contraceptive-techniques, effectiveness, and the full range of complex factors involved, *see generally* J. PEEL & M. POTTS, CONTRACEPTIVE PRACTICE (1969).

Failure Rates of Contraceptive Methods

Method	*Pregnancy rates for 100 woman-years of use*[49]	
	High	*Low*
No contraceptive	80[50]	80
Aerosol foam	—	29
Foam tablets	43	12
Suppositories	42	4
Jelly or cream	38	4
Douche	41	21
Diaphragm and jelly	35	4
Sponge and foam powder	35	28
Condom	28	7
Coitus interruptus	38	10
Rhythm	38	0
Lactation	26	24
Steroid contraception (the "pill")	2.7	0
Abortion	0	0
Intrauterine contraception (averages)		
Lippes loop (large)		
0-12 months	2.4	
12-24 months	1.4	

SOURCE: Berelson et al., *Family Planning and Population Programs*, University of Chicago Press, 1966.

[49] The factor of patient *use*, or non-use is always relevant. Well motivated, sophisticated users might have no failure with a contraceptive foam, for example.

[50] The number 80 in the first line indicates that among 100 women utilizing no contraception for one year, 80 will become pregnant.

Summary of Argument

This case presents three separate actions: (1) that of Jane Roe, an unmarried pregnant woman, who sues on behalf of herself and other women unable to obtain a legal abortion because of the Texas abortion laws; (2) that of John and Mary Doe, a childless married couple who sue on behalf of themselves and others similarly situated complaining of the adverse effect of the Texas abortion law on their marital relations; and (3) that of James Hubert Hallford, M.D., a Texas physician who intervenes on behalf of himself and other doctors similarly situated, alleging the constraint of the Texas abortion law on the practice of medicine.

The parties requested that articles 1191-1194 and 1196 of the Texas Penal Code, which make abortion a crime unless performed "upon medical advice for the purpose of saving the life of the mother," be declared unconstitutional and that Defendant Henry Wade be enjoined from instituting future prosections thereunder.

The three-judge federal court declared the statutes unconstitutional on two grounds: first "because they deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children" and are overbroad and not supported by compelling state interests; and second because they are unconstitutionally vague. The court, however, refused to grant an injunction and found that John and Mary Doe had no standing.

Appellants appeal to this Court from the denial of injunctive relief and from the holding that John and Mary

Doe have no standing; they urge the Court to go beyond jurisdictional points to a consideration of the merits of the statute in question.

Appellants urge first that John and Mary Doe do have standing to challenge the Texas abortion law and that they do present a case or controversy. The Does are complaining not of a future, anticipated injury resulting from the unavailability of legal abortions, but rather are complaining of the effect that unavailability is currently having upon their marital relationship. They are facing a dilemma forced upon them by the abortion statute: whether to discontinue normal marital intimacies or to risk contraceptive failure, which would be detrimental to Mary's health. Mary could not obtain a legal abortion in Texas since pregnancy would pose no immediate danger to her life. The continuing spectre of pregnancy is having a divisive effect upon their marriage. They are vitally affected by the Texas abortion law and do present a case or controversy within the meaning of those terms as established by prior decisions of this Court. *Flast* v. *Cohen*, 392 U.S. 83 (1968); *Investment Co. Institute* v. *Camp*, 401 U.S. 617 (1971).

Appellants urge that they are entitled to injunctive relief to effectuate the rights established by the decision of the three-judge court and that the court erred in refusing to grant the injunction.

Appellants have suffered and are continuing to suffer irreparable injuries which are both great and immediate, and there is no opportunity for them to eliminate the threat to their rights posed by the abortion statute through the defense of a single prosecution. Under the standards laid

down in *Younger* v. *Harris*, 401 U.S. 37 (1971), they have brought their case within those special circumstances where Federal equitable relief against the enforcement of state criminal statutes is justified. *Ex parte Young*, 209 U.S. 123 (1908).

Appellants required an injunction to vindicate their rights; since no injunction was issued, appellee continues to consider the laws to be in force and effect and Dallas physicians, reasonably fearful of prosecution, continue to refuse to perform medical abortions. As a consequence, safe abortion procedures are no more available now in Texas than they were prior to the district court's decision holding the Texas law unconstitutional.

Further, appellants contend that injunctive relief was appropriate and should have been granted since no adequate state remedy is available (particularly as to appellants Roe and Doe) due to the unique Texas division of criminal and civil jurisdiction.

As to the merits, appellants contend that the Texas abortion law is unconstitutional since it interferes with the exercise of fundamental rights and is neither narrowly drawn nor supported by a compelling state interest. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). The law abridges rights emanating from the First, Fourth, Ninth, and Fourteenth Amendments to seek and receive health care, to privacy and autonomy in deciding whether to continue pregnancy, and, as to physicians, to administer medical care according to the highest professional standards. The right of personal and marital privacy has been recognized by this Court and by numerous state and lower federal courts, and is grievously infringed by the statute in ques-

tion. The law is unconstitutional since it is overboard and since it does not support any compelling state interest.

The primary interest asserted by appellee in the lower court was an interest in protecting fetal life, yet appellants have clearly shown that the state's position is fatally inconsistent since it does not exhibit any interest in or provide any protection of fetal life in any circumstance other than the medical procedure of abortion.

Additionally, the Texas abortion law is unconstitutionally vague since it gives no meaningful indication to physicians of the conditions under which an abortion may legally be performed.

Finally, the law in question imposes an unconstitutional burden of proof on a physician accused of having performed an abortion to establish that an alleged abortion was within the statutory exception established by article 1196.

In summary, appellants urge this Court to render a decision holding that the three-judge court erred in refusing to grant injunctive relief; that the three-judge court erred in holding that John and Mary Doe presented no case or controversy and did not have standing to challenge the Texas abortion law; and affirming the decision of the three-judge court that articles 1191-1194 and 1196 of the Texas Penal Code are unconstitutional.

ARGUMENT AND AUTHORITIES

Obviously a single brief cannot present all of the considerations which should be brought to bear on the issue of the constitutionality of the Texas abortion law. Beyond the authority applicable to the questions of injunctive relief and standing, Counsel for Appellants have chosen primarily to amplify the constitutional issues relied upon by the lower court.

Counsel for Appellants invite this Court's attention to each of the *amicus curiae* briefs filed herein on appellants' behalf. Each presents unique aspects of legal, medical and social science factors relating to the question of abortion which this Court is urged to consider in deciding the instant case.

I.

The Statutory Three-Judge District Court Was Properly Convened and Had Jurisdiction to Grant Declaratory Relief to the Three Complaining Classes of Party Plaintiffs.

A. The Class of Adversely Affected Married Couples: Mary and John Doe

1. *Standing of Mary and John Doe*

The uncontradicted allegations of Mary and John Doe have been discussed at pp. 10-11 of this brief. It is not contested that the Texas abortion law has a recurring, present adverse impact upon their marital relations. This Court has frequently upheld the standing of parties with far less at stake than marital harmony and overall health.

As to standing in itself, there exists a "nexus between the status asserted by the litigant[s] and the claim[s] [they present]." *Flast* v. *Cohen*, 392 U.S. 83, 102 (1968). Laws regulating the medical procedure of induced abortion inevitably affect the class of married couples.

2. *Case or Controversy Between the Does and Defendant-Appellee*

Nothing in Article III nor considerations of judicial policy justified the determination below that the Does failed to present a case or controversy.

Regardless of the possibility that a married couple might present a *more* concrete controversy, Mary and John Doe satisfy all of the logical and constitutional prerequisites for invoking the jurisdiction of a court over their controversy with appellees.

Unspecified economic injury between a litigant and a *potential* business competitor was held to create a case or controversy in *Investment Co. Institute* v. *Camp*, 401 U.S. 617 (1971); *accord*, *Arnold Tours* v. *Camp*, 400 U.S. 45 (1970) (per curiam). Mary and John Doe, who assert a *present* personal injury to their marital harmony, not measurable in economic terms, are in a dilemma of far greater reality than that in *Investment Co. Institute*.

The Arkansas Monkey-Law case, *Epperson* v. *Arkansas*, 393 U.S. 97 (1968), is more akin to this problem. There a teacher posed a case or controversy with state officials because she was inhibited by a statute which had never been enforced. The inhibition in the present case is more serious. Both present a realistic case or controversy, and both cases have been vigorously pursued by the parties. The decisions

above, and the long line of loyalty oath cases, show a realistic approach to Article III and recognize that the quantifiable impact of a statute, rather than the imminence of jail, is a sound criteria. *See also LSCRRC* v. *Wadmond*, 401 U.S. 154, 158-59 (1971); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964).

B. The Class of Adversely Affected Pregnant Women Denied Medical Care: Jane Roe

1. *Standing of Jane Roe*

At the time she filed her complaint, Jane Roe was pregnant and had been denied a legal, hospital abortion in Texas because of the law. She sought to contest the statute on behalf of herself and others presently or in the future similarly situated. The lower court upheld her standing, and this has not been questioned.

2. *Case or Controversy Between the Jane Roes and Defendant-Appellee*

The fact that Jane Roe was forced to continue her pregnancy pending determination of her suit and that she could not then obtain a safe abortion does not moot the appeal in any sense, particularly in light of the class allegations. "The problem is . . . 'capable of repetition, yet evading review,' *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). The need for its resolution thus reflects a continuing controversy. . . . " *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969). The case is the same as those in which events of nature or conduct by one of the parties threatens to obscure a substantial, on-going problem which must be finally resolved. *See, e.g., Gaddis* v. *Wyman*, 304 F. Supp. 713, 717 (S.D.N.Y. 1969), *aff'd mem. sub nom. Wyman* v.

Bowens, 397 U.S. 49 (1970); *Kelly* v. *Wyman*, 294 F. Supp. 887, 890, 893 (S.D.N.Y. 1968), *aff'd sub nom. Goldberg* v. *Kelly*, 397 U.S. 254, 257 n. 2 (1970). The 728 Texas women who were forced to travel to New York City for medical care from July 1, 1970, to March 31, 1971[51]—a rate of 81 per month—illustrate the continuing controversy. This Court has held that a "mere possibility of [recurrence] . . . serves to keep the case alive." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953). In the present context, mere possibility has been replaced with the inevitability of Texas women being forced to seek out unknown doctors at medical facilities in distant states at great expense.

C. The Class of Adversely Affected Physicians Prohibited on a Regular and Recurring Basis From Providing Necessary Medical Care for Their Patients: James H. Hallford, M.D.

1. *Standing of Dr. Hallford*

The action on behalf of physicians, represented by Dr. Hallford, alleged throughout that the abortion statute directly curtailed the interests in providing adequate medical advice and treatment for patients. These interests are aspects of "liberty," "property," and association directly protected by the Fourteenth and First Amendments. The opportunity to pursue one's profession is encompassed within the concepts of "liberty" and "property." This has been the teaching of decisions involving members of and aspirants to the bar, *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96, 102-03 (1963); teachers, *Slochower* v. *Board of Higher Educ.*, 350 U.S. 551 (1956); scientists,

[51] Chase, *Twelve Month Report on Abortions in New York City* (June 29, 1971) (Health Services Administration, City of New York).

Greene v. *McElroy,* 360 U.S. 474, 492 (1959); and physicians as well, *Birnbaum* v. *Trussell,* 371 F.2d 672 (2d Cir. 1966).

The present case, therefore, is wholly unlike *Tileston* v. *Ullman,* 318 U.S. 44 (1943) (per curiam). There a physician, who claimed no rights whatsoever of his own, sought declaratory relief against a statute which prohibited *patients* from using contraceptives. Here, physicians are drastically affected by direct enforcement provisions of the challenged statute. Tileston, however, had made "no allegations asserting any claim under the Fourteenth Amendment of infringement of [his] liberty or his property rights." 318 U.S. at 44. It is abundantly clear that the physician sub-class,

> "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr,* 369 U.S. 186, 204 (1962), quoted in *Flast* v. *Cohen,* 392 U.S. 83, 99 (1968).

2. *Standing of the Physician-Class to Assert the Rights of Patients to Seek the Medical Care of Induced Abortion*

Dr. Hallford also invoked the rights of present, past, and prospective patients. A pregnant woman is generally in no position to undertake protracted litigation to establish her right to an abortion, and none has ever been prosecuted. Neither a physician's rights, nor those of his patients, should depend upon the ability to find a cooperative martyr.

This case, then, is a close parallel to *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), because,

> "[t]he rights of [patients] are likely to be diluted or adversely affected unless those rights are considered in a suit involving [physicians] who have this kind of confidential relationship to them." 381 U.S. at 479.

Similarly, it has been held in abortion prosecutions that the physician may assert his patient's rights, a proposition which the lower court correctly accepted, and *California* v. *Belous*[52] considered so self-evident as to justify no more than a footnote. In fact, each federal and state court decision in recent months has concluded, without the need for extensive discussion, that physicians in both declaratory and defensive actions have standing to assert the rights of patients. *E.g., United States ex rel. Dr. Jesse Williams, II* v. *Zelker*, —— F.2d ——, No. 35381 (2d Cir. July 2, 1971) (Tom C. Clark, J.); *Crossen* v. *Breckenridge*, —— F.2d ——, No. 20852 (6th Cir. June 23, 1971) (Miller, J.). *See also Truax* v. *Raich*, 239 U.S. 33 (1915); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *see generally* Sedler, *Standing to Assert Constitutional Jus Tertii*, 71 YALE L.J. 599 (1962).

Physicians, in light of their direct involvement in the day to day effects and enforcement of the statute, are situated in much the same way as the defendant-covenantor in *Barrows* v. *Jackson*, 346 U.S. 249 (1953), because here as there "it would be difficult if not impossible for the persons whose rights are asserted to present their griev-

---

[52] 71 Cal.2d 954, 963 n. 5, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969) ("Dr. Belous' standing to raise this right is unchallenged."), *cert. denied*, 397 U.S. 915 (1970).

ances before any court." 346 U.S. at 257. In any medical context it is meaningless to speak of physicians without patients and patients without physicians. In law it would be equally meaningless to hold that a physician may not rely upon her or his patients' rights.

3. *The Recurring Case or Controversy Between the Physician-Class and Defendant-Appellee*

"There can be little doubt that fear of the law is a determining factor in the policy adopted by hospitals and surgeons, both in the United States and in Great Britain." G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 168 (1966). Medical professionals, commendably, do not habitually flout laws in order to contest their validity. This Court, and lower courts, should not force such anti-social conduct by taking an unduly narrow view of the Article III case or controversy requirement. Nothing in Article III, prior decisions by this Court, or considerations of judicial management remotely suggests that a physician must flout a statute, undertake piecemeal defense of repeated prosecutions and risk fines, imprisonment, and license revocation in order to challenge a law which poses concrete cases and controversies in the physician's office day after day.

The nature of the recurring case or controversy produced by the challenged statute is understandable, specific, and fully manageable within sound judicial procedures. Physicians do not simply "'feel inhibited'" by the restrictions on reasons and procedures for medical abortions in Texas. *See Younger* v. *Harris*, 401 U.S. 37, 42 (1971). They *are inhibited* in a very serious, plainly demonstrable, concrete, and specific manner.

Federal courts in Wisconsin,[53] Colorado,[54] Illinois,[55] North Carolina,[56] and Ohio[57] have faced the same questions of recurring case or controversy, and ruled in the manner suggested by Appellants.

Prospective lawyers are not required to be disbarred or refused admission to the bar in order to contest statutes which affect the conduct of law students. *LSCRRC* v. *Wadmond*, 401 U.S. 154, 158-59 (1971). The teachers in *Epperson* v. *Arkansas*, 393 U.S. 97 (1968), and *Baggett* v. *Bullitt*, 377 U.S. 360 (1964), did not face a court-imposed dilemma forcing them to flout an anti-evolution statute in the Scopes tradition, or risk entanglement in a perjury prosecution which might follow the signing of a loyalty oath.

Similarly, the drug companies in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), were permitted by this Court to make a broad attack on labelling regulations promulgated by the Commissioner of Food and Drugs. Physicians, even more than drug companies, "deal in a sensitive [profession], in which public confidence," 387 U.S. at 153, is especially important.

---

[53] McCann v. Babbitz, 310 F. Supp. 293 (E.D. Wis.) (per curiam), *appeal dismissed*, 400 U.S. 1 (1970) (per curiam).

[54] Doe v. Dunbar, 320 F. Supp. 1297 (D. Colo. 1970).

[55] Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill.), *appeal docketed sub nom.* Hanrahan v. Doe, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (No. 70-105, 1971 Term).

[56] Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C.), *appeal docketed*, 40 U.S.L.W. 3048 (U.S. July 17, 1971) (No. 71-92, 1971 Term).

[57] Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970).

Indeed, even the earlier "ripeness" cases which found no controversy support the presence of a sufficient degree of justiciable adversity on the facts presented here.[58]

A bare majority in *Poe* v. *Ullman*, 367 U.S. 497 (1961), for example, found no controversy over the unenforced Connecticut law against the use of contraceptives. Justice Frankfurter's plurality opinion relied upon four factors: (1) a history of non-enforcement of the statutes against physicians and patients. 367 U.S. at 501-02; (2) the fact that "contraceptives are commonly and notoriously sold in Connecticut stores. Yet no prosecutions are recorded. . . ." 367 U.S. at 502; (3) the absence of "real threat of enforcement," 367 U.S. at 507; and (4) the failure to find "deterrent effect . . . grounded in a realistic fear of prosecution." 367 U.S. at 508.

Each of these features is different in the present case, and additional considerations make this case even more appropriate for decision, on the merits.

(1) The Texas abortion statutes are regularly enforced by criminal prosecutions and license revocations. In addition, hospital committees in effect enforce the laws within their institutions. Neither *Poe* nor *Griswold* indicated that hospital committees in Connecticut regulated the prescription of contraceptives to patients.

(2) Abortions in Texas hospitals are obviously not "commonly and notoriously" available upon request.

---

[58] This is not a case like *Hall* v. *Beals*, 396 U.S. 45 (1969) (per curiam), where no continuing injury whatsoever was present. Nor is *Brockington* v. *Rhodes*, 396 U.S. 41 (1969) (per curiam), pertinent. There the relief sought was limited in nature and rendered impossible to grant by the passage of time.

(3) There is more than "real threat of enforcement" of the Texas abortion laws. There is frequent actual enforcement.

The above analysis considers the *Poe* plurality opinion in isolation and assumes the case was correctly decided. However, *Poe* was handed down over persuasive dissents by Justices Harlan and Douglas, and memorandum notations of dissent from Justices Stewart and Black. *Poe* has been repeatedly criticized and suggestions made that it be or was limited to its facts.[59]

Poe appears to be one of the exceedingly few decisions which requires a litigant to invite and undergo criminal prosecution. Ultimately, the physicians prevailed, seven-to-two, four years later. Suppose they had not? The *Poe* decision would have consigned them to accepting the penalty. Other decisions, as Justices Harlan and Douglas pointed out, dissenting in *Poe,* imposed no such Hobson's choice.

Justice Harlan's dissent in *Poe* undertook at length to demonstrate that the majority was in substantial error. 367 U.S. at 522-39. The Justice placed chief reliance on *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), and *Truax* v. *Raich,* 239 U.S. 33 (1915). Both permitted anticipatory relief to avoid damage caused by the present *effect* of a statute rather than imminence of enforcement. Significantly, in *Pierce,*

---

[59] *See* A. Bickel, The Least Dangerous Branch 143-55 (1962); Note, 62 Colum. L. Rev. 106 (1962); Comment, 50 Calif. L. Rev. 137 (1962). For an excellent general discussion of the "ripeness" question in the context of criminal law, see Note, *Declaratory Relief in the Criminal Law,* 80 Harv. L. Rev. 1490 (1967).

> "a Court which included Justices Holmes, Brandeis, and Stone rejected a claim of prematureness and then passed upon and held unconstitutional a state statute whose sanctions were not even to become effective for more than seventeen months after the time the case was argued. . . ." *Poe* v. *Ullman,* 367 U.S. 497, 538 (1961) (Harlan, J., dissenting).

See also West Virginia Board of Education v. *Barnette,* 319 U.S. 624 (1943) (students allowed to challenge possible expulsions prior to actual dismissal, and prior to effective date of rule which, if enforced, would have required expulsion); *Terrace* v. *Thompson,* 263 U.S. 197, 216 (1923) ("They are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights").

Congress, in passing the Declaratory Judgment Act, recognized the need to provide a federal anticipatory remedy in lieu of defense to a criminal prosecution. A Senate Report reflected this specific concern:

> "It is often necessary, in the absence of the declaratory judgment procedure, to violate or purport to violate a statute in order to obtain a judicial determination of its meaning or validity." S. Rep. No. 1005, 73d Cong., 2d Sess., at 2-3.

In the instant case, physicians positively refrain from treating and advising patients for the reason that they fear criminal prosecution, or administrative sanctions. They are not uninterested citizens urging an academic question, but are a class of citizens greatly affected and deterred by the challenged statutes. As Professor Bickel

suggested, in a slightly different context, "it may be true that by hypothesis no more suitable case can ever be constructed, because those who are unjustifiably deterred will never be prosecuted, and what deters them is precisely the prospect of litigation." [60]

In light of the considerations set out above, the lower court correctly recognized the claims of the physician class as presenting a recurring case or controversy within the meaning of Article III.

II.

The Three-Judge Court Should Have Granted Injunctive Relief to the Three Complaining Classes of Plaintiffs.

The relief sought by Appellants below did not include any order against actual pending or contemplated state court proceedings. Appellants' claims met the requirements of equitable jurisdiction, and posed a situation justifying injunctive relief against future enforcement of the abortion statutes. By denying the requested injunction, the Court below in effect failed to enforce the very Constitutional rights which that Court had found to be in jeopardy.

A. Injunctions Against Future Enforcement of State Criminal Statutes Are Proper Absent a Showing of Bad-Faith Enforcement for the Purpose of Discouraging Protected Rights.

The District Court based its refusal to issue an injunction on an erroneous interpretation of *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), stating that:

---

[60] A. Bickel, The Least Dangerous Branch 149-50 (1962).

> "This federal policy of non-interference with state criminal prosecutions must be followed except in cases where 'statutes are justifiably attacked on their face as abridging free expression,' or where statutes are justifiably attacked 'as applied for the purpose of discouraging protected activities.' *Dombrowski* v. *Pfister*, 380 U.S. at 489-490. Neither of the above prerequisites can be found here." *Roe* v. *Wade* (314 F. Supp. at 1224; A. 122).

The district court's opinion seemed to require literal threats of bad-faith prosecution for the purpose of discouraging plaintiffs' constitutionally-protected activities before the plaintiffs would have been entitled to an injunction. However, the quoted phrases from *Dombrowski* relate to the appropriateness of abstention in cases where a statute might be construed by a state court to be inapplicable to the conduct of the federal court plaintiff. While the facts in *Dombrowski* included a threat to freedom of expression and bad faith on the part of the local law enforcement officials, the case should not be read as a restriction of the law relating to equitable relief from unconstitutional criminal statutes.

The correct standard by which the claims of the appellants for injunctive relief should have been judged was restated by Mr. Justice Black in *Younger* v. *Harris*, 401 U.S. 37, 47 (1971). The plaintiff must show: (1) irreparable injury; (2) that the irreparable injury is both great and immediate; and (3) that the threat to plaintiff's federally protected rights is one that cannot be eliminated by his defense against a single criminal prosecution. *Ex parte Young*, 290 U.S. 123 (1908), and injunction cases

decided since, indicate that the three prerequisites for injunctive relief may be met absent actual threats of bad-faith enforcement.

The actions resulting in *Ex parte Young*, 209 U.S. 123 (1908), were initiated on the day *before* the statute in question took effect. It was not until a temporary injunction had been issued against the attorney general of Minnesota that he took any action against the railroad involved. The pleadings of the plaintiffs merely alleged that *should* the railroad fail to observe the law, "such failure *might result* in an action against the company or criminal proceeding against its officers . . ." *Id.* at 131 (emphasis added). In fact, the plaintiffs were stockholders in the railroad and could not have been subjected to either civil or criminal action. Their interest was only monetary.

In *Truax* v. *Raich*, 239 U.S. 33 (1915), the plaintiff filed his bill in the district court one day after the statute in question (establishing penalties against employers who employed fewer than 80 per cent native-born citizens) was signed into law. The immediate and irreparable injury about to be suffered by Raich, an alien, was that his employer, fearing criminal sanction, was planning to discharge him. After Raich applied for an injunction against the local prosecutor, the employer was arrested. Raich was not arrested, nor was he threatened. There were no allegations of bad faith. Rather, this Court emphasized the inadequacy of the plaintiff's remedy at law and spoke of the exception to the rule against interference with criminal prosecution that existed,

> "when the prevention of such prosecutions is essential to the safeguarding of rights of property. The right to earn a livelihood and continue in employment unmo-

lested by efforts to enforce void enactments should similarly be entitled to protection. . . ." 239 U.S. at 37-38. (Citations omitted.)

In *Terrace* v. *Thompson*, 263 U.S. 197 (1923), this Court spoke of the "threatened enforcement of the law" in question as being subject to an injunction if necessary to protect federal rights. There was no allegation that the threats were anything more than good-faith willingness on the part of the state officials to enforce a law on the books.

Hygrade Provision Co. v. *Sherman*, 266 U.S. 497 (1925), involving a New York statute establishing penalties for falsely representing meat as "kosher," perhaps represents the "low-water" mark in the quality of allegations necessary to support equitable jurisdiction. The offenses in question were classified as misdemeanors with a maximum fine of $500.00, and the "threats" of prosecution were general, directed to the public. Yet, the Court's unanimous opinion stated that: "if the statutes under review are unconstitutional, appellants are entitled to equitable relief. . . ." 266 U.S. at 500.

Perhaps because of a constant parade into the federal courts of litigants such as those in *Hygrade*, whose anticipated injuries consisted of small fines under economic regulation statutes, this Court began to tighten the prerequisites for equitable interference with state criminal statutes. Thus, in a series of economic regulation statute cases including *Fenner* v. *Boykin*, 271 U.S. 240 (1926); *Beal* v. *Missouri Pac. R.R. Corporation*, 312 U.S. 45 (1941); *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89 (1935); and *Watson* v. *Buck*, 313 U.S. 387 (1941); this Court somewhat narrowed the *factual* requirements necessary to obtain an in-

BLEED THROUGH POOR COPY

junction. That the substantive law was not changed or narrowed can be gleaned from the individual facts of the cases. In *Fenner*, the state statute made participation in certain assignments for purchase or sale of future commodities a crime. The plaintiffs were commodity dealers. The district court concluded that the statute only applied to gambling transactions, and dismissed the bill. This Court affirmed holding that the plaintiffs should first set up their defense in state court, unless it plainly appeared that such a course would not afford adequate protection. *Fenner, supra*, at 244. Thus, not only was it unclear that the statute jeopardized the plaintiff's federal rights, but it was clear that the validity of the statute depended upon whether it would apply to plaintiffs.

Spielman involved a misdemeanor statute with a maximum $500 fine. The defendant-prosecutor stipulated only one prosecution until a decision on the constitutionality of the state statute was reached and it was not clear that plaintiff's business would be seriously hurt. This Court stressed that the injury must be both great and immediate to warrant equitable relief. Obviously from the facts, Spielman's anticipated injury was not.

Beal also dealt with the problem of single versus multiple prosecutions. The penalty was a fine and it was an issue of fact, undecided by the district court, whether multiple prosecutions were contemplated. If there was to be only one, this Court felt that the injury entailed in a single defense with only the possibility of a fine at stake was not great enough to warrant injunction. *Beal, supra*, at 50.

In *Watson*, the statutes in question (regulating music copyrights) were extremely complicated and had not been

construed by the state courts. The district court had enjoined enforcement of the entire statute, whereas only part of it was constitutionally suspect. Whether multiple prosecutions were contemplated was also in doubt. In fact this Court spoke of "an absence of any showing of a definite and expressed intent to enforce particular clauses of a broad, comprehensive and multi-provisioned statute." *Watson, supra,* at 400.

Contrasted with the above cases, the facts of *Hague* v. *CIO,* 307 U.S. 496 (1939), decided during the same period, are particularly enlightening. There, the injuries alleged involved ordinances which among other things flatly prohibited distributing any newspapers, paper, periodical, book, magazine, circular, card or pamphlet on any public street or public place. The plaintiffs had been denied the right to meet, had been arrested and at times "thrown out of town." While much was said in the opinion concerning the "rights and immunities" of citizens of the United States and the states, and whether free speech and assembly were included in the Civil Rights Acts, there was never any indication that only violations of speech and assembly rights would establish a case for equitable relief.

In *Douglas* v. *City of Jeannette,* 319 U.S. 157 (1943), an injunction was denied but the decision did not hinge on the question of threats or bad-faith enforcement to discourage federally protected rights. First, the ordinance was general, relating to all peddlers and was only unconstitutional as applied to plaintiffs and other Jehovah's Witnesses; second, there was no factual allegation of multiple prosecutions and it appeared that the plaintiffs could completely present their claims in the defense of a single suit—especially since this Court had that day held the statute void as to those in plaintiffs' class; third, since

the ordinance was not void as to all applications, the district court would have had to attempt to envision all possible applications, enjoining some and leaving others alone; and finally, the rather unique situation that existed in this Court's having declared the ordinance as applied unconstitutional in a companion case effectively mooted whatever injuries might have been suffered in the future by the plaintiffs.

Stefanelli v. *Minard*, 342 U.S. 117 (1951), and *Cleary* v. *Bolger*, 371 U.S. 392 (1963), are often cited as precedents against injunctions involving state criminal process, but both cases involved pending prosecutions. The rights in jeopardy were procedural rather than substantive and involved only the single trials in which the plaintiffs were being prosecuted. Also, another policy, that of avoiding piecemeal review of cases, militated against an injunction.

In *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), this Court spoke again of the reluctance of federal courts to intervene when a plaintiff's rights might be fully determined in the defense and ultimate Supreme Court review of a single indictment, but held that such was not the situation in the case being considered.

> "[T]he allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights." 380 U.S. at 485.

The rights could not be vindicated by setting up a defense in a criminal trial because the prosecutions were in bad-faith and for the purpose of harassment. The special vulnerability of speech to such tactics made the injuries irreparable, immediate and great. This, taken with the

bad-faith prosecutions, made out a case for equitable relief. That free expression and bad faith on the part of state prosecutors were the determinative factors in *Dombrowski* cannot be denied, but to hold that these are the only factors justifying an injunction is to ignore the substantive law contained in *Ex parte Young*, 209 U.S. 123 (1908), *Truax* v. *Raich*, 239 U.S. 33 (1915), and other cases cited above while keying upon the peculiar factual situation to which the substantive law was applied in *Dombrowski*.

That *Dombrowski*-type situations are not the only cases in which federal interference is justified was affirmed by this Court last term in the case of *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971). There the threats to the plaintiff's rights were not in the form of threats of prosecution either in good or bad faith. The only criminal sanctions involved applied to those who sold alcoholic beverages to persons whose names had been posted. The statute itself, by allowing officials and relatives to "post" a person's name without notice or hearing, posed the threat to the plaintiff's rights. The rights could not be vindicated by defending a single state prosecution.

B. The Question of Relief by Injunction Against the Texas Abortion Statute Is Not Foreclosed by the Decisions in *Younger* v. *Harris* and Companion Cases.

Younger v. *Harris*, 401 U.S. 37 (1971), *Samuels* v. *Mackell*, 401 U.S. 66 (1971), *Dyson* v. *Stein*, 401 U.S. 200 (1971), *Byrne* v. *Karalexis*, 401 U.S. 216 (1971), *Boyle* v. *Landry*, 401 U.S. 77 (1971) and *Perez* v. *Ledesma*, 401 U.S. 82 (1971), all involved, in part, the requested injunction of a *pending* prosecution. Since those plaintiffs who were being prosecuted did not make out a case of bad

BLEED THROUGH POOR COPY

faith on the part of the local officials, they failed to satisfy the requirement that the threats to their rights must be such that they could not be vindicated in the defense of a single prosecution. As Mr. Justice Stewart pointed out in his concurring opinion to *Younger* v. *Harris,* 401 U.S. 37, 54-55 (1971):

> "[T]he Court today does not resolve the problems involved when a federal court is asked to give injunctive or declaratory relief from *future* state criminal prosecutions."

Although the plaintiff, Dr. Hallford, was being prosecuted under the Texas Abortion Statutes at the time he filed his motion to intervene and complaint, he requested an injunction only against future prosecutions under the statutes, reserving the right to ask for an injunction against the *pending* prosecutions against him (A. 34). In fact, as the record discloses, he never asked the district court to enjoin the pending prosecutions. Plaintiffs Roe and Doe were not in any sense involved in the pending prosecutions. Under the authority of *Hale* v. *Bimco Trading, Inc.,* 306 U.S. 375 (1939), neither the Anti-Injunction Statute, 28 U.S.C. §2283, nor collateral court-made rules relating to comity would bar their actions as strangers to the pending prosecution of Dr. Hallford. To hold otherwise would be to ignore that three different rights are being claimed: (1) The physician's right to perform an abortion; (2) the pregnant woman's right to obtain an abortion and (3) the married couple's right to the assurance of abortion as a back-up procedure to protect their marital harmony. Dr. Hallford might fail to vindicate his rights in defending the criminal action. He may rely in part upon the rights of his patients, but

there is no guarantee that those rights will be reviewed by this Court. Plaintiffs Doe and Roe are not required to leave the defense of their personal rights to another. *Pearlman* v. *United States*, 247 U.S. 7 (1918). The fact that the pending state action did not involve the same parties as the federal action eliminates the danger of the type of gratuitous interference with state court litigation spoken of in *Brillhart* v. *Excess Ins. Co. of America*, 316 U.S. 491, 495 (1942).

In both *Younger* v. *Harris*, 401 U.S. 37 (1971), and *Boyle* v. *Landry*, 401 U.S. 77 (1971), there were plaintiffs who were not being prosecuted under the statutes in question. However, in both instances it was not clear that the statutes prohibited what those plaintiffs wished to do. In *Boyle* the statute involved threatening to commit a criminal offense. The majority opinion by Mr. Justice Black indicates that the plaintiffs were asking for an injunction because they feared bad-faith enforcement of the statutes, not because the statutes on their face forbade any activity in which plaintiffs wished to participate. Since no facts showing that actual threats or arrests had been received were introduced in the district court, plaintiffs failed to make out a case of bad-faith harassment. In *Younger*, the three plaintiffs who were not being prosecuted only alleged that they felt "inhibited" by the statute. It was not clear that the statute would apply to them, nor that their inhibitions were at all justified. *Younger* v. *Harris, supra*, at 57, 58 (Mr. Justice Brennan concurring).

By contrast, Plaintiffs Roe, Doe and Hallford in the present case presented factual allegations to the District Court which clearly brought them within the criteria necessary to invoke equitable relief from the statute. Whether

the rights alleged by the plaintiffs are federally protected has yet to be decided by this Court, and arguments related to those rights are treated in this brief in the section on the merits of the statutes in question. Similarly, the arguments relating to the impact of an unwanted pregnancy and a physician's right to use his best medical judgment are also treated elsewhere in this brief. It is enough for purposes of this section to point out that in the case of plaintiff Jane Roe and the class she represents, the economic, social, psychological, and physiological effects of being forced to go through an unwanted pregnancy and deal with an unwanted child certainly represent irreparable injuries. When she and those in her class are forced to continue an unwanted pregnancy their lives are irremediably altered. They have no action for damages or any other traditional legal action which in fact or theory can remedy their situation. That problems concerning pregnancy are both great and immediate obviously follows from even a cursory consideration of the nature of the condition. Plaintiff Roe and those in her class cannot eliminate the threat to their rights by setting up a defense in a single prosecution or any number of prosecutions since under Texas law a woman upon whom an abortion is performed cannot be prosecuted as either a principal or an accomplice. *Gray* v. *State*, 77 Tex. Cr. R. 221, 178 S.W. 411 (1915); *Moore* v. *State*, 37 Tex. Cr. R. 552, 40 S.W. 287 (1897). Plaintiff Roe in her complaint and in her affidavit, which was uncontroverted by the defendant, presented a factual resumé consisting of pregnancy out-of-wedlock, social stigma and economic hardship due to that pregnancy, a desire to put an end to that condition, and an inability to do so under conditions which would not jeopardize her life. That there are many in

her situation is uncontroverted. If Jane Roe and those in her class have a constitutional right to an abortion, there is but one way to effectuate that right—by enjoining the enforcement of the statute so that physicians will be willing to attend to their health needs.

Plaintiffs John and Mary Doe presented claims and facts to the district court which showed a pervasive and continuing injury to their most intimate marital relations. The Texas abortion statute poses a constant threat to their ability to plan their family and avoid possible injury to Mary Doe's health. Each day that they must face this uncertainty represents a great and immediate injury. Like Plaintiff Roe, there is no way that they can eliminate this threat to the rights of marital privacy by setting up a constitutional defense in a criminal prosecution. Mary Doe could not be prosecuted. While her husband could theoretically be prosecuted as an accomplice should Mary undergo an illegal abortion, his defense on constitutional grounds would come too late to prevent the disruption of their marital relations prior to pregnancy. For it is not their right to end an unwanted pregnancy at present that is being violated by the statute, but rather, the right to engage in normal marital relations with the assurance that should contraception fail, Mary's health would not be endangered. Again, if John and Mary have a constitutional right to the availability of abortion as means to insure normal marital relations, there is only one way they can be secure in that right—the enforcement of the statutes must be enjoined.

Plaintiff Dr. Hallford's threatened rights include his license to practice medicine and earn a livelihood, his right to administer to his patients to the best of his medical

BLEED THROUGH POOR COPY

ability, and his right to be free from arbitrary regulation which furthers no legitimate state interest. The abortion statute and its enforcement pose a constant threat and interference to those rights. Of course, Dr. Hallford's case for equitable relief differs in one respect from that of the other plaintiffs. He is being prosecuted, so that theoretically he could vindicate his rights by his defense in the criminal prosecution. However, several problems arise in this context. Under Texas law, the State has no appeal in any criminal case. TEX. CODE CRIM. PROC., art. 44.02, TEX. CONST., art. 5, §26. Therefore, even if Dr. Hallford's trial judge determines that the abortion statute is unconstitutional, the decision would affect only that trial judge. Should Dr. Hallford perform an abortion in the future not within the statutory exception, he could be brought to trial again in a different court before another trial judge who would in no way be bound by the first judge's ruling. Also, how far must Dr. Hallford go in attempting to vindicate his rights? Must he deliberately eschew all other defenses save that based on the Federal Constitution so as to be sure that the issue will be preserved for ultimate review by this Court? If he is acquitted by the jury on the facts he can be prosecuted again if he performs abortions in the future.

C. No Effective State Remedy was Available to Appellants Roe and Doe.

The underlying considerations for the professed policy against federal court interference with state criminal process have been stated by this Court many times. They include basic factors unique to federalism, a reluctance to embarrass state officials, and the fact that state courts are under a duty to protect constitutional rights. Despite

CPOY BOUND CLOSE IN CENTER

these considerations, this Court has affirmed time and again that when absolutely necessary to protect federal rights the policy may be set aside. Certainly one basic factor to be considered in determining whether such absolute necessity exists is the availability of a state remedy by which one whose rights are affected may test the allegedly unconstitutional statute.

Due to a rather unique situation existing in Texas, Plaintiffs Roe and Doe had absolutely no effective method of testing the Abortion Statutes in a state court.

The Texas Declaratory Judgment Act, TEX. REV. CIV. STAT. art. 2524-1, only provides a remedy for determining property rights. Furthermore, the general rule is that there is no right to a declaratory judgment involving any penal statute unless property rights are concerned. *State* v. *Parr*, 293 S.W.2d 62 (Tex. Crim. App. 1956);[61] *Bean* v. *Town of Vidor*, 440 S.W.2d 676 (Tex. Civ. App. 1969).

Likewise, the same general rule applies to injunctions against enforcement of a penal statute. They are not allowed unless property is about to be destroyed. *City of Austin* v. *Austin City Cemetery Ass'n*, 28 S.W. 528 (Tex. 1894); *City of Richardson* v. *Kaplan*, 438 S.W.2d 366 (Tex. 1969).

While the Texas Supreme Court recently held in *Passel* v. *Fort Worth Independent School District*, 440 S.W.2d 61 (1969), that it would be possible in the case of an unconstitutional statute to obtain an injunction even though only personal rights are involved, the opinion pointed out that

---

[61] *Parr* involved an original petition for declaratory judgment by the State of Texas. The petition was denied.

in that case the plaintiffs were not seeking to enjoin prosecutions. *Id.*, at 63.

At best the practical availability of the remedies is still questionable, especially if one seeks to enjoin prosecution under a penal statute. But even if Plaintiff Roe or Plaintiffs Doe could manage to obtain an injunction in state court restraining enforcement of the abortion statutes, they would still not have an effective remedy. The Texas Constitution, Article 5, §3 grants appellate jurisdiction over civil matters to the Texas Supreme Court, while Article 5, §5 gives appellate jurisdiction over criminal matters to the Texas Court of Criminal Appeals. Thus if Plaintiffs sought the civil remedy of an injunction, their case would eventually be reviewed in the Texas Supreme Court. But a judgment in their favor from that court would be, in effect, useless since the Supreme Court has ruled that it has no jurisdiction to mandamus a trial court to dismiss a prosecution, even though the statute in question is clearly unconstitutional, because to do so would encroach upon the jurisdiction of the Court of Criminal Appeals. *Pope* v. *Ferguson*, 445 S.W.2d 950 (Tex. 1969). And in *State ex rel. Flowers* v. *Woodruff*, 200 S.W.2d 178, 182-183 (Tex. Crim. App. 1947), the Court of Criminal Appeals issued a writ of prohibition to a district court prohibiting it from enforcing its injunction against enforcement of a penal statute, saying that the district court had no jurisdiction to enjoin a penal statute. To do so would deprive the Court of Criminal Appeals of its jurisdiction.

As might be expected there are problems concerning the precedential value of one court's opinion over the other. A dramatic illustration of the problem may be found in *Barnes* v. *State*, 170 S.W. 548, 554 (Tex. Crim. App. 1914),

where the Court of Criminal Appeals was dealing with a penal statute which had been ruled constitutional by the State Supreme Court. The Court of Criminal Appeals pointed out that the two courts were of equal dignity, said the Supreme Court's opinion was not binding in any way, and held the statute to be unconstitutional.

Thus had the plaintiffs resorted to state court they could have *at best* gotten a declaratory judgment or injunction which could not be enforced and possibly a decision that would not preclude future prosecutions under the statute. As has been stated before, they could not be prosecuted under the statutes. They were completely without state remedy. Surely no concept of federalism can dictate that these plaintiffs must live with a law that vitally affects their lives—not on occasion, but each day and yet have no right to test that law in a court—anywhere.

D. The Existence of a Pending Prosecution Against One of the Plaintiffs Below Does Not Foreclose Equitable Relief Against Future Prosecutions.

Under the *holdings* of this Court, the special considerations and facts present in this case make it one in which federal intervention by injunction is both necessary and proper. The fact that all plaintiffs brought class actions; that no injunction against pending prosecutions was asked; that even if injunctive or declaratory relief might be considered improper in Dr. Hallford's case because of the decision in *Samuels* v. *Mackell,* 401 U.S. 66 (1971), plaintiffs Doe and Roe are claiming rights which are distinct from those of Dr. Hallford and do not and should not have to rely upon him to vindicate those rights; and finally that while Dr. Hallford may have some oppor-

tunity to present his claims at the defense of his prosecution, Plaintiffs Doe and Roe have no opportunity whatsoever to test the statutes either by incurring prosecution or seeking state adjudication of their rights, leave no doubt that the *actual holdings* of this Court do not foreclose *all* of the plaintiffs.

However, certain language in the majority opinion of *Samuels* v. *Mackell, supra,* at 72-73, and Mr. Justice Brennan's separate opinion in *Perez* v. *Ledesma,* 401 U.S. 93, 118-121, is susceptible to two different interpretations. It might be concluded that in speaking of the reluctance of federal courts to interfere with pending state prosecutions, the same considerations apply to both prosecutions pending against the parties before the federal court and any other prosecutions. Such an interpretation, however, is not only a direct departure from precedent, but if adopted would cause hopeless confusion among the federal courts and render the procedure of testing unconstitutional statutes by suit for injunction into a theoretical tool of interest only to historians.

That such an interpretation is not dictated by *Younger* v. *Harris, supra,* and companion cases is demonstrated by the fact that in both *Younger* and *Boyle* v. *Landry, supra,* this Court determined the appropriateness of the relief, which was requested by the plaintiffs who were *not* being prosecuted, on traditional equitable grounds, rather than by merely stating that the pending prosecutions against their co-plaintiffs foreclosed any discussion.

In the present case, Plaintiffs Roe and Doe initially brought their actions with no knowledge of the prosecution pending against Dr. Hallford. Because of his intervention the fact became apparent. Were there other

prosecutions pending in other parts of the state? At the time the actions resulting in *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), were brought, were there other, *good-faith* prosecutions pending in another part of the state? Must a federal plaintiff in Texarkana, Texas, ascertain that the statute he is contesting is not the basis of a prosecution in El Paso, Texas, 780 miles away and must the three-judge court also determine that fact? Obviously, if the statute in question has any vitality at all, there is always the danger that somewhere a state prosecution is pending which will be "affected," if not legally then psychologically, by either an injunction or declaratory judgment.

The special concerns over friction between the Federal and State judiciaries do not dictate that injunctions against future prosecutions should never issue when there is a pending state prosecution dealing with the statute in question. Obviously, in the situation posed in *Steffanelli* v. *Minard*, 342 U.S. 117 (1951), and *Cleary* v. *Bolger*, 371 U.S. 392 (1963), friction would be imminent, for the arm of the federal government would literally be interjected into the state court room to pluck out all or part of the case. It is easy to see why such an action would be unseemly. However, in the case of a federal injunction against future prosecutions issued while a prosecution concerning the statute dealt with in the federal action is in process, the state judge may use his own discretion. If he agrees with the interpretation of the federal court, he may stay proceedings pending this Court's review of the injunction and avoid the possible waste of both his time and that of everyone else concerned. If not, he may proceed in the belief that the federal court's ruling on the statute will be reversed.

E. The Special Considerations Underlying the Doctrine of Comity Are Inapplicable to the Present Case.

Volumes have been written concerning the principles of comity and federal-state relations in the area of state enforcement of criminal statutes. Appellants do not presume that they could add to the discussions of the historical and philosophical background of that policy in the opinions written in *Younger* v. *Harris* and companion cases last term. That the principles of comity avoid confusion and friction in some instances cannot be doubted, but in cases like the present the very reluctance of federal courts to intervene in the state criminal process produces confusion and friction and wastes the efforts of state judges, juries, and state officials.

The issue is not procedure, as in *Steffanelli.* The issue is not a statute which may proscribe both harmful and protected activity as in *Cameron* v. *Johnson,* 390 U.S. 611 (1968), or *Boyle* v. *Landry* and thus if enjoined would leave the states confused as to what they may or may not legislate against. Rather, the case involves a set of statutes with deep and fundamental constitutional infirmities. Thus, even if federal courts do not intervene, the issue of abortion will continue to cause confusion and delay in the state's criminal process until a decision is reached by this Court.

While it seems likely that eventually the question of whether a woman has a right to an abortion will reach this Court in the context of review of a criminal conviction, that process might very well entail the convening of countless state courts, both trial and appellate, the assembling of countless jurors, and the occupation of countless prosecutors, not to mention the untold anxiety, expense and

humiliation of those physicians willing to offer themselves as potential sacrificial lambs to test the statutes.

Added to the waste of manpower will be the unquantifiable effect of the willful violation by respectable citizens of criminal laws for the purpose of testing them. Perhaps it may be moral to defy a law that one considers unjust and unconstitutional, but to hold that "except in rare circumstances" that is the only way to judicially bring about an end to such laws places a stamp of approval on the activity which can lead to chaos. Is the orderly adjudication of suspect statutes to be abandoned to those who delight in confrontation with those who enforce the laws?

Consider the moral dilemma of a Texas trial judge when presented with a constitutional defense to the violation of the abortion statute. He is of course obligated to uphold the United States Constitution. His zealousness in protecting federal rights may equal or surpass that of his brother in the federal judiciary. He may be firmly convinced that the statute is totally unconstitutional. And yet, if he dismisses the indictment the State cannot appeal.[62] The question will be foreclosed from appellate consideration. Another factor he must bear in mind is that if he dismisses the indictment his action may very well become the basis of a political attack when he must run for re-election, turning the question of who will sit on the bench into one not of competence or intellect, but of religion or political philosophy. In the face of such considerations the state judge may feel that he has no choice but to enforce an unconstitutional statute. Far from resenting the "intru-

[62] Art. 44.01, Tex. Code Crim. App., states: "The State shall have no right of appeal in criminal actions."

sion" of a federal court, he may well welcome the end to his moral quandry—the reprieve from his threatened violation of oath and conscience.

On the state appellate level, the considerations involving the "politicization of the judiciary" also apply since, in Texas, all judges are elected. Also, should the Texas Court of Criminal Appeals hold the statute unconstitutional, the State must either violate Article 5, §26 of the Texas Constitution, which provides that the State shall have no appeal in a criminal case, by appealing the decision to this Court, or let the matter rest.

Contrasted with the problems above, the institution of a suit for injunction in federal court represents a much more orderly, civilized method for the vindication of federal rights. If the three-judge court is unsure of the effects of an injunction upon state law enforcement, the judgment can be stayed pending appeal to this Court. That the invalidation of a state statute will cause friction is not denied, but there is no reason to assume that federal-state relations are damaged more in the case of an injunction proceeding than when this Court reverses a conviction based on a statute which until reaching this Court had been ruled constitutional. The friction is caused by the act of intercession of federal constitutional concerns with individual notions of morality and "law and order," not by the particular procedure of intercession. It is not the federal court that interferes with the enforcement of a state statute, but the Constitution itself. Such an interference can never be accomplished without friction, for it is clear that there are many who would repeal that Constitution, especially where it protects the rights of a racial, religious or political minority.

F. Having Decided That the Texas Abortion Statute Unconstitutionally Infringes Upon Plaintiffs' Rights, the Three Judge Court by Failing to Grant an Injunction Against Future Prosecutions Effectively Failed to Protect Those Rights.

The three-judge court was presented with allegations and uncontroverted facts that set up a class action in which the right of women to have an abortion was claimed. The affidavit of a medical expert, whose qualifications and opinions were uncontroverted by any evidence from the defendant-district attorney, stated that physicians in Texas refused to do abortions because of fear of jeopardizing their careers. Were abortions legal, the physician-expert stated that he and other physicians would perform them. Affidavit of Paul C. Trickett, M.D. (A. 54-55). Plaintiff-Intervenor Dr. Hallford also testified by way of affidavit that physicians in the Dallas area feared criminal prosecution under the abortion statutes and for that reason refused to do abortions (A. 67). The Court below found that:

> "Since the Texas Abortion Laws infringe upon plaintiffs' fundamental right to choose whether to have children, the burden is on the defendant to demonstrate to the satisfaction of the Court that such infringement is necessary to support a compelling state interest. The defendant has failed to meet this burden." *Roe* v. *Wade*, 314 F. Supp. 1212, 1222 (1970) (A. 118, 119) [footnotes omitted].

Yet, despite the conclusion that rights were being infringed, the Court failed to grant the only relief that could reasonably allow the class bringing the suit to exercise their "fundamental right to choose whether to have children."

In explaining the denial of injunctive relief, the Court below quoted from *Dombrowski* v. *Pfister,* 380 U.S. 479, 484-485 (1965):

> "It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." *Roe, supra* at 1224 (A. 122).

However, it is precisely the "mere possibility of erroneous initial application of constitutional standards" that effectively forecloses any possibility of the women within the classes represented being able to obtain an abortion. Having obtained an affirmance of their rights these women must still depend on the willingness of physicians to risk prosecution if state officials choose to ignore the declaratory judgment. If the women themselves were subject to prosecution, at least some of them might be willing to take the risk. But they must rely upon strangers for help. In view of the fact that a declaratory judgment "neither mandates nor prohibits state action" *Perez* v. *Ledesma,* 401 U.S. 82, 124 (1971) (Brennan, *J.*) individual physicians, having no personal issue at stake, would be foolhardy to risk performing an abortion.

In fact, the declaratory judgment was ignored, as is evidenced by the affidavits of the chairmen of obstetrics and gynecology (Appendices B, C, D at B-1, C-1, D-1) letter from Defendant's office, Appendix A at A-1 and indictments brought since the Three-Judge Court's judgment (Appendix E at E-1). No facts or pleadings were

presented to the Court below that could have led to any conclusion but that such would be the case.

Given the affidavits of the physicians, the special problems of the class of women who must rely on others in order to exercise their fundamental rights, and the omission of any evidence whatsoever that Defendant would abide by the declaratory judgment, it follows that the Court below was not relying on any separate factual ground in denying an injunction. Their decision was based wholly on an erroneous view that no allegations had been presented which required that considerations of comity in the area of state criminal enforcement be disregarded.

Although the decision of whether or not to grant an injunction is spoken of as being "discretionary," *Bokulich* v. *Jury Commission of Greene County, Alabama,* 394 U.S. 97, 98 (1969), *Abbott Laboratories* v. *Gardner,* 387 U.S. 138, 148 (1967), it is clear that if the claims of the plaintiffs present "sufficient irreparable injury to justify equitable relief," the case should be remanded with instructions to enter a decree enjoining enforcement of the statute. *Dombrowski* v. *Pfister,* 380 U.S. 479, 497 (1965).[63]

[63] In *Bokulich,* the Court held that the District Court had not "abused its discretion" in failing to grant the injunction; however, it then proceeded to state that the plaintiffs' claims could be raised at their criminal trial and thus the case was not a "proper" one for injunction. 394 U.S. at 98, 99.

III.

The Appeals Were Properly Taken Directly to This Court and Represent the Entire Case for Plenary Review by This Court.

The appeals are "from an order . . . denying . . . [a] permanent injunction," pursuant to 28 U.S.C. §1253. The actions attacked state statutes on constitutional grounds and requested declaratory and injunctive relief from enforcement of the statutes which are applicable statewide. The defendant was and is a state officer and the complaints presented a substantial federal question. Thus all requirements for direct appeal to this Court are met. *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89 (1935). *Bell* v. *Waterfront Commission of New York*, 279 F.2d 853 (2d Cir. 1960).

Although appellants technically "won" the issue of declaratory relief in the Court below, they join with appellee in urging this Court to decide the merits and constitutionality of the Texas abortion statute, regardless of its decision on other aspects of the case. That such action is within this Court's jurisdiction is illustrated by its action in the case of *Carter* v. *Jury Commission of Greene County*, 396 U.S. 320 (1969). There, the plaintiffs had requested (1) a declaration that qualified Negroes were systematically excluded from grand and petit juries; that the Alabama statutes governing jury selection were unconstitutional and that the jury commission was a deliberately segregated agency; (2) injunctions forbidding systematic exclusion of Negroes and the enforcement of the jury selection statutes; and, (3) an order vacating the appointments of the Governor to the commission. The

three-judge district court found that Negroes were being excluded and enjoined their systematic exclusion. The plaintiffs appealed the denial of injunctive relief against the jury selection statute and the Governor's appointments. In affirming the District Court, this Court not only discussed the questions concerning the constitutionality of the jury selection statute and the Governor's appointments, but also discussed the merits of the district court's finding of systematic exclusion and the injunction against that exclusion. No mention of appeal by the defendants from the granting of the injunction against systematic exclusion is made, so that theoretically the issue was not before the Court.

In a slightly different context, but of value, is Mr. Justice Frankfurter's statement in *Florida Lime and Avacado Growers, Inc.* v. *Jacobsen,* 362 U.S. 73 (1960):

> "Cases in this Court . . . have consistently adhered to the view that, in an injunction action challenging a state statute on substantial federal constitutional grounds, a three judge court . . . has—just as we have on a direct appeal from its action—jurisdiction over *all* claims raised against the statute." 362 U.S. at 80, 81.

The statutes here were attacked on the basis of: overbroad denial of the fundamental rights of privacy, choice as to giving birth to children, to seek health care, and to practice medicine without arbitrary restraint; vagueness; and denial of due process concerning burden of proof. It is certain that appellee will base a major portion of his argument on a defense of the statutes, so as to insure that all of the issues above are fully briefed and argued

before the Court thus meeting the requirements set out in *Dandridge* v. *Williams*, 397 U.S. 471, 475, n. 6. (1970).[64]

Thus the question hinges, not on this Court's power to reach the merits, but on whether the judicial inefficiency and confusion which will result from its failure to do so outweigh the professed doctrine that the Court will usually avoid reaching a constitutional issue if possible. This Court's willingness to consider the effect of a decision upon pending cases in state and federal courts was illustrated last term in Mr. Justice Black's opinion in *United States* v. *Vuitch*, 402 U.S. 62 (1971).

> "In the last several years, abortion laws have been attacked as unconstitutionally vague in both state and federal courts with widely varying results. A number of these cases are now pending on the docket. A refusal to accept jurisdiction here would only compound confusion for doctors, their patients, and law enforcement officials. As this case makes abundantly clear, a ruling on the validity of a statute applicable only to the District can contribute to great disparities and confusion in the enforcement of criminal laws." 402 U.S. at 66.

The confusion spoken of in *Vuitch* has not subsided. The abortion laws of Texas,[65] Wisconsin,[66] Illinois,[67] Cali-

---

[64] See also, Mercer v. Theriot, 377 U.S. 152 (1964); Reece v. Georgia, 350 U.S. 85 (1955); Urie v. Thompson, 337 U.S. 163 (1939).

Professor Wright indicates that while the Court is severely limited in its review of direct appeals under the Criminal Appeals Act, it is not so limited on other direct appeals from district courts. C. Wright, HANDBOOK OF THE LAW OF FEDERAL COURTS 431 (1963).

[65] The present case.

(footnotes continued on following page)

fornia,[68] and Georgia[69] have been partially or completely declared invalid as denying fundamental rights, while abortion laws in Ohio,[70] Louisiana[71] and North Carolina[72] have been upheld. At least three appeals involving physicians indicted for violations of abortion statutes are presently pending in state courts.[73]

Appellants respectfully submit that nothing will be gained by another round of consideration by lower courts. It seems obvious that, rather than reaching a consensus, the federal district courts will continue to split on the question. It also seems obvious that this difference of opinion will carry over to the courts of appeals if they are

---

[66] Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis.) (*per curiam*), *appeal dismissed*, 400 U.S. 1 (1970) (*per curiam*).

[67] Doe v. Scott, 321 F. Supp. 1384 (N.D. 1971), *appeals docketed, sub noms.* Hanrahan v. Doe and Heffernan v. Doe, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) Nos. 1522, 1523, 1970 Term; renumbered Nos. 70-105, 70-106, 1971 Term).

[68] People v. Barksdale, Docket No. 1 Crim. 9526 (Calif. Ct. of Appeal, First App. Dist., Division 1, July 22, 1971).

[69] Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970) (per curiam), *ques. of juris. postponed to merits*, 91 S. Ct. 1614 (1971) (No. 971, 1970 Term; renumbered No. 70-40, 1971 Term).

[70] Steinberg v. Brown, 321 F. Supp. 741 (W.D. Ohio, 1970).

[71] Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970), *appeal docketed*, 39 U.S.L.W. 3247 (U.S. Nov. 27, 1970) (No. 1010, 1970 Term; renumbered No. 70-42, 1971 Term).

[72] Corkey v. Edwards, 322 F. Supp. 1248 (W.D. N.C. 1971), *appeal docketed*, 40 U.S.L.W. 3048 (U.S. July 17, 1971) (No. 71-92).

[73] Hodgson v. State of Minnesota, No. 42966, Minnesota Supreme Court; State v. Munson, South Dakota Supreme Court, State of Kansas v. Jamieson, No. 46150, Kansas Supreme Court.

required to decide the issue. Considering its effect on the area of marital relations, illegitimacy, poverty, women's rights, women's mental and physical health, mentally and physically deformed children, and the practice of medicine, the question of abortion potentially and actually affects virtually every person in the United States. The question itself compels an answer and appellants urge this Court to reach the merits.

IV.

The Provisions in the Texas Penal Code, Articles 1191-1194 and 1196, Which Prohibit the Medical Procedure of Induced Abortion Unless "procured or attempted by medical advice for the purpose of saving the life of the mother," Abridge Fundamental Personal Rights of Appellants Secured by the First, Fourth, Ninth, and Fourteenth Amendments, and Do Not Advance a Narrowly Drawn, Compelling State Interest.

As former Supreme Court Justice Tom C. Clark has said:

> "The result of [Griswold and its predecessors] is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children, and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution." Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOYOLA UNIV. (L.A.) L. REV. 1, 8 (1969).

The Constitution does not specifically enumerate a "right to seek abortion," or a "right of privacy." That such a right is not enumerated in the Constitution is no impediment to the existence of the right. Other rights not specifically enumerated have been recognized as fundamental rights entitled to constitutional protection[74] including the right to marry,[75] the right to have offspring,[76] the right to use contraceptives to avoid having offspring,[77] the right to direct the upbringing and education of one's children,[78] as well as the right to travel.[79]

The difficulty in identifying the precise sources and limits of these rights has long been evident. In 1923 in *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), this Court outlined some of the protections afforded by the Due Process Clause of the Fourteenth Amendment:

---

[74] "The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the first Amendment has been construed to include certain of those rights." Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

[75] Loving v. Commonwealth, 388 U.S. 1, 12 (1967) (alternate ground of decision).

[76] Skinner v. Oklahoma, 316 U.S. 535, 536 (1942).

[77] Griswold v. Connecticut, 381 U.S. 479 (1965).

[78] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[79] United States v. Guest, 383 U.S. 745 (1966). What was said by Mr. Justice Stewart in that opinion may be aptly paraphrased to apply in the present context:

> "The Constitutional right [of marital privacy] . . . occupies a position fundamental to the concept of our Federal Union. * * * [T]hat right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be . . . necessary . . . ." 383 U.S. at 757.

"While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and *some of the included things have been definitely stated.* Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men." 262 U.S. at 399. [Emphasis added.]

The 1965 Court, in *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), demonstrated the variety of sources of these fundamental rights.[80]

Appellants contend that fundamental rights[81] entitled to constitutional protection are involved in the instant case,

---

[80] Justice Douglas, delivering the opinion of the Court that Connecticut could not constitutionally outlaw the use of contraceptives, relied upon the penumbras of specific guarantees in the Bill of Rights, "formed by emanations from those guarantees that help give them life and substance." 381 U.S. at 484. Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, concurred, relying upon the Ninth Amendment. Justice Harlan's concurring opinion stated the inquiry to be whether the statute infringed the Due Process Clause of the Fourteenth Amendment by violating basic values implicit in the concept of liberty. 381 U.S. 500. Justice White found that the law deprived plaintiffs of "liberty" without due process, as used in the Fourteenth Amendment. 381 U.S. 502.

[81] The complaints of appellants invoked the jurisdiction of the district court under the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments (A. 10-11, 15-16, 24). The district court confined its consideration to the Ninth Amendment and vagueness arguments and did not pass upon the "array of constitu-

namely the right of individuals to seek and receive healt care unhindered by arbitrary state restraint; the right married couples and of women to privacy and autonom in the control of reproduction; and the right of phys cians to practice medicine according to the highest pr fessional standards. These asserted rights meet const tutional standards arising from several sources an expressed in decisions of this Court. The Texas abortio law infringes these rights, and since the law is not sup ported by a compelling justification, it is therefore u constitutional.

A. *The Right to Seek and Receive Medical Care for the Pr tection of Health and Well-Being Is a Fundamental Pe sonal Liberty Recognized by Decisions of This Court an by International and National Understanding.*

In *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1904), th defendant resisted his conviction under a compulsory vac cination statute by asserting "the inherent right of ever freeman to care for his own body and health in such wa as to him seems best." 197 U.S. at 26. Appropriately this Court responded that liberties secured by the Consti tution are not wholly free from restraint and found th dangers of widespread smallpox justified the statute. Fa from downgrading the importance of defendant's asserte rights, however, the Court repeatedly emphasized the im minence of pervasive disease; "the evils of smallpox . .

---

tional arguments" (A. 116). Appellants have chosen in this bri to stress the application of the First, Ninth, and Fourteen Amendments. However, the arguments relating to application other Amendments and particularly the Eighth Amendment, a well developed in the Brief *Amicus Curiae* filed in this case b Attorney Nancy Stearns. Brief *Amicus Curiae* on Behalf of N Women Lawyers, Women's Health and Abortion Project, In National Abortion Coalition, at 34 *et seq.* (Eighth Amendment

imperiled an entire population." 197 U.S. at 31. In explaining the principle underlying the decision, the Court paralleled the statute's intrusion upon personal liberty with military conscription to protect national security, and emphasized the compelling interest necessary to justify the invasion of personal rights:

> "There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government,—especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, *under the pressure of great dangers,* be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand . . . It is not, therefore, true that the power of the public to *guard itself against imminent danger* depends in every case involving the control of one's body upon his willingness to submit to reasonable regulations established by the constituted authorities, under the sanction of the state, for the purpose of protecting the public effectively against such danger." 197 U.S. at 29-30. [Emphasis added.]

The reference for the Court's standard of reasonableness was the compelling interest of the state in meeting the danger of epidemic smallpox. *Jacobson* thus embodies the principle that the personal right to care for one's health is a fundamental right which can be abridged by state law only when justified by a compelling interest.

The personal right to care for and protect one's health in the manner one deems best has been honored by legislatures, except as to measures necessary to check widespread disease and except for the intrusion of restrictive contraception, abortion, and sterilization laws.

Although this Court has not expressly delineated a right to seek health care, the importance of such care has been recognized and the existence of such a right suggested. In *United States* v. *Vuitch,* 402 U.S. 62 (1971), this Court reaffirmed society's expectation that patients receive "such treatment as is necessary to preserve their health." 402 U.S. at 71. In this Court's invalidation of Connecticut's proscription against contraception, Justice White noted that statute's intrusion upon "access to medical assistance . . . in respect to proper methods of birth control." *Griswold* v. *Connecticut,* 381 U.S. 479, 503 (1965) (White, J., concurring).

A right of access to health care has been held necessary in other factual settings. *McCollum* v. *Mayfield,* 130 F. Supp. 112 (N.D. Cal. 1955), involved an accused prisoner injured while in custody awaiting trial. The sheriff and jailer refused him medical care. As a result he became paralyzed. The court upheld a claim for relief under the Civil Rights Act based on deprivation of the plaintiff's life, liberty, and property without due process. *Accord, Coleman* v. *Johnson,* 247 F.2d 273 (7th Cir. 1957); *Edwards* v. *Duncan,* 355 F.2d 993 (4th Cir. 1966); *Tolbert* v. *Eyman,* 434 F.2d 625 (9th Cir. 1970). Custodial patients have been afforded a constitutional right to receive sufficient treatment to provide a realistic opportunity to improve or to be cured. *Wyatt* v. *Stickney,* 325 F. Supp. 781 (M.D. Ala. 1971). *Chrisman* v. *Sisters of St. Joseph*

of Newark, Civ. No. 70-430 (D. Ore., July 22, 1971), held that a hospital's refusal, for non-medical reasons, to permit voluntary sterilization of a plaintiff violated her federal rights. And *EDF* v. *Hoerner Waldorf,* 1 E.R. 1960 (D. Mont. 1970), recognized a right to protection of health against environmental pollution.

The existence of other types of state statutes, not under constitutional attack, which affect matters of personal health does not negate the right asserted here. In contrast to laws which intrude upon the protection of personal health, statutes which prescribe working conditions have an indirect, positive impact on the person's well-being. None intrude so far as the assault alleged in *Jacobson* or the compulsory pregnancy asserted here. *See, e.g., Prince* v. *Massachusetts,* 321 U.S. 158; *West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379 (1937). Similarly, laws prescribing requisites for medical practice are designed to assure qualified practitioners, not to impose upon a citizen's person. *See, e.g., Dent* v. *West Virginia,* 129 U.S. 114 (1889); *Graves* v. *Minnesota,* 272 U.S. 425 (1926).

Finally, policy statements of national and international organizations indicate a pervasive recognition of the right to seek health care. For example, the Constitution of the World Health Organization provides:

> "The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition." [82]

[82] Basic Documents of the World Health Organization 1 (Geneva 1969 ed.). *See also* Curran, *The Right to Health in National and International Law,* 284 New Eng. J. of Medicine 1258 (1971).

Congress, in passing the Comprehensive Health Planning Act of 1966, took a similar position:

> "[T]he fulfillment of our national purpose depends on promoting and assuring the highest level of health attainable for every person, in an environment which contributes positively to healthful individual and family living. . . ." [83]

Abortion is an accepted medical procedure for terminating pregnancy. *See* pp. 30-35, *supra*. *Amici* medical organizations recognize the acceptability of abortion, as their policy statements indicate; they draw no distinction between abortion and other medical procedures.

The Texas abortion law effectively denies Appellants Roe and Doe access to health care. Jane Roe was forced to bear a pregnancy to term though an abortion would have involved considerably less risk to her health. *See* p. 34 *supra*. Physicians who would otherwise be willing to perform an abortion in clinical surroundings are deterred by the fear of prosecution. Since Appellant Roe could not afford to travel elsewhere to secure a safe abortion, to avoid continuation of pregnancy she would have been forced to resort to an unskilled layman and accept all the health hazards attendant to such a procedure.[84] Even had she been able to travel out of state, the time required to make financial and travel arrangements would have entailed greater health risks inherent in later abortions. *See* p. 33 *supra*.

---

[83] Public Law 89-749.

[84] *See* Brief *Amici Curiae* for Planned Parenthood Federation of America, Inc. and American Association of Planned Parenthood Physicians, at 22-24.

B. *The Fundamental Rights to Marital and Personal Privacy Are Acknowledged in Decisions of This Court as Protected by the First, Fourth, Ninth, and Fourteenth Amendments.*

1. The Right to Marital Privacy

The importance of the institution of marriage and of the family has long been recognized by this Court. Consequently the Court and its members have often affirmed the sanctity of the marital relationship and of the family union. In *Maynard* v. *Hill,* 125 U.S. 190, 211 (1888), marriage was called "the foundation of the family and of society, without which there would be neither civilization nor progress." The opinion of the Court in *Skinner* v. *Oklahoma,* 316 U.S. 535, 541 (1942), spoke of marriage and procreation as being "fundamental to the very existence and survival of the race." Mr. Justice Harlan, for example, has written:

> "[T]he integrity of [family] life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right. . . . Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations." *Poe* v. *Ullman,* 367 U.S. 497, 551-52 (1961) (Mr. Justice Harlan, dissenting).

Mr. Justice Douglas, in delivering the opinion of the Court in *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), wrote of marriage as being

> "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not

causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." 381 U.S. at 486.

Most recently in *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), this Court reaffirmed "the basic position of the marriage relationship in this society's hierarchy of values" 401 U.S. at 374, and reiterated that "[a]s this Court on more than one occasion has recognized, marriage involves interests of basic importance in our society." 401 U.S. at 376.

Recognition of the sanctity of the marital relationship has resulted in recognition of a right of marital privacy, or as the *Griswold* decision states, "notions of privacy surrounding the marriage relationship", 381 U.S. at 486, and of rights attendant to the marital state. Protection has been extended to such rights as the rights to marry and have offspring because of their fundamental nature, even though such rights are not expressly enumerated in the Bill of Rights. These decisions support the proposition that there is a sphere of marital privacy and that important interests associated with marriage and the family are, and should be, protected from arbitrary government intrusion.

Loving v. *Commonwealth*, 388 U.S. 1, 12 (1967) (alternate ground of decision), specifically held that the due process clause of the Fourteenth Amendment protects "[t]he freedom to marry . . . as one of the vital personal rights essential to the orderly pursuit of happiness by men." *Loving* stands for the proposition that "the right to marry" is protected by the due process clause although not specifically mentioned in the Bill of Rights. Yet the

right *to* marry is meaningful only to the extent that there are rights *of* marriage, *i.e.*, rights attendant to the marital state which promote the happiness of the couple.

Associated with the right to marry is the right to have children, if one chooses, without arbitrary governmental interference. This Court unanimously held that "the right to have offspring" is a constitutionally protected "human right" which cannot be taken away by a discriminatory statute requiring the sterilization of some persons convicted of crime, but not of others similarly situated. *Skinner* v. *Oklahoma*, 316 U.S. 535, 536 (1942). The *Skinner* Court recognized a constitutionally protected right *to have* offspring even though such right is not mentioned in the Bill of Rights; a right *not to have* offspring should be of equal constitutional stature.

Further cases supporting these family rights include *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), and *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), both of which were reaffirmed in *Griswold* v. *Connecticut*, 381 U.S. 479, 483 (1965). A unanimous Court in *Pierce* recognized a right to send one's children to private school. This right derived from "the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U.S. at 534-35. This liberty, and the responsibility it implies, suggests a concomitant right of persons to determine the number of children whose "upbringing and education" they will direct.

Similar in principle is *Meyer*, a 7-2 decision invalidating a State statute which prohibited teaching German to pupils below the eighth grade. The *Meyer* Court stated that the due process clause includes "the right . . . to marry, establish a home and bring up children." 262 U.S.

at 399. Again the Court recognized a fundamental right not enumerated in the Constitution entitled to Constitutional protection.

Griswold reaffirms these privacy concepts, and makes it clear that a husband and wife are constitutionally privileged to control the size and spacing of their family at least by contraception.

Taken together, the *Griswold, Loving, Skinner, Pierce* and *Meyer* decisions illustrate that the Constitution protects certain privacy and family interests from governmental intrusion unless a compelling justification exists for the legislation. The right of a family to determine whether to have additional children, and to terminate a pregnancy in its early stages if a negative decision is reached, is such a right and is fully entitled to protection.

The number and spacing of children obviously have a profound impact upon the marital union. Certainly the members of this Court know from personal experience the emotional and financial expenditures parenthood demands. For those couples who are less fortunate financially and especially for those who are struggling to provide the necessities of life, additional financial responsibilities can be economically disastrous. For families who require two incomes for economic survival, the pregnancy can be ruinous since the wife will generally have to resign her job. In many other situations, such as where husband and wife are working to put themselves through school, pregnancy at a particular time can present a crisis.

Pregnancy can be a significant added problem in marriages. The added pressures of prospective parenthood can be "the last straw."

This Court has previously upheld the right to use contraceptives to avoid unwanted pregnancy.

> "[I]t would seem that if there is a right to use contraception, this right must also take account of the fact that most techniques are not 100 per cent protective. If the contraceptive method fails and the *Griswold* right of choice is preserved, it is a strong argument toward recognizing the right to an abortion." [55]

As did the law considered in *Griswold*, "[t]his law . . . operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation." 381 U.S. 482. The Texas abortion law in forbidding resort to the procedure of medical abortion, has a maximum destructive impact upon the marriage relationship.

2. The Related Rights to Personal Privacy and Physical Integrity

In addition to rights associated with marital privacy, an overlapping body of precedent extends significant constitutional protection to the citizen's sovereignty over his or her own physical person.

As early as 1891 this Court stated:

> "No right is more sacred, [n]or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right to one's person may be said

[55] Brodie, *Marital Procreation*, 49 ORE. L. REV. 245, 256 (1970).

> to be a right of complete immunity: to be let alone." *Union Pac. Ry.* v. *Botsford,* 141 U.S. 250, 251 (1891), quoted in *Terry* v. *Ohio,* 392 U.S. 1, 8-9 (1968).

This right, like all rights, does have some limitations, as illustrated by *Jacobson* v. *Massachusetts,* 197 U.S. 11 (1904), *supra* at 94 *et seq.* Nonetheless, absent a compelling justification, one is entitled to personal autonomy.

In family matters relating to child rearing and procreation, the Court has recognized and sustained individual rights on a constitutional plane. "The freedom to marry . . . ," *Loving* v. *Commonwealth,* 388 U.S. 1, 12 (1967); "the right to have offspring," *Skinner* v. *Oklahoma,* 316 U.S. 535, 536 (1942); "the liberty of parents and guardians to direct the upbringing and education of children under their control," *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534-35 (1925); as well as the right, at least of a married woman, to use contraceptives, *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), are all protected constitutionally.

Most recently the Court reaffirmed the "fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy," *Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969) (Marshall, J.), and embraced with approval Mr. Justice Brandeis' dissent in *Olmstead* v. *United States*:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They

sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." 277 U.S. at 478.

The Chief Justice, then a Circuit Judge, in *Application of Georgetown College, Inc.*, 331 F.2d 1010, 1016-17 (D.C. Cir.) (en banc), *cert. denied*, 377 U.S. 978 (1964), also urged a right to be let alone, in the context of a religious objection to blood transfusions, which could include "even absurd ideas which do not conform, such as refusing medical treatment even at great risk." 331 F.2d at 1017.

Pregnancy obviously does have an overwhelming impact on the woman. The most readily observable impact of pregnancy, of course, is that of carrying the pregnancy for nine months. Additionally there are numerous more subtle but no less drastic impacts.[86]

3. The Right to Terminate Unwanted Pregnancy Is an Integral Part of Privacy Rights

Without the right to respond to unwanted pregnancy, a woman is at the mercy of possible contraceptive failure, particularly if she is unable or unwilling to utilize the most effective measures.[87] Failure to use contraceptives effec-

[86] For a discussion of the impacts of pregnancy on women *see* Brief *Amici Curiae* on Behalf of New Women Lawyers, Women's Health and Abortion Project, Inc., National Abortion Action Coalition filed herein by Nancy Stearns as follows: employment, at 17-21, 27-28; education, at 21-22; responsibility for the child, at 29-30; emotional, at 38-42.

[87] *See* Brief *Amici Curiae* for Planned Parenthood Federation of America, Inc. and American Association of Planned Parenthood Physicians filed herein, "The Facts About Contraception," pp. 12-21.

tively, if pregnancy ensues, exacts an exceedingly high price.

The court in *Baird* v. *Eisenstadt,* 429 F.2d 1398 (1st Cir. 1970), *prob. juris. noted,* 401 U.S. 934 (U.S. No. 70-17, 1971 Term), recognized the inhumane severity of laws which impose continued pregnancy and compulsory parenthood as the cost of inadequate contraception. The statute there proscribed distribution of contraceptives to unmarried women, but the deciding principle applies to restrictive abortion laws as well.[88]

> ". . . [P]ersons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation of support. Such a view of morality is not only the very mirror image of sensible legislation; we consider that it conflicts with fundamental human rights." 429 F.2d at 1402.

Baird involved contraceptives unavailable to unmarried women; this case involves measures unavailable to all women. The impact of the two statutes is identical for the women affected. Moreover, the magnitude of the impact is substantial.

When pregnancy begins, a woman is faced with a governmental mandate compelling her to serve as an incubator for months and then as an ostensibly willing mother for up to twenty or more years. She must often forego further education or a career and often must endure economic and social hardships. Under the present law of Texas she is given no other choice. Continued pregnancy is compulsory, unless she can persuade the author-

---

[88] *See* Lamm & Davison, *Abortion Reform,* 1 YALE REV. L. & SOC'L ACTION, No. 4, at 55, 58-59 (Spring 1971).

ities that she is potentially suicidal or that her life is otherwise endangered. TEXAS PENAL CODE, arts. 1191-1194, 1196 (1961). The law impinges severely upon her dignity, her life plan and often her marital relationship. The Texas abortion law constitutes an invasion of her privacy with irreparable consequences. Absent the right to remedy contraceptive failure, other rights of personal and marital privacy are largely diluted.

Commentators and courts have articulated and recognized the privacy which restrictive abortion laws invade:

> "[A]bortion falls within that sensitive area of privacy—the marital relation. One of the basic values of this privacy is birth control, as evidenced by the *Griswold* decision. Griswold's act was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent conception, why can he not nullify that conception when prevention has failed?" [89]

The decisions of this Court which implicitly recognize rights of marital and personal privacy have been followed by state and federal court decisions expressly holding the decision of abortion to be within the sphere of constitutionally protected privacy.

That there is a fundamental constitutional right to abortion was the conclusion of the court below in the instant case:

> "On the merits, plaintiffs argue as their principal contention that the Texas Abortion Laws must be

---

[89] Tom C. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOYOLA UNIV. (L.A.) L. REV. 1, 9 (1969).

declared unconstitutional because they deprive single women and married couples of their right, secured by the Ninth Amendment to choose whether to have children. We agree.

"The essence of the interest sought to be protected here is the right of choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of individuals." (A. 116)

That view has been shared by a number of other courts which have considered the question and have affirmed that this is a fundamental right.[90] The progression of decisions by courts which have indicated their recognition of abortion as an aspect of protected privacy rights includes the following:

"The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of

---

[90] *E.g., Doe* v. *Bolton,* 319 F. Supp. 1048 (N.D. Ga. 1970) (per curiam), *ques. of juris. postponed to merits,* 91 S. Ct. 1614 (1971) (No. 971, 1970 Term; renumbered No. 70-40, 1971 Term); Doe v. Scott, 321 F. Supp. 1384 (N.D. Ill.), *appeals docketed sub nom.* Hanrahan v. Doe and Heffernan v. Doe, 39 U.S.L.W. 3438 (U. S. Mar. 29, 1971) (Nos. 1522, 1523, 1970 Term; renumbered Nos. 70-105, 70-106, 1971 Term); Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis.) (per curiam), *appeal dismissed,* 400 U.S. 1 (1970) (per curiam); California v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied,* 397 U.S. 915 (1970); People v. Barksdale, —— Cal. App. 3d ——, —— Cal. Rptr. ——, 1 Crim. 9526 (Calif. Dist. Ct. App. July 22, 1971); *contra,* Corkey v. Edwards, 322 F. Supp. 1248 (W.D. N.C. 1971), *appeal docketed,* 40 U.S.L.W. 3048 (U. S. July 17, 1971) (No. 71-92); Rosen v. Louisiana State Bd. of Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970), *appeal docketed,* 39 U.S.L.W. 3247 (U. S. Nov. 27, 1970) (No. 1010, 1970 Term; renumbered No. 70-42, 1971 Term).

a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." *California* v. *Belous*, 71 Cal. 2d 954, 458 P.2d 194, 199, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970).

"For whatever reason, the concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy. Like the decision to use contraceptive devices, the decision to terminate an unwanted pregnancy is sheltered from state regulation which seeks broadly to limit the reasons for which an abortion may be legally obtained." *Doe* v. *Bolton*, 319 F. Supp. 1048, 1055 (N.D. Ga. 1970) (per curiam).

"It is as true after conception as before that 'there is no topic more closely interwoven with the intimacy of the home and marriage than that which relates to the conception and bearing of progeny.' We believe that *Griswold* and related cases establish that matters pertaining to procreation, as well as to marriage, the family, and sex are surrounded by a zone of privacy which protects activities concerning such matters from unjustified governmental intrusion." *Doe* v. *Scott*, 321 F. Supp. 1385, 1389-90 (N.D. Ill.) *appeal docketed sub nom. Hanrahan* v. *Doe*, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (No. 70-105, 1971 Term).

Without the ability to control their reproductive capacity, women and couples are largely unable to control determinative aspects of their lives and marriages. If the concept of "fundamental rights" means anything, it must surely include the right to determine when and under what circumstances to have children.

4. Physicians Have a Fundamental Right to Administer Health Care Without Arbitrary State Interference

The First, Ninth, and Fourteenth Amendments protect the right of every citizen to follow any lawful calling, business, or profession he may choose, subject only to rational regulation by the state as necessary for the protection of legitimate public interests. *See, e.g., Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957); *Smith v. Texas,* 233 U.S. 630 (1914); *Dent* v. *West Virginia,* 129 U.S. 114 (1889). In reviewing legislation affecting the medical profession, courts have particularly respected the knowledge and skill necessary for medical practice, the broad professional discretion necessary to apply it, and the concomitant state interest in guaranteeing the quality of medical practitioners:

> "Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which life and health depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind.
>
> • • • • •
>
> . . . Every one may have occasion to consult [the physician], but comparatively few can judge the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license . . . that he possesses the requisite qualifications." *Dent* v. *West Virginia,* 129 U.S. 114, 122-23 (1889).

Similarly, courts have been alert to protect medical practice from rash or arbitrary legislative interference. Thus, the court in *United States* v. *Freund*, 290 Fed. 411 (D. Mont. 1923), invalidated a Prohibition-era statute restricting the amount of alcohol a physician could prescribe:

> "It is an extravagant and unreasonable attempt to subordinate the judgment of the attending physician to that of Congress, in respect to matters with which the former alone is competent to deal, and infringes upon the duty of the physician to prescribe in accord with his honest judgment, and upon the right of the patient to receive the benefit of the judgment of the physician of his choice."

Most recently, this Court, in *United States* v. *Vuitch*, 402 U.S. 62 (1971), recognized that "doctors are encouraged by society's expectations . . . and by their own professional standards to give their patients such treatment as is necessary to preserve their health." 402 U.S. at 71. The *Vuitch* decision went on to construe the term health to encompass "psychological as well as physical health," and " 'the state of being sound in body or mind.' "

Here, the practice of medicine clearly includes the treatment of pregnancy and conditions associated with it. However, the Texas statute prohibits physicians from administering the appropriate remedy to preserve the patient's health or well-being. Physicians are not required to forego the right to make medically sound judgments and to act upon them with respect to any other human disease or condition. With appropriate consents they may administer electric shock therapy, excise vital organs, perform prefrontal lobotomies and take any other drastic action they

believe indicated. They are not indictable for these actions. However, obstetricians and gynecologists who are asked to abort their patients for sound medical reasons risk a prison sentence if they do so. The statute severely infringes their practice and seriously compromises their professional judgments.

The state must demonstrate a legitimate interest to impair doctors' rights to practice their profession. *Dent* v. *West Virginia*, 219 U.S. 114 (1889). Historically, the interest asserted by the state is a health interest, and courts have upheld laws designed to ensure the quality of medical practice, *e.g.*, *Dent* v. *West Virginia*, *supra*; *Douglas* v. *Noble*, 261 U.S. 165 (1923); *Graves* v. *Minnesota*, 272 U.S. 425 (1926). Similarly, statutes have been upheld which require doctors' intervention in sales of medically-related products in order to protect public health. *See, e.g.*, *Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483 (1955) (doctor's prescription required for optician to perform eyeglass fitting operations); *see also Head* v. *New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963) (prohibition against eyeglass price advertising).

None of the above interests are applicable here, however. The statute in question here does not protect the public from unqualified practitioners. *Cf. Dent* v. *West Virginia*, 129 U.S. 114 (1889); *Douglas* v. *Noble*, 261 U.S. 168 (1923); *Graves* v. *Minnesota*, 272 U.S. 425 (1926); *Schware* v. *Board of Examiners*, 353 U.S. 232 (1957). Rather the statute applies to laymen and physicians alike. Indeed, it endangers patients' health by unduly confining doctors' exercise of medical judgment. This endangering of health distinguishes the case from *Williamson;* the court there afforded broad discretion to the legislature *because public*

health was at stake. Further, the statute addresses no other legitimate state interest. *See* pp. 115-124, *infra.*

C. Appellants' Rights to Seek Medical Care, and to Marital and Individual Privacy May Not Be Abridged Unless the State Can Establish a Compelling Interest Which Can Not Be Protected By Less Restrictive Means.

In his concurring opinion in *Griswold* v. *Connecticut,* 381 U.S. 479, 497 (1965), Justice Goldberg indicated the stricter standard of review that applies when state laws affect personal rights:

> "In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.'"

This Court has applied the stricter standard to protect marital privacy, *Griswold* v. *Connecticut, supra;* religious freedom, *Sherbert* v. *Verner,* 374 U.S. 398 (1963); freedom of expression and of association, *N.A.A.C.P.* v. *Button,* 371 U.S. 415 (1963); freedom to travel, *Shapiro* v. *Thompson,* 394 U.S. 618 (1968); and access to courts, *Boddie* v. *Connecticut,* 401 U.S. 371 (1971). As argued above, the Texas abortion laws infringe privacy rights here as much as the Connecticut statute did in *Griswold.* As in that case, the compelling interest test is the proper standard for reviewing the Texas statute. See also *Roe* v. *Wade,*

314 F. Supp. 1217, 1222 (N.D. Tex. 1970); *Doe* v. *Scott*, 321 F. Supp. 1385, 1390 (N.D. Ill. 1971); *Babbitz* v. *McCann*, 310 F. Supp. 293, 301 (E.D. Wis. 1970); *California* v. *Belous*, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354, 360 (1968), *cert. denied* 397 U.S. 915 (1970).

Appellants further urge this Court to reaffirm the personal right to health care recognized in *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1904). The infringements upon personal health care caused by the Texas law are described earlier, pp. 94-98. The physical and psychological harm caused by the statute fully warrants a demonstration of compelling justification to sustain it.

A further constitutional condition of the statute's intrusion upon fundamental rights is that the law must be minimally restrictive:

> "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Griswold* v. *Connecticut*, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring).

Here, the availability of adultery and fornication statutes to enforce strictures on sexual behavior, the absence of any distinctions based on gestation period in the abortion statute, and its blanket application to gynecologists and laymen alike suggest classifications which are overly broad. To meet these constitutional objections, the State must show that a less restrictive statute will not effectuate any compelling interests it can establish.

D. The Texas Statute Does Not Advance Any State Interest of Compelling Importance in a Manner Which is Narrowly Drawn.

1. The Statute Is Not Rationally Related to Any Legitimate Public Health Interest.

As shown earlier, at pages 30-35, medical abortion is a safe and simple procedure when performed during the early stages of pregnancy; indeed, it is safer than childbirth. This fact alone vitiates any contention that the statute here serves a public health interest. Numerous state and federal courts have taken notice of this fact and concurred that no health rationale supports a statute like the one here. *See, e.g., California* v. *Belous,* 71 Cal. 2d 954, 965, 458 P.2d 194, 200, 80 Cal. Rptr. 354, 360 (1969), *cert. den.,* 397 U.S. 915 (1970); *McCann* v. *Babbitz,* 310 F. Supp. 293, 301 (E.D. Wis. 1970), *appeal dismissed,* 400 U.S. 1 (1970) (per curiam); *Doe* v. *Scott,* 321 F. Supp. 1385, 1391 (N.D. Ill. 1971).

Moreover, no concern for mental health justifies the statute, for it does not permit abortion even if a woman's mental health is threatened. Such a view is untenable for the additional reason that abortion is a procedure without clinically significant psychiatric sequellae.

Additional data reveal that statutes like the one here actually *create* "a public health problem of pandemic proportions" [91] by denying women the opportunity to seek safe medical treatment. Severe infection, permanent sterility, pelvic disease, and other serious complications accompany

---

[91] Hall, "Abortion in American Hospitals," 57 *Am. J. Pub. Health* 1933, 1934 (1967).

the illegal abortions to which women are driven by laws like this one.[92]

Any notion that less restrictive abortion laws would produce excessive demands on medical resources and thereby endanger public health also is unfounded. The experience in New York City after one year under an elective abortion law dispels any such fears:

> "New York City has accounted for the lion's share of abortions in the State and has been a resource for women all over the country. Nevertheless, the catastrophe many foresaw a year ago failed to materialize: we have been able to serve our residents as well as substantial numbers of out-of-state women, and, most important, we are serving women safely." Chase, "Twelve Month Report on Abortions in New York City" (Health Services Administration, City of New York, June 29, 1971).

The absence of a public health problem accompanying less restrictive abortion is indicated by comparative mortality rates: for the first eleven months of operation, the mortality for abortion in New York City is approximately equal to that of tonsillectomy in the United States.[93]

---

[92] *See* Brief *Amici Curiae* for Planned Parenthood Federation of America, Inc. and American Association of Planned Parenthood Physicians, at 22-24.

[93] There were 8 deaths in over 150,000 abortions during the first eleven months, a rate of 5.3 per 100,000. Chase, Twelve Month *Report on Abortions in New York City* (June 29, 1971) (Health Services Administration, City of New York). The 1969 mortality rate for tonsillectomy in the United States was 5.2 per 100,000. *T&A Profile*, 8 PROFESSIONAL ACTIVITIES SURVEY (PAS) REPORTER No. 5 (Mar. 9, 1970).

Against this background of medical fact, there is no support whatever for the suggestion that public health is an interest protected by this statute.

2. *The Statute Is Not Rationally Related to Any Legitimate Interest In Regulating Private Sexual Conduct.*

One of the constitutional defects in the Connecticut statute struck down in *Griswold* v. *Connecticut,* 381 U.S. 479 (1965) was its overbreadth; the law there prohibited use of contraceptives by married couples as well as unmarried ones. Thus, the statute could not be justified as a device to discourage pre-marital or extra-marital relations, for it had the same impact on marital relations.

The Texas abortion law operates identically. No distinction is made between married and unmarried women, and married women who seek abortion are not required to reveal whether they were impregnated through a lawful marital relation. The Texas statute, if explained as a deterrent to illegal sexual conduct, is unconstitutionally overbroad for failing to make these distinctions.

Moreover, if the state desires to discourage certain sexual conduct, it may enforce laws prohibiting adultery and fornication. To view the abortion law as protecting public morals by making pregnancy the penalty for forbidden conduct would ascribe a monstrous intention to the Texas legislature. *State* v. *Baird,* 50 N.J.L. 376, 235 A.2d 673, 677 (1967). Furthermore, using the abortion law for such a purpose would be overbroad and beyond the competence of the state. *Baird* v. *Eisenstadt,* 429 F.2d 1398, *jur. noted,* 401 U.S. 934 (1971) (No. 70-17, 1971 Term); *King* v. *Smith,* 392 U.S. 309, 320 (1968); *Griswold* v.

Connecticut, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring). *See also* Brief *Amicus Curiae* on Behalf of New Women Lawyers, Women's Health and Abortion Project, Inc., National Abortion Action Coalition, at 44 *et seq.*

No evidence exists that limited access to abortion curtails promiscuity, nor is it conceivable that such a correlation could exist. The widespread availability of contraception would seem to be a more significant factor. In any event, from the physician's standpoint, a patient is no less worthy of medical care simply because she has unfortunately conceived out of wedlock. Moreover, as one prominent physician observed, "[t]he fear that the availability of abortion will lead to promiscuity is sheer nonsense. . . ." Ryan, *Humane Abortion Laws and the Health Needs of Society,* 17 W. Res. L. Rev. 424, 432 (1965).

3. The Statute Does Not Advance Any Public Interest in Protecting Human Life.

As counsel for appellee admitted during oral argument, "the State only has one interest and that is the protection of the life of the unborn child" (A. 104-105). The question then becomes whether this interest is sufficiently compelling to overcome the couple's or woman's fundamental right to privacy and autonomy. In this regard it is revealing to examine other aspects of the State's attitude toward the fetus. Such an inquiry reveals that only in the area of abortion does the State exhibit an interest in the fetus or treat it as having legal personality.

First, the pregnant woman who searches out a person willing to perform an abortion and who consents to, if not pleads for, the procedure is guilty of no crime. Texas

courts have repeatedly held that the woman is neither a principal nor an accomplice. *Willingham* v. *State*, 33 Cr. R. 98, 25 S.W. 424 (1894); *Shaw* v. *State*, 73 Cr. R. 337, 165 S.W. 930 (1914); *Moore* v. *State*, 37 Cr. R. 552, 40 S.W. 287 (1897); *Cave* v. *State*, 33 Cr. R. 335, 26 S.W. 503 (1894). Similarly, the women who travel from Texas to states with less restrictive abortion laws in order to secure medical abortions and avoid the alleged state interest in protecting the fetus are guilty of no crime. Moreover, self-abortion has never been treated as a criminal act. The State has failed to seek to deter through criminal sanctions the person whose interests are most likely to be adverse to those of the fetus. This suggests a statutory purpose other than protecting embryonic life.

An unborn fetus is not a "human being" and killing a fetus is not murder or any other form of homicide. "Homicide" in Texas is defined as "the destruction of the life of one human being by the act, agency, procurement, or culpable omission of another," 2A Tex. Pen. Code art. 1201 (1961). Since the common law definition of "human being" is applicable, a fetus neither born nor in the process of birth is not a "human being" within the meaning of those words as they appear in the homicide statute. In *Keeler* v. *Superior Court*, 2 Cal. 3d 619, 470 P.2d 662, 87 Cal. Rptr. 481 (1970), a pregnant woman was assaulted by her former husband; a Caesarean section and examination *in utero* revealed that the fetus, of approximately thirty-five weeks gestation, had died of a severely fractured skull and resultant hemorrhaging. The California Supreme Court held the man could not be guilty of murder; the same result would apply in Texas. A fetus is not con-

sidered equal to a "human being," and its destruction involves a significantly lesser penalty." [94]

The State does not require that a pregnant woman with a history of spontaneous abortion go into seclusion in an attempt to save the pregnancy. No pregnant woman having knowingly engaged in conduct which she reasonably could have foreseen would result in injury to the fetus (such as skiing in late pregnancy) has ever been charged with negligent homicide.

No formalities of death are observed regarding a fetus of less than five months gestation. Property rights are contingent upon being born alive. There has never been a tort recovery in Texas as the result of injury to a fetus not born alive. No benefits are given prior to birth in situations, such as workman's compensation, where benefits are normally allowed for "children." [95]

Appellants realize that the fact that states have failed in most instances to protect the rights of the fetus does not automatically mean that a state would not have a compelling interest in doing so. One assumes that if a state

---

[94] Abortion, if the woman consented, is punishable by confinement in the penitentiary for not less than two nor more than five years. 2A TEX. PEN. CODE art. 1191 (1961). The punishment for murder is death or confinement in the penitentiary for life or for any term of years not less than two. 2A TEX. PEN. CODE art. 1257 (1961).

[95] Although parents of stillborn or miscarried fetuses have recovered under wrongful death statutes in some states, it is very likely that what is really being compensated is the "mental anguish" of the parents. PROSSER, TORTS §§105, 715 (2nd ed. 1955). The general subject of civil law treatment of the fetus is exhaustively treated in Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579 (1965), and Lamm & Davison, *Abortion Reform*, 1 YALE REV. OF LAW & SOC. ACTION 55 (1971).

POOR COPY

had never enacted a statute prohibiting theft, a constitutional right to steal would not necessarily follow. However, the traditional subjects of legislation which bear upon individual liberty have, of necessity, always guided our notions of what the state may or may not do. The fact that the fetus has only been protected in the area of abortion, and not even then when the mother's life is in danger or she performs the abortion herself, together with the strong evidence that abortion laws were passed in response to the dangers of surgery, makes out a strong case for a traditional right of the mother to abort the fetus which was only taken away for her own protection. The converse is that the state has no *traditional* interest in protection of the fetus. If an interest exists, it must be relatively recent in its discovery.

It is sometimes argued that scientific discoveries show that human life exists in the fetus. Scientific studies in embryology have greatly expanded our understanding of the process of fertilization and development of the fetus and studies relating to the basic elements of life have shown that life is not only present in the fertilized egg, sperm and ova but that each cell contains elements which could conceivably constitute the beginning of a new human organism. Such studies are significant to science but only confuse the problem of defining human life.

> "When a fetus is destroyed, has something valuable been destroyed? The fetus has the potentiality of becoming a human being. Therefore, is not the fetus of equal value? This question must be answered.
>
> "It can be answered, but not briefly. What does the embryo receive from its parents that might be of value? There are only three possibilities: substance,

energy and information. As for the substance, it is not remarkable: merely the sort of thing one might find in any piece of meat, human or animal, and there is very little of it—only one and half micrograms, which is about a half of a billionth of an ounce. The energy content of this tiny amount of material is likewise negligible. As the zygote develops into an embryo, both its substance and energy content increase (at the expense of the mother); but this is not a very important matter—even an adult from this standpoint is only a hundred and fifty pounds of meat.

"Clearly, the humanly significant thing that is contributed to the zygote by the parents is the information that 'tells' the fertilized egg how to develop into a human called 'DNA.' . . . The DNA constitutes the information needed to produce a valuable human being. The question is: is this information precious? I have argued elsewhere that it is not. . . .

"People who worry about the moral danger of abortion do so because they think of the fetus as a human being, hence equate feticide with murder. Whether the fetus is or is not a human being is a matter of definition, not fact, and we can define it any way we wish." Hardin, *Abortion or Compulsory Pregnancy?* 30 J. Mar. & Fam. No. 2 (May, 1968).

Thus science only leads to a worse quandary for obviously if one goes far enough back along the continuum of human development one encounters the existence of sub-microscopic double-helix molecules which have human life potential. When does something become human? As Judge Cassibry pointed out in his dissent in *Rosen* v. *Louisiana State Board of Medical Examiners,* 318 F. Supp. 1217,

1232 (E.D. La. 1970) appealed docketed 39 U.S.L.W. 3302 (U.S. Dec. 27, 1970) (No. 1010), the "meaning of the term 'human life' is a relative one which depends on the purpose for which the term is being defined." [96]

Once the fact that science can offer no guidance on the question of when human life begins is conceded, arguments concerning preservation of the fetus almost always fall back to the proposition of potential life. Despite disagreements as to when human characteristics are assumed by the fetus, its would-be protectors argue that since there is potential human life present, which, unlike "DNA" molecules *can* be protected, it must be preserved. But matters are not so simple. Obviously all potential life may not be protected. A legislative decision to cut appropriations for slum clearance, for medical facilities, for food subsidies; a declaration of war; a court's refusal to consider the habeas corpus petition of a condemned man —all in some way destroy life. And, to the extent that past experience shows that in the future "x" number of lives will be lost if the decisions are made, they are conscious decisions.

It is obvious that the legislative decision forbidding abortions also destroys potential life—that of the pregnant woman—just as a legislative decision to permit abortions destroys potential life.[97] The question then becomes not one

---

[96] Section 1 of the Fourteenth Amendment of the United States Constitution refers to "All persons born or naturalized in the United States. . . ." There are no cases which hold that fetuses are protected by the Fourteenth Amendment.

[97] "Potential life" is used here in the sense that each living person has a life "potential" in the future which may or may not be realized (i.e., the person may die in the next few moments or

of destroying or preserving potential, but one of who shall make the decision. Obviously some decisions are better left to a representative process since individual decisions on medical facilities, wars, or the release of a convict would tend toward the chaotic. It is our contention that the decision on abortion is exactly the opposite. A representative or majority decision making process has led to chaos. Indeed, in the face of two difficult, unresolvable choices—to destroy life potential in either a fetus or its host—the choice can only be left to one of the entities whose potential is threatened.

The above argument is perhaps only another way of stating that when fundamental rights are infringed upon, the State bears the burden of demonstrating a compelling interest for doing so. The question of the life of the fetus versus the woman's right to choose whether she will be the host for that life is incapable of answer through the legislative fact-finding process. Whether one considers the fetus a human being is a problem of definition rather than fact. Given a decision which cannot be reached on the basis of fact, the State must give way to the individual for it can never bear its burden of demonstrating that facts exist which set up a compelling state interest for denying individual rights.

---

live "x" number of years). When speaking of the "potential life" of the mother being destroyed, not only is an actual cessation of brain waves included, but damage to her health, emotional security and happiness—all things which may result from an unwanted pregnancy, in effect those things which can destroy "life" while leaving a living organism.

V.

The Provisions in Articles 1191-1194 and 1196 of the Texas Penal Code, Which Prohibit Medically Induced Abortions Unless Undertaken "by medical advice for the purpose of saving the life of the mother" Are Unconstitutionally Vague and Indefinite, Facially and in Application, Because the Language Is Not Meaningful in Medical Practice, and Provides Wholly Inadequate Warning to Physicians, Their Counsel, Judges, and Jurors, of Which Physical, Mental, and Personal Factors May Be Taken Into Consideration When Assessing Necessity.

Appellants successfully challenged the statutory exception in the lower court on grounds of unconstitutional uncertainty. The provision sanctioning the medical procedure of induced abortion for "saving the life" of the woman, on its face and as interpreted in practice, provides insufficient prior warning of what conduct it proscribes, and what it authorizes. It shows the difficulties encountered when an instrument as blunt as the criminal law crudely attempts to define and regulate "those subtle and mysterious influences upon which life and health depend . . . ." *Dent* v. *West Virginia,* 129 U.S. 114, 122 (1889).

A vast body of case law exists on the problem of unconstitutional uncertainty.[98] This doctrine has, moreover, sev-

---

[98] *See generally,* Amsterdam, *The Void for Vagueness Doctrine,* 109 U. Pa. L. Rev. 67 (1960); Collings, *Unconstitutional Uncertainty—An Appraisal,* 40 Corn. L.Q. 195 (1955); Aigler, *Legislation in Vague or General Terms,* 21 Mich. L. Rev. 831 (1923); Freund, *The Use of Indefinite Terms in Statutes,* 30 Yale L.J. 437 (1921); Note, 62 Harv. L. Rev. 77 (1948).

eral complementary, and competing strands. The test most frequently articulated has been that

> "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process. . . ." [99]

This is partly because

> "it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large." [100]

Clearly, "[v]ague laws in any area suffer a constitutional infirmity," [101] be they of common law antiquity,[102] administrative,[103] or criminal.[104] Furthermore, statutes challenged

---

[99] Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

[100] United States v. Reese, 92 U.S. 214, 221 (1875).

[101] Ashton v. Kentucky, 384 U.S. 195, 200 (1966) (ancient common law offense of "criminal libel" void for uncertainty).

[102] Lanzetta v. New Jersey, 306 U.S. 451, 454-55 (1939); Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 242-43 (1932). *See also,* United States v. Evans, 333 U.S. 483 (1948), in which the statute had been passed in 1917; and Giaccio v. Pennsylvania, 382 U.S. 399 (1966), in which the statute had been passed in 1860.

As Professor Amsterdam stated in his extensive study of vagueness, "common-law terms may have no more illuminating clarity to the layman offender than the neologisms of Ronsard. . . ." Amsterdam, *supra,* note 136, 109 U. PA. L. REV. at 84.

[103] *See, e.g.,* Keyishian v. Regents, 385 U.S. 589 (1967); Baggett v. Bullitt, 377 U.S. 360 (1964).

[104] Lanzetta v. New Jersey, 306 U.S. 451 (1939).

POOR COPY

for vagueness which impinge upon sensitive human rights are to be closely scrutinized. *Griswold* dealt with "a right of privacy older than the Bill of Rights . . . " [105] and that right is invoked again here, as well as the rights to seek and administer medical care. Thus, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." [106]

This Court has never ruled on a vagueness challenge to a similar statute, and accordingly this case must be decided on its own merits as one largely of first impression. *United States* v. *Vuitch*, 402 U.S. 62 (1971), is in no way dispositive, moreover, having involved not only a differently worded statute, having been based upon no record whatever of statutory application in practice, and having been concerned with *federal* legislation which this Court might construe. The Texas courts have upheld this statute against vagueness claims, *Jackson* v. *State*, 55 Tex. Crim. 79, 115 S.W. 262 (1908), and it stands construed as written. In any event no construction could possibly meet the claim of physicians and patients to access to the medical procedure of induced abortion in cases of contraceptive failure, where the procedure would in no way be detrimental to the patient.

Both medical and legal commentary have recognized the uncertainty of American abortion laws, of which the Texas statute is a typical example. Retired Justice Clark recently remarked:

"The increasing number of abortions subjects physicians to increased dangers of liability for incorrectly

---

[105] Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

[106] NAACP v. Button, 371 U.S. 415, 438 (1963).

> interpreting a statute . . . . [D]octors face an uncertain fate when performing an abortion. This uncertainty will continue unless the legislatures or courts provide relief from liability." [107]

Christopher Tietze, M.D., perhaps internationally the most knowledgeable authority on abortion practices and statistics, commented

> "The application of these laws, however, varies greatly between localities and between hospitals." [108]

Similarly, a 1967 study concluded:

> "Abortion policies vary not only from hospital to hospital but also from service to service within the same hospital. They also vary widely from doctor to doctor on the same service of the same hospital." [109]

---

[107] Tom C. Clark, *Religion, Mortality, and Abortion: A Constitutional Appraisal*, 2 LOYOLA UNIV. (L.A.) L. REV. 1, 7 (1969) [hereafter "Clark"].

[108] Tietze, *Maternal Mortality Associated With Legal Abortion*, Proceedings of the Fifth International Conference on Planned Parenthood 24 (Oct. 1955) (Tokyo).

[109] Hall, *Abortion in American Hospitals*, 57 AM. J. PUB. HEALTH 1933, 1935 (1967). Dr. Hall continues:

> "The victim of all this confusion is, of course, the American female . . . [S]he must find Doctor X in hospital Y with policy Z in order to have it done." *Id.*

For a vivid illustration of the variations among hospitals in assessing the legality of therapeutic abortion on a given set of facts, see the questionnaire study and analysis of results in Packer & Gampell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417, 423 (1959). The study, directed to 29 San Francisco Bay Area and Los Angeles hospitals (*id.*, at p. 423) based on hypothetical cases involving pregnant women seeking abortions, yielded the following results (*id.*, at p. 444):

(footnote continued on following page)

nd, as Dr. Alan F. Guttmacher indicated in an early tudy, "[t]he doctor's dilemma lies in the phrase 'preserv- ng the life of the woman.'" [110]

The medical profession has no experience in applying he provisions of felony statutes to the day-to-day practice f their science.[111] It is not an offense to perform an appen-

Case No.	Authors' Evaluation of Legality of Abortion	Hospital Would Perform Abortion	
		Yes	No
1	Yes	21	1
2	No	10	12
3	No	6	16
4	No	15	7
5	No	8	13
6	No	8	14
7	Yes	17	4
8	No	5	17
9	Prob. Yes	10	11
10	Maybe	17	4
11	No	1	20

[110] Guttmacher, *Therapeutic Abortion: The Doctor's Dilemma*, 21 J. Mt. Sinai Hosp. 111 (1954).

[111] Materials from medical and psychiatric literature which illustrate the wide-ranging interpretations of language in laws on abortion, and the sometimes arbitrary implementation of these laws include the following authorities:

(1) M. Calderone, (ed.), Abortion in the United States 34-35, 52 (1958):

"[N]ecessity as a sine qua non of performing an abortion . . . leaves the doctor's position perilous and uncertain. * * * The current laws provide no accurate criteria by which the doctor can govern his actions."

(2) White, *Induced Abortions: A Survey of their Psychiatric Implications, Complications, and Indications*, 24 Tex. Reps. of Biology & Medicine 531, 541 (1966):

"[T]he enormous variability in the frequency of therapeutic abortions from one hospital to another . . . must surely reflect, more than anything else, differences in the

dectomy far in advance of rupture, and when only necessary to prevent a risk that might never materialize. Gen-

---

personal values, religious beliefs, and social ideology of the staffs of the respective hospitals about the matter of abortion."

(3) R. H. SCHWARZ, SEPTIC ABORTION 11 (1968):

"The legal status of abortion varies not only throughout the world but from state to state. Interpretation and enforcement differ from community to community; professional assessment varies from hospital to hospital, and from physician to physician."

(4) GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, THE RIGHT TO ABORTION: A PSYCHIATRIC VIEW 40 (Comm. on Law & Psychiatry, 1970):

"[T]he rate of therapeutic abortion varies dramatically from hospital to hospital within a state, even though all are supposedly governed by the same statutes."

In addition to the above authorities, who stress variations from place-to-place and person-to-person, much research and analysis has examined some of the many reasons why physicians and psychiatrists have difficulty with the statutes, including specific aspects of confusion:

(5) Ryan, *Humane Abortion Laws and the Health Needs of Society*, 17 W. RES. L. REV. 424, 431 (1965):

"Distinctions between physical and mental health are meaningless in terms of modern medical thinking. Health cannot be divorced from socio-economic factors which influence people's lives since health is a product of these conditions."

(6) White, *supra* no. (2), at 532:

"[T]here are no generally accepted policies, little or no systematically gathered data, and remarkably few well and objectively substantiated points of view among psychiatrists about 'legally' or 'illegally' induced abortions."

(7) Pike, *Therapeutic Abortion and Mental Health*, 111 CALIF. MED. 318, 319 (Oct. 1969).

"One of the controversial aspects of the situation is the undeniable effect of sociological factors on an individual's mental health. The stress and consequences of an unwanted pregnancy as they affect mental health must be determined for an individual patient, taking into consideration her

eral malpractice principles, which take all circumstances into account, govern the physician's everyday practice, not the criminal law. Nor is an instance of malpractice *per se* ever a cause for license revocation, much less criminal prosecution, unless so serious, wanton, and reckless as to constitute criminal negligence. The physician's professional role is directed toward preserving a patient's *health*, that term is used in its broadest sense:

---

total life situation. Factors such as marital status, family support, economic conditions, subcultural attitudes toward the pregnancy, and personality structure all contribute toward her ability to maintain and complete her pregnancy without damage to her mental functioning.

The new law requires physicians to make judgments that are difficult to make, impossible to prove and of crucial importance to the patient's welfare and the welfare of those dependent on her and intimately involved with her."

(8) Sir Dugald Baird, *The Obstetrician and Society*, 60 AM. J. PUBLIC HEALTH 628, 635 (1970).

"[E]ven in a basically stable woman, emotional health and subsequently physical health can be undermined by adverse social conditions: for example, substandard housing, overcrowding, illness in other children, elderly or bedridden parents, alcoholic husband, and economic necessity for the mother to work outside the home."

(9) Thompson, Cowen & Berris, *Therapeutic Abortion: A Two-Year Experience in One Hospital*, 213 J.A.M.A. 991, 994 (1970):

"Psychiatric and socioeconomic problems are so intertwined that it is difficult for the Therapeutic Abortion Board to extract the relevant data in order to make a just and lawful decision. . . . In light of the previously stated vagueness of the law, the evaluation of the patient for psychiatric indications has been one of our major problems."

(10) Moyers, *Abortion Laws: A Study in Social Change*, 7 SAN DIEGO L. REV. 237, 241 (1970):

"Although some hospitals in the state have done away with the requirement, most committees still require psychiatric consultation when a request for abortion is presented on this [mental health] ground."

"Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

"The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition." [112]

In no sphere of medicine other than abortion does a criminal statute impose such a burden upon a physician, and in no other sphere of medical practice is treatment restricted by criminal law to those instances in which it is necessary to save the patient's life. The Court might consider the impact on the lives of all citizens if a penal statute prohibited gall bladder surgery, kidney stone removal, the prescription of contraceptives,[113] use of antibiotics, vaccination, or even the taking of aspirin "unless necessary for the preservation of the life or health" of the patient. There are not and never have been such laws or practices.

An increasing number of federal and state courts have been asked to declare similarly worded statutes unconstitutionally vague. A comparison of the analysis by invalidating judges with that by others is instructive. The case language discussing vagueness in the two types of decision can be compared as follows:

---

[112] *Constitution of the World Health Organization*, in BASIC DOCUMENTS OF THE WORLD HEALTH ORGANIZATION 1 (Geneva 1969 ed.).

[113] Griswold v. Connecticut, 381 U.S. 479 (1965), at least implies that such a requirement would violate the patient's right of privacy, but Connecticut, for obvious reasons, made no such contention.

VAGUE	NOT VAGUE
"[T]here are grave and manifold uncertainties in the application of Article 1196. How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How *imminent* must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years? These questions simply cannot be answered." *Roe* v. *Wade*, 314 F. Supp. 1217, 1223 (N.D. Tex. 1970) (per curiam); Supp. App. at 83.	"We have examined the challenged phraseology and are persuaded that it is not indefinite or vague. In our opinion, the word 'necessary' and the expression 'to save the life of the mother' are both reasonably comprehensible in their meaning. * * * [T]he California court found that the words 'necessary to preserve her life' in that state's abortion statute were unconstitutionally vague. While the Wisconsin statute uses slightly different language ('necessary to save'), we doubt that the distinction between the words used in the two statutes is significant. However, we do not share the view of the majority in *Belous* that such language is so vague that one must guess at its meaning." *Babbitz* v. *McCann*, 310 F. Supp. 293, 297-98 (E.D. Wis. 1970) (per curiam); Supp. App. at 145-46.
"If courts cannot agree on what is the essential meaning of 'necessary for the preservation of the woman's life' and like words, we fail to see how those who may be subject to the statute's proscriptions can know what it prohibits. . . . One need not inquire in great depth as	"On the vagueness question I first observe that we have before us no contention by any party that an actual situation exists where a licensed physician acting in good faith is in jeopardy of prosecution for performing an abortion he believed to be 'necessary for the

VAGUE	NOT VAGUE
to the meaning of such words as 'necessary' and 'preserve' to conclude that the holdings of those cases are correct. 'Necessary' has been characterized as vague by the United States Supreme Court and has been similarly described by other courts. It is 'a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, proper, or conducive to the end sought.'	preservation of the woman's life.' In other words we are presented with no actual circumstance where the vagueness question is in issue. The rather forced game of semantics urged by plaintiffs and adopted by the majority has not presented any *actual* controversy but is merely a convenient vehicle for these plaintiffs to challenge a law which they believe is unwise. . . .
"The word 'preserve' is similarly susceptible of so broad a range of connotations as to render its meaning in the statute gravely amorphous, since it may mean anything from maintaining something in its status quo to preventing the total destruction of something." *Doe* v. *Scott*, 321 F. Supp. 1385, 1388-89 (N.D. Ill. 1971); Supp. App. at 128-29.	"The words of the Illinois Abortion Statute taken in their ordinary meaning sufficiently convey definite warning as to the proscribed conduct . . . ." *Doe* v. *Scott*, 321 F. Supp. 1385, 1392-93 (N.D. Ill. 1971) (Campbell, J., dissenting); Supp. App. at 132-33.
"Dictionary definitions and judicial interpretations fail to provide a clear meaning for the words, 'necessary' or 'preserve.' There is, of course, no standard definition of 'necessary to preserve,' and taking the words separately, no clear meaning emerges. 'Necessary' is defined as: '1. Essential to a desirable	"Amici for appellant, 178 deans of medical schools, state that . . . 'the medical profession has "approved" abortions in cases [in which the objective was not to preserve the life of the woman and therefore] clearly outside of Penal Code section 274. Packer & Gampell, Therapeutic Abortion: A

VAGUE	NOT VAGUE
or projected end or condition; not to be dispensed with without loss, damage, inefficiency, or the like; * * *' (Webster's New International Dictionary (2d ed.), unabridged.) The courts have recognized that '"necessary" has not a fixed meaning, but is flexible and relative.' (Westphal v. Westphal, 122 Cal. App. 379, 382, 10 P.2d 119, 120; see also, City of Dayton v. Borchers (Ohio Com. Pl., 1967) 13 Ohio Misc. 273, 232 N.E.2d 437, 441 ['A *necessary* thing may supply a wide range of wants, from mere convenience to logical completeness.'].)	Problem in Law and Medicine, 11 Stan.L.Rev. 417, 447. * * *' However, that sentence must be understood to mean recognized and approved by such persons as being required to preserve the life of the patient.
"The definition of 'preserve' is even less enlightening. It is defined as: '1. To keep or save from injury or destruction; to guard or defend from evil; to protect; save. 2. To keep in existence or intact; * * * To save from decomposition, * * * 3. To maintain; to keep up; * * *' (Webster's New International Dictionary, *supra*.) The meanings for 'preserve' range from the concept of maintaining the status quo—that is, the woman's condition of life at the time of pregnancy—to maintaining the biological or medical definition of 'life'—that is, as opposed to the biological or medical definition of 'death'. * * *	"The word 'preserve' is defined in the dictionary as '1. To keep or save from injury or destruction; * * * to protect; save. 2. To keep in existence or intact; * * * To save from decomposition * * *.' (See Webster's New Internat. Dict. (3d ed. 1961).) As used in section 274, the word 'preserve' has been regarded as synonymous with 'save' * * * and to save a life ordinarily is understood as meaning to save from destruction, i.e. dying—not merely from injury. Thus the precipitation of a psychosis in the absence of a genuine threat of suicide is not a threat to life under section 274." *California* v. *Belous*, 71 Cal. 2d 954, 974-

VAGUE	NOT VAGUE
	75, 458 P.2d 194, 80 Cal. Rptr. 354 (1969) (Burke, J., dissenting); Supp. App. at 112-13.
"Various possible meanings of 'necessary to preserve * * * life' have been suggested. However, none of the proposed definitions will sustain the statute." *California* v. *Belous*, 71 Cal. 2d 954, 961-62, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970); Supp. App. at 104.	"[O]ne would think that the English language which has been the sensitive instrument of our system of law for over 500 years, has lost, by the mere passage of time, all capacity for clarity of expression. . . . There is no mystique enveloping the statute and . . . the clause now challenged has stood the test of over a hundred years, and presumably of countless human incidents falling within its scope, apparently without evoking a single whimpering cry against it." *Id.* at 979-80 (O'Sullivan, J., dissenting).
"It is my opinion that the difficulty with the statute in question is not its failure to be phrased in 'numerous paragraphs of fine-spun legal terminology', but rather its attempt to define a medical problem in terms that are not understandable by the medical profession. A continuing complaint of the medical profession is that the laws in general, and judicial decisions, are not responsive to the realities of medical science. It is interesting to note that while the body of the statute	"It appears to us that the vagueness which disturbs the plaintiffs herein results from their own strained construction of the language used, coupled with the modern notion among law review writers that anything that is not couched in numerous paragraphs of fine-spun legal terminology is too imprecise to support a criminal conviction. . . . The words of the Ohio statute, taken in their ordinary meaning, have over a long period of years proved entirely adequate to inform the

VAGUE

condemns the attempt to procure a 'miscarriage', the statute is captioned 'Attempt to procure abortion.' This failure of this statute, and others like it, to observe the medical distinction between abortion and miscarriage has been noted, and it is said that the two terms are used indiscriminately by the courts. . . . I should like to set forth what I believe to be a primary example of the vagueness of the Ohio statute: the suicidal patient.

"A pregnant woman informs her physician that if her pregnancy goes to term she will take her own life. Is an abortion *necessary to preserve* the life of that patient? The patient will not die from any physiological condition related to her pregnancy. Suicide is an intentional act (although, perhaps, not truly a volitional one), and the patient may not, in fact, carry out her threat. Assuming that the physician has strong and valid reasons to believe that his patient will take her own life, does this statute tell him whether he may legally terminate the pregnancy?

"There are other questions created by this statute. How imminent must the threat of death be to warrant an abortion

NOT VAGUE

public, including both lay and professional people, of what is forbidden. The problem of the plaintiffs is not that they do not understand, but that basically they do not accept, its proscription." *Steinberg* v. *Brown*, 321 F. Supp. 741, 745 (N.D. Ohio 1970); Supp. App. at 193.

"We have examined the challenged language and are persuaded that it is neither vague nor indefinite, but is instead reasonably comprehensible in its meaning, with its reach delineated in words of common understanding.

The clause 'unless done for the relief of a woman whose life appears in peril' requires no guessing at its meaning. Rosen focuses upon the words 'relief,' 'appears,' and 'life.' These are widely used and well understood words, particularly when read

VAGUE

'to preserve life?' If permitting a pregnancy to go to term would clearly shorten the mother's life by a substantial number of years, would a physician be justified in performing an abortion in accordance with the term 'necessary to preserve her life?'

"An Ohio court has recently defined a 'necessary thing' as follows:

> 'A necessary thing may supply a wide range of wants, from mere convenience to logical completeness.' City of Dayton v. Borchers, 13 Ohio Misc. 273, 232 N.E.2d 437, 441, 42 O.O.2d 193, 197 (Ohio Com.Pl. 1967)

Such a definition certainly does not advise what is permitted and what is forbidden.

"With regard to the assertion that the lessons of time have compensated for the deficiencies of the statute, I do not find that to be the case. I have endeavored to examine all recorded Ohio decisions construing O.R.C. §2901.16 and the predecessor thereto, and find that not one of the cases I have reviewed construes the statutory phrase 'necessary to preserve her life', or the language of similar import in the earlier statutes. (A listing of the said decisions is ap-

NOT VAGUE

in the context of section 37: 1285(6). We conclude that the statute was intended to permit an induced abortion of an embryo or fetus only when the physician, after due consultation with another licensed physician, determines in good faith that continuation of the pregnancy will directly and proximately result in the death of the woman. In our opinion, the statute so read provides fair warning that Louisiana does not suffer the performance of all medically indicated abortions, however wise in the physician's estimation such an operation might be in a particular case, but rather allows the induced abortion of an embryo or fetus to be performed without sanction only when the life of the mother is directly endangered by the condition of pregnancy itself." *Rosen* v. *Louisiana State Bd. of Medical Examiners*, 318 F. Supp. 1217, 1220 (E.D. La. 1970); Supp. App. at 214.

VAGUE

pended hereto). A study of the Ohio case histories offers little guidance to the physician searching for the meaning of the language 'necessary to preserve her life.'" *Steinberg* v. *Brown*, 321 F. Supp. 741, 749-50 (N.D. Ohio 1970) (Green, J., dissenting); Supp. App. at 197-98.

NOT VAGUE

Little can be added to the analysis offered by numerous distinguished state and federal judges on the vagueness questions raised here. It is sufficient to note that the courts upholding the statute as not vague committed three plain errors. First, the validating courts completely and deliberately ignored the discussions in medical literature which carefully explain why and how interpretative difficulties arise. Second, those courts did not even discuss the various possible interpretations of the statutory language, and point to any likelihood that state courts would adopt or had adopted a specific meaning. Third, the validating courts did not draw the obvious distinction between the fluid and varying standards of ordinary medical practice, and the different standards brought about with respect to induced abortion by the variant ethic views of physicians that are compounded by the threat of felony punishment and license revocation for committing what would at most be a medical misunderstanding in any other context.

VI.

Texas Penal Code Articles 1191-1194 and 1196, as Applied to Impose Upon a Physician the Burden of Pleading and Proving That a Medical Abortion Procedure Was "procured or attempted by medical advice for the purpose of saving the life of the mother," Reverses the Due Process Guarantee of Presumed Innocence and Invades the Privilege Against Self-Incrimination.

The Texas abortion law comes to this Court with a supplementary gloss of state law that cannot be squared with the Fourteenth Amendment. According to *Veevers* v. *State,* 354 S.W.2d 161, 166 (Tex. Crim. App. 1962), and numerous prior decisions, "[it] is unnecessary for the State to allege that the act was 'unlawfully' done." Although Article 1196 permits the medical procedure of induced abortion in a limited class of cases, the State need not inquire whether the exception applied. As the *Veevers* case held, "[t]his is a separate statute, and it need not be negated in the allegations of the indictment. It would be an affirmative defense available in the proper case to an accused." *Id.* at 166.

The import of the *Veevers* gloss is that a physician may be indicted and tried before a jury each time he undertakes the medical procedure of induced abortion. It is up to him to raise Article 1196 as a defense, admit complicity in the offense, and prove that the medical procedure was done "for the purpose of saving the life of the mother."

Indictments contained in the record (A. 73, 74; Appendix E, E-1 to E-9) illustrate this practice. Law enforcement authorities are free to seek indictments without even the bare courtesy of seeking an explanation from the physician.

Medical literature has shown at least one Dallas, Texas hospital which has generally performed 1 abortion for each 680 deliveries.[114] If this ratio has been consistent on a statewide basis, then the 220,000 births in Texas during 1969[115] permit an inference that there were also 324 medical abortions done in Texas hospitals. Under Texas law, the physicians, their cooperating associates, and perhaps the hospitals themselves could have been indicted without warning on abortion charges in any of the 324 cases.

This Court's decision in *United States* v. *Vuitch*, 402 U.S. 62 (1971), and the weight of authority, support the contention that lack of medical justification for the abortion "is an objective element of the crime." George, *Current Abortion Laws: Proposals and Movements for Reform*, 17 W. Res. L. Rev. 371, 377 (1965). As the Court in *Vuitch* stated:

> "Certainly a statute that outlawed only a limited category of abortions but 'presumed' guilt whenever the mere fact of abortion was established, would at the very least present serious constitutional problems under this Court's previous decisions interpreting the Fifth Amendment." 402 U.S. at 70.

An initial infirmity of the *Veevers* rule inheres in its inevitable invasion of the Fifth Amendment privilege against self-incrimination. *Veevers* requires that the physician bring forth evidence that the abortion was necessary to preserve the patient's "life." This means that

---

[114] Hall, *Therapeutic Abortion, Sterilization, and Contraception*, 91 Am. J. Obstetrics & Gynecology 518, 524-25, Table VI, line 2 (1965); Supp. App. at 402.

[115] U. S. Bureau of the Census, *Statistical Abstract of the United States: 1970*, Table 57, at 49 (91st ed.).

the accused physician stands mute at penalty of certain conviction because of his failure to testify. If he testifies, however, he must admit the very fact of the abortion, *i.e.*, complicity in one element of the offense, and then attempt to persuade the jury that the second element of the offense was not present. If the jury finds his justifications insufficient, or that his "good faith" was not "good enough," the physician has been convicted upon his own testimony. Moreover, if the jury had not believed the prosecution's evidence that an abortion was performed, the physician's testimony could supply proof from his own mouth of *both* elements of the offense.

Leary v. *United States,* 395 U.S. 6 (1969), teaches that the *Veevers* rule must be held to violate the privilege against self-incrimination. In *Leary,* registration and payment under the Marihuana Tax Act "compelled [an accused] to expose himself to a 'real and appreciable' risk of self-incrimination . . . ." 395 U.S. at 16. Such registration "would surely prove a significant 'link in a chain' of evidence tending to establish . . . guilt." *Marchetti* v. *United States,* 390 U.S. 39, 48 (1968).

So it is with the *Veevers* rule. If the physician comes forward with evidence that the abortion was necessary for medical reasons, he must perforce admit presence at the scene, and performance of the very act charged in the indictment. His own testimony will suffice to corroborate the first element of the offense, namely, that he performed the abortion. Not only will his own testimony provide a "link" in the chain, it may provide both links to a two-link chain, that is, the entire chain. He will have admitted performing the abortion and the jury may not believe his reasons for justification. Accordingly, a weak prosecution

case may be fortified and proved from the physician's own testimony. Since *Veevers* requires that testimony, the rule invades the physician's privilege against self-incrimination. Under *Leary*, and earlier supporting decisions,[116] this is not permissible.

The Texas felony abortion statute, as construed in *Veevers*, also violates the due process clause of the Fourteenth Amendment by reversing the presumption of innocence. The physician must take the burden upon himself of proving that the abortion was necessary to save the patient's life. To undertake such proof, the physician must first waive any defense based upon not having participated at all in the alleged offense. He must admit what the indictment states, that he performed the abortion, and prove that the act was justified.

A long line of decisions by this Court, carefully reviewed by the Eight Circuit *en banc* in *Stump* v. *Bennett*, 398 F.2d 111 (8th Cir. 1968) (*en banc*), establishes the presumption of innocence on its constitutional plane.[117] As this Court stated in *Deutch* v. *United States*:

> "'One of the rightful boasts of Western civilization is that the [prosecution] has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the

---

[116] *See, e.g.*, Haynes v. United States, 390 U.S. 85 (1968); Tot v. United States, 319 U.S. 463 (1943).

[117] Authorities recognizing the constitutional status of the presumption of innocence go back to Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 328 (1866). *See also* United States v. Romano, 382 U.S. 136, 139-44 (1965) (presence at still does not justify inference that accused possesses or controls the still); Speiser v. Randall, 357 U.S. 513, 525-26 (1958); Morissette v. United States, 342 U.S. 246, 274-75 (1952); Morrison v. California, 291 U.S. 82 (1934).

> safeguards of a fair procedure.' Irving v. Dowd, 366 U.S. 717, 729. Among these is the presumption of the defendant's innocence." 367 U.S. 456, 471 (1961).

Plainly, this right is invaded when a physician can be convicted solely because he performed an abortion, and without further proof.

Necessity is not a collateral matter, like self-defense. With respect to abortion, the circumstances under which the procedure was undertaken go to the very heart of the matter. It is not every abortion which the statute condemns, but only a special, opaquely defined class. *Veevers* incorrectly suggests that the exceptions are collateral and affirmative justifications. In every physician case, however, the center of the controversy will be whether the abortion in question fell within the exception. Abortions *per se* are no offense. It is only unnecessary abortions which the statute proscribes. Under a broad definition of "life" there are many necessary abortions. Under other definitions, there may be more. By presuming that all abortions are legally unnecessary, the State may convict, as it did in *Veevers*, upon no more than a showing persuasive to the jury, that the physician performed the abortion. It is presumed, unless the physician shows otherwise, that the abortion was unnecessary. In other words, Texas practice presumes, upon proof of one element of the offense, that the second element is present, that the accused is guilty. This presumption of guilt cannot stand in light of the constitutional status of the presumption of innocence under the due process clause of the Fifth Amendment, as applied through the Fourteenth.

CONCLUSION

For the reasons stated in this brief this Court should reverse the lower court's judgment denying standing to Appellants Doe and denying injunctive relief, declare that the Texas Abortion Statutes, Arts. 1191, 1192, 1193, 1194, 1196, TEXAS PENAL CODE, violate the United States Constitution and remand with instructions that a permanent injunction against enforcement of said statutes be entered.

Respectfully submitted,

ROY LUCAS
James Madison Constitutional Law Institute
Four Patchin Place
New York, New York 10011

SARAH WEDDINGTON
JAMES R. WEDDINGTON
709 West 14th
Austin, Texas 78701

LINDA N. COFFEE
2130 First Nat'l Bank Bldg.
Dallas, Texas 75202

FRED BRUNER
ROY L. MERRILL, JR.
Daugherty, Bruner, Lastelick & Anderson
1130 Mercantile Bank Bldg.
Dallas, Texas 75201

Attorneys for Appellants

APPENDICES

APPENDIX A

HENRY WADE
DISTRICT ATTORNEY
DALLAS COUNTY GOVERNMENT CENTER
DALLAS, TEXAS 75202

July 22, 1971

Mrs. Sarah Weddington
c/o The James Madison Constitutional Law Institute
Four Patchin Place
New York, N. Y. 10011

Re: Roe v. Wade

Dear Mrs. Weddington:

This is to advise you that this office will continue to enforce Articles 1191, 1192, 1193, 1194, and 1196 of the Texas Penal Code in all abortion cases in which indictments are returned by the Dallas County Grand Jury.

Very truly yours,

John B. Tolle

JOHN B. TOLLE
ASSISTANT DISTRICT ATTORNEY
DALLAS COUNTY, TEXAS

JBT:hc

APPENDIX B

Affidavit of Paul C. MacDonald, M.D.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 70-18, 1971 TERM

JANE ROE, JOHN DOE, MARY DOE, and
JAMES HUBERT HALLFORD, M.D.,

Appellants,

—v.—

HENRY WADE, DISTRICT ATTORNEY
OF DALLAS COUNTY, TEXAS,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

STATE OF TEXAS
COUNTY OF DALLAS

BEFORE ME, the undersigned authority, on this day personally appeared PAUL C. MACDONALD, M.D., to me well known, who, after being first duly sworn, did depose and say as follows:

My name is Paul C. MacDonald. The copies of my "Curriculum Vitae" and "Bibliography" attached hereto accurately reflect my medical background and the articles I have had published.

As the attached "Curriculum Vitae" indicates, I am Chairman of the Department of Obstetrics and Gynecology of The University of Texas Southwestern Medical School (5323 Harry Hines Boulevard, Dallas, Texas 75235), the only medical school located in Dallas, Texas. As Chairman of the Department of Obstetrics and Gynecology, I am also Chief of the Obstetrics and Gynecology Service at Parkland Memorial Hospital (the hospital associated with the medical school), which is the city and county hospital. The hospital has full responsibility for furnishing medical and hospital care to the medically indigent who reside in the hospital district, which includes the City of Dallas and Dallas County. My time is approximately equally divided between teaching and clinical duties.

Parkland Memorial Hospital is under the jurisdiction of the Commissioners' Court of Dallas County and the Dallas County Hospital District. Henry Wade, the District Attorney of Dallas County and the appellee herein, is the attorney of record for the hospital district and for Parkland Memorial Hospital.

Almost all of the patients served by Parkland are medically indigent. I would estimate that about 50% of them are virtually in a no-pay category and, because of their inability to pay, are not charged for the medical services they receive. Persons in the other 50% are charged varying percentages of the usual costs of medical services, depending upon individual financial situations.

The medical policies adopted and enforced by the hospital are important for at least two reasons: first, because Parkland is virtually the only source of medical services available to the medically indigent of Dallas and Dallas County; and second because the physicians of the city and of the surrounding area generally "key on" and

adopt the standards and policies of Parkland regarding evolving areas of medicine. Theoretically the policies and procedures of the medical school and thus of Parkland exemplify the scholarly and most advanced approach to the practice of medicine.

Prior to June 17, 1970, the date of the decision of the U.S. District Court in *Roe* v. *Wade*, the following general procedures were followed at Parkland Hospital in regard to requests for abortion: For an abortion to be performed required written permission of the patient, her physician, the Chief of the Obstetrics and Gynecology Service, and a representative of the hospital administration (generally a senior administrator). To secure permission from the Chief of the Obstetrics and Gynecology Service required the recommendation of a full-time member of the medical school obstetrics and gynecology department and of a full-time member of the medical school department or medical specialty with expertise regarding the condition of the patient which prompted consideration of an abortion (such as a member of the cardiology department if the patient had a heart condition). In addition, abortions were generally performed only upon the recommendation of two other consulting physicians. There was no hospital committee *per se* which reviewed requests for abortion.

In keeping with the Texas abortion law, abortions were performed only "for the purpose of saving the life of the mother." Thus such procedures were allowed only where each of the persons involved felt that the patient's medical condition came within the language of the statute. Conditions given careful consideration, as grounds possibly within the statute, included carcinoma of the cervix, severe renal disease, various heart diseases, and severe hypertension.

Prior to the *Roe* v. *Wade* decision an abortions policy committee, a subcommittee of the Medical Advisory Council of the Hospital, was appointed at my request. The purpose of the committee was to make plans as to the mechanics of meeting the anticipated increase in abortion procedures were the Texas abortion law to be declared unconstitutional.

Following the U.S. District Court decision in *Roe* v. *Wade* on June 17, 1970, which declared the Texas abortion law unconstitutional, I, in my capacities as Chairman of the Department of Obstetrics and Gynecology and as Chief of the Obstetrics and Gynecology Service, sought to ascertain the implications of that decision for medical practice. I made an inquiry of Mr. C. J. Price, the Administrator of Parkland Memorial Hospital, regarding the impact of the ruling; on June 29, 1970, I received the following reply, a copy of which is attached hereto:

> Dear Paul:
>
> I have just returned from a conference with Wilson Johnson of District Attorney Henry Wade's Office where we discussed the possible affects of the recent three-judge Federal ruling on the constitutionality of the State's laws on abortion.
>
> Mr. Johnson reaffirmed our recent telephone conversation regarding this matter. The policy for us to follow is the same policy which has prevailed in the past, as regards to any abortion.
>
> Mr. Johnson stated that pertinent points which the District Attorney's Office considers of importance are:
>
> 1. The law is still what it has been,

2. The Statutes pertaining to abortion are still on the books,
3. The District Attorney's Office has ruling by the Federal judges under appeal.
4. The Federal judges did not issue any injunctions against the District Attorney to preclude prosecution or following the state law,
5. The District Attorney is prosecuting the Doctor involved in the case.

John Tolle, a member of District Attorney Henry Wade's Staff has been assigned to work with your committee when you are ready to schedule a meeting. You may be interested to know that Mr. Tolle was involved in the case referred to the Federal judges so he is familiar with all aspects of the state law as well as the Federal judges' opinion.

When you are ready to call a meeting of your committee, if you will let me know I will be glad to coordinate it with the medical members, members of the Administrative Staff and the District Attorney's Office.

Very truly yours,

/s/ Jack
C. J. Price, FACHA
Administrator

In light of the letter and Henry Wade's stated attitude toward the federal decision, no meeting of the abortions policy committee was ever held and the pre-June 17, 1970,

requirements regarding abortion procedures continue to be in effect pending a Supreme Court decision.

Because of the position taken by Henry Wade, the only marked impact of the *Roe* v. *Wade* decision was to increase the frustration felt by many of the faculty members of my department regarding the matter of abortion. A majority of them strongly believe that an abortion procedure is appropriate in a variety of circumstances other than where a termination of the pregnancy is necessary to preserve the life of the woman in the most narrow sense.

Even the doctors on my staff do not agree as to the meaning of the statute or the medical indications it encompasses. Aside from the insurmountable difficulty of determining what conditions are severe enough to threaten a pregnant woman's life, in my view an entirely different and more pervasive vagueness is embodied in the current Texas law because of the impossibility of determining the precise degree of risk to life a given condition poses in regard to a particular patient's pregnancy. It is rare that a doctor can even confidently describe the risks attendant to a given condition of a given patient in such broad terms as "minimal risk", "some risk", "great risk", etc. Every woman who is pregnant is generally submitted to a greater degree of risk to her life than a woman of similar age and health who is not pregnant. There is a great arena of problems which accrue in pregnancy and which may increase the risk of pregnancy to one degree or another. Yet the Texas law requires a doctor to weigh intangibles in each individual case and to precisely determine the statistical risk applicable to a patient's individual accumulation of problems. Such is medically impossible.

The fear of prosecution under the Texas abortion law is the sole reason no change was made in Parkland

Memorial Hospital's abortion requirements. Because of a fear of prosecution, abortion procedures continue to be allowed only where deemed necessary to preserve the woman's life, as that standard can best be determined. It is my personal opinion that the policy of the hospital and of this obstetrics and gynecology department would undoubtedly have been significantly liberalized absent Henry Wade's position that the Texas abortion law, though declared unconstitutional, still has force and effect.

/s/ PAUL C. MACDONALD, M.D.

STATE OF TEXAS
COUNTY OF DALLAS

SWORN TO AND SUBSCRIBED TO before me on this the 28 day of July, 1971.

/s/ ELIZABETH A. CAREY
Notary Public in and for
Dallas County, Texas

Curriculum Vitae

Name: Paul C. MacDonald

Born: September 14, 1930, McAlester, Oklahoma

Undergraduate Work: Southern Methodist University, Dallas, B.S., 1951

Medical School: The University of Texas (Southwestern) Medical School, M.D., 1955

Internship: Rotating Internship, Methodist Hospital, Dallas, 1955-56

Residency: Parkland Memorial Hospital, Dallas, 1957-60

Fellowships: 1960—Dr. Joseph W. Jailer, Columbia University College of Physicians and Surgeons, New York, New York

1960-62—Dr. Seymour Lieberman, Columbia University College of Physicians and Surgeons, New York, New York

Academic Positions: Chairman, Department of Obstetrics and Gynecology, The University of Texas (Southwestern) Medical School—1970—

Professor and Acting Chairman, Department of Obstetrics and Gynecology, The University of Texas (Southwestern) Medical School, 1969-1970

Professor, Obstetrics and Gynecology, The University of Texas (Southwestern) Medical School, 1966-1969

Associate Professor, Obstetrics and Gynecology, The University of Texas (Southwestern) Medical School 1965-1966

Assistant Professor, Obstetrics and Gynecology, The University of Texas (Southwestern) Medical School 1962-1965

Instructor, Obstetrics and Gynecology, The University of Texas (Southwestern) Medical School, 1960-1962 (on leave of absence)

Societies, Memberships, Etc.: AOA; Society for Gynecologic Investigation; American Society for Clinical Investigation; Endocrine Society; American Federation for Clinical Research; Dallas-Fort Worth Obstetrics and Gynecological Society; County, State and American Medical Association; Fellow, American College of Obstetricians and Gynecologists; Diplomate, American Board of Obstetrics and Gynecology; Consultant, American Medical Association Council on Drugs; Member, Reproductive Biology Study Section, NIH, USPHS (1966-1970); Recipient, Career Development Award, USPHS (1964-1969).

Hospital Affiliations: Chief, Obstetrics and Gynecology Service, Parkland Memorial Hospital, Dallas, Texas

Consultant, Dallas Presbyterian Hospital, Dallas, Texas

Military Service: Medical Officer, U.S. Navy, 1956-57

Bibliography

Paul C. MacDonald, M.D.

1. Jamison, H. B., Dees, D. B., and MacDonald, Paul: Assessment of Amenorrhea. Bulletin of the Sloan Hospital for Women, *7*:67, 1961.

2. MacDonald, Paul, VandeWiele, R. L., and Lieberman, S.: Testicular Precursors of Urinary 17-Ketosteroids. Proceedings of the Endocrine Society, p. 69, 1961.

3. MacDonald, Paul, VandeWiele, R. L., and Lieberman, S.: Gonadal and Adrenal Androgens. Proc. of the Socy. of Endocrinology (Mexico), p. 239, 1961.

4. MacDonald, Paul, VandeWiele, R. L., and Lieberman, S.: Gonadal Precursors of Urinary 17-Ketosteroids. Proceedings of the International Congress Steroid Hormones, Milan, Italy, 1962.

5. MacDonald, P. C., VandeWiele, R. L., and Lieberman, S.: Precursors of the Urinary 11-Desoxy-17-Ketosteroids: Influence of the Level of Secretion of Dehydroisoandrosterone Upon its Metabolism. J. Clin. Endocrinol. & Metab., *22*:1222, 1962.

6. MacDonald, P. C., VandeWiele, R. L., and Lieberman, S.: Influence of Daily Variation in the Metabolism of Dehydroisoandrosterone Upon the Determination of its Secretory Rate. J. Clin. Endocrinol. & Metab., *22*:1229, 1962.

7. VandeWiele, R. L., MacDonald, P. C., Bolte, E., and Lieberman, S.: Precursors of the Urinary 11-Desoxy-17-Ketosteroids: Estimation of the Secretory Rate of

Dehydroisoandrosterone. J. Clin. Endocrinol. & Metab., *22*:1207, 1962.

8. Gurpide, E., MacDonald, P. C., VandeWiele, R. L., and Lieberman, S.: Measurement of the Rates of Secretion and of Peripheral Interconversion of Two Interconvertible Compounds: Dehydroisoandrosterone-Dehydroisoandrosterone Sulfate. J. Clin. Endocrinol. & Metab., *23*:346, 1963.

9. MacDonald, Paul, VandeWiele, R. L., and Lieberman, S.: Ovarian Precursors of Urinary 17-Ketosteroids. Am. J. Obstet. & Gynec., *86*:1, 1963.

10. VandeWiele, R. L., MacDonald, Paul, Gurpide, E., and Lieberman, S.: Studies on the Secretion and Metabolism of Androgens in Recent Progress in Hormone Research, G. Picus, editor, Academic Press, Inc., New York, New York, *19*:275, 1963.

11. MacDonald, Paul, Gonzalez, O., VanderWiele, R. L., and Lieberman, S.: Excretion of Radioactive 17-Ketosteroid Conjugates Following Intravenous Administration of 7α-H^3-Dehydroisoandrosterone. J. Clin. Endocrinol. & Metab., *23*:665, 1963.

12. Siiteri, P. K., and MacDonald, Paul C.: The Utilization of Dehydroisoandrosterone Sulfate for Estrogen Synthesis in Human Pregnancy. Steroids, *2*:713, 1963.

13. Siiteri, P. K., and MacDonald, Paul: Biogenesis of Urinary Estriol in Human Pregnancy. Clinical Research, *12*:44, 1964.

14. MacDonald, Paul and Siiteri, P. K.: Utilization of Circulating Dehydroisoandrosterone Sulfate for Estrogen Synthesis in Normal Pregnancy. Clinical Research, *12*:67, 1964.

15. MacDonald, Paul and Siiteri, P. K.: Study of Estrogen Production in Women with Hydatidiform Mole. J. Clin. Endocrinol. & Metab., *24*:685, 1964.

16. Sullivan, Geo. H., and MacDonald, Paul: Study of Hormone Production in a Virilized 14 year old Girl with a Mucinous Cystadenoma. Texas Association Obstetric. & Gynecologists, Feb., 1964.

17. MacDonald, Paul and Siiteri, P. K.: The Conversion of Dehydroisoandrosterone Sulfate to Estrogen in Normal and Abnormal Pregnancy in Estrogen Assays in Clinical Medicine, 1965, A. Paulsen, editor, University of Washington Press.

18. MacDonald, Paul and Siiteri, P. K.: Origin of Estrogen in Women Pregnant with an Anencephalic Fetus. J. Clin. Investigation, *44*:465, 1965.

19. Siiteri, P. K., and MacDonald, Paul: Estrogen Biosynthesis During Human Pregnancy. Fed. Proc. *24*:385, 1965.

20. Chapdelaine, A., MacDonald, Paul, Gurpide, E., VandeWiele, R., and Lieberman, S.: Adrenal and Testicular Secretion of C-19 Steroids. Proc. of the Endocrine Soc., p. 42, 1965.

21. Gurpide, E., MacDonald, Paul, Chapdelaine, A. VandeWiele, R. L., and Lieberman, S.: Studies on the Secretion and Interconversion of the Androgens. II. Methods for Estimation of Rates of Secretion and of Metabolism from Specific Activities of Urinary Metabolites. J. Clin. Endocrinol. & Metab., *25*:1537, 1965.

22. MacDonald, Paul, Chapdelaine, A., Gonzalez, O., Gurpide, E., VandeWiele, R. L., and Lieberman, S.: Studies on the Secretion and Interconversion of the

Androgens. III. Results Obtained After the Injection of Several Radioactive C-19 Steroids, Singly or as Mixtures. J. Clin. Endocrinol. & Metab., *25*:1557, 1965.

23. Chapdelaine, A., MacDonald, Paul, Gonzalez, O., Gurpide, E., VandeWiele, R. L., and Lieberman, S.: Studies on the Secretion and Interconversion of the Androgens. IV. Quantitative Results in a Normal Man whose Gonadal and Adrenal Function were Altered Experimentally. J. Clin. Endocrinol. & Metab., *25*:1569, 1965.

24. MacDonald, Paul: Origin of Placental Estrogen. Fetal Homeostasis, Ralph Wynn, editor, Vol. I, 1965, Port City Press, Inc., Balt. Md.

25. Siiteri, P. K., and MacDonald, P. C.: In Vivo Demonstration of an Estrone-Independent Pathway of Estriol Biosynthesis During Pregnancy. Excerpta Medica Int. Congress Series No. 99, 181, 1965.

26. Siiteri, P. K., and MacDonald, P. C.: The Origin of Placental Estrogen Precursors During Human Pregnancy. Proceedings of the Second International Congress on Hormonal Steroids, Excerpta Medica Int. Congress Series, No. 132, 726, 1966.

27. MacDonald, P. C., and Siiteri, P. K.: Quantitation of Estrogen Production from Circulating C_{19} Precursors in Nonpregnant Subjects. Excerpta Medica Int. Congress Series No. 111, Second International Congress on Hormonal Steroids, Milan, Italy, May 1966.

28. Siiteri, P. K., and MacDonald, Paul C.: Placental Estrogen Biosynthesis During Human Pregnancy. J. Clin. Endocrinol. & Metab., *26*:751, 1966.

29. MacDonald, Paul C., and Siiteri, P. K.: The In Vivo Mechanism of Origin of Estrogen in Subjects with Trophoblastic Tumors. Steroids, *8*:589, 1966.

30. MacDonald, P. C.: Origin of Estriol in Human Pregnancy. Fetal Homeostasis, Ralph Wynn, editor, Vol. II, 1967, Port City Press, Inc., Balt. Md.

31. MacDonald, Paul C., Rombaut, Raoul, and Siiteri, P. K.: Plasma Precursors of Estrogen. I. The Extent of Conversion of Plasma Δ^4-Androstenedione to Estrone in Normal Males and Non-Pregnant Normal, Castrate and Adrenalectomized Females. J. Clin. Endocrinol. & Metab., *27*:1103, 1967.

32. MacDonald, P. C., Grodin, Jay M., and Siiteri, P. K.: The Utilization of Plasma Androstenedione for Estrogen Production in Women. Excerpta Medica Int. Congress Series. No. 184, Progress in Endocrinology, p. 770.

33. MacDonald, Paul C.: The Ovaries in Pediatrics, Henry L. Barnett, Editor, Appleton-Century-Crofts 1086, 1968.

34. MacDonald, Paul C.: Placental Hormones in Obstetrics, Editors Eastman and Hellman, 13:175, 1966.

35. Grodin, Jay, Siiteri, P. K., and MacDonald, Paul: Plasma Precursors of Estrogen II. Source of Estrogen in Postmenopausal Women. Submitted J.C.E.M.

36. Grodin, Jay, Siiteri, P. K., and MacDonald, Paul: Origin of Increased Estrogen Production in Women with Postmenopausal Uterine Bleeding. Submitted Am. J. Ob-Gyn.

37. Hutchinson, H. T., Siiteri, P. K., MacDonald, Paul.: The Metabolic Clearance Rate of Dehystoisoandrosterone Sulfate During Human Pregnancy. Proceedings Society Gynecologic Invest. 1969.

38. Brenner, Paul, Hutchinson, H. T., Siiteri, P. K., and MacDonald, Paul: The Origin of Estrogen in Normal Males and in Males with Gynecomastia (Abs.). Proceedings Endocrine Society—p. 38, 1969.

39. Hutchinson, H. T., Rombaut, R. P., MacDonald, P. C., and Siiteri, P. K.: Metabolism of Androgens in Testicular Feminization (Abs.). Proceedings Endocrine Society, p. 155, 1969.

40. Martin, Joseph E., Paul C. MacDonald and Norman M. Kaplan: Successful Pregnancy in a Patient with Sheehans Syndrome. New Eng. J. Med. 1970, *282*, 425.

41. MacDonald, Paul, Jay M. Grodin and P. K. Siiteri: Dynamics of Androgen and Estrogen Secretion, Ciba Foundation Symposium, D. Baird, editor, in press.

42. MacDonald, Paul: The Placental Hormanes in Obstetrics, Eds. Hellman & Pritchard 14, 1970 (in press).

43. MacDonald, Paul: Abnormalities of Menstruation in Pediatrics, Barnett, 1970, (in press).

APPENDIX C

Affidavit of Joseph Seitchik, M.D.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 70-18, 1971 TERM

JANE ROE, JOHN DOE, MARY DOE, and
JAMES HUBERT HALLFORD, M.D.,

Appellants,

—v.—

HENRY WADE, DISTRICT ATTORNEY
OF DALLAS COUNTY, TEXAS,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

STATE OF TEXAS
COUNTY OF BEXAR

BEFORE ME, the undersigned authority, on this day personally appeared JOSEPH SEITCHIK, M.D., to me well known, who, after being first duly sworn, did depose and say as follows:

My name is Joseph Seitchik, M.D. The copies of my "Curriculum Vitae" and "Bibliography" attached hereto accurately reflect my medical background and the articles I have had published.

As the attached "Curriculum Vitae" indicates, I am Professor and Chairman, Department of Obstetrics and Gynecology, The University of Texas Medical School at San Antonio (7703 Floyd Curl Dr., San Antonio, Texas 78229). As Chairman of the Department of Obstetrics and Gynecology, I am also Chief of the Obstetrics and Gynecology Service at both the hospitals of the Bexar County Hospital District, Bexar County Hospital (which abuts the medical school) and Robert B. Green Hospital. Members of the medical school faculty constitute the staff of such hospitals.

The doctors under my supervision as regards obstetrics and gynecology include eight full-time faculty members, twenty clinical faculty members (local physicians who donate time), and sixteen house officers (residents and interns).

The Bexar County Hospital District is responsible for the medical care of persons who are medically indigent and who reside in San Antonio and/or Bexar County; its two hospitals are the chief medical facilities for such persons. Although some private patients are treated at Bexar County and Robert B. Green Hospitals, the overwhelming number of patients are medically indigent. "Medically indigent" refers both to persons with no income and to a larger number of persons with limited incomes.

The obstetrics and gynecology staff, under my supervision, in 1970 cared for approximately 16,000 out-patients and 6,000 in-patients. The number of patients seen to date in 1971 indicates that over 20,000 out-patients will be treated by the obstetrics and gynecology staff this year.

Last year about 18,000 birth certificates were issued in the metropolitan hospitals; about 3,000 of the 18,000 birth certificates were issued in military hospitals and about

15,000 in civilian hospitals. Approximately 4,000 of the 18,000 certificates were issued at Bexar County and Robert B. Green Hospitals. Therefore about 22% of all births in the metropolitan area and about 27% of all births in civilian institutions occurred in Bexar County and Robert B. Green Hospitals.

During 1970, approximately 500 patients were treated for the after-effects of abortion in Bexar County and Robert B. Green Hospitals. Physicians on the gynecology and obstetrics service see an average of 1 patient per week with evidence of infection as the result of an induced abortion performed by a nonphysician in undesirable surroundings; additionally they see approximately 1 patient per week who is moderately to desperately ill as the result of such an induced abortion. Those physicians also have an average of one patient every other month who enters the clinic or hospital with medical complications resulting from induced abortion which require surgical procedures that cause sterility for the patient.

Prior to July 1, 1970, few—if any—abortions had been performed in either Bexar County or Robert B. Green Hospitals. A strict construction had prevailed as to the language of the Texas abortion law that abortions are lawful only "for the purpose of saving the life of the mother". Such language had been interpreted to require an immediate (one year or less), severe, and professionally undebatable threat to life; abortion procedures were not allowed by the hospitals absent such a threat.

When I learned of the three-judge decision of June 17, 1970, holding the Texas abortion law to be unconstitutional, I called Mr. R. Emmett Cater, who at that time was the Assistant District Attorney of Bexar County assigned to the hospital district, to ask the implication of the decision

for medical practice. He called back about a week later and said that the Texas law still stood and that it would still be enforced. Thus it is my understanding and that of the doctors on my staff that the Texas abortion law still stands and a possibility of prosecution for allegedly performing an illegal abortion still exists.

Since the court decisions, abortions have continued to be performed only when the persons involved feel that the procedure is justified "for the purpose of saving the life of the mother." However, there has been some change as regards the performance of abortion procedures in Bexar County and Robert B. Green Hospitals in that staff physicians are now allowed more leeway in making decisions as to whether the condition of a given patient warrants (according to the physician's interpretation of the statute) an abortion. Each faculty member functions according to his individual conscience. There is no departmental policy defining the circumstances where the Texas law is considered to allow an abortion procedure.

Other local hospitals severely restrict their staff members regarding when an abortion may be performed; those hospitals enforce the traditional narrow interpretation of Texas law. However as stated, physicians on the staff of Bexar County and Robert B. Green Hospitals are now allowed to exercise their own judgment as to the legality of performing an abortion in a given medical context. Since individual physicians differ as to the meaning and appropriate interpretation of the statutory exception, the exercise of individual judgment often results in a more liberal approach to the Texas law. Thus when a local physician determines that a patient is within the statutory exception and should be aborted, the patient is often referred

to a member of my staff because the referring physician would not be allowed to perform the abortion in the hospitals where he has staff privileges. The physicians of Bexar County are reacting to the problem of unwanted pregnancy in two distinct manners: as individuals they often state in writing their opinion that a given patient comes within the statutory exception yet as a group in hospitals they are unwilling to allow the performance of the same procedure.

The situation in Bexar County demonstrates the vagueness of the Texas abortion law. All physicians are complying with the Texas law as they understand it; yet completely different levels of performance exist because of a difference in interpretation.

Although there has been no attempt to develop a hospital policy on abortion for the hospitals of the Bexar County Hospital District, last spring I did submit to the hospital administration a detailed protocol for the administrative mechanics—a "how to" system—for caring for the large number of patients whom we anticipate will need abortion procedures in the event the Texas law at some future point ceases to be in force. The protocol, developed on the premise that the law will change, involved a combination of managers, nurses, social workers and physicians who would work together to provide efficient counselling and care for a large number of abortion patients without interferring with the health care of other types of patients. However the law is still considered to be in force, and the proposed protocol has never been answered or acted upon by the hospital administration.

As to administrative steps preceding an abortion, the procedure must be recommended by two physicians and my own signature must be obtained. Not more than one

of the two recommending physicians may be a full-time member of the obstetrics and gynecology staff. The second recommending physician is generally a local physician or a staff member of another medical specialty. Only the consent of the woman is required if she is past 21 years of age and unmarried. If she is married, her husband's consent is also required. If she is a minor, the consent of a guardian or parent is also required.

We prefer that all abortion patients be seen by a social worker prior to the procedure since we are interested in continuing care for the patients and since they often are experiencing difficulties other than pregnancy.

Several additional points relating to the current status and effect of the Texas abortion law are pertinent. First, there is a considerable lack of uniformity even among the doctors on my staff as regards the meaning and correct interpretation of the language of the Texas statute, "for the purpose of saving the life of the mother". Patients are often seen either in the clinic or as a hospital admittee whose request for an abortion is considered by some staff members to be within the statutory exception and considered by other staff members to be outside the statutory exception. Further it is often difficult to determine the exact degree of danger a particular medical condition presents; similarly psychiatrists often honestly differ as to how much threat a given pregnancy poses to the mental health of the patient.

Second, members of the staff and faculty are often asked to perform an abortion by patients experiencing an unwanted pregnancy. Such cases often involve medical indications or circumstances that seem to warrant abortion, yet it generally appears that the case would not come within the statutory exception, either because there does

not appear to be sufficient danger to the woman's health, because the health problem is one anticipated from sources other than the pregnancy, or because the woman is physically capable of carrying the pregnancy to term.

One problematic situation is where the threat to the patient's health and life arises from a circumstance other than her present physicial condition, as when the girl is threatening to go or has given evidence that she will go to an illegal abortionist. It is common knowledge among the members of the hospital staff that some of the patients refused an abortion by our doctors because of the Texas abortion law will eventually resort to going to one of the local persons with no medical training who perform abortions.

As an example, nine months ago we treated a girl who was seriously ill as the result of a criminal abortion. Recently she returned to our clinic and, when she learned that she was again pregnant, told the physician that unless a staff physician performed an abortion she would return again to the same lay-abortionist. The attending physician was convinced that she would in fact obtain another illegal abortion. Knowing the patient's medical history, would the performance of an abortion for the purpose of preventing the very real threat to her life posed by a septic abortion be one "for the purpose of saving" her life within the meaning of the statute?

A recent example of the situations where an abortion seems indicated although the woman is physically capable of carrying the pregnancy to term is that of a feeble-minded patient who was pregnant. The 25-year-old girl had a feeble-minded mother and two feeble-minded sisters. The family was supported by the girl's 75-year-old grandfather and a normal brother who was married and support-

ing three children of his own. The apparent probability that the pregnancy would produce a feeble-minded child and the problem of its support indicated that an abortion should be considered, assuming effective consent, yet such pregnancy apparently does not come within the statutory exception. Another example was a pregnant 13-year-old girl who could not even care for herself to the point of menstruating on the schoolroom floor; she obviously could not care for herself during pregnancy nor for a baby.

Similarly in cases of congenital anomaly many physicians feel that an abortion is indicated although the mother is physically capable of carrying the pregnancy to term. In such a case the physician might determine that the mother would become insane if forced to have the child, but in all probability that decision would be prompted more by the fact of the anomaly than by considerations regarding the mother's mental or physical health.

Other members of the medical staff oppose the present Texas abortion law because of the obviously discriminatory effect on our patients. Non-indigents are now able to travel to other states and to obtain safe abortions performed in sterile surroundings. Our patients, the medically indigent, for financial reasons are not able to travel to other cities to obtain safe abortions and are forced to resort to crude substitutes in order to terminate an unwanted pregnancy.

It is my opinion that the staff of Bexar County and Robert B. Green Hospitals would now be caring for our medically indigent patients who need abortions, but who do not seem to be within the statutory exception, if the Texas abortion law were not in effect. Because of the stated policy of the local District Attorney's office and the resulting fear of prosecution, abortion procedures continue

to be performed only where deemed necessary for the purpose of saving the woman's life.

/s/ JOSEPH SEITCHIK, M.D.

STATE OF TEXAS
COUNTY OF BEXAR

SWORN TO AND SUBSCRIBED TO before me on this the 9th day of August, 1971.

/s/ RUTH E. RICHARDSON
Notary Public in and for
Bexar County, Texas

Curriculum Vitae

Joseph Seitchik, M.D.

BORN:

October 22, 1915—Philadelphia, Pennsylvania

EDUCATION:

High School: West Philadelphia High School 1932

College: University of Pennsylvania, Philadelphia, Pennsylvania, B.A. 1936

University of Pennsylvania, Philadelphia, Pennsylvania, M.A. 1937

Medical School: University of Pennsylvania, Philadelphia, Pennsylvania, M.D. 1942

INTERNSHIP:

Mt. Sinai Hospital, Philadelphia, Pennsylvania 1942-43

RESIDENCY:

Obstetrics and Gynecology, Vanderbilt University Hospital, Nashville, Tennessee. 1943-45

PRIVATE PRACTICE:

Philadelphia, Pennsylvania 1946-47

APPOINTMENTS:

Instructor, Obstetrics and Gynecology, Vanderbilt University School of Medicine, Nashville, Tennessee.	1945-46
Instructor, Hahnemann Medical College, Philadelphia, Pennsylvania	1947-48
Assistant Professor, Hahnemann Medical College, Philadelphia, Pennsylvania.	1948-50
Associate Professor, Hahnemann Medical College, Philadelphia, Pennsylvania.	1950-54
Clinical Professor, Hahnemann Medical College, Philadelphia, Pennsylvania.	1954-61
Obstetrician and Gynecologist-in-Chief, Sinai Hospital of Baltimore, Inc., Baltimore, Maryland.	1961-68
Associate Professor, The Johns Hopkins University School of Medicine, Baltimore, Maryland.	1961-68
Professor and Chairman, Department of Obstetrics and Gynecology, The University of Texas Medical School at San Antonio.	1968-present

ORGANIZATIONS:

American Society for the Study of Sterility	
Diplomate, American Board of Obstetrics and Gynecology	1950
Sigma Xi	1951
Fellow, American College of Surgeons	1951
Fellow, Philadelphia College of Physicians	1952
Society for Gynecologic Investigation (President-elect 1970-71)	1956

American College of Obstetricians and Gynecologists	1956
American Institute of Nutrition (Clinical Division)	1961-68
Member, Human Embryology and Development Study Section, National Institutes of Health	1964-68
American Association of Obstetricians and Gynecologists	1967
Member Obstetrics and Gynecology Residency Review Committee, Council on Education, American Medical Association	1968
Bexar County Medical Society	1969
American Gynecological Society	1969
Central Association of Obstetricians and Gynecologists	1971

Publications

1. Seitchik, J. Mechanism of the production of exophalmos in exophthalmic goiter. Arch Ophth 27:762, 1942.
2. Burch, L. E. and Seitchik, J. Ectopic gestation. Amer J Obstet Gynec 50:765, 1945.
3. Seitchik, J. "Appendix of useful drugs" Menstrual Disorders and Sterility. 2nd Ed. Paul C. Hoeber, Inc., New York, 1946.
4. Seitchik, J. and Agerty, H. A. Experimental use of methyl testosterone in premature infants. Pediatrics 5:200, 1950.
5. Seitchik, J. The urinary excretion of pregnanediol in pregnant women receiving diethylstibestrol. Amer J Obstet Gynec 60:877, 1950.

POOR COPY

6. Agerty, H. and Seitchik, J. Experimental use of methyl testosterone and testosterone in premature infants. Pediatrics 10:28, 1952.

7. Seitchik, J. Observations on the renal tubular resorption of uric acid. Amer J Obstet Gynec 65:981, 1954.

8. Seitchik, J. and Alper, C. The body compartments of normal pregnant, edematous pregnant and pre-eclamptic women. Amer J Obstet Gynec 68:1540, 1954.

9. Seitchik, J. and Alper, C. The relationship of body composition to changes in weight during pregnancy. Surg Clin N Amer 34:1535, 1954.

10. Seitchik, J. and Alper, C. The effect of dietary protein intake on the metabolism of N^{15} labelled glycine in pregnant women. Surg Forum 6:451, 1956.

11. Seitchik, J. and Alper C. The estimation of changes in body composition in normal pregnancy by measurement of body water. Amer J Obstet Gynec 71:1165, 1956.

12. Seitchik, J. The metabolism of urate in pre-eclampsia. Amer J Obstet Gynec 72:40, 1956.

13. Seitchik, J. Changes in body composition and displacement volume in pregnancy. Report of the First Ross Obstetric Conference. 14-16, 1956.

14. Alper, C. and Seitchik, J. Comparison of the Archibald-Kern and Stransky colorimetric procedure and the praetorius enzymatic procedure for the determination of uric acid. Clin Chem 3:95, 1957.

15. Seitchik, J., Szutka, A., and Alper, C. Further studies on the metabolism of N^{15} labelled uric acid in normal

and in toxemic women. Amer J Obstet Gynec 76:1151, 1958.

16. Seitchik, J. Fluid and electrolyte metabolism in toxemia of pregnancy. Clin Obstet Gynec 1:309, 1958.

17. Seitchik, J. "Fluid and electrolyte metabolism in pregnancy" Edema, W. B. Saunders Company, Philadelphia, 1960.

18. Seitchik, J. Endometriosis and hormone therapy. Amer J Obstet Gynec 81:183, 1961.

19. Seitchik, J. Postoperative water, electrolyte, and transfusion therapy. Clin Obstet Gynec 5:567, 1962.

20. Seitchik, J., Alper, C., and Szutka, A. Changes in body composition during pregnancy. Ann N.Y. Acad Sci 110:821, 1963.

21. Seitchick, J. Water and electrolyte metabolism in normal pregnancy. Obstet Gynec 7:185, 1964.

22. Seitchik, J. and Cushner, I. M. "Bleeding complications of pregnancy" Gynecology Obstetrics Guide, Vol 1. Commerce Clearing House, Inc., Chicago, 1964.

23. Seitchik, J. and Cushner, I. M. "Obstetrical Hemorrhage" Surgical Bleeding. Blakiston Div McGraw-Hill, New York, 1966.

24. Yousem, H., Seitchik, J., and Solomon, D. Maternal estriol excretion and fetal dysmaturity. Obstet Gynec 28:491, 1966.

25. Seitchik, J. Total body water and total body density of pregnant women. Obstet Gynec 29:155, 1967.

26. Seitchik, J. Body composition and energy expenditure during rest and work in pregnancy. Amer J Obstet Gynec 97:701, 1967.

27. Seitchik, J., Goldberg, E., Goldsmith, J., and Pauerstein, C. J. Pharmacodynamic studies of the human fallopian tube in vitro. Amer J Obstet Gynec 102:727, 1968.

APPENDIX D

D-1

Affidavit of William J. McGanity, M.D.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 70-18, 1971 TERM

JANE ROE, JOHN DOE, MARY DOE, and
JAMES HUBERT HALLFORD, M.D.,

Appellants,

—v.—

HENRY WADE, DISTRICT ATTORNEY
OF DALLAS COUNTY, TEXAS,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

STATE OF TEXAS
COUNTY OF GALVESTON

BEFORE ME, the undersigned authority, on this day personally appeared WILLIAM J. MCGANITY, M.D., to me well known, who, after being first duly sworn, did depose and say as follows:

My name is William J. McGanity. The copies of my "Curriculum Vitae" and "Bibliography" attached hereto accurately reflect my medical background and the articles I have had published.

As the attached "Curriculum Vitae" indicates, I am Professor and Chairman, Department of Obstetrics and Gynecology, The University of Texas Medical Branch, Galveston, Texas 77550. As Chairman of the Department of Obstetrics and Gynecology, I am also Chief of the Obstetrics and Gynecology Service at The University of Texas Medical Branch hospitals. At least thirty percent of my time is devoted to the medical care and treatment of obstetrics and gynecology patients.

The seven hospitals that comprise the Medical Branch Hospitals are supported in large part by the State of Texas. They are charged with the care and treatment of both private and medically indigent patients who are referred to The University of Texas Medical Branch physicians by their local physicians or health related governmental agencies. The larger metropolitan areas in Texas have their own hospital districts which serve the medically indigent residing within the districts. The Medical Branch Hospitals serve as referral hospitals for such hospital districts, as well as the several million Texans who do not reside in a hospital district. Upon referral, the staff of the Medical Branch Hospitals are directly responsible for the medical care of those persons, be they private or medically indigent patients. The John Sealy Hospital is the largest general hospital unit on our campus.

Approximately 27,000 out-patient examinations are performed by physicians on the obstetrics and gynecology service each year; of this number, 12,000 visits are for family planning services. About 3,500 obstetrics and gynecology patients are admitted to The University of Texas Medical Branch Hospitals annually.

Physicians on the obstetrics and gynecology service have frequently been requested by patients in early pregnancy

to perform abortions. It is likely that even more requests would be received were it not for the fact that many of the medically indigent patients served by our hospital live a considerable distance from Galveston and often enter prenatal care only late in their pregnancy, beyond the abortion period of gestation.

Before a therapeutic abortion may be performed in our hospital, the procedure must be recommended by the patient's physician plus a consulting physician, and approved by a three-member therapeutic abortion board of the hospital. On this board there must be at least three disinterested physicians (i.e. persons other than the recommending and consulting physicians). The board always includes an obstetrics and gynecology specialist, usually a psychiatrist, with a doctor from the medical discipline which specializes in the treatment of the patient's medical problem which served as the basis for the recommendation. If the board approves performance of the interruption procedure, such approval is recorded in the minutes of the meeting and the chairman (a person of senior faculty level) completes and signs a formal consult form, which contains a summary of the findings of the board. The statements of the recommending and the consulting physicians are placed on the patient's chart along with the signed summary form with the therapeutic abortion board's recommendation.

In addition to the standard operative permit which the patient must sign, a therapeutic abortion permit must be signed by the persons whose consent is required for the procedure. If she is married, the consent of the patient's husband must also be obtained. If she is a minor, consent of the patient's parent or guardian is also required. Only the consent of the pregnant woman is required if she is over 21 years-of-age and single.

The situation regarding when, under what lifesaving maternal circumstances, and after what administrative procedures an abortion may be performed in John Sealy Hospital is exactly what it was prior to the June 17, 1970 decision of the three-judge court in *Roe* v. *Wade*. The decision has had no impact on medical practice in the Medical Branch Hospitals. Abortions are performed only when the procedure is deemed to be indicated "for the purpose of saving the life of the mother," although that standard is often difficult to define and to apply.

Physicians on our hospital staff continue to disagree regarding the circumstances under which a requested abortion is within the statutory exception. Disagreements are most pronounced regarding psychiatric indications; some physicians feel that there are bona fide psychiatric disorders that jeopardize a woman's life, while other physicians feel that there are no psychiatric indications which would justify an abortion under current Texas law. There is more agreement regarding straightforward medical indications, such as a general agreement that pregnancy associated with severe heart or renal disease or malignancy would constitute a threat to the woman's life.

Texas doctors, including the members of my staff, are reluctant to perform medical abortions except when unquestionably indicated because of the ambiguity of the meaning and status of the Texas abortion law. That ambiguity and the resulting possibility and fear of prosecution is an effective restraint, for physicians are understandably anxious to avoid any possible involvement in criminal litigation. Several factors contribute to the fear of prosecution: the Court's refusal to issue an injunction against enforcement of the Texas law; the fact that the local district attorney has not indicated any change in

pplicability of the law; statements of other district attor-
eys that the law is still in effect; reports of indictments
eing returned against Texas doctors in other cities for
llegedly performing illegal abortions; and a great reluc-
ance to engage in procedures or conduct which *may* lead
o even the threat of criminal prosecution.

It is my opinion that the policy of the Medical Branch Hospitals, including that of John Sealy Hospital, regarding abortion prior to the twentieth week of pregnancy will be significantly altered if the Texas law becomes null and void. It can be anticipated that local hospitals or appropriate health care facilities will not be available for performing abortions in many Texas counties. Medically indigent patients who are in need of medical abortions from such localities and/or counties will be referred for care to the Medical Branch Hospitals. The Department of Obstetrics and Gynecology will have to consider the ways and means of providing care for the large number of patients one can anticipate will be seeking abortions should the law be changed.

/s/ William J. McGanity, M.D.

State of Texas
County of Galveston

Sworn to and subscribed to before me on this the thirteenth day of August, 1971.

/s/ Nancy Byrd
Notary Public in and for
Galveston County, Texas

Curriculum Vitae

WILLIAM JAMES MCGANITY, M.D.

Business Address:

Department of Obstetrics and Gynecology, University of Texas Medical Branch, Galveston, Texas

Home Address:

1402 Harbor View Drive, Galveston, Texas

Born:

Kitchener, Ontario, Canada—September 21, 1923

Citizenship:

American—Naturalized December 18, 1957

Wife:

Mary Kathryn Hambrock McGanity
Married on December 11, 1948

Children:

Peter Louis James McGanity	(December 1, 1949)
Martha Lee Jane McGanity	(November 5, 1951)
Brian David McGanity	(December 17, 1954)

Education:

1941	High School, Grade 13, Kitchener Waterloo Collegiate Institute, Kitchener, Ontario, Canada
1946 (Feb.)	M.D. Degree, University of Toronto Medical School, Toronto, Ontario, Canada

1946-47	Internship, Toronto General Hospital, Toronto, Canada
1949-52	Residence in Obstetrics and Gynecology, University of Toronto and Toronto General Hospital, under Doctors H. B. Van Wyck and D. E. Cannell

Honors and Fellowships:

1946	Hendry Prize in Obstetrics and Gynecology, University of Toronto
1947-48	Research Fellow in Nutrition, Department of Public Health Nutrition under Dr. E. W. McHenry, University of Toronto
1948-49	Research Fellow in Nutrition, Division of Nutrition under Dr. W. J. Darby, Vanderbilt University, Nashville, Tennessee
1953	F.R.C.S. (Canada) Royal College of Surgeons of Canada, Ottawa, Ontario, Canada
1954-56	Lowell M. Palmer Senior for Medical Sciences

Military:

Royal Canadian Army Medical Corps, 1944-46-52

Appointments—Faculty:

1949-52	Part-time lecturer in Nutrition, Department of Public Health Nutrition, University of Toronto

1952-53	Instructor in Obstetrics and Gynecology, Vanderbilt University School of Medicine
1953-56	Assistant Professor of Obstetrics and Gynecology, Vanderbilt University School of Medicine
1956-59	Associate Professor of Obstetrics and Gynecology, Vanderbilt School of Medicine
1960-Present	Professor and Chairman, Department of Obstetrics and Gynecology, University of Texas Medical Branch
1964-67	Dean of Medicine, University of Texas Medical Branch

Appointments—Consultant:

1956-Present	Consultant for the Nutrition Program, Office of International Research, National Institutes of Health: formerly ICNND
1959-63	Food and Nutrition Board of National Research Council-Committees on Dietary Allowances and International Nutrition
1966-70	Committee on Maternal Nutrition
1960-Present	Consultant of Department of Air Force
1960-67	Consultant of Department of Army
1960-63	Consultant to Food and Drug Administration, Committee to Consider Folic Acid
1961-67	T.M.A.—Committee on Maternal Mortality (Chairman) and Scientific Activities
1963-66	Member of Council on Foods and Nutrition—AMA
1963-67	Nutrition Study Section—USPHS—NIH
1964-66	Children's Bureau (HEW)—Research Panel—Maternal and Child Health

1964-66	Governor's Committee (Texas) on Mental Retardation
1967	Committee on Maternal Nutrition—NRC —Food and Nutrition Board

Licensed to Practice Medicine:

1946	Province of Ontario, Canada
1958	State of Mississippi
1959	State of Tennessee
1960	State of Texas

Professional Organizations and Societies:

American Association of Obstetricians and Gynecologists
American College of Obstetricians and Gynecologists
American Institute of Nutrition
American Medical Association
American Society for Clinical Nutrition (President Elect)
Association of Professors of Gynecology and Obstetrics
Central Association of Obstetricians and Gynecologists
Galveston County Medical Society
Royal College of Physicians and Surgeons of Canada
Sigma Xi Society
Society for Gynecologic Investigation
Southern Society for Clinical Research
Southwest Cancer Chemotherapy Group

Texas Association of Obstetricians and Gynecologists
Texas Medical Association

Publications:

Approximately 80 in the field of reproductive physiology and pathology and nutrition

Publications

WILLIAM JAMES MCGANITY, M.D.

Books

1. *McGanity, William J.*, et al., Manual on Nutrition Surveys, 1st Edition, Chapter 5 and 9, 1957
2. *McGanity, William J.*, et al., Manual on Nutrition Surveys, 2nd Edition, Chapter 5 and 9, 1963

Papers

1. *McGanity, W. J.*, E. W. McHenry, H. B. Van Wyck, and G. L. Watt, "An Effect of Pyridoxine on Blood Urea in Human Subjects", J. Biol. Chem., 178:511, 1949
2. McHenry, E. W. and *W. J. McGanity,* "The Levels of Several Metabolites in Blood and Urine During Normal Pregnancy", Am. J. Obstet. & Gynec., 62:156, 1951
3. Beaton, J. R., *W. J. McGanity,* and E. W. McHenry, "Plasma Clutamic Acid Levels in Malignancy", J. Canad. Med. Assoc., 65:219, 1951

4. Cannell, D. E. and *W. J. McGanity,* "Treatment of Premature Separation of Placenta", Arch. Medico de Cuba, 3:534, 1952

5. *McGanity, W. J.* and J. C. Burch, "Estrogen Preparations", J. Biol. Data, 1953

6. *McGanity, W. J.,* "Review of Obstetrics and Gynecology", Medicine of the Year, 1953, Am. Pract., March 1953

7. *McGanity, W. J.* and J. C. Burch, "Pain in the Right Lower Quadrant of the Female Abdomen", Bul. Chicago Med. Society, 1953

8. Byrd, B. F. and *W. J. McGanity,* "Effect of Pregnancy on Clinical Course of Malignant Melanoma", Sou. Med. J., 47:196, 1954

9. Woodruff, C. W., *W. J. McGanity,* A. Stockwell and W. J. Darby, "Ascorbic Acid, Pterylglutamates and Other Factors in Scorbutic Hydroxyphenyluria", Proc. Nutrition Soc., 12:329, 1953

10. Darby, W. J., *W. J. McGanity,* et al., "The Vanderbilt Cooperative Study of Maternal and Infant Nutrition—IV", J. Nutrition, 51:565, 1953

11. *McGanity, W. J.,* et al., "The Vanderbilt Cooperative Study of Maternal and Infant Nutrition—V", Am. J. Obstet. and Gynec., 67:501, 1954

12. *McGanity, W. J.,* et al., "The Vanderbilt Cooperative Study of Maternal and Infant Nutrition—VI", Am. J. Obstet. and Gynec., 67:501, 1954

13. *McGanity, W. J.* and W. J. Darby, Some Considerations in Making Therapeutic Trials, Methods for

Evaluation of Nutritional Adequacy and Status", Advisory Board on Quartermaster Research and Development Committee on Foods, pp. 82-88, 1954

14. Ferguson, M. E., *W. J. McGanity*, W. J. Darby, et al., "The Vanderbilt Cooperative Study of Maternal and Infant Nutrition—VII", J. Nutrition, 55:305, 1955

15. *McGanity, W. J.*, et al., "The Vanderbilt Cooperative Study of Maternal and Infant Nutrition—VIII", J. Am. Dietetic Assoc., 31:582, 1955

16. Darby, W. J. and *W. J. McGanity*, et al., "The Vanderbilt Cooperative Study of Maternal and Infant Nutrition—IX", Obstet. and Gynec., 5:528, 1955

17. Darby, W. J., *W. J. McGanity*, et al., "A Study of the Dietary Background and Nutrition of the Navajo Indian", J. Nutrition, Vol. 60, suppl. 2, 1956

18. Peerman, C. G. and *W. J. McGanity*, "Cortisone and Antibiotic Therapy in Resistant Pelvic Inflammatory Disease", Sou. Med. J., 50:3, 1957

19. Hartmann, R. C. and *W. J. McGanity*, "Fibrinogen Deficiency in Pregnancy", Obstet. and Gynec., 9:4, 1957

20. Martin, M. P., E. B. Bridgforth, *W. J. McGanity*, and W. J. Darby, "The Vanderbilt Cooperative Study of Maternal and Infant Nutrition—X", J. Nutrition, 62:2, 1957

21. Williams, R. R., G. F. Combs, *W. J. McGanity*, and Z. I. Kertesz, "A Nutrition Survey of the Armed Forces of the Republic of Korea", J. Nutrition Supp:1 Vol. 63: 1959

22. Martin, M. P., E. B. Bridgforth, *W. J. McGanity,* and W. J. Darby, "The Vanderbilt Cooperative Study of Maternal and Infant Nutrition—XI", J. Nutrition, 1958

23. *McGanity, W. J.,* et al., "The Vanderbilt Cooperative Study of Maternal and Infant Nutrition—XII", J. Am. Med. Assoc., 168:2138, 1959

24. *McGanity, W. J.,* "Vitamin B_{12} Requirement in Adult Men", Am. J. Med. 25:726, 1959

25. *McGanity, W. J.,* "Development of Vitamin B_{12} Deficiency in Man", Am. J. Clin. Nutrition, 6:513, 1959

26. *McGanity, W. J.,* "Nutrition and Its Relation to Public Health in the Middle East, Transactions of the Middle East Medical Assembly, presented May 8, 1959

27. *McGanity, W. J.* and R. O. Cannon, "Iron Deficiency in Gynecologic Patients", Am. J. Clin. Nut., 7:633, 1959

28. Darby, W. J. and *W. J. McGanity,* "A Nutrition Survey of the Armed Forces of the Philippines", Am. J. Clin. Nut., 7:657, 1959

29. *McGanity, W. J.,* "Nutrition in Pregnancy", Modern Medicine, 28:108, 1960

30. *McGanity, W. J.,* "Nutrition Survey in Lebanon", Transactions of the Middle East Medical Assembly, May 1962

31. Coal, G. B., Richey, L. E., *McGanity, W. J.,* "Localization of the Placenta with Aortography", Am. J. Ob. Gyn., 83:1150, 1962

32. Schreiber, M. H., M. M. Nichols, and *W. J. McGanity,* "Epiphyseal Ossification Center Visualization", J. Am. Med. Assoc., 184:504, 1963

33. Darby, W. J., *W. J. McGanity,* et al., "Bitot's Spots and Vitamin A Deficiency", Public Health Reports, 75:738, 1960

34. LeBlanc, A. L. and *W. J. McGanity,* "Bacteriuria in Pregnancy—Preliminary Report", Tex. State Med. J., 60:137, 1964

35. LeBlanc, A. L. and *W. J. McGanity,* "The Impact of Bacteriuria in Pregnancy—A Survey of 1300 Pregnant Patients", Tex. Rep. Biol. Med., 22:336, 1964

36. Wilson, C. S., A. E. Schaefer, W. J. Darby, E. B. Bridgforth, W. N. Pearson, G. F. Combs, E. C. Leatherwood, J. C. Greene, L. J. Teply, I. C. Plough, *W. J. McGanity,* D. B. Hand, Z. I. Kertesz, and C. W. Woodruff, "A Review of Methods Used in Nutrition Surveys Conducted by the Interdepartmental Committee on Nutrition for National Defense (ICNND)", Am. J. Clin. Nut., 15:29, 1964

37. *McGanity, W. J.,* "Sensible Care for Anemia in Pregnancy", Consultant, June 1963

38. Laubach, J. B., *McGanity, W. J.,* "Hysterectomy Post Conization of the Cervix", Am. J. of Ob. Gyn., 91:3, 1965

39. Schreiber, M. H., Henrick, C. K., *McGanity, W. J.,* and Nichols, M., "Relation of Maternal Cardiac Volume to Infant Maturity", University of Texas Medical Branch NIH Grant

40. Fujino, M., Dawson, E. B., *McGanity, W. J.,* "Vitamin C and Vanil-Mandelic Acid Economy During Surgical Stress", Fed. Proc., 24:2, 1965

41. Fujino, M., Dawson, E. B., Holeman, T. and *McGanity, W. J.*, "Interrelationships Between Estrogenic Activity, Serum Iron and Ascorbic Acid Levels During the Menstrual Cycle", Am. J. of Clin. Nut., Vol. 18, 1966

42. *McGanity, W. J.*, Fujino, M. and Dawson, E. B., "Nutritional Aspects of Gynecic Stress," Am. J. Ob. & Gyn., 97 :6, 1967

43. Menon, M.P., Wainerde, R.E., Omar, E.M., Dawson, E.B. and *McGanity, W.J.*, "Activation Analysis for Trace Element and K/Na Ratio Measurements in Placenta, and Their Relation to Acute Toxemia of Pregnancy", Am. J. of Nuclear Medicine.

44. Dawson, E.B., Clark, R.R., and *McGanity, W.J.*, "Trace Metals and Vitamins in Adolescent Pregnancy", Am. J. of OB-GYN.

45. Dawson, E.B., Clark, R.R. and *McGanity, W.J.* "Determination of Urine Thiamine by Automated Fluorometry", Am. J. of OB-GYN.

46. Dawson, E.B., Clark, R.R., and *McGanity, W.J.*, "Determination of Urine Riboflavin by Automated Fluorometry", Am. J. of OB-GYN.

47. Dawson, E.B., Clark, R.R., and *McGanity, W.J.*, "Season Variation in Adenosine Triphosphate and Nicotinamide Adenosine Dinucleotide in Normal Term Placenae", Am. J. of OB-GYN.

48. Dawson, E.B., Clark, R.R., and *McGanity, W.J.*, "Plasma Vitamins and Trace Metal Changes During Teenage Pregnancy", Am. J. of OB-GYN.

49. Dawson, E.B., *McGanity, W.J.*, "A Study of Nine Cation Levels in Term Placentae: (2) Changes Asso-

ciated with Toxemia of Pregnancy and Fetal Prematurity", Am. J. of OB-GYN.

50. *McGanity, W.J.*, "Nutrition Survey in Texas", Texas Medicine.

51. Dawson, E.B., and *McGanity, W.J.*, "Plasma Amino Acid Alteration During Teenage Pregnancy", Am. J. of OB-GYN.

52. Dawson, E.B., Moore, T.D., and *McGanity, W.J.*, "The Mathematical Relation of Drinking Water Lithium and Rainfall to Mental Hospital Admission", Diseases of the Nervous System.

Abstracts

1. Dawson, E.B., Croft, H., *McGanity, W.J.*, McCoy, T.C. Seasonal Variation in Placental Trace Metals. VII International Congress of Nutrition, Hamburg, Germany, August 3-10, 1966

2. Menon, M.P., Wainerdi, R.E., Omar, E.M., Dawson, E.B., *McGanity, W.J.*, Activation Analysis in Trace Element and Na/K Ratio Measurements in Placenta and Their Relation to Acute Toxemia of Pregnancy. VII Japanese Conference on Radioisotopes, Tokyo, Japan, May 16-19, 1966

3. Dawson, E.B., and *McGanity, W.J.* Impact of Urinary Tract Infection on Nutritional Status. VI Annual Meeting of the American Society for Clinical Nutrition, Atlantic City, New Jersey, April 30, 1966. (Read by title).

4. Dawson, E.B., Croft, H., McCoy, T.C., *McGanity, W.J.* Seasonal Variation in Placental Macro-Metals. Annual Meeting of the American Institute of Nutrition, Atlantic City, New Jersey, April 11-16, 1966

5. Fujino, M., Holeman, T., Dawson, E.B., *McGanity, W.J.*, Interrelationships Between Estrogenic Activity, Serum Iron, and Vitamin C During Menstrual Cycle. Fifth Annual Meeting of the American Society of Clinical Nutrition, Atlantic City, New Jersey, May 1, 1965.

6. Fujino, M., Dawson, E.B., *McGanity, W.J.* Vitamin C and Vanilmandelic Acid Economy During Surgical Stress. Annual Meeting of the American Institute of Nutrition, Atlantic City, New Jersey, April, 1965

7. *McGanity, W.J.*, et al., "Convulsions Occurring in Suckling Young of Maternal Rats Fed Pyridoxine Restricted Diets", Fed. Proc., 14:444, 1955

ICNND Reports

1. Korea, Nutrition Survey, April 1957
2. Philippines, Nutrition Survey, November 1957
3. Ethiopia, Nutrition Survey, September 1959
4. Vietnam, Nutrition Survey, July 1960
5. Lebanon, Nutrition Survey, May 1962
6. Jordan, Nutrition Survey, May 1963
7. Gaza, Nutrition Survey, November 1964
8. Fort Belknap Indian Reservation, Nutrition Survey, December 1964
9. Blackfeet Indian Reservation, Nutrition Survey, December 1964
10. Central America Panel Reports—Nicaragua, April 1966
    Costa Rica, July 1966
    Honduras, December 1966
    Panama, April 1967

APPENDIX B

SUPPLEMENTARY APPENDIX TO BRIEF:
MATERIALS ON LEGAL, MEDICAL, AND
SOCIAL IMPACT OF ABORTION LAW
RESTRICTIONS IN THE UNITED STATES

This Supplementary Appendix consists of offset reproductions of particularly relevant legal, medical, and social science publications, all of which are in the public domain.

Legal materials and commentary include a table showing in simplified form the types of statutes regulating the medical procedure of induced abortion in the United States. Also set out are the most recent versions of proposals by the Commissioners on Uniform State Laws, and the American Law Institute, as well as statutes and regulations from the State of Washington and New York.

Similarly included, for the Court's convenience, are offset copies of all major court decisions, both state and federal, which passed upon significant substantive and procedural points in cases which questioned the validity of restrictions on medical abortion.

Finally, the principal medical and social science publications concerning relevant aspects of medical abortion incidence, safety, and need, have also been offset and included in this Appendix. None of the materials are highly technical, and several have been noticed judicially in support of state and federal decisions. E.g., California v. Belous, 71 Cal. 2d 954, 965, 458 P.2d 194, 200, 80 Cal. Rptr. 354, 360 (1969), cert. denied, 397

915 (1970); McCann v. Babbitz, 310 F. Supp. 293, 301 (E.D. Wis.) (per curiam), appeal dismissed, 400 U.S. 1 (1970)(per curiam). These materials are included to ensure that the Court will not be without what Judge Learned Hand denominated as "the aid of unpartisan and authoritative scientific assistance in the administration of justice" in this case. Parke-Davis & Co. v. H.K. Mulford Co., 189 Fed. 95, 115 (C.C.S.D.N.Y. 1911).

The subject matter of this case - restrictions on the medical procedure of abortion - is particularly susceptible to predisposition. What in scientific circles is accepted fact may in other circles be heresy. The folklore on abortion, contraception, and human fertility in general is not likely to rest on firm scientific foundations. Only a few short years ago, an examination of texts used in medical schools revealed that "[t]wo thirds of the texts (25 texts) contained either no mention of contraception or only isolated reference to it, with no complete discussion." Tietze, et al., Teaching of Fertility Regulation in Medical Schools, 196 J. American Medical Ass'n 20, 23 (1966). If the medical profession only recently began to examine and understand contraception, with abortion lagging years behind, it is not to be expected that lawyers, judges, and the public at large would be fully knowledgeable in either or both fields.

As indicated above, the lower state and federal courts have taken judicial notice of non-record scientific materials needed for a full understanding of the subject matter of abortion. This

practice has firm foundations in decisions dating back throughout this century. Facts pertaining to the discriminatory impact of laws fair on their face have been noticed in Reynolds v. Sims, 377 U.S. 533 (1964)(voter distribution); social and economic conditions in West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1936); studies by public and private agencies in Muller v. Oregon, 208 U.S. 412, 419-21 (1908); published statistics in Parker v. Brown, 317 U.S. 341, 363 (1942); and even letters from knowledgeable citizens, as in American Federation of Labor v. American Sash & Door Co., 335 U.S. 538, 551 (1949)(Frankfurter, J. concurring).

Much of the scientific data relevant to this case was not in assembled or published form until recent months. Other items were not unearthed from medical libraries until recently. All of what is included has been carefully sifted in order to present the most directly relevant materials. It is the hope of the parties that these materials will be of use to the Court in reaching an informed and just decision.

CONTENTS

Author, Title, Description	Page in App.
I. REGULATIONS, LAWS, AND GUIDELINES CONCERNING ACCESS TO MEDICAL ABORTION IN THE UNITED STATES.	
National Center for Family Planning Services, Health Services and Mental Health Administration, Department of Health, Education and Welfare, *Current Status of Abortion Laws--August 1, 1970* (1970) (updated). (Chart indicating current provisions of abortion laws in effect in all fifty states.)	1
Commissioners on Uniform State Laws, Uniform Abortion Act (2d Tentative Draft, 3d Working Draft, Aug. 4, 1970). (Draft sanctioning medical procedure of abortion as lawful in first 24 weeks and permitting non-hospital clinics.)	3
American Law Institute, Model Penal Code §230.3 (Proposed Official Draft, 1962).	5
New York State Abortion Law, N.Y. Penal Law §125.05(3), at 79 (McKinney Supp. 1970-1971). (Statute permitting elective abortion in first 24 weeks of gestation, as a sanctioned medical procedure.)	9
New York City Health Code, tit. III, art. 42, 98 City Record 6313-15 (Oct. 23, 1970). (Guidelines for non-hospital abortion clinics.)	11
Washington State Abortion Law, Rev. Code Wash. Ann., tit. 9, §§9.02.060 to 9.02.090 (Supp., 1970) (Laws 1970, c.3). (Referendum statute permitting elective abortion up to 18 weeks of pregnancy.)	15
Abortion Regulations Adopted by the Washington State Board of Health, WAC 248-140 (December 10, 1970). (Guidelines for licensure of non-hospital abortion clinics.)	17
American College of Obstetricians and Gynecologists, Policy on Abortion (Aug. 1970). (Policy of the A.C.O.G. giving medical sanction to the performance of abortion upon request of the patient.)	23

American Public Health Association, Recommended Standards for Abortion Services (Nov. 1970). (Statement of the A.P.H.A. recognizing abortion services as an integral part of health care and sanctioning the performance of abortion outside of hospitals in specialized clinics.) 25 [8]

American Medical Association, Policy Regarding Abortion (June, 1970). 33 [1]

Constitution of the World Health Organization. (Statement stressing the right of access to health care.) 35 [1]

National Association for the Repeal of Abortion Laws, National Organizations Recommending Repeal of Abortion Laws. 37 [1]

II. FEDERAL AND STATE COURT DECISIONS

A. CASES BEFORE THE SUPREME COURT OF THE UNITED STATES

United States v. Vuitch, 402 U.S. 62 (April 21, 1971). 39 [3]

Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex., June 17, 1970) (per curiam) (GOLDBERG, Cir. J. and HUGHES & TAYLOR, D.JJ.), *juris. postponed*, 402 U.S. ___(No. 808, 1970 Term; renumbered No. 70-18, 1971 Term). (Decision of a three-judge Federal court granting standing to a pregnant woman and a physician, and holding the Texas anti-abortion statute unconstitutional as an infringement of the right to privacy, unsupported by a compelling state interest; and void for vagueness. The court declined to grant injunctive relief.) 77 [9]

Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga., July 31, 1970; *Supplemental Opinion*, Oct. 14, 1970) (per curiam) (MORGAN, Cir. J. and SMITH & HENDERSON, D.JJ.) *juris. postponed*, 402 U.S. ___(No. 971, 1970 Term; renumbered No. 70-40, 1971 Term). (Decision of a three-judge Federal court granting standing to plaintiffs and holding portions of the Georgia Therapeutic Abortion Act unconstitutional. The court held that the state cannot limit the reasons for which an abortion is sought, although it can regulate abortion procedures beyond the basic requirement that they be performed by licensed physicians. In a Supplemental Opinion the court held that 87 [1]

hospital committees cannot adopt strict abortion standards similar to those struck down in the statute.)

B. DECISIONS BY HIGHEST STATE COURTS

California v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (Sept. 5, 1969) (per PETERS, 4-3 decision), *cert. denied*, 397 U.S. 915 (1970). (Landmark decision of California Supreme Court striking down pre-1967 anti-abortion statute, permitting abortion only when "necessary to preserve her life," as void for vagueness. The Court also found "a fundamental right of the woman to choose whether to bear children" following from "right to privacy" decisions. The Court argued that the compelling state interest, based on the medical dangers of abortion in an earlier time, which would be required before such a strict abortion statute could be held constitutional, no longer exists today.) 99

State v. Jamieson, 480 P.2d 87 (Kan., Jan. 23, 1971). (Decision of Kansas Supreme Court overturning conviction of a physician under anti-abortion statute on grounds that the information was invalid for failing to negate the exception to the definition of criminal abortion, "unless necessary to preserve the life of said woman.") 119

C. DECISIONS BY FEDERAL DISTRICT COURTS

1) DECISIONS INVALIDATING ABORTION LAWS IN WHOLE OR IN PART

Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill., Jan. 29, 1971) (SWYGERT Cir. J. and ROBSON & CAMPBELL, D.JJ.) (2-1 decision, Campbell dissenting), *appeal docketed sub nom. Hanrahan v. Doe*, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (No. 1522, 1970 Term; renumbered No. 70-105, 1971 Term). (Decision of a three-judge Federal court granting standing to women seeking abortions and to certain physicians, declaring Illinois anti-abortion statute unconstitutional, and granting permanent injunction. The court held that the statute (permitting abortion only to preserve the woman's life) was unconstitutionally vague and a violation of a woman's right to life and privacy. No legitimate or compelling state interest in fetal life permitted the state to prohibit first trimester abortions performed by licensed physicians in licensed medical facilities.) 125

Doe v. Rampton, No. C-234-70 (D. Utah, Sept. 14, 1970) (per curiam) (RITTER, D.J.). (Order of a single Federal district judge temporarily restraining enforcement of Utah anti-abortion statute in light of its probable unconstitutionality.) 139

Doe v. Bolton, supra.

Roe v. Wade, supra.

Babbitz v. McCann (I), 310 F. Supp. 293 (E.D. Wis., March 5,1970) (per curiam) (KERNER, Cir. J. and REYNOLDS & GORDON, D.JJ.), *appeal dismissed*, 400 U.S. 1 (1970) (per curiam). (Decision of a three-judge court declaring Wisconsin's anti-abortion statute unconstitutional as an invasion of a woman's right to privacy guaranteed by the Ninth Amendment. The court held that any state interest in the fetus was out-weighed by the rights of the pregnant woman.) 141

Babbitz v. McCann (II), 320 F. Supp. 219 (E.D. Wis., Nov. 18, 1970) (per curiam) (KERNER, Cir. J. and REYNOLDS & GORDON, D.JJ.), *vacated*, 402 U.S. 903 (1971). (Decision of three-judge court granting previously denied injunctive relief, vacated by the Supreme Court for reconsideration in light of *Younger v. Harris*, 401 U.S. 37 (1971), and companion cases.) 151

Harling v. Department of Health and Social Services, 323 F. Supp. 899 (E.D. Wis., March 11, 1971) (GORDON, D.J.). (Decision of district court judge setting aside conviction of a non-physician for violation of abortion law, in light of *Babbitz v. McCann* (I), *supra*.) 157

Kennan v. Nichol, No. 71-C-118 (W.D. Wis., April 27, 1971) (DOYLE, D.J.). (Decision of district judge enjoining prosecution of doctor for violations of Wisconsin abortion statute in light of *Babbitz v. McCann* (I), *supra*, on the ground that the federal proceeding pre-dated the state criminal proceeding and was therefore not precluded by the "anti-injunction" statute.) 161

Kennan v. Warren, No. 71-C-132 (W.D. Wis., May 5, 1971; Supplemental Opinion, May 6, 1971) (DOYLE, D.J.). (Decision of district judge enjoining additional civil proceedings taken against same physician as in *Kennan v. Nichol, supra*.) 167

2) FEDERAL DECISIONS UPHOLDING ABORTION LAWS

Corkey v. Edwards, 322 F. Supp. 1248 (W.D. N.C., Feb 1, 1971) (CRAVEN, Cir. J. and JONES & McMILLAN, D.JJ.), *appeal docketed*, 40 U.S.L.W. 3048 (U.S. July 17, 1971) (No. 71-92, 1971 Term). (Decision of three-judge court upholding North Carolina's Therapeutic Abortion Act. The court held that a state interest in the fetus was sufficient to support the statute against constitutional challenge. The court struck down a four month residency requirement for abortion as a violation of the right to travel.) 181

Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio, Dec. 18, 1970) (WEICK, Cir. J. and GREEN & YOUNG, D.JJ.) (2-1 decision, Green dissenting) (not appealed). (Decision of a three-judge court upholding Ohio anti-abortion statute by finding the statute not vague and a legitimate exercise of state power to protect the fetus. In a dissenting opinion Judge Green found the statute in violation of the Fourteenth Amendment and the right to privacy. In addition, he challenged the majority's interpretation of the statute's legislative history.) 189

Rosen v. Louisana, 318 F. Supp. 1217 (E.D. La., Aug. 7, 1970) (AINSWORTH, Cir. J. and CASSIBRY & BOYLE, D.JJ.) (2-1 decision, Cassibry dissenting), *appeal docketed*, 39 U.S.L.W. 3247 (U.S. Nov. 27, 1970) (No. 1010, 1970 Term; renumbered No. 70-42, 1971 Term). (Decision of three-judge court upholding Lousiana statute authorizing revocation of medical doctor's license for performing abortions. The court found the statute not vague and a valid exercise of power to protect the fetus. In his dissent Judge Cassibry held the statute constitutionally infirm on numerous grounds including violation of the right to privacy, and denial of equal protection to the poor.) 211

D. STATE LOWER COURT DECISIONS

1) STATE LOWER COURT DECISIONS INVALIDATING ABORTION LAWS IN WHOLE OR IN PART

Rogers v. Danforth, No. 315512 (Mo. Cir. Ct. St. Louis, June 7, 1971) (LASKY, J.). (Decision of trial court finding Missouri anti-abortion statute void for vagueness and in violation of the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. 241

People v. Gwynne, No. 173309 (Central Orange Cnty. Mun. Ct., Calif., June 16, 1970) (THOMPSON, J.). (Decision of a trial judge that California statute goes beyond legitimate health purposes and is an unconstitutional infringement of the rights to life and liberty protected by the Fourteenth Amendment.) 245

People v. Robb, Nos. 149005 and 159061 (Central Orange Cnty. Mun. Ct., Calif., Jan. 7, 1970) (MAST, J.). (Decision of trial judge finding California statute in violation of U.S. Constitution on various grounds including: improper delegation of legislative authority (accreditation and hospital committee provisions), vagueness, denial of equal protection, and interference with the right to privacy.) 251

People v. Barksdale, No. 33237C (San Leandro-Hayward Mun. Ct., Alameda Cnty., Calif., March 24, 1970) (FOLEY, J.). (Decision of trial judge indicating his concurrence in *People v. Robb, supra*.) 259

People v. Barksdale, ___Cal.App. 3d__, __ Cal. Rptr. ___, 1 Crim. 9526 (Calif. Dist. Ct. App. July 22, 1971). (Decision of intermediate appellate court invalidating major portions of A.L.I.-type therapeutic abortion act, in particular a provision limiting abortions to hospitals accredited by the private Joint Commission on Accreditation of Hospitals.) 268-1

Shively v. Board of Medical Examiners, No. 590333 (Calif. Super. Ct. San Francisco Cnty., Sept. 24, 1968) (HYMAN, J.) *on remand from* 65 Cal. 2d 475, 421 P.2d 65, 55 Cal. Rptr. 217 (1968). (Decision of a trial judge that defendant physician was not guilty of performing criminal abortion under pre-1967 statute in performing therapeutic abortion in conformity with accepted medical practice on women who had contracted rebella. The court held that a woman's right to therapeutic abortion in these circumstances was protected by the Eighth and Fourteenth Amendments. The court also held that the state must prove that the exception ("necessary to preserve her life") had not been met.) 269

People v. Anast, No. 69-3429 (Ill. Cir. Ct. Cook Cnty., July 29, 1970) (DOLEZAL, J.) (Decision of trial judge holding Illinois anti-abortion statute unconstitutionally vague and in violation of a woman's right to privacy. The court also held that the indictment failed to state the crime of "soli- 275

tation" in alleging only that the defendant encouraged women to procure abortions.)

Commonwealth v. Page, No. 1968-353 (Pa. Ct. Comm. Pl., Centre Cnty., July 23, 1970) (CAMPBELL, J.). (Decision of a trial court holding Pennsylvania statute unconstitutional as violative of due process and equal protection standards of the Fourteenth Amendment and as an infringement of a woman's right to privacy.) 279

State v. Munson, No. 24949 (S. Dak. 7th Cir. Ct., Pennington Cnty., April 6, 1970) (COOPER, J.). (Decision of trial court holding South Dakota statute unconstitutionally vague and an invasion into private conduct unsupported by vital interests of the state.) 283

State v. Ketchum, (Mich. Dist. Ct., March 30, 1970) (REID, J.). (Decision of a trial judge holding Michigan anti-abortion law void for vagueness and in violation of the right to privacy.) 287

2) STATE LOWER COURT DECISIONS UPHOLDING ABORTION LAWS

State v. Hodgson, No. 23789 (Minn. Dist. Ct., Ramsey Cnty., June 29, 1970) (HACKEY, J.). (Decision of trial court upholding Minnesota anti-abortion statute in prosecution of a physician for performing a therapeutic abortion in a hospital. The court held that the state's interest in the fetus was sufficient to support the law.) 289

Commonwealth v. Brunelle, No. 83879 (Mass. Super. Ct., Middlesex Cnty., Dec. 1970) (MOYNIHAN, J.). (Decision of trial judge upholding the constitutionality of the Massachusetts anti-abortion statute. The court found no establishment of religion by the statute and no interference with the woman's right to privacy in light of the state's interest in the fetus.) 307

III. LEGAL COMMENTARY

Tom C. Clark, *Religion, Morality and Abortion: A Constitutional Appraisal*, 2 Loyola U. (L.A.) Law Rev. 1 (1969). (Article by the retired Supreme Court Justice who argues that no compelling state interest exists that would 315

constitutionally permit the state to place restrictions on obtaining abortion other than those designed to insure the safety of the procedure.

William Curran & S.M. Hyg, *The Right to Health in National and International Law,* 284 New England J. of Med. 1258 (1971). (Brief discussion of an emerging concept, the "right to health.") 327

Ruth Roemer, *Abortion Law Reform and Repeal: Legislative and Judicial Developments,* 61 Am. J. Pub. Health 500 (1970). (Review of recent judicial decisions and legislative action concerning abortion.) 329

IV. MEDICAL AND SOCIAL SCIENCE STUDIES ON ABORTION PRACTICES

L. Bumpass & C. Westoff, *The "Perfect Contraceptive" Population,* 169 Science 1177 (Sept. 1970). (Demographic analysis finding high degree of unwanted fertility in the U.S. and measuring the effects of unwanted births on population trends.) 339

R. Lerner, *Geographic Distribution of Need for Family Planning and Subsidized Services in the United States,* 60 Am. J. Pub. Health 1945 (Oct. 1970). (Review of a massive government survey of the availability of family planning services to low-income women which found that 85% of such women had no access to family planning programs.) 345

C. Muller, *Socioeconomic Outcomes of Restricted Access to Abortion,* 61 Am. J. Pub. Health 1110 (June, 1971). (Review of the impact of restricted abortion and the resultant unwanted births on a broad range of social problems.) 357

H. Forssman & I. Thuwe, *One Hundred and Twenty Children Born After the Application for Therapeutic Abortion Refused,* in Abortion and the Unwanted Child, Carl Reiterman, ed. (1970). (Long-term study of the psychological development of unwanted children born after an application for abortion was denied.) 367

R. Hall, *Abortion in American Hospitals,* 57 Am. J. Pub. Health 1933 (Nov. 1967). (Study of the practice of 391

abortion in American hospitals finding gross inequality and inconsistency in the administration of abortion regulations.)

R. Hall, *Therapeutic Abortion, Sterilization, and Contraception,* 91 Am. J. Obstetrics & Gynecology 518 (Feb. 1965). (Results of a survey of hospitals finding, in particular, a far higher incidence of therapeutic abortion for private patients than for ward patients.) 396

A. Margolis, *et al., Therapeutic Abortion Follow-Up Study,* 110 Am. J. Obstetrics & Gynecology 243 (May, 1970). (Results of a study of women who had undergone an abortion, finding no evidence of psychological damage.) 411

G. Walter, *Psychologic and Emotional Consequences of Elective Abortion,* 36 Obstetrics & Gynecology 482 (Sept. 1970). (Review of studies of psychological reaction to abortion, finding no evidence of significant abortion-related distress.) 419

B. HEALTH AND SAFETY ASPECTS OF ABORTION

Eastman & Hellman, Williams Obstetrics .1085 (13th ed. 1966). (Medical discussion of therapeutic abortion from the leading obstetrical textbook.) 429

C. Tietze, *Morality With Contraception and Induced Abortion,* 45 Studies in Family Planning 6 (Sept. 1969). (Comparison of safety rates among induced abortion, childbirth, and contraception- medical abortion found 7 times safer than childbirth.) 437

C. Tietze, *Abortion Laws and Abortion Practices in Europe,* V Advances in Planned Parenthood 194 (Excerpta Medica International Congress Series No. 207, 1969). (Detailed analysis of abortion practices in Europe, as to safety, incidence, and patient characteristics.) 439

A. Margolis & E. Overstreet, *Legal Abortion Without Hospitalization,* 36 Obstetrics & Gynecology 479 (Sept. 1970). (Study showing that overnight hospital stay after abortion not likely to reduce the minimal future complications.) 459

H. Harvey & B. Pyle, *On the Healthiness of Four Thousand Abortions in a Free Standing Clinic* (unpublished material). (Study of excellent medical safety rate at non-hospital clinic in New York City.) 463

S. Goldsmith & A. Margolis, *Aspiration Abortion Without Cervical Dilation,* 110 Am. J. Obstetrics & Gynecology 580 (June, 1971). (Study of relatively uncomplicated abortion technique adaptable for non-hospital use with exceptional safety features.) 469

Penfield, *Abortion Under Paracervical Block,* 71 N.Y. State J. of Med. 1185 (June, 1971). (Analysis of 600 first trimester abortions under local anesthesia, concluding that procedure suitable for well-equipped office.) 473

I.

REGULATIONS, LAWS, AND GUIDELINES CONCERNING ACCESS TO MEDICAL ABORTION IN THE UNITED STATES

CURRENT STATUS OF ABORTION LAWS - August 1, 1970

Statutes provide that abortions are permitted for the reasons indicated and under the conditions specified.

State	Year	Physician	Hospital	Life	Health	Physical Health	Mental Health	Fetal Deformity	Forcible Rape	Statutory Rape (Age)	Incest	Time Limit (Weeks)	M.D. Approval	Residency
ALABAMA	1951			√	√									
ALASKA	1970	√	√[1]									•		√ 30 days
ARIZONA	1965			√										
ARKANSAS	1969	√	√	√	√			√	√		√		3C	√ 4 mos
CALIFORNIA	1967	√	√	√		√	√		√	√(15)	√	√(20)	2 3B[3]	
COLORADO	1967	√	√	√		√	√	√	√	√(16)	√	√(16)[3]	3B	
CONNECTICUT	1860			√										
DELAWARE	1969	√	√	√		√	√	√	√		√	√(20)[4]	1C RA	√ 4 mos[5]
DIST OF COL	1901			√	√									
FLORIDA	1868			√										
GEORGIA	1968	√	√	√	√			√	√	√(14)			2C 3B	√
HAWAII	1970	√	√									•		√ 90 days[6]
IDAHO	1863			√										
ILLINOIS	1874			√										
INDIANA	1838			√										
IOWA	1843			√										
KANSAS	1969	√	√[7]	√		√	√	√	√	√(16)	√		3C	
KENTUCKY	1910			√										
LOUISIANA	1914			√									1C	
MAINE	1840			√										
MARYLAND	1968	√	√	√		√	√	√	√			√(26)[8]	RA	
MASSACHUSETTS	1845			√[9]	√[9]									
MICHIGAN	1846			√										
MINNESOTA	1861			√										
MISSISSIPPI	1966	√		√					√[10]	√[10]			2C	
MISSOURI	1836			√										

State	Year	Physician	Hospital	Life	Health	Physical Health	Mental Health	Fetal Deformity	Forcible Rape	Statutory Rape (Age)	Incest	Time Limit (Weeks)	M.D. Approval	Residency
MONTANA	1864			√										
NEBRASKA	1873			√										
NEVADA	1861			√										
NEW HAMPSHIRE	1848			√										
NEW JERSEY	1849			√[11]										
NEW MEXICO	1969	√	√	√		√	√	√	√	√(16)	√		2B	
NEW YORK	1970	√										√(24)[12]		
N. CAROLINA	1967	√	√	√	√			√	√		√		3C	√ 30 days
N. DAKOTA	1943			√										
OHIO	1841			√										
OKLAHOMA	1910			√										
OREGON	1969	√	√	√		√[13]	√[13]	√	√	√(16)	√	√(150 days)[14]	1C	√
PENNSYLVANIA[15]	1860													
PUERTO RICO	1913			√										
RHODE ISLAND	1896			√										
S. CAROLINA	1970	√	√	√		√	√	√	√		√		3C	√ 90 days
S. DAKOTA	1929			√										
TENNESSEE	1883			√										
TEXAS	1889			√										
UTAH	1876			√										
VERMONT	1867			√										
VIRGINIA	1970	√	√	√		√	√	√	√		√		Board	√ 120 days[16]
WASHINGTON	1970	√	√									√ 16		√ 90 days
WEST VIRGINIA	1849			√										
WISCONSIN	1956			√									2C	
WYOMING	1959			√										

C – Consultant; B – Therapeutic Abortion Board; RA – Hospital Review Authority

*Non-Viable Fetus

[1] Abortion must be "performed in a hospital or other facility approved for the purpose by the Department of Health and Welfare or a hospital operated by the federal government or an agency of the federal government . . ." Abortion may not be performed unless "consent has been received from the parent or guardian of an unmarried woman less than 18 years of age . . ."

[2] Two-member abortion board required through the 12th week of pregnancy, three-member board thereafter.

[3] The 16-week time limit applies to rape and incest only.

[4] After 20 weeks a pregnancy may be terminated to preserve the woman's life or where the fetus is dead.

[5] Residency requirement does not apply if the woman or her husband works in Delaware or if she has previously been a patient of a Delaware physician or if her life is in danger.

[6] "The affidavit [re: residency] of such a woman shall be prima facie evidence of compliance with this requirement."

[7] Abortion must be done in a hospital "or other place as may be designated by law."

[8] After 26 weeks a pregnancy may be terminated to preserve maternal life or when the fetus is dead.

[9] The statute prohibits "unlawful" abortion, or abortion which is "malicious" or performed "without lawful justification." Case law, however, sanctions abortion to preserve maternal life and protect maternal health. COMMONWEALTH V. WHEELER (1944).

[10] Statute does not specify whether forcible or statutory rape (or either) is meant.

[11] The statute forbids abortions done "maliciously or without lawful justification." Case laws provide that abortions are permitted at least to preserve the life of the woman. GLEITMAN V. COSGROVE (1967).

[12] After 24 weeks pregnancy may be terminated only to preserve woman's life.

[13] "In determining whether or not there is substantial risk [to her physical or mental health] account may be taken of the mother's total environment, actual or reasonably foreseeable."

[14] The 150-day time limit does not apply in cases of danger to life.

[15] "Unlawful" abortion is proscribed but not defined.

[16] Residency may be proved by affidavit.

Primary source: *Checklist of Abortion Laws in the United States*. Association for the Study of Abortion, Inc., 1970

Lader, Lawrence. "A National Guide to Legal Abortion." *Ladies' Home Journal*, July 1970

Prepared by NATIONAL CENTER FOR FAMILY PLANNING SERVICES, HSMHA, HEW

1

Item No. 1

Item No. 2

August 4, 1970

Second Tentative Draft
(Third Working Draft)

UNIFORM ABORTION ACT

SECTION 1. *[Abortion defined; Prohibited; Exceptions.]*

(a) "Abortion" means the intentional termination of human pregnancy other than by live birth.

(b) No abortion shall be performed in this state unless it is performed:

(1) by a physician licensed to practice medicine [or osteopathy] in this state or by a physician practicing medicine [or osteopathy] in the employ of the government of the United States or of this state, [and the abortion is performed in the physician's office or in a medical clinic, or in a hospital approved by the [Department of Health] or operated by the United States, this state or any department, agency, or political subdivision of either;] or

(2) by a female upon herself upon the advice of a licensed physician [; and in either case]

(3) within 24 weeks after the commencement of the pregnancy; or if after 24 weeks, the physician believes there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the physical or mental health of the mother, or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape or incest, or illicit intercourse with a girl under 16 years of age.]

(c) Any person who violates this section is guilty of a [felony] and, upon conviction thereof, may be sentenced to pay a fine not exceeding [$1,000] or to imprisonment [in the state penitentiary] not exceeding [5 years], or both.

SECTION 2. *[Uniformity of Interpretation].* This Act shall be construed to effectuate its general purpose to make uniform the law of those states which enact it.

SECTION 3. *[Short Title.]* This Act may be cited as the Uniform Abortion Act.

SECTION 4. *[Severability.]* If any provision of this Act or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 5. *[Repeal.]* The following acts and parts of acts are repealed:

(1)

(2)

(3)

SECTION 6. *[Time of Taking Effect.]* This Act shall take effect _____.

Model Penal Code (Proposed Official Draft, 1962)

Section 230.3. Abortion.

(1) Unjustified Abortion. A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.

(2) Justifiable Abortion. A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for

purposes of this subsection. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable. [Additional exceptions from the requirement of hospitalization may be incorporated here to take account of situations in sparsely settled areas where hospitals are not generally accessible.]

(3) Physicians' Certificates; Presumption from Non-Compliance. No abortion shall be performed unless two physicians, one of whom may be the person performing the abortion, shall have certified in writing the circumstances which they believe to justify the abortion. Such certificate shall be submitted before the abortion to the hospital where it is to be performed and, in the case of abortion following felonious intercourse, to the prosecuting attorney or the police. Failure to comply with any of the requirements of this Subsection gives rise to a presumption that the abortion was unjustified.

(4) Self-Abortion. A woman whose pregnancy has continued beyond the twenty-sixth week commits a felony of the third degree if she purposely terminates her own pregnancy otherwise than by a live birth, or if she uses instruments, drugs or violence upon herself for that purpose. Except as justified under Subsection (2), a person who induces or knowingly aids a woman to use instruments, drugs or violence upon herself for the purpose of terminating her pregnancy otherwise than by a live birth commits a felony of the third degree whether or not the pregnancy has continued beyond the twenty-sixth week.

(5) Pretended Abortion. A person commits a felony of the third degree if, representing that it is his purpose to perform an abortion, he does an act adapted to cause abortion in a pregnant woman although the woman is in fact not

pregnant, or the actor does not believe she is. A person charged with unjustified abortion under Subsection (1) or an attempt to commit that offense may be convicted thereof upon proof of conduct prohibited by this Subsection.

(6) Distribution of Abortifacients. A person who sells, offers to sell, possesses with intent to sell, advertises, or displays for sale anything specially designed to terminate a pregnancy, or held out by the actor as useful for that purpose, commits a misdemeanor, unless:

(a) the sale, offer or display is to a physician or druggist or to an intermediary in a chain of distribution to physicians or druggists; or

(b) the sale is made upon prescription or order of a physician; or

(c) the possession is with intent to sell as authorized in paragraphs (a) and (b); or

(d) the advertising is addressed to persons named in paragraph (a) and confined to trade or professional channels not likely to reach the general public.

(7) Section Inapplicable to Prevention of Pregnancy. Nothing in this Section shall be deemed applicable to the prescription, administration or distribution of drugs or other substances for avoiding pregnancy, whether by preventing implantation of a fertilized ovum or by any other method that operates before, at or immediately after fertilization.

Item No. 4

N. Y. Penal Law §125.05(3), at 79 (McKinney Supp.1970-1971)

* * * * *

3. "Justifiable abortional act." An abortional act is justifiable when committed upon a female with her consent by a duly licensed physician acting (a) under a reasonable belief that such is necessary to preserve her life, or, (b) within twenty-four weeks from the commencement of her pregnancy. A pregnant female's commission of an abortional act upon herself is justifiable when she acts upon the advice of a duly licensed physician (1) that such act is necessary to preserve her life, or, (2) within twenty-four weeks from the commencement of her pregnancy. The submission by a female to an abortional act is justifiable when she believes that it is being committed by a duly licensed physician, acting under a reasonable belief that such act is necessary to preserve her life, or, within twenty-four weeks from the commencement of her pregnancy.

As amended L.1970, c. 127, eff. July 1, 1970.

Item No. 5

98 THE CITY RECORD 6313 (October 27, 1970).

HEALTH SERVICES ADMINISTRATION
DEPARTMENT OF HEALTH

Resolution Adopted

AT A MEETING OF THE BOARD OF HEALTH OF THE DEPARTMENT OF Health held September 17, 1970, the following resolution was adopted:

Resolved, That the schedule of article headings of Title III of the New York City Health Code, as enacted by resolution adopted on the twenty-third day of March, nineteen hundred fifty-nine and filed with the City Clerk on the twenty-fourth day of March, nineteen hundred fifty-nine, be and the same hereby is amended by adding thereto a new article heading, to follow the article heading "ARTICLE 41 MATERNITY AND NEWBORN SERVICES," to read as follows:

ARTICLE 42 ABORTION SERVICES

Resolved further, that such Title be and the same hereby is amended, by adding a new Article 42 thereto, to follow Article 41 thereof, to be printed together with explanatory notes, to read as follows:

Section
42.01 Definitions
42.03 Requirements and standards
42.05 Filing of staff and service regulations
42.07 Records and reports; inspection
42.09 Compliance with Title V, Vital Statistics
42.11 Facilities, equipment and supplies generally
42.13 Transportation facilities for affiliated service
42.15 Elevators
42.17 Admission and examination facilities
42.19 Laboratory facilities
42.21 Operating facilities
42.23 Recovery room or rooms
42.25 Staff; physician in charge of abortion service; duties
42.27 Staff; nursing supervision of abortion patients
42.29 Staff; social service
42.31 Admission and examination procedures
42.33 Operative and post-operative requirements
42.35 Modification by Board

INTRODUCTORY NOTES

Article 42 was enacted by resolution of the Board of Health adopted on September 17, 1970 to provide public health standards of care in the performance of abortions, with proper regard for the health, safety and well-being of the patient. This article requires that abortions be performed only by physicians operating in a place or facility where there is qualified supervision in obstetrics or surgery, and where equipment, staff and facilities are provided to handle hemorrhage, shock, cardiac arrest and other emergencies, as well as to apply aseptic procedures. The article further protects the health of the patient by providing that abortions performed on women pregnant 12 weeks or less may be performed on an ambulatory basis; that pregnancies of longer duration or those involving medical, surgical, gynecological or psychiatric conditions, or complications occurring during or after the abortion, require inpatient facilities. The article also requires that family planning services should be made available to patients.

The article follows the enactment of a new abortion law (Chapter 127, Laws of 1970, effective July 1, 1970) by the State Legislature. The new law amended subdivision 3 of Section 125.05 of the State Penal Law to generally provide that an abortion performed within twenty-four weeks from the commencement of pregnancy by a physician with the consent of the pregnant female shall be a justifiable abortional act and, therefore, not subject to criminal prosecution under related provisions of the Penal Law.

§ 42.01 Definitions

When used in this article:

(a) Abortion service means a place or facility in which abortions are performed.

(b) Hospital means a hospital as defined in Section 700.2 (5) of the State Hospital Code.

(c) Affiliated abortion service means an abortion service which is located within a total transport time of ten minutes from a hospital with which such service has a written affiliation agreement for the treatment of its patients requiring care on an inpatient basis.

(d) Total transport time means the total elapsed time between the diagnosis, at an affiliated abortion service, of a complication requiring emergency care and the delivery of the patient and the transfer of responsibility for the patient's care to appropriate medical personnel at a hospital.

(e) Unaffiliated abortion service means an abortion service which is not located in a hospital and is not an affiliated abortion service.

(f) Qualified obstetrician means:

(1) A licensed physician who is a diplomate of the American Board of Obstetrics and Gynecology, or who submits evidence to the Department that his training and experience qualify him for admission to the examination by such Board; or,

(2) A licensed physician who is a fellow of the American College of Surgeons in the specialty of obstetrics and gynecology; or,

(3) A licensed physician who has the rank of associate attending obstetrician or higher at a voluntary or municipal hospital approved for residency training in obstetrics by the Council on Medical Education and Hospitals of the American Medical Association; or,

(4) A licensed physician who has the rank of assistant professor of obstetrics or gynecology or higher in a medical school approved by the Board of Regents of the University of the State of New York; or,

(5) A Doctor of Osteopathy who holds a license to practice medicine in the State of New York and who is certified by the American College of Osteopathic Obstetricians and Gynecologists, or who submits evidence to the Department that his training and experience qualify him for admission to the examination by such Board, or who submits evidence of completion of a residency in obstetrics and gynecology.

(g) Qualified surgeon means:

(1) A licensed physician who is a diplomate of the American Board of Surgery, or who submits evidence to the Department that his training and experience qualify him for admission to the examination by such Board; or

(2) A licensed physician who is a fellow of the American College of Surgeons; or

(3) A licensed physician who has the rank of associate attending surgeon or higher at an accredited voluntary or governmental hospital.

(h) Registered professional nurse means a person who is registered as a registered professional nurse by the State Department of Education pursuant to Article 139 of the Education Law.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.03 Requirements and standards

An abortion shall be performed in an abortion service operated in accordance with the provisions of this article and related provisions of this Code.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.05 Filing of staff and service regulations

An abortion service shall be maintained in accordance with a set of formal standards which define the professional qualifications of its obstetric, gynecological, surgical, nursing and administrative staff, and which govern the conduct of the service. These standards shall be prepared by the physician in charge of such service and a copy of such standards and any change or modification thereof shall be filed with the Department.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.07 Records and reports; inspection

(a) An abortion service shall keep records including admission and discharge notes, histories, results of tests and examinations, nurse's work sheets, social service records and other progress notes of patients, and it shall submit such records to the Department when the Department shall so require.

(b) An abortion service shall prepare reports which shall be submitted to the Department when it shall so require. Such reports shall include the number of:

(1) Patients requesting abortions;

(2) Patients on whom abortions were performed according to the period of gestation and method of termination of pregnancy;

(3) Patients for whom abortions were refused and the reasons therefor; and

(4) Patients referred to other abortion services.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.09 Compliance with Title V, Vital Statistics

Abortion services shall comply with applicable requirements of Title V of this Code

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.11 Facilities, equipment and supplies generally

Facilities, equipment and supplies in an abortion service shall be maintained in proper working order. Necessary solutions, drugs and medications shall be supplied and maintained pursuant to related provisions of Article 75. Knee or foot controlled sinks shall be provided in or immediately adjacent to the room where the abortion is performed. The abortion service facilities and equipment shall be maintained in a clean and sanitary condition.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.13 Transportation facilities for affiliated service

An affiliated abortion service shall have immediately available organized transportation facilities capable of insuring that a patient requiring emergency care at the hospital with which such service is affiliated will be transported to such hospital within the total transport time of ten minutes.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.15 Elevators

Any building of more than one story in height and of which an abortion service is a part shall be provided with an elevator for the use of non-ambulatory abortion patients. The elevator shall be of sufficient size to accommodate a standard stretcher. When a non-ambulatory abortion patient is moved from one floor to another, she shall be accompanied by attending medical or nursing personnel.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.17 Admission and examination facilities

An abortion service shall provide facilities for registration, medical evaluation, examination and referral, equipped with suitable furnishings and accommodations, including waiting and dressing rooms and other appurtenances for the physical comfort and convenience of patients and personnel. Sufficient, suitably equipped examining rooms shall be provided for the daily caseload. Nothing contained herein shall prohibit registration, interviewing, history-taking, medical examination and appropriate referral from being conducted in an existing prenatal, gynecology and/or family planning clinic.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.19 Laboratory facilities

(a) An unaffiliated abortion service or an abortion service located in a hospital shall have on its premises a blood bank maintained and operated pursuant to the requirements of Articles 17 and 19, a clinical laboratory maintained pursuant to Article 13 of this Code, and an X-ray laboratory which meets the requirements of Article 175. The clinical laboratory shall be qualified to perform urinalysis, hematocrit and other hematological tests including cross-matching and determinations of blood group and Rh type. The examination of surgically removed tissue, tests for pregnancy, and infrequently performed tests, or those not included within specialties or subspecialties stated on its permit, or those requiring specialized equipment and skill, may be forwarded to another laboratory approved by the Department.

(b) The affiliation agreement of an affiliated abortion service shall include provision for use in the hospital of those facilities required in subsection (a). However, the affiliated abortion service shall have on its premises such facilities as are necessary to perform clinical tests specified in the agreement.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.21 Operating facilities

(a) An unaffiliated abortion service or an abortion service located in a hospital shall have available on its premises a standard operating room capable of accommodating abdominal as well as vaginal surgical procedures. An affiliated abortion service shall include in its affiliation agreement provision for the use of a standard operating room in the treatment of its patients requiring care on an innatient basis.

(b) For abortions specified in Section 42.35(a), existing outpatient operating facilities may be utilized or new outpatient operating facilities created, if the policies established by the physician in charge of the abortion service and the patient load warrant. If it is found necessary to add to existing outpatient operating facilities, a standard sized treatment room may be converted to an operating facility.

(c) All rooms in which abortions are performed shall be adequately equipped, supplied and staffed and shall include the following in addition to the instruments and equipment needed for the performance of abortions.

(1) Anesthesia equipment and such other equipment as is necessary to treat patients for hemorrhage, shock, cardiac arrest, and other emergencies.

(2) In an unaffiliated abortion service or an abortion service located in a hospital an adequate supply of drugs, compatible whole blood, blood fractions, blood concentrates, plasma expanders and parenteral fluids immediately available at all times with appropriate refrigeration equipment therefor; in an affiliated abortion service an adequate supply of drugs, plasma expanders and paremteral fluids shall be available at all times with appropriate refrigeration equipment therefor;

(3) Dressing room and scrub-up facilities which are suitably located;

(4) A utility room with facilities for sterilization of bedpan and enema equipment.

(5) A utility room with facilities for sterilization of supplies, except in an abortion service which receives sterile supplies from a central supply service.

(d) The operating facilities and equipment shall be constructed and maintained so as to be free from sanitary hazards and safety hazards likely to cause a fire or explosion.

(e) Environmental controls to prevent infection, including the control of personnel and patient traffic, shall be maintained in the operating facilities.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.23 Recovery room or rooms

An adequately sized and separate recovery room or rooms in proximity to the operating facilities shall be provided. The recovery room shall contain adequate monitoring equipment, suction oxygen and other related equipment. Such room shall be staffed by qualified nursing personnel. An adequate number of recovery beds and/or rooms shall be provided to insure a minimum of three (3) hours for the recovery of each patient.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.25 Staff; physician in charge of abortion service; duties

(a) An abortion service shall be staffed so as to provide on the premises adequate medical, nursing, and ancillary personnel.

(b) The abortion service shall be supervised by a physician in charge who shall be a qualified obstetrician or, in a service which does not have a qualified obstetrician, by a qualified surgeon.

(c) The physician in charge of the abortion service shall be responsible for:

(1) Setting the policies and procedures pertaining to abortions and the implementation thereof; and

(2) Designating a licensed physician or physicians whom he deems qualified to supervise directly the care of all patients undergoing abortion, including their post-operative care and follow-up.

(3) Establishing standards for the observation of patients by nursing personnel during the post-operative period.

(d) A physician shall be present on the premises of the abortion service at all times during the operative and post-operative period.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.27 Staff; nursing supervision of abortion patients

(a) At least one registered professional nurse with post-graduate education or experience in obstetric or gynecologic nursing shall supervise and direct the nursing personned and care and shall be on duty in an abortion service at all times while in use.

(b) Student nurses, practical nurses, attendants and other ancillary personnel assigned to give nursing care in an abortion service shall be adequately trained in observational and emergency techniques for pre-operative and post-operative care of abortion patients and shall be supervised by registered professional nurses.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.29 Staff; social service

An abortion service shall have a social service unit available to serve its patients adequately.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.31 Admission and examination procedures

(a) Every woman seeking to terminate her pregnancy shall be registered as expeditiously as possible and, whenever possible, on the same day of registration she shall be seen by a physician and staff for history-taking, physical examination and necessary laboratory tests.

(b) If the patient cannot be accepted for registration and examination within a reasonable period of time, the abortion service shall refer her to an appropriate resource or to a central registry, and shall make every effort to secure treatment for her.

(c) Pregnancy testing should be available at the patient initial visit and may precede actual registration. The result and type of pregnancy test shall be available to the examining physician before the performance of the abortion. The diagnosis of pregnancy shall be the responsibility of the examining physician.

(d) A complete medical history shall be obtained and the physical examination shall be complete and not confined solely to a pelvic examination. The following laboratory tests shall be performed on every patient; hematocrit, complete urinalysis, blood grouping

and Rh typing. The blood specimen used for blood grouping and typing shall be retained by the blood bank in the event a cross-matching test for transfusion is required.

(e) Interviewing and counseling by social service staff shall be made available to patients before and after abortions are performed.

(f) Family planning counseling by such personnel as may be prescribed by the physician in charge of the service shall be made available to patients before and after abortions are performed.

(g) Where medical evaluation, examination and referral are made from a private physician's office, hospital, clinic or other abortion service pertinent records thereof shall be made available at the time the patient is registered and admitted to the abortion service. Proper policies and procedures for coordination or referral from various sources shall be established by the physician in charge of the abortion service and adhered to by all members of the staff.

(h) There shall be an interval of not less than two days between initial examination and termination of pregnancy to permit the reporting to and review of all laboratory tests by the examining physician and to permit and encourage thorough consideration and a firm decision by the patient regarding termination of pregnancy. No patient shall be coerced in any manner by the staff of the abortion service in arriving at her decision.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.33 Operative and post-operative requirements

(a) Abortions on patients with a gestation up to and including twelve weeks as determined by the physician may be performed on an ambulatory basis if the patient's medical condition permits.

(b) The following patients shall be treated on an inpatient basis for the abortion:

(1) Patients pregnant more than twelve weeks as determined by the physician;

(2) Patients having such medical, surgical, gynecological or psychiatric conditions or complications as specified in the rules of the chief of staff of the abortion service and filed with the Department pursuant to Section 42.05; and

(3) Patients having a sterilization procedure immediately following the abortion.

(c) Only physicians shall be permitted to perform abortions. Termination of pregnancies involving more than twenty weeks gestation shall not be performed by the physician without appropriate medical consultation.

(d) Where general or local anesthesia is administered to abortion patients it shall be administered pursuant to the requirements of Section 41.61.

(e) Pathologic examination of all tissue removed from the uterus shall be performed routinely.

(f) Patients shall receive the following post-operative care:

(1) Patients whose pregnancy was terminated on an ambulatory basis shall be observed in the abortion service for a reasonable number of hours, not less than three, to ensure that no immediate post-operative complications are present and thereafter such patients may be discharged if their course has been uneventful;

(2) Patients in whom any adverse condition exists or in whom a complication is known or suspected to have occurred during or after the performance of the abortion shall remain in the abortion service or the back-up hospital for a minimum of twenty-four hours.

(g) Written instructions shall be issued to all patients in accordance with the rules of the physician in charge of the abortion service and shall include the following:

(1) Symptoms of complications to be looked for;

(2) Activities to be avoided;

(3) Specific telephone number to be used by the patient should any complication occur or question arise;

(4) Date for follow-up or return visit after the performance of the abortion, which shall be scheduled within two to six weeks as indicated by the condition of the patient; and

(5) Information on the availability of family planning services when desired by the patient. When, in the opinion of the physician it is in the best interests of the patient, family planning services may be initiated, with the consent of the patient, prior to leaving the abortion service.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

§ 42.35 Modification by Board

When the strict applicability of any provision of this article presents practical difficulties or unusual hardships, the Board, in a specific instance, may modify the application of such provision consistent with the general purpose of this article and upon such condition as are necessary, in the opinion of the Board to protect the health of abortion patients.

NOTES: This section is new. It was enacted by resolution adopted on September 17, 1970.

Resolved further, that this resolution shall take effect immediately.

A true copy.

LORANCE HOCKERT, Secretary.

Filed with the City Clerk October 19, 1970. o23

Item No. 6

Rev. Code Wash. Ann., tit. 9, §§9.02.060 to 9.02.090 (Supp.1970) (Laws 1970, c.3):

§9.02.060. Neither the Termination by a physician licensed under Chapters 18.71 or 18.57 RCW of the pregnancy of a woman not quick with child nor the prescribing, supplying or administering of any medicine, drug or substance to or the use of any instrument or other means on, such woman by a physician so licensed, nor the taking of any medicine, drug or substance or the use or submittal to the use of any instrument or other means by such a woman when following the directions of a physician so licensed, with the intent to terminate such pregnancy, shall be deemed unlawful acts within the meaning of this act.

§9.02.070. A pregnancy of a woman not quick with child and not more than four lunar months after conception may be lawfully terminated under this act only: (a) with her prior consent and, if married and residing with her husband or unmarried and under the age of eighteen years, with the prior consent of her husband or legal guardian, respectively; (b) if the woman has resided in this state for at least ninety days prior to the date of termination; and (c) in a hospital accredited by the Joint Commission on Accreditation of Hospitals or at a medical facility approved for that purpose by the State Board of Health, which facility meets standards prescribed by regulations to be issued by the State Board of Health for the safe and adequate care and treatment of patients: PROVIDED, that if a physician determines that termination is immediately necessary to meet the medical emergency the pregnancy may be terminated elsewhere. Any physician who violates this section of this 1970 act or any regulation of the State Board of Health issued under authority of this section shall be guilty of a gross misdemeanor.

§9.02.080. No hospital, physician, nurse, hospital employee nor any other person shall be under any duty, by law or contract, nor shall such hospital or person in any circumstances be required, to participate in a termination of pregnancy if such hospital or person objects to such termination. No such person shall be discriminated against in employment or professional privileges because he so objects.

§9.02.090. If any provision of this act, or its application to any person or circumstance, is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances, is not affected.

Item No. 7

ABORTION REGULATIONS ADOPTED

BY THE WASHINGTON STATE BOARD OF HEALTH

DECEMBER 10, 1970

WAC 248-140

Section 010 PURPOSE. It is the purpose of the Washington State Board of Health to establish guidelines to assure the safe and adequate care of patients undergoing termination of pregnancy, by means of rules and regulations setting standards for medical facilities at which pregnancies are terminated, in accordance with Chapter 3, Laws of 1970.

Section 020 DEFINITIONS. Unless the context clearly indicates otherwise, the following terms, whenever used in this chapter, shall be deemed to have the following meanings:

(1) "Board" means the Washington State Board of Health.

(2) "Department" means the Washington State Department of Social and Health Services, which shall serve as agent of the board.

(3) "Secretary" means the secretary of the Department of Social and Health Services or his designee or authorized representative.

(4) "Certificate of Approval" means a certificate issued in behalf of the board by the department to a facility approved for the performance of abortion procedures.

(5) "Clean" when used in reference to a room or area means space and/or equipment for storage and handling of supplies and/or equipment which are in a sanitary or sterile condition.

(6) "Facility" means any institution, place, building or agency or portion thereof in which an abortion procedure is performed.

(7) "Physician" means a doctor of medicine or a doctor of osteopathy duly licensed in the state of Washington.

(8) "Physical barrier" means a partition or similar space divider designed to prevent splash or spray between room areas.

(9) "Recovery unit" means a room or rooms for the segregation and close or continuous observation and care of patients immediately following an abortion procedure.

(10) "Soiled" when used in reference to a room or area, means space and equipment for collection and/or cleaning of used or contaminated supplies and equipment and/or collection and/or disposal of wastes.

Section 030 APPLICABILITY OF THESE RULES AND REGULATIONS. These standards, rules and regulations apply to any facility which is not an accredited hospital as set forth in Chapter 3, Laws of 1970, in which any drug, substance, instrument, or other means is administered or used to terminate the pregnancy of a woman, except that Section 12 shall apply to all accredited hospitals.

Section 040 CERTIFICATE OF APPROVAL REQUIRED. No person shall establish, maintain, or operate a facility in which any means are employed or actions taken for the purpose of terminating the pregnancy of a woman without a certificate of approval from the department: PROVIDED, that this provision shall not apply to accredited hospitals as set forth in Chapter 3, Laws of 1970.

Section 050 APPLICATION FOR CERTIFICATE OF APPROVAL. An application for a certificate of approval may be made to the department by nonaccredited, licensed hospitals and all other facilities upon forms provided by the department and shall contain such information as the department reasonably requires and which may include affirmative evidence of ability to comply with these standards, rules and regulations. An application for renewal of license shall be made to the department upon forms provided by it and submitted thirty days prior to the date of expiration of the certificate of approval.

Section 060 ISSUANCE, DURATION AND ASSIGNMENT OF CERTIFICATE OF APPROVAL. (1) Upon receipt of an application for a certificate of approval, the department shall issue a certificate of approval if the applicant and the facility meet the requirements, standards, rules and regulations established herein. Each certificate of approval shall be issued for the premises and persons named in the application and no certificate of approval shall be transferrable or assignable.

(2) If there be failure to comply with the standards, rules and regulations, the secretary may, when, in his judgment, the well-being and safety of patients would not be jeopardized, issue to an applicant for an initial or renewed certificate of approval, a provisional certificate of approval which will permit the operation of the facility for a specific, determined period of time. A provisional certificate of approval may be issued only when, after thorough investigation, it has been determined that time can be allowed for the facility

to correct existing deficiencies without placing in jeopardy the safety or health of women who receive services for the termination of pregnancy. In no case shall provisional approval exceed six months without review and sanction by the secretary.

Section 070 FORM OF APPLICATION FOR CERTIFICATE OF APPROVAL AND INSPECTION. The secretary shall prescribe the form upon which applications for approval shall be made, shall prior to the approval, within a reasonable time after application, evaluate the findings of inspections and issue a certificate of approval if the findings demonstrate conformity to the law and to these rules and regulations. A certificate of approval shall be valid immediately and for twelve months following the first day of the month following issuance, unless revoked for cause, and may be renewable. The secretary shall have access at any reasonable time, to the premises for which approval has been requested or has been issued, for purposes of ascertaining conformance to the law or to these rules and regulations.

Section 080 PROCEDURE UPON DENIAL OF APPLICATION FOR CERTIFICATE. Applicants denied approval shall have recourse to review of the decision of the secretary in conformance with the Administrative Procedure Act.

Section 090 HOSPITAL FACILITIES APPROVED FOR TERMINATING PREGNANCY. A hospital facility approved for the purpose of terminating a pregnancy lawfully shall be:

(1) A hospital accredited by the Joint Commission on Accreditation of Hospitals; or

(2) Any other hospital licensed under chapter 70.41 RCW: PROVIDED, That such licensed hospital meets, at a minimum, the standards set forth in these regulations with the exception of Section 10 (1), (8), and (9).

Section 100 NON-HOSPITAL FACILITIES APPROVED FOR TERMINATING PREGNANCY. Any facility not an integral organizational part of an accredited or licensed hospital and not located within its premises, must meet the following requirements to be approved for termination of pregnancy.

(1) Has an agreement with an accredited or licensed hospital for medical consultation and for the transfer of patients in need of immediate hospitalization because of medical emergencies such as hemorrage, shock, perforation or infection, and is located so that it would ordinarily be practical

to transport a patient from the outpatient facility to a hospital in ten minutes or less.

(2) Has a surgical operating room with a minimum dimension of at least ten feet and a minimum area of at least one hundred and twenty square feet; which must be well-lighted, with adequate illumination; with a suction outlet or suction machine, an oxygen outlet or oxygen tank, intravenous stand, a resucitator, storage for surgical supplies, and equipment for collection of surgical linens and wastes.

(3) Has adequate facilities available for patients for short periods of rest and recuperation and due regard to the patient's dignity and privacy.

(4) Has sufficient sanitary toilet facilities for patients within the premises of the facility.

(5) Has a soiled area which includes a clinic service sink, a work-counter, a double compartment sink, storage cabinet and adequate space for linen hampers and waste containers. Soiled areas shall be separated from clean areas by a physical barrier.

(6) Has an autoclave, with a recording thermometer, of sufficient size to accomodate medical supplies and equipment to be sterilized. If the practice of sterilizing unwrapped trays of instruments and other equipment is followed, the autoclave must be located to provide direct access to the operating room from the autoclave. The autoclave may be in either a clean or soiled room area wherein the arrangement and workflow is such that separation of contaminated items from sterile items is maintained.

(7) There shall be sufficient storage units and clean areas to provide for storage of linens, drugs, anesthesia, solutions, instruments, utensils and other clean or sterile supplies and equipment.

(8) No pregnancy more than ten weeks after conception may be terminated in such a facility.

(9) Flammable anesthesia shall not be used in any terminations.

(10) Each patient receiving services within the facility shall be under the care of a physician. Administration of anesthesia to the patient shall be by a physician or a certified registered nurse anesthetist.

(11) A patient who has undergone a procedure which is producing hemorrhage, shock, respiratory depression or other serious complication shall be transferred to a hospital, when in the judgment of the attending physician, it is deemed medically feasible. All other patients shall be retained in a recovery unit for a period of observation and care until it has been determined that the patient's condition has stabilized to a point where she may be released without jeopardy to her health and safety.

(12) The secretary may modify or exempt an applicant from one or more of the requirements of this section when in his judgment, the well-being and safety of patients would not be jeopardized thereby: PROVIDED, That such action is taken only after thorough inspection and evaluation of all relevant circumstances and conditions.

Section 110 DISCLOSURE OF INFORMATION. Information received by the board or the department through filed reports, inspections or as otherwise authorized, shall not be disclosed publicly in such a manner as to identify any individual without her consent, except by subpoena, nor in such manner as to identify any facility except in a proceeding involving issues of certificates of approval.

Section 120 REPORTING OF PREGNANCY TERMINATIONS. In order for the board and the department to evaluate the effect of the board's rules and regulations in assuring safe and adequate care and treatment of patients, each hospital where lawful abortions are performed in accordance with chapter 3, Laws of 1970, and these rules and regulations shall, on forms prescribed and supplied by the secretary, report to the department during the following month the number and dates of abortions performed during the previous month, giving for each abortion the age and marital status of the patients, the duration of the pregnancy, the method of abortion, any complications such as perforations, infections, and incomplete evacuations, the name of the physician performing the abortion and such other relevant information as may be required by the secretary. All physicians performing abortions in other facilities approved for that purpose shall report in the same manner. All physicians performing abortions in non-approved facilities, when the physician has determined that termination of the pregnancy was immediately necessary to meet a medical emergency shall also report in the same manner, and shall additionally provide a clear and detailed statement of the facts upon which he based his judgment of medical emergency.

Section 130 REVIEW OF REGULATIONS. These regulations shall be reviewed and evaluated on or before six months from this date: December 10, 1970.

Section 140 EMERGENCY SECTION. (Regulations to be effective immediately.)

##

Item No. 8

THE AMERICAN COLLEGE
OF OBSTETRICIANS AND GYNECOLOGIST
79 West Monroe Street • Chicago, Illinois 60603
Telephone 312-236-6814

POLICY ON ABORTION

Policies covering abortions should be designed by the medical staff to safeguard the patient's health or improve her family life situation. They should have due regard for local legal statutes and judicial decrees. Abortion should only be performed in facilities that are administered by a hospital approved by the Joint Commission on Accreditation of Hospitals and/or licensed by a state or province.

It is recognized that abortion may be performed at a patient's request, or upon a physician's recommendation. No physician should be required to perform, nor should any patient be forced to accept an abortion.

When abortion is requested by a patient, the request should be obtained in writing from the patient, or, in the case of a minor, from her parent or guardian. The patient should be informed of the medical nature of the procedure and of its potential consequences. When abortion is recommended by a physician, the indications should be stated in the patient's record, and informed consent obtained from the patient and her husband, or herself if she is unmarried, or from her nearest relative or guardian if she is under the age of consent. When abortion is requested by a patient, a consultation is not necessary. When abortion is recommended by a physician, the indication for the procedure should be approved by a consultant knowledgeable in regard to the condition thought to indicate abortion.

Abortion is an operative procedure and should only be performed: (1) by a physician who has hospital privileges for the care of obstetric-gynecologic patients and (2) in a hospital-facility adequately equipped to care properly for unexpected complications.

In order to assure that adequate facilities will be available for indicated care of other obstetric-gynecologic patients in some communities, consideration should be given by hospitals to (1) providing a room or entirely separate facilities where abortion can be performed with minimal disruption of other hospital procedures and the hospital based educational program, and (2) utilizing hospital personnel who volunteer to care for patients admitted to be aborted.

Approved by the Executive Board
August 1970

THE AMERICAN PUBLIC HEALTH ASSOCIATION, INC.
NEW YORK WASHINGTON SAN FRANCISCO BIRMINGHAM
1740 BROADWAY, NEW YORK, N. Y. 10019 Phone: (212) 245-8000

RECOMMENDED STANDARDS FOR ABORTION SERVICES

I. INTRODUCTION:

Since 1967, 15 states have responded to the increasing public demand for changes in the legal restriction of abortion practice by passing new laws. Moreover, at least 14 states have had the constitutionality of their abortion laws challenged in court. Public health agencies must be prepared, therefore, to respond to an increasing need for abortion services.

Abortion services are an integral part of comprehensive family planning and maternal and child health care. As such, abortion and contraceptive counseling and services should be available together.

Contraception should be encouraged as a means of minimizing the need for abortion. Counseling and services for abortion and contraception should receive full administrative and financial support as part of maternal and child health programs.

When there is a large demand for a service that is in limited supply, a situation exists in which human needs can be exploited for economic gain. The public interest requires that health agencies recognize this fact and make very effort to provide safe, accessible abortion services at reasonable fees for all who are in need of such services.

II. SPECIFIC RECOMMENDATIONS:

A. Referral and Counseling

1. Abortion referral services should be available through state and local health departments, in collaboration with medical societies and voluntary agencies. These services should make both private and public care known and available to women seeking abortion.

2. Counseling is an integral part of abortion services. The manner in which referral and counseling are carried out plays a major role in determining whether the abortion patient is treated in a safe, humane and dignified manner, and protected against exploitation.

3. The APHA therefore recommends the following five standards:

   a. Rapid and simple abortion referral must be readily available through state and local public health departments, medical societies, or other nonprofit organizations.

   b. An important function of counseling should be to simplify and expedite the provision of abortion services; it should not delay the obtaining of these services.

   c. Psychiatric consultation should not be mandatory. As in the case of other specialized medical services psychiatric consultation should be sought for

definite indications and not on a routine basis.

d. A wide range of individuals from appropriately trained, sympathetic volunteers to highly skilled physicians may qualify as abortion counselors.

e. Contraception and/or sterilization should be discussed with each abortion patient.

. Public Education

Education about abortion procedures and services is a public responsibility. Public health agencies should take a leadership role in providing information to the public. They should educate the public so that there is a general awareness of the current status concerning a woman's legal right to abortion, and so that women desiring abortion know of the circumstances under which this procedure is most safely performed. The importance of having an abortion before the end of the third month of pregnancy should be stressed as a safety factor to every woman at risk of pregnancy who might want to have a pregnancy terminated. Effective education in contraceptive use is an essential part of an abortion service program and will help women seeking abortion to minimize subsequent unwanted pregnancies.

C. Surgical Care

1. While comprehensive information is not available on all factors determining the risks to life and health

associated with the performance of an abortion, three such factors are recognized as important:

a. the skill of the physician,

b. the environment in which the abortion is performed, and above all

c. the duration of pregnancy, as determined by uterine size and confirmed by menstrual history.

It stands to reason that the risks to a woman having an abortion are smaller when in the hands of a well-trained obstetrician-gynecologist than in the hands of a physician with little training or experience. It is also clear that a well equipped hospital offers a wider range of specialized personnel and equipment to cope with unforeseen difficulties than an office or clinic without such resources. It has been abundantly documented that risks to life and health increase steeply with each additional week of gestation. The factor of gestational age is of overriding importance.

2. The APHA recommends therefore that abortions in the second trimester and early abortions in the presence of pre-existing medical complications be performed in hospitals as in-patient procedures.

3. For pregnancies prior to the end of the 12th week, as measured by gestational size, abortion in the hospital with or without overnight stay is probably the safest

practice. The performance of abortions in an extramural treatment facility, however, is an acceptable alternative to abortion in a hospital provided arrangements exist in advance to admit patients promptly if unforeseen complications develop. Standards for any abortion facility should include the following essentials:

a. An operating table, or conventional gynecologic examining table with accessories, which is located in a room which is adequately lighted and ventilated and meets all other environmental standards for surgical procedures.

b. Surgical instruments sufficient in number to permit individual sterilization for each patient and which are adequate to perform conventional cervical dilatation and curettage, and electrically safe equipment for vacuum aspiration.

c. Drugs, parenteral fluid and electrolyte solutions (including plasma volume expander) in sufficient supply for emergency use.

d. Anesthesia equipment, including oxygen and equipment for artificial ventilation and administration of anesthetic gases, and resuscitation equipment.

e. Capability to transfer a patient immediately to an operating room in a hospital.

f. Supporting laboratory equipment and personnel, or immediate access to same, for preoperative and emergency laboratory determinations.

g. Special arrangements for patient emergency care including diagnostic and therapeutic contacts for postoperative follow-up on examination.

4. The APHA is concerned with the high prices charged for abortions in many areas and with the inadequate coverage of these services by Medicaid and private insurance carriers, and by the fact that in many places the burden of performing abortions appears to fall on a minority of physicians. The APHA feels that qualified physicians who do not have religious or philosophic objections to abortions are professionally obliged to make their services available at a reasonable cost.

5. The APHA is also concerned with the hostile and punitive attitudes toward women seeking abortion which are manifested by some members of the health professions and ancillary personnel. Women in need of abortion frequently have requirements for counseling, health education, tenderness, and understanding that are even greater than those of other patients.

6. At present, abortions should be performed by physicians or osteopaths who are licensed to practice in their state.

Abortions performed in hospitals should be carried out with adherence to the policies established by the chief of the hospital staff or his delegate.

7. Physicians doing abortions should have adequate training. Such training should be available to all physicians doing abortions. Abortion training should be a part of medical school education and residency training in obstetrics and gynecology and family practice.

8. New developments in the delivery of abortion services and techniques need to be explored in a way that is consonant with the same safeguards which govern all other research involving human subjects.

D. Reporting

1. Reporting of abortions performed is essential to planning for, providing, and improving abortion services. State health departments should assume the responsibility for collecting abortion reports, delegating the responsibility and authority to local health departments when appropriate. The collection of state data nationally is essential to national health planning by the federal government.

2. Confidentiality is essential to abortion reporting. Medical records must identify individuals, but reports to state and local health departments need not do so.

3. The following items are recommended for inclusion in an abortion reporting system:

   a. Date of abortion.

   b. Place of abortion (city and state).

   c. Type of facility (hospital, extramural clinic, doctor's office, other).

   d. Gestational age.

   e. Age of woman.

   f. Ethnic group.

   g. Technique of abortion.

   h. Type of care (inpatient, outpatient).

   i. Residence of woman.

   j. Number of prior pregnancies.

   k. Number of prior deliveries (20 weeks or more) (live birth + fetal deaths).

   l. Number of prior abortions (under 20 weeks)- spontaneous or induced.

   m. Marital status.

   n. Education (years of schooling).

ember 1970

Item No. 10

ABORTION

The AMA policy regarding abortion as determined by its House of Delegates, June 25, 1970 is:

> Whereas, Abortion, like any other medical procedure, should not be performed when contrary to the best interests of the patient since good medical practice requires due consideration for the patient's welfare and not mere acquiescence to the patient's demands; and
>
> Whereas, The standards of sound clinical judgment, which together with informed patient consent should be determinative according to the merits of each individual case; therefore be it
>
> *Resolved*, That abortion is a medical procedure and should be performed only by a duly licensed physician and surgeon in an accredited hospital after consultation with two other physicians chosen becuase of their professional competency, acting only in conformance with standards of good medical practice and within the Medical Practice Act of his State; and be it further
>
> *Resolved*, That no physician or other professional personnel shall be compelled to perform any act which violates his good medical judgment. Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles. In these circumstances good medical practice requires only that the physician or other professional personnel withdraw from the case so long as the withdrawal is consistent with good medical practice.

- -

The AMA's Judicial Council said:

> "The Judicial Council is charged with interpreting the Principles of Medical Ethics as adopted by the House of Delegates of the AMA.
>
> The Principles of Medical Ethics of the AMA do not prohibit a physician from performing an abortion that is performed in accordance with good medical practice and under circumstances that do not violate the laws of the community in which he practices.
>
> In the matter of abortions, as of any other medical procedure, the Judicial Council becomes involved whenever there is alleged violation of the Principles of Medical Ethics as established by the House of Delegates."

Item No. 11

TEXT OF THE CONSTITUTION OF THE WORLD HEALTH ORGANIZATION

THE STATES Parties to this Constitution declare, in conformity with the Charter of the United Nations, that the following principles are basic to the happiness, harmonious relations and security of all peoples :

Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.

The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States.

The achievement of any State in the promotion and protection of health is of value to all. Unequal development in different countries in the promotion of health and control of disease, especially communicable disease, is a common danger.

Healthy development of the child is of basic importance ; the ability to live harmoniously in a changing total environment is essential to such development.

The extension to all peoples of the benefits of medical, psychological and related knowledge is essential to the fullest attainment of health.

Informed opinion and active co-operation on the part of the public are of the utmost importance in the improvement of the health of the people.

Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures.

ACCEPTING THESE PRINCIPLES, and for the purpose of co-operation among themselves and with others to promote and protect the health of all peoples, the Contracting Parties agree to the present Constitution and hereby establish the World Health Organization as a specialized agency within the terms of Article 57 of the Charter of the United Nations.

Ilcm 12

NATIONAL ASSOCIATION FOR REPEAL OF ABORTION LAWS
250 WEST 57TH STREET
NEW YORK, N.Y. 10019

NATIONAL ORGANIZATIONS RECOMMENDING REPEAL OF ABORTION LAWS

merican Association of Planned Parenthood Physicians
merican Baptist Convention
merican Civil Liberties Union
merican College of Obstetricians & Gynecologists
mericans for Democratic Action
merican Ethical Union
merican Friends Service Committee
merican Humanist Association
merican Jewish Congress
merican Medical Women's Association
merican Protestant Hospital Association
merican Psychiatric Association
merican Psychoanalytic Association
merican Psychological Association
merican Public Health Association
ssociation for Voluntary Sterilization
hurch Women United, Board of Managers
itizen's Advisory Council on the Status of Women
lergy Consultation Service on Abortion
piscopal Churchwomen of the U. S. A.
ederation of American Scientists
roup for the Advancement of Psychiatry
zaak Walton League
Medical Committee for Human Rights
Moravian Church, Northern Province Synod
National Association for Repeal of Abortion Laws
National Committee for Children & Youth
National Council of Jewish Women
National Council of Obstetrics-Gynecology
National Council of Women of the United States
National Emergency Civil Liberties Committee
National Medical Association
National Organization for Women
Physicians Forum
Planned Parenthood-World Population
President's Task Force on the Mentally Handicapped
Student American Medical Association
Unitarian Universalist Association
Unitarian Universalist Women's Federation
United Automobile Workers Union
United Church of Christ, United Church Board for Homeland Ministries
United Methodist Church
United Presbyterian Church in the U. S. A., Board of Christian Education
Women's Division of the United Methodist Church
Women's Liberation
Young Women's Christian Association of the U. S.
Zero Population Growth, Inc.

In addition, organizations in each state have declared support for repeal. For example, th following joined the recent effort to repeal Hawaii's abortion law:

merican Association of University Women, Hawaii Chapter
merican Civil Liberties Union of Hawaii
ssociated Students of the University of Hawaii
hamber of Commerce of Hawaii
hamber of Commerce of Maui
hild and Family Service
lergy Counseling Service
ommission on Children and Youth
ommittee for Protection of Children
emocratic Action Group
epartment of Social Services
piscopal Diocese of Hawaii
awaii Council of Churches
awaii Government Employees Association
awaii Island Chamber of Commerce
awaii Medical Association
Hawaii Planned Parenthood
Hawaii Psychiatric Society
Hawaii Psychological Association
Hawaii Public Health Association
Hawaii State Federation of Labor, A.F.L.-C.I.O.
I. L. G. W. U., Local 142
John Howard Association
Kappa Delta Sorority Alumnae Association
Kilohana United Methodist Church
Mental Health Association of Hawaii
National Association of Social Workers, Hawaii Chapter
Salvation Army, Hawaiian Headquarters
Sierra Club of Hawaii
Unitarian Church
University Abortion & Birth Control Committee
Volunteers from VISTA
Zero Population Growth, Inc., Hawaii Chapter

II.

FEDERAL AND STATE COURT DECISIONS

p. 38

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

United States, Appellant, v. Milan Vuitch.	On Appeal From the United States District Court for the District of Columbia.

[April 21, 1971]

Mr. Justice Black delivered the opinion of the Court.*

Appellee Milan Vuitch, a licensed physician, was indicted in the United States District Court for the District of Columbia for producing and attempting to produce abortions in violation of 22 D. C. Code 201. Before trial, the district judge granted Vuitch's motion to dismiss the indictments on the ground that the District of Columbia abortion law was unconstitutionally vague. 305 F. Supp. 1032 (DCDC 1969). The United States appealed to this Court under the Criminal Appeals Act, 18 U. S. C. § 3731. We postponed decision on jurisdiction to the hearing on the merits, 397 U. S. 1061, and requested the parties to brief and argue specified questions on that issue. 399 U. S. 923. We hold that we have jurisdiction and that the statute is not unconstitutionally vague. We reverse.

I

The first question is whether we have jurisdiction under the Criminal Appeals Act to entertain this direct appeal from the United States District Court for the

*The Chief Justice, Mr. Justice Douglas, Mr. Justice Stewart, and Mr. Justice White join in Part I of this opinion. The Chief Justice, Mr. Justice Harlan, Mr. Justice White, and Mr. Justice Blackmun join in Part II of this opinion.

District of Columbia. That Act[1] gives us jurisdiction over direct appeals from district court judgments "in all criminal cases . . . dismissing any indictment where such decision is based upon the invalidity . . . of the statute upon which the indictment is founded." 18 U. S. C. § 3731. The decision appealed from is a dismissal of an indictment on the ground that the District of Columbia abortion law, on which the indictment was based, is unconstitutionally vague. This abortion statute, 22 D. C. Code 201, is an Act of Congress applicable only in the District of Columbia and we suggested that the parties argue whether a decision holding unconstitutional such a statute is appealable directly to this Court under the Criminal Appeals Act. The literal wording of the Act plainly includes this statute, even though it applies only to the District. A piece of legislation so limited is nevertheless a "statute" in the sense that it was duly enacted into law by both Houses of Congress and was signed by the President. And the Criminal Appeals Act contains no language that purports to limit or qualify the term "statute." On the contrary, the Act authorizes government appeals from district courts to the Supreme Court in *"all criminal cases"* where a district court judgment dismissing an indictment is based upon the invalidity of the statute on which the indictment is founded.

---

[1] The Act states in pertinent part:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision of judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded. . . ." 18 U. S. C. § 3731.

An examination of the legislative history of the Criminal Appeals Act and its amendments suggests no reason why we should depart from the Act's literal meaning and exclude D. C. statutes from its coverage. The committee reports and floor debates contain no discussion indicating that the term "statute" does not include statutes applicable only to the District of Columbia.[2] We therefore conclude that we have jurisdiction over this appeal under the Criminal Appeals Act.

Our Brother HARLAN has argued in dissent that we do not have jurisdiction over this direct appeal. He suggests that such a result is supported by the decision in *United States* v. *Burroughs*, 289 U. S. 159 (1933), the policy underlying the Criminal Appeals Act, and the canon of construction that statutes governing direct appeals to this Court should be strictly construed.

It is difficult to see how the *Burroughs* decision lends much force to his argument, since that case held only that the term "district court" in the Criminal Appeals Act did not include the then-existing Supreme Court of the District of Columbia. *Id.*, at 163–164. The dissent goes on to suggest the Act should be construed in light of the Congressional purpose of "avoiding inconsistent enforcement of criminal laws." *Post*, at 12. This purpose would not be served by our refusing to decide this case now after it has been orally argued. In the last several years, abortion laws have been repeatedly attacked as unconstitutionally vauge in both state and federal courts with widely varying results. A number of these cases are now pending on our docket. A refusal to accept jurisdiction here would only compound confusion for doctors,

[2] See H. Conf. Rep. No. 8113, 59th Cong., 2d Sess.; H. R. Rep. No. 2119, 59th Cong., 1st. Sess.; H. R. Rep. No. 45 and S. Rep. No. 868, 77th Cong., 1st. Sess.; H. Conf. Rep. No. 2052, 77th Cong., 2d Sess.

their patients, and law enforcement officials. As this case makes abundantly clear, a ruling on the validity of a statute applicable only to the District can contribute to great disparities and confusion in the enforcement of criminal laws. Finally, my Brother HARLAN'S dissent also appears to rely on the fact that this Court has never accepted jurisdiction over a direct appeal under the Criminal Appeals Act involving the validity of a District of Columbia statute. *Post*, at 13. Since this Court has never either accepted or rejected jurisdiction of such an appeal, it is difficult to see how the complete absence of precedent in this Court lends any weight whatever to his argument. Neither previous cases nor the purpose behind the Criminal Appeals Act provides any satisfactory reason why the term "statute" should not include those statutes applicable only in the District of Columbia.

One other procedural problem remains. We asked the parties to brief the question whether the Government could have appealed this case to the Court of Appeals for the District of Columbia under 23 D. C. Code 105, and, if so, whether we should refuse to entertain the appeal here as a matter of sound judicial administration. That D. C. Code provision states:

> "In all criminal prosecutions the United States . . . shall have the same right of appeal that is given to the defendant . . . ."

The relationship between the Criminal Appeals Act and this Code section was considered in *Carroll* v. *United States*, 354 U. S. 394, 411, where the Court concluded:

> "[C]riminal appeals by the Government in the District of Columbia are not limited to the categories set forth in 18 U. S. C. 3731 [the Criminal Appeals Act], although as to cases of the type covered by that special jurisdictional statute its explicit direc-

> tions will prevail over the general terms of [23 D. C. Code 105]."

Since we have concluded above that this appeal is covered by the Criminal Appeals Act, it would seem to follow from *Carroll* that the Act's provisions control and no appeal could have been taken to the Court of Appeals. Although *Carroll* seems to be dispositive, it has been suggested that it may now be limited by *United States* v. *Sweet*, 399 U. S. 517 (1970), which contains some language suggesting that the Government may be empowered to take an appeal to the Court of Appeals under 23 D. C. Code 105, even when a direct appeal would be proper here under the Criminal Appeals Act. *Id.*, at 518. We do not elaborate upon that suggestion. We only hold that once an appeal is properly here under the Criminal Appeals Act, we should not refuse to consider it because it might have been taken to another court.

II

We turn now to the merits. Appellee Milan Vuitch was indicted for producing and attempting to produce abortions in violation of 22 D. C. Code 201. That Act provides in part:

> "Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years; . . ."

Without waiting for trial, the District Judge dismissed the indictment on the ground that the abortion statute

was unconstitutionally vague. In his view, set out substantially in full below,[3] the statute was vague for two principal reasons:

1. The fact that once an abortion was proved a physician "is presumed guilty and remains so unless a jury

---

[3] The District Judge stated:

". . . It is suggested that these words [as necessary for the preservation of the mother's life or health] are not precise; that, as interpreted, they improperly limit the physician in carrying out his professional responsibilities; and that they interfere with a woman's right to avoid childbirth for any reason. The word "health" is not defined and in fact remains so vague in its interpretation and the practice under the act that there is no indication whether it includes varying degrees of mental as well as physical health. While the law generally has been careful not to interfere with medical judgment of competent physicians in treatment of individual patients, the physician in this instance is placed in a particularly unconscionable position under the conflicting and inadequate interpretations of the D. C. abortion statute now prevailing. The Court of Appeals established by such early cases as *Peckham* v. *United States*, 96 U. S. App. D. C. 312 (1955), *cert. denied*, 350 U. S. 912, and *Williams* v. *United States*, 78 U. S. App. D. C. 147 (1943), that upon the Government establishing that a physician committed an abortion, the burden shifted to the physician to justify his acts. In other words, he is presumed guilty and remains so unless a jury can be persuaded that his acts were necessary for the preservation of the woman's life or health. These holdings, which may well offend the Fifth Amendment of the Constitution, as interpreted in recent decisions such as *Leary* v. *United States*, 395 U. S. 89 Sup. Ct. 1532, 23 L. Ed. 2d 658 (1965), and *United States* v. *Gainey*, 380 U. S. 63, 85, Sup. Ct. 754, 13 L. Ed. 2d 658 (1965), also emphasize the lack of necessary precision in this criminal statute. The jury's acceptance or nonacceptance of an individual doctor's interpretation of the ambivalent and uncertain word 'health' should not determine whether he stands convicted of a felony, facing ten years' imprisonment. His professional judgment made in good faith should not be challenged. There is no clear standard to guide either the doctor, the jury or the Court. No body of medical knowledge delineates what degree of mental or physical health or combination of the two is required to make an abortion conducted by a competent physician legal or illegal under the Code. . . ." 305 F. Supp. 1032, at 1034.

can be persuaded that his acts were necessary for the preservation of the woman's life or health."

2. The presence of the "ambivalent and uncertain word 'health.'"

In concluding that the statute places the burden of persuasion on the defendant once the fact of an abortion has been proved,[4] the court relied on *Williams* v. *United States*, 138 F. 2d 81 (CADC 1943). There the Court of Appeals for the District of Columbia held that the prosecution was not required to prove as part of its case in chief that the operation was not necessary to preserve life or health. *Id.*, at 81, 83. The court indicated that once the prosecution established that an abortion had been performed the defendant was required "to come forward with evidence which with or without other evidence is sufficient to create reasonable doubt of guilt." *Id.*, at 84. The District Court here appears to have read *Williams* as holding that once an abortion is proved, the burden of persuading the jury that it was legal (*i. e.*, necessary to the preservation of the mother's life or health) is cast upon the physician. Whether or not this is a correct reading of *Williams*, we believe it is an erroneous interpretation of the statute. Certainly a statute that outlawed only a limited category of abortions but "presumed" guilt whenever the mere fact of abortion was established, would at the very least present serious constitutional problems under this Court's previous decision interpreting the Fifth Amendment. *Tot* v. *United States*, 319 U. S. 463 (1943); *Leary* v. *United States*, 395 U. S. 6, 36 (1969). But of course statutes should be construed whenever possible so as to uphold their constitutionality.

---

[4] The trial court also cited *Peckham* v. *United States*, 226 F. 2d 34 (CADC 1955), as dealing with the D. C. abortion law. However, the opinion in that case does not discuss the burden of proof under the statute.

The statute does not outlaw all abortions, but only those which are not performed under the direction of a competent, licensed physician, and those not necessary to preserve the mother's life or health. It is a general guide to the interpretation of criminal statutes that when an exception is incorporated in the enacting clause of a statute, the burden is on the prosecution to plead and prove that the defendant is not within the exception. When Congress passed the District of Columbia abortion law in 1901 and amended it in 1953, it expressly authorized physicians to perform such abortions as are necessary to preserve the mother's "life or health." Because abortions were authorized only in more restrictive circumstances under previous D. C. law, the change must represent a judgment by Congress that it is desirable that women be able to obtain abortions needed for the preservation of their lives or health.[8] It would be highly anomalous for a legislature to authorize abortions necessary for life or health and then to demand that a doctor, upon pain of one to ten years' imprisonment, bear the burden of proving that an abortion he performed fell within that category. Placing such a burden of proof on a doctor would be peculiarly inconsistent with society's notions of the responsibilities of the medical profession. Generally, doctors are encouraged by society's expectations, by the strictures of malpractice law and by their own professional standards to give their patients such treatment as is necessary to preserve their health. We are unable to believe that Congress intended that a physician be required to prove his innocence. We therefore hold that under 22 D. C. Code 201, the burden is on

[8] Before 1901 the existing statute allowed abortion only "for the purpose of preserving the life of any woman pregnant . . . ." Abert, The Compiled Statutes in Force in the District of Columbia, c. XVI, pp. 158–159 (1894).

the prosecution to plead and prove than an abortion was not "necessary for the preservation of the mother's life or health."

There remains the contention that the word "health" is so imprecise and has so uncertain a meaning that it fails to inform a defendant of the charge against him and therefore the statute offends the Due Process Clause of the Constitution. See, *e. g.*, *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939). We hold that it does not. The trial court apparently felt that the term was vague because there "is no indication whether it includes varying degrees of mental as well as physical health." 305 F. Supp. 1032, at 1034. It is true that the legislative history of the statute gives no guidance as to whether "health" refers to both a patient's mental and physical state. The term "health" was introduced into the law in 1901 when the statute was enacted in substantially its present form. The House Report [6] on the bill contains no discussion of the term "health" and there was no Senate report. Nor have we found any District of Columbia cases prior to this district court decision that shed any light on the question. Since that decision, however, the issue has been considered in *Doe* v. *General Hospital of the District of Columbia*, 313 F. Supp. 1170 (DCDC 1970). There District Judge Waddy construed the statute to permit abortions "for mental health reasons whether or not the patients had a previous history of mental defects." *Id.*, at 1174–1175. The same construction was followed by the United States Court of Appeals for the District of Columbia in further proceedings in the same case. *Doe* v. *General Hospital of the District of Columbia*, 434 F. 2d 423; 434 F. 2d 427 (CADC 1970). We see no reason why this interpretation of the statute should not

[6] H. R. Rep. No. 1017, 56th Cong., 1st Sess.

be followed. Certainly this construction accords with the general usage and modern understanding of the word "health," which includes phychological as well as physical well-being. Indeed Webster's Dictionary, in accord with that common usage, properly defines health as "the state of being sound in body or mind." Viewed in this light, the term "health" presents no problem of vagueness. Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered.[7]

We therefore hold that properly construed the District of Columbia abortion law is not unconstitutionally vague, and that the trial court erred in dismissing the indictments on that ground. Appellee has suggested that there are other reasons why the dismissal of the indictment should be affirmed. Essentially, these arguments are based on this Court's decision in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965). Although there was some reference to these arguments in the opinion of the court below, we read it as holding simply that the statute was void for vagueness because it failed in that court's language to "give that certainty which due process of law considers essential in a criminal statute." 305 F. Supp. 1032, at 1034. Since that question of vagueness was the only issue passed upon by the District Court it is the

[7] Our Brother DOUGLAS appears to fear that juries might convict doctors in any abortion case simply because some jurors believe all abortions are evil. Of course such a danger exists in all criminal cases, not merely those involving abortions. But there are well-established methods defendants may use to protect themselves against such jury prejudice: continuances, changes of venue, challenges to prospective jurors on *voir dire*, and motions to set aside verdicts which may have been produced by prejudice. And of course a court should always set aside a jury verdict of guilt when there is not evidence from which a jury could find a defendant guilty beyond a reasonable doubt.

only issue we reach here. *United States* v. *Borden Co.*, 308 U. S. 188 (1939); *United States* v. *Petrillo*, 332 U. S. 1 (1947); *United States* v. *Blue*, 384 U. S. 251, 256 (1966).

The judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

United States, Appellant, v. Milan Vuitch.	On Appeal From the United States District Court for The District of Columbia.

[April 21, 1971]

Mr. Justice White, concurring.

I join the Court's opinion and judgment. As to the facial vagueness argument, I have these few additional words. This case comes to us unilluminated by facts or record. The District Court's holding that the District of Columbia statute is unconstitutionally vague on its face because it proscribes all abortions except those necessary for the preservation of the mother's life or health was a judgment that the average person could not understand which abortions were permitted and which were prohibited. But surely the statute puts everyone on adequate notice that the health of the mother, whatever that phrase means, was the governing standard. It should also be absolutely clear that a doctor is not free to perform abortions on request without considering whether the patient's health required it. No one of average intelligence could believe that under this statute abortions not dictated by health considerations are legal. Thus even if the "health" standard were unconstitutionally vague, which I agree is not the case, the statute is not void on its face since it reaches a class of cases in which the meaning of "health" is irrelevant and no possible vagueness problem could arise. We do not, of course, know whether this is one of those cases. Until we do facial vagueness claims must fail. Cf. *United States* v. *National Dairy Corp.*, 372 U. S. 29 (1963).

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

United States, Appellant, v. Milan Vuitch.	On Appeal From the United States District Court for the District of Columbia.

[April 21, 1971]

Mr. Justice Douglas, dissenting in part.

While I agree with Part I of the Court's opinion that we have jurisdiction over this appeal, I do not think the statute meets the requirements of procedural due process.

The District of Columbia Code makes it a felony for a physcian to perform an abortion "unless the same were done as necessary for the preservation of the mother's life or health." 22 D. C. Code 201.

I agree with the Court that a physician—within the limits of his own expertise—would be able to say that an abortion at a particular time performed on a designated patient would or would not be necessary for the "preservation" of her "life or health." That judgment, however, is highly subjective, dependent on the training and insight of the particular physician and his standard as to what is "necessary" for the "preservation" of the mother's "life or health."

The answers may well differ, physician to physician. Those trained in conventional obstetrics may have one answer; those with deeper psychiatric insight may have another. Each answer is clear to the particular physician. If we could read the Act as making that determination conclusive, not subject to review by judge and by jury, the case would be simple, as Mr. Justice Stewart points out. But that does such violence to the statutory

scheme that I believe it is beyond the range of judicial interpretation so to read the Act. If it is to be revised in that manner, Congress should do it.

Hence I read the Act, as did the District Court, as requiring submission to court and jury of the physician's decision. What will the jury say? The prejudices of jurors are customarily taken care of by challenges for cause and by preemptory challenges. But vagueness of criminal statutes introduces another element that is uncontrollable. Are the concepts so vague that possible offenders have no safe guidelines for their own action? Are the concepts so vague that jurors can give them a gloss and meaning drawn from their own predilections and prejudices? Is the statutory standard so easy to manipulate that although physicians can make good-faith decisions based on the standard, juries can nonetheless make felons out of them?

The Court said in *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453, that a ". . . statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process."

A three-judge court in evaluating a Texas statutory standard as to whether an abortion was attempted "for the purpose of saving the life of the mother" said:

> "How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How *imminent* must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years?" *Roe* v. *Wade*, 314 F. Supp. 1217, 1223.

The *Roe* case was followed by a three-judge court in *Doe* v. *Scott*, — F. Supp. —, which struck down an Illinois statute which sanctioned an abortion "necessary for the preservation of a woman's life." And see *People* v. *Belous*, 71 Cal. 2d 954, 458 Pac. 2d 194.

A doctor may well remove an appendix far in advance of rupture in order to prevent a risk that may never materialize. May he do the same under this abortion statute?

May he perform abortions on unmarried woman who want to avoid the "stigma" of having an illegitimate child? Is bearing a "stigma" a "health" factor? Only in isolated cases? Or is it such whenever the woman is unmarried?

Is any unwanted pregnancy a "health" factor because it is a source of anxiety?

Is an abortion "necessary" in the statutory sense if the doctor thought that an additional child in a family would unduly tax the mother's physical well-being by reason of the additional work which would be forced upon her?

Would a doctor be violating the law if he performed an abortion because the added expense of another child in the family would drain its resources, leaving an anxious mother with an insufficient budget to buy nutritious food?

Is the fate of an unwanted child or the plight of the family into which it is born relevant to the factor of the mother's "health?"

Mr. Justice Holmes, in holding that "unreasonable" restraint of trade was an adequate constitutional standard of criminality, said in *Nash* v. *United States*, 229 U. S. 373, 377, that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he

incur a fine or a short imprisonment, as here; he may incur the penalty of death."

He wrote in a context of economic regulations which are restrained by few, if any, constitutional guarantees.

Where, however, constitutional guarantees are implicated, the standards of certainty are more exacting.

Winters v. *New York*, 333 U. S. 507, 514, 519, held void-for-vagueness a state statute which as construed made it a crime to print stories of crime "so massed as to incite to crime," since such a regulatory scheme trenched on First Amendment rights of the press.

The standard of "sacrilegious" can be used in such accordion-like way as to infringe on religious rights protected by the First Amendment. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 505.

The requirement of a "narrowly drawn" statute when the regulation touches a protected constitutional right (*Cantwell* v. *Connecticut*, 310 U. S. 296, 311; *Thornhill* v. *Alabama*, 310 U. S. 88, 100) is only another facet of the void-for-vagueness problem.

What the Court held in *Herndon* v. *Lowry*, 301 U. S. 242, is extremely relevant here. The ban of publications made to incite insurrection was held to suffer the vice of vagueness:

> "The statute, as construed and applied in the appellant's trial, does not furnish a sufficiently ascertainable standard of guilt. . . . Every person who attacks existing conditions, who agitates for a change in the form of government, must take the risk that if a jury should be of opinion he ought to have foreseen that his utterances might contribute in any measure to some future forcible resistance to the existing government he may be convicted of the offense of inciting insurrection. . . . *The law, as*

> *thus construed, licenses the jury to create its own standard in each case." Id.*, 261, 262, 263. (Italics added.)

If these requirements of certainty are not imposed then the triers of fact have "a power to invade imperceptibly (and thus unreviewably) a realm of constitutionally protected personal liberties." Amsterdam, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 104 (1960).

Abortion touches intimate affairs of the family, of marriage, of sex, which in *Griswold* v. *Connecticut*, 381 U. S. 479, we held to involve rights associated with several express constitutional rights and which are summed up in "the right of privacy." They include the right to procreate (*Skinner* v. *Oklahoma*, 316 U. S. 535), the right to marry across the color line (*Loving* v. *Virginia*, 388 U. S. 1), the intimate familial relations between children and parents (*Meyer* v. *Nebraska*, 262 U. S. 390; *Levy* v. *Louisiana*, 391 U. S. 68, 71–72). There is a compelling personal interest in marital privacy and in the limitation of family size. And on the other side is the belief of many that the fetus, once formed, is a member of the human family and that mere personal inconvenience cannot justify his destruction. This is not to say that government is powerless to legislate on abortions. Yet the laws enacted must not trench on constitutional guarantees which they can easily do unless closely confined.

Abortion statutes deal with conduct which is heavily weighted with religious teachings and ethical concepts.[1]

[1] "There remains the moral issue of abortion as murder. We submit that this is insoluble, a matter of religious philosophy and religious principle and not a matter of fact. We suggest that those who believe abortion is murder need not avail themselves of it. On the other hand, we do not believe that such conviction should limit

POOR COPY

Mr. Justice Jackson once spoke of the "treacherous grounds we tread when we undertake to translate ethical concepts into legal ones, case by case." *Jordan* v. *De George*, 341 U. S. 223, 242 (dissenting). The difficulty and danger are compounded when religion adds another layer of prejudice.[2] The end result is that juries condemn what they personally disapprove.

The subject of abortions—like cases involving obscenity[3]—is one of the most inflammatory ones to reach

---

the freedom of those not bound by identical religious conviction. Although the moral issue hangs like a threatening cloud over any open discussion of abortion, the moral issuses are not all one-sided. The psychoanalyst Erik Erikson stated the other side well when he suggested that 'The most deadly of all possible sins is the mutilation of a child's spirit.' There can be nothing more destructive to a child's spirit than being unwanted, and there are few things more disruptive to a woman's spirit than being forced without love or need into motherhood." VII The Right to Abortion: A Psychiatric View, pp. 218–219 (Group for the Advancement of Psychiatry, 1969).

[2] Mr. Justice Clark recently wrote: "Throughout history religious belief has wielded a vital influence on society's attitude regarding abortion. The religious issues involved are perhaps the most frequently debated aspects of abortion. At the center of the ecclesiastical debate is the concept of 'ensoulment' or 'person-hood,' *i. e.*, the time at which the fetus becomes a human organism. The Reverend Joseph F. Donceel of Fordham University admitted that no one can determine with certainty the exact moment at which 'ensoulment' occurs, but we must deal with the moral problems of aborting a fetus even if it has not taken place. Many Roman Catholics believe that the soul is a gift of God given at conception. This leads to the conclusion that aborting a pregnancy at any time amounts to the taking of a human life and is therefore against the will of God. Others, including some Catholics, believe that abortion should be legal until the baby is viable, *i. e.*, able to support itself outside the womb. In balancing the evils, the latter conclude that the evil of destroying the fetus is outweighed by the social evils accompanying forced pregnancy and childbirth." Religion, Morality and Abortion: A Constitutional Appraisal, 2 Loy. L. Rev. 1, 4 (1969).

[3] I have expressed my views on the vagueness of criminal laws governing obscenity in *Dyson* v. *Stein*, decided February 23, 1971

BLEED THROUGH

the Court. People instantly take sides and the public, from whom juries are drawn, makes up its mind one way or the other before the case is even argued. The interests of the mother and the fetus are opposed. On which side should the State throw its weight? The issue is volatile; and it is resolved by the moral code which an individual has. That means that jurors may give it such meaning as they choose, while physicians are left to operate outside the law. Unless the statutory code of conduct is stable and in very narrow bounds, juries have a wide range and physicians have no reliable guideposts. The words "necessary for the preservation of the mother's life or health" become free-wheeling concepts, too easily taking on meaning from the juror's predilections or religious prejudices.

I would affirm the dismissal of this indictment and leave to the experts the drafting of abortion laws [4] that protect good-faith medical practitioners from the treacheries of the present law.

(dissenting opinion). And see the dissent of MR. JUSTICE BLACK in *Ginzburg* v. *United States*, 383 U. S. 463, 477.

[4] Clark, *supra* n. 2, at 10–11.

Cf. New York's new abortion law effective July 1, 1970, 39 McKinney's Consol. L. § 125.05:

"An abortional action is justifiable when committed upon a female with her consent by a duly licensed physician (a) under a reasonable belief that such is necessary to preserve her life, or, (b) within twenty-four weeks from the commencement of her pregnancy. A pregnant female's commission of an abortional act upon herself is justifiable when she acts upon the advice of a duly licensed physician (1) that such act is necessary to preserve her life, or, (2) within twenty-four weeks from the commencement of her pregnancy. The submission by a female to an abortional act is justifiable when she believes that it is being committed by a duly licensed physician, acting under a reasonable belief that such act is necessary to preserve her life, or, within twenty-four weeks from the commencement of her pregnancy." And see Hall, The Truth About Abortion in New York, Columbia Forum, Winter 1970, p. 18; Schwartz, The Abortion Laws, 67 Ohio St. Med. J. 33 (1971).

POOR COPY

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

United States, Appellant, *v.* Milan Vuitch.	On Appeal From the United States District Court for the District of Columbia.

[April 21, 1971]

Mr. Justice Harlan, with whom Mr. Justice Brennan, Mr. Justice Marshall, and Mr. Justice Blackmun join, dissenting as to jurisdiction.

Appellee Vuitch was indicted in the United States District Court for the District of Columbia for violations of 22 D. C. Code 201, the District of Columbia abortion statute. This statute is applicable only within the District of Columbia. On pretrial motion by Vuitch, the indictments were dismissed on the ground that the abortion statute was unconstitutionally vague. The United States appealed directly to this Court under the terms of the Criminal Appeals Act of 1907, 18 U. S. C. § 3731, relying on the provision allowing direct appeal "[f]rom a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded." [1] It is not contested that, but for this provision of the Criminal Appeals Act, the Government would have a right of appeal to the Court of

[1] The text of 18 U. S. C. § 3731 was as follows:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based

BLEED THROUGH

Appeals for the District of Columbia under 23 D. C. Code 105, which provides:

> "In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall

---

upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

"From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

"The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

"Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.

"If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

"If an appeal shall be taken pursuant to this section to any court of appeals which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court."

As noted in *United States* v. *Weller*, No. 77, October Term 1970 (decided Feb. 24, 1971), these provisions were amended by § 14 (a) of the Omnibus Crime Control Act of 1970, 84 Stat. 1890 (1971). But cases begun in the District Court before the new statute took effect are not affected. See *United States* v. *Weller*, *supra*, at n. 1.

POOR COPY

> have the same right of appeal that is given to the defendant, including the right to a bill of exceptions: *Provided,* That if on such appeal it shall be found that there was error in the rulings of the court during a trial, a verdict in favor of the defendant shall not be set aside."

The Court today—relying on the generic reference to "statutes" and "all criminal cases" in the text of 18 U. S. C. § 3731 and the absence of an express exclusion of statutes applicable only within the District of Columbia—concludes that 18 U. S. C. § 3731 rather than 23 D. C. Code 105 provides the proper appellate route for this case. I must disagree.

I

The historical development of the Government's right to appeal in criminal cases both in the District of Columbia and throughout the Nation is surveyed in *Carroll* v. *United States,* 354 U. S. 394 (1957). Section 105 of the D. C. Code was passed in 1901 as § 935 of the Code of 1901. 31 Stat. 1341. Prior to the Criminal Appeals Act of 1907, the Government had no right of appeal in criminal cases outside of the District of Columbia. To remedy this situation, a bill was introduced in the House of Representatives. That bill practically tracked the language of the D. C. statute, and made no provision for direct appeal to this Court. 40 Cong. Rec. 5408. The accompanying House Report described the bill as follows: "The accompanying bill will extend [§ 935] of the code of the District of Columbia to all districts in the United States." H. R. Rep. No. 2119, 59th Cong., 1st Sess., at 2 (1906). That bill passed the House, but the Senate Committee on the Judiciary rejected the House approach of simply extending the provisions of the D. C. appeals statute to the rest of the Nation; the Senate Committee instead substituted a more narrowly drawn measure

BLEED THROUGH

which enumerated specific substantive categories of criminal cases to be appealable by the Government and allocated jurisdiction over these appeals between the Supreme Court and the then Circuit Courts of Appeals according to the allocation of appellate jurisdiction for civil cases established in the Circuit Court of Appeals Act of 1891. S. Rep. No. 3922, 59th Cong., 1st Sess. (1906). See *Carroll* v. *United States*, *supra*, at 402 n. 11. Even that bill as narrowed could not pass the Senate; it provoked extended debate in which the opponents of the measure focused on the potential for abuse of individual rights arising from repeated court proceedings, delays in appeals, and restraints on personal freedom while the Government prosecuted its appeal. See generally *United States* v. *Sisson*, 399 U. S. 267 (1970). The upshot of these debates was that Senator Nelson, the bill's floor manager in the Senate, agreed to accept a variety of amendments which further narrowed the categories of cases appealable by the Government and made special provision for the defendant's release on his own recognizance. See 41 Cong. Rec. 2818–2825.[2]

It is at this point that Senator Clarke of Arkansas offered an amendment limiting the Government's right to appeal decisions dismissing indictments or arresting judgments for insufficiency of the indictment to instances where the decision was based upon "the validity or construction of the statute." The purpose of that amendment was described by Senator Clarke as follows:

> "Mr. President, the object of the amendment is to limit the right of appeal upon the part of the General Government to the validity or constitutionality of the statute in which the prosecution is proceeding. It has been enlarged by the addition of another

[2] The bill had been amended earlier to require the Government to take an appeal within 30 days. 41 Cong. Rec. 2193–2194.

POOR COPY

clause, which gives the right of appeal where the construction by the trial court is such as to decide that there is no offense committed, notwithstanding the validity of the statute, and in other respects the proceeding may remain intact. I think that is a broad enough right to concede to the General Government in the prosecution of persons in the court.

. . . . . .

"In view of the defects that recent years have disclosed, I do not believe it to be sound policy to go beyond the necessities as they have developed defects in our procedure. A case recently occurring has drawn attention to the fact that if a circuit judge or a district judge holding the circuit should determine that a statute of Congress was invalid, the United States is without means of having that matter submitted to a tribunal that under the Constitution has power to settle that question. I do not believe the remedy ought to be any wider than the mischief that has been disclosed. I do not believe that any additional advantages ought to be given to the General Government in the prosecution of persons arraigned in court, but I do believe the paragraph ought to be perfected in that behalf, so as to provide that there shall be an appeal to the court having authority to give uniformity to the practice which shall prevail in all the courts of the United States, and that they shall be ready to say, and say promptly, what the statute means and whether or not it is a valid statute.

. . . . . .

"So I think this amendment gives expression to the proposition that the remedy we provide here now should be no wider than the defect that has been disclosed in the preceding criminal procedure; and that is that whenever the validity of a statute has

been adversely decided by a trial court, wherever its unconstitutionality has been pronounced by a trial court, the Government ought to have the right to promptly submit that to the tribunal having authority to dispose of such questions in order that there may be a uniform enforcement of the law throughout the entire limits of the United States.

"This is the purpose, I have, Mr. President, and having discussed it with the distinguished Senator from Wisconsin . . . and the distinguished Senator from Minnesota [Mr. Nelson], we agreed that that would probably meet the defect." 41 Cong. Rec. 2819–2820. See generally 41 Cong. Rec. 2819–2822.

The bill as thus amended passed the Senate; the House disagreed to the Senate amendment, but yielded in conference. The bill in conference was amended to provide for direct appeals to the Supreme Court. See H. R. Conf. Rep. No. 8113, 59th Cong., 2d Sess. (1970). No explanation was given in the conference report for the exclusive direct appeal route.

I draw from these legislative materials the following relevant propositons: (1) The Congress was definitely advertent to the existence of a governmental appeal right in criminal cases within the District; (2) the Congress explicitly rejected the simple approach of extending the D. C. provision to the Nation; (3) the particular provision of the Act relied on by the Government as supporting its direct appeal in this case was amended with a view to limiting its reach to a relatively precise defect; *i. e.*, the debilitating effect on the enforcement of criminal laws arising from conflicting judicial intepretations; and (4) the substitution of an exclusive direct appeal to this Court, while not expressly explained, is perfectly compatible with the goal of promptly achieving uniformity in construction of statutes applicable nationwide, while at the same time being wholly unnecessary to the resolu-

POOR COPY

tion of conflicting district court constructions of local D. C. statutes, given the existence of a right of appeal to the Court of Appeals for the District of Columbia.

II

The question of overlap between the appellate routes available to the Government in criminal cases under the D. C. Code and 18 U. S. C. § 3731 was first dealt with by this Court in *United States* v. *Burroughs*, 289 U. S. 159 (1933). In *Burroughs* the defendants were indicted in the then Supreme Court of the District of Columbia for violation of the Federal Corrupt Practices Act, a statute of nationwide applicability. They successfully demurred on two grounds: one involving the construction of the statute, and the other involving the sufficiency of the indictment as a pleading. The Government took an appeal to the Court of Appeals for the District of Columbia under the D. C. appeals statute. The appellate court certified to this Court the question whether it had jurisdiction over an appeal where a § 3731-type challenge was joined with a challenge to the sufficiency of the indictment as a pleading. The Court disposed of the question by holding that the Criminal Appeals Act is inapplicable to any criminal case appealable under the provision of the D. C. Code:

> "*The Criminal Appeals Act, in naming the courts from which appeals may be taken to this court, employs the phrase 'district courts;' not 'courts of the United States,' or 'courts exercising the same jurisdiction as district courts.' We need not, however, determine whether the statute should be construed to embrace criminal cases tried in the Supreme Court of the District if § 935 of the District Code were not in effect.* That section deals comprehensively with appeals in criminal cases from all

of the courts of first instance of the District and confers on the Court of Appeals jurisdiction of appeals by the Government seeking review of the judgments of those courts. The Criminal Appeals Act, on the other hand, affects only certain specified classes of decisions in district courts, contains no repealing clause, and no reference to the courts of the District of Columbia or the territorial courts, upon many of which jurisdiction is conferred by language quite similar to that of the Code of Law of the District. We cannot construe it as impliedly repealing the complete appellate system created for the District of Columbia by § 935 of the Code, in the absence of expression on the part of Congress indicating that purpose. Implied repeals are not favored; and if effect can reasonably be given to both statutes, the presumption is that the earlier is intended to remain in force . . . ." 289 U. S., at 163–164.[3]

The holding in *Burroughs* established a complete separation of the two statutory schemes for Government appeals in criminal cases; the essence of the Court's rationale was a presumption against implied repeals.

In 1942, Congress amended the Criminal Appeals Act to provide for Government appeals to the Courts of Appeals from all decisions dismissing indictments or arresting judgments of convictions except where a right of direct appeal to this Court exists. 56 Stat. 271. The

[3] The Court's opinion characterizes *Burroughs* as having "held only that the term 'district court' in the Criminal Appeals Act did not include the then-existing Supreme Court of the District of Columbia." *Ante*, at [3]. As I read the italicized portion of the above-quoted passage, that is the precise question that the *Burroughs* Court concluded it did *not* have to decide, in light of its holding that the Criminal Appeals Act could not, by implication, effect the repeal of § 935 of the District Code.

new amendment expressly included the United States Court of Appeals for the District of Columbia as one of the intermediate appellate tribunals to which the Government could appeal;[4] in addition, the Act added a new provision to the Judicial Code establishing appellate jurisdiction in the then circuit courts of appeal "in criminal cases on appeals taken by the United States in cases where such appeals are permitted by law." 56 Stat. 272. The latter provision also expressly incorporated the United States Court of Appeals for the District of Columbia.[5] *Ibid.*

The legislative history of the 1942 amendment offers no explication of Congressional intent in including the D. C. courts within the Act.[6] It is certain that this amendment generates some form of overlap between the two statutory schemes for Governmental appeals in criminal cases. In *Carroll* v. *United States*, 354 U. S. 394, 411 (1957), the Court recognized the new situation created by the 1942 amendment:

> "It may be concluded, then, that even today criminal appeals by the Government in the District of Columbia are not limited to the categories set forth in 18 U. S. C. § 3731, although as to cases of the type covered by that special jurisdictional statute, its explicit directions will prevail over the general terms of [the D. C. statute] . . . ."

---

[4] These explicit references were subsequently omitted by amendment in 1949, 63 Stat. 97, which altered the language of the statute to conform to the changed nomenclature of the federal courts.

[5] This last provision was an amendment to 28 U. S. C. § 225 (1940 ed.); see 56 Stat. 272 and *Carroll* v. *United States*, *supra*, at n. 5.

[6] The focus was on the decision to accord the Government a right of appeal to the courts of appeal where no direct appeal to this Court lay. See H. R. No. 45, 77th Cong., 1st Sess. (1941); S. Rep. No. 868, 77th Cong., 1st Sess. (1941).

That, however, leaves open the question which cases come within the categories set forth in 18 U. S. C. § 3731.

III

After this Court's holding in *Burroughs*, it was clear that if Congress wished to effectuate any displacement of the pre-1907 route for Government appeals of criminal cases within the District of Columbia, some express manifestation of its intent was required. The 1942 amendment followed the *Burroughs* decision. Since Congress then acted to create some overlap between the two statutes without further limiting the categories of directly appealable criminal cases, it may be argued that we should presume Congress intended, as of 1942, to embrace within the very special appeals procedures of 18 U. S. C. § 3731 criminal cases based upon statutes applicable only within the District.

But that presumption from a completely silent legislative record flies in the face of the principle that statutes creating a right of direct appeal to this Court should be narrowly construed. Cf. *Swift & Co.* v. *Wickham*, 382 U. S. 111, 128–129 (1965); *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73, 92–93 (Frankfurter, J., dissenting). And, in light of the legislative history of the 1907 Act and this Court's explicit holding in *Burroughs* that the 1907 Act had no impact on cases appealable under the D. C. provision, it is especially inappropriate to rely on the absence of any further limiting language in the 1942 amendment as a justification for reading the term "statute" as encompassing criminal prosecutions in the District based on local as well as nationwide statutes.

The legislative history of the 1907 Act suggests a perfectly plausible reason for interpreting the language "based upon the invalidity or construction of the statute" as excluding D. C. statutes: that language was put in the Act by Senator Clarke with the express intention of

limiting the Act's goal to remedying the precise defect of inconsistent enforcement of criminal statutes arising from the lack of a Government appeal. The Court of Appeals for the District of Columbia constitutes a perfectly adequate appellate tribunal for resolving conflicting interpretations given local statutes by judges within the District of Columbia.[7] Where, however, the Government brings a prosecution in the District of Columbia based on a statute of nationwide applicability, the Court of Appeals for the District of Columbia cannot achieve uniformity in the enforcement of the statute.

As an original proposition, then, a construction of the relevant provisions of the 1907 Act as excluding criminal cases in the District brought under local statutes but including cases brought under nationwide statutes would have been consistent both with the express purpose of Senator Clarke's amendment and the canon of strict construction as applied to direct appeals statutes.[8] But the

[7] The Government suggests a construction of the Criminal Appeals Act excluding D. C. statutes would require the Court to exclude other criminal statutes of only limited territorial application, *e. g.*, 18 U. S. C. §§ 1111–1112; (punishing homicide "[w]ithin the special maritime and territorial jurisdiction of the United States"); 18 U. S. C. §§ 1151–1165 regulating offenses within Indian territory). See Gov. Brief, at 15–16. But I would not construe 18 U. S. C. § 3731 as excluding D. C. criminal cases punishable under D. C. statutes because they are of limited territorial application; rather, the point is that given the existence of a prior right of Government appeal, the risks of disuniformity which Senator Clarke described the statute as intended to cure do not exist.

[8] The Government suggests, in its Supplemental Memorandum for the United States, at 6–7, that a construction of the 1907 Act excluding statutes applicable only within the District of Columbia from the scope of the first two provisions leads to the "anomalous consequence" that 18 U. S. C. § 3731 would still allow a direct appeal in a D. C. case where the motion-in-bar provision is concerned. *E. g., United States* v. *Sweet*, 399 U. S. 517 (1970). The alleged "anomaly" would seem to argue for the conclusion that D. C. cases

Court in *Burroughs* took the position that Congress could not displace the pre-existing appellate route to any extent without indicating an express intent to do so; *Burroughs*, significantly, involved a prosecution under a statute of nationwide applicability. Subsequently, Congress did expressly indicate an intent to displace the alternative appellate route available within the District. The extent of that displacement, I think, should now be measured by the express goal of the relevant provision of the 1907 Act, as limited by Senator Clarke: avoidance of inconsistent enforcement of criminal laws. That theory of legislative purpose—combined with the *Burroughs* holding that Congress should be required to affirmatively indicate an intent to displace the prior appellate route—yields an interpretation of the 1907 Act as amended in 1942 which is consistent with the canon of strict construction generally applied to direct appeals statutes.[9]

---

involving the motion-in-bar provision are not directly appealable here, either. Certainly, the Court's disposition in *Sweet* would not foreclose that result.

In any event, the purpose Senator Clarke had in mind in offering his limiting amendment with regard to the first two provisions of 18 U. S. C. § 3731 was rather clearly expressed; that he failed to address himself to the motion-in-bar provision—which, after all, received very little attention in the prolonged debates on the floor of the Senate—hardly justifies an expansive reading of the other provisions of the Act.

[9] The Government relies principally on *Shapiro* v. *Thompson*, 394 U. S. 618, 625 n. 4, as supporting its construction of the generic reference to "statutes" in 18 U. S. C. § 3731 to include statutes applicable only within the District of Columbia. *Shapiro* dealt with 28 U. S. C. § 2282, which requires a three-judge court to hear requests for injunctions against the enforcement of "any Act of Congress" when the ground for the requested relief is the alleged unconstitutionality of the Act. Decisions of such three-judge courts are, under the circumstances set forth in 28 U. S. C. § 1253, directly appealable to this Court. In *Shapiro*, the Court noted at least one prior instance where the Court had taken jurisdiction over

IV

I have little doubt that, had the Criminal Appeals Act not been recently amended to dispense with direct appeals to this Court, see n. 1 *supra*, the interpretation of the Act I have suggested would be adopted by the Court. This Court has never taken jurisdiction over a direct appeal from a dismissal of a prosecution brought in the

---

a case involving a statute applicable only within the District and then stated: "Section 2282 requires a three-judge court to hear a challenge to the constitutionality of '*any* Act of Congress.' We see no reason to make an exception for Acts of Congress pertaining to the District of Columbia." 394 U. S., at 625 n. 4 (emphasis in original).

The *Shapiro* approach is obviously inappropriate for the present problem. First, despite the Government's assertion to the contrary, see Gov. Brief, at 15, the phrase "*any* Act of Congress" is arguably broader than a generic reference to "statutes." Indeed, the *Shapiro* Court explicitly chose to emphasize the presence of the word "any" in the relevant portion of that statute. Second, while an exercise of jurisdiction in a case where jurisdiction is not challenged is of little precedential value, the Court in *Shapiro* still chose to take note of such a prior case; in the present context, this Court has never taken jurisdiction of a § 3731 appeal involving a statute applicable only within the District.

Third, and most importantly, Congress at the time of the three-judge court Acts altered the principles of both original and appellate jurisdiction for the substantive categories of litigation involved; the new procedural routes reflect crucial considerations of comity between sovereigns and among the branches of the Federal Government. See generally Currie, The Three-Judge Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1 (1964). There is no legislative history supporting the notion that the new procedures were narrowed to alleviate particular defects of inconsistent constitutional interpretation due to the absence of any appellate route for the substantive categories of cases to be included within the Act.

In these circumstances, it is fair to conclude that the principle of strict construction applicable to such statutes must yield to the "inert language" of the statute. Cf. *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73, 92 (1960) (Frankfurter, J., dissenting).

District of Columbia for violation of a statute applicable within the District. It is worth noting that, given the Court's adherence to the principles of *Carroll* v. *United States, supra,* the rather absurd waste of our judicial resources on cases such as *United States* v. *Waters,* 175 F. 2d 340, appeal dismissed on motion of the United States, 335 U. S. 869 (1948), and *United States* v. *Sweet,* 399 U. S. 517 (1970), see n. 7 *supra,* could not even be avoided by the exercise of governmental discretion in choosing appellate routes. In light of *Carroll,* I cannot believe that a pefectly acceptable reading of congressional purpose underpinning the definiton of categories of cases directly appealable under 18 U. S. C. § 3731 which excludes statutes applicable only within the District of Columbia would have been turned down by the Court.

Of course, the recent elimination of the direct appeal route removes a great deal of the incentive to continue the stringent standards of construction with respect to this statute that have traditionally prevailed in this Court. Indeed, at this stage of the game, the canon of strict construction produces the ironic result of compelling a relatively greater expenditure of judicial energies in assessing our jurisdiction over the remainder of the criminal cases pending in the district courts of the Nation at the time of the most recent amendment than would be involved in deciding those cases on the merits. Nonetheless, this very Term we have indicated that we intend to adhere to the rules of construction evolved by this Court during the long and tortuous history of this statute. *United States* v. *Weller,* No. 77, October Term 1970 (decided February 24, 1971).

The only response we are offered to the reading of congressional purpose I have suggested is that the interests of avoiding inconsistent enforcement of criminal laws argues for exercising jurisdiction over this case because similar statutes in other jurisdictions are under attack

on vagueness grounds. See the Court's opinion, at [3]. Surely those of my Brethren who subscribe to the views on jurisdiction expressed in the opinion of the Court must recognize that we cannot limit the category of appealable cases under this provision of the Act to prosecutions brought under D. C. statutes which are (a) duplicated in other jurisdictions, and (b) under attack on similar federal question grounds in other jurisdictions. The proffered response is, therefore, not truly a reason for concluding we have jurisdiction over the relevant category of cases; rather, it is a reason for exercising our power in this one case to settle Dr. Vuitch's vagueness claim in spite of the absence of the jurisdictional prerequisites which legitimize the exercise of that judicial power.

V

Having concluded that the Government cannot directly appeal the dismissal of the indictment to this Court under the provisions of 18 U. S. C. § 3731, it also follows that we cannot utilize the remand provisions of that statute to reroute the appeal to the Court of Appeals for the District of Columbia. However, we do have jurisdiction to determine our jurisdiction, and, in the analogous three-judge court situation where an alternative appellate route exists but the statute according this Court direct jurisdiction over the certain appeals includes no remand procedure, this Court has vacated the judgment of the court of original jurisdiction and remanded the case to that court for the entry of a fresh decree from which timely appeal may be taken to the proper appellate tribunal. *Rockefeller* v. *Catholic Medical Center of Brooklyn & Queens*, 397 U. S. 820 (1970). The instant case, of course, is a criminal prosecution, and there is a consideration not present in the three-judge court situation: *i. e.*, the additonal anxiety caused the

defendant by virtue of the Government's erroneous choice of appellate routes. But, while 18 U. S. C. § 3731 cannot empower us to transfer the case, that statute is still relevant as an expression of congressional policy to save the Government's appeal where an erroneous choice of appellate routes is made, even at the expense of additional anxiety to the defendant. Accordingly, I think the proper disposition of this case would be to vacate the judgment of the District Court and remand the case for the entry of a fresh judgment from which the Government could take a timely appeal to the Court of Appeals for the District of Columbia pursuant to 23 D. C. Code § 105.

VI

Notwithstanding the views on jurisdiction expressed above, and speaking only for myself, and not for those of my Brethren who agree with my discussion of the jurisdictional issue in this case, I have concluded, substantially for the reasons set forth in MR. JUSTICE BLACKMUN's separate opinion, that I should also reach the merits. Accordingly, I concur in Part II of the Court's opinion and the judgment of the Court.

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

United States, Appellant, v. Milan Vuitch.	On Appeal From the United States District Court for the District of Columbia.

[April 21, 1971]

Mr. Justice Stewart, dissenting in part.

I agree that we have jurisdiction of this appeal for the reasons stated in Part I of the Court's opinion.

As to the merits of this controversy, I share at least some of the constitutional doubts about the abortion statute expressed by the District Court. But, as this Court today correctly points out, "statutes should be construed whenever possible so as to uphold their constitutionality." The statute before us can be so construed, I think, simply by extending the reasoning of the Court's opinion to its logical conclusion.

The statute legalizes any abortion performed "under the direction of a competent licensed practitioner of medicine" if "necessary for the preservation of the mother's life or health." Under the statute, therefore, the legal practice of medicine in the District of Columbia includes the performing of abortions. For the practice of medicine consists of doing those things which, in the judgment of a physician, are necessary to preserve a patient's life or health. As the Court says, "whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered."

It follows, I think, that when a physician has exercised his judgment in favor of performing an abortion, he has, by hypothesis, not violated the statute. To put it an-

other way, I think the question of whether the performance of an abortion is "necessary for the mother's life or health" is entrusted under the statute exclusively to those licensed to practice medicine, without the overhanging risk of incurring criminal liability at the hands of a second-guessing lay jury. I would hold, therefore, that "a competent licensed practitioner of medicine" is wholly immune from being charged with the commission of a criminal offense under this law.

It is true that the statute can be construed in other ways, as MR. JUSTICE DOUGLAS has made clear. But I would give it the reading I have indicated "in the candid service of avoiding a serious constitutional doubt." *United States* v. *Rumely*, 345 U. S. 41, 47.

SUPREME COURT OF THE UNITED STATES

No. 84.—October Term, 1970

United States, Appellant, v. Milan Vuitch.	On Appeal From the United States District Court for the District of Columbia.

[April 21, 1971]

Mr. Justice Blackmun.

Although I join Mr. Justice Harlan in his conclusion that this case is not properly here by direct appeal under 18 U. S. C. § 3731, a majority, and thus the Court, holds otherwise. The case is therefore here and requires decision.

The five Justices constituting the majority, however, are divided on the merits. One feels that 22 D. C. Code § 201 lacks the requirements of procedural due process and would affirm the dismissal of the indictment. One would hold that a licensed physician is immune from charge under the statute. Three would hold that, properly construed, the statute is not unconstitutionally vague and that the dismissal of the indictment on that ground was error.

Because of the inability of the jurisdictional-issue majority to agree upon the disposition of the case, I feel obligated not to remain silent as to the merits. See *Screws* v. *United States*, 325 U. S. 91, 134 (1945) (addendum by Mr. Justice Rutledge); *United States* v. *Jorn*, 400 U. S. 470, 487–488 (1971) (statement of Black and Brennan, JJ.); *Mills* v. *Alabama*, 384 U. S. 214, 222–223 (1966) (separate opinion of Harlan, J.); *Kesler* v. *Department of Public Safety*, 369 U. S. 153, 174, 179 (concurring opinion of Stewart, J., and dissenting opinion of Warren, C. J.). Assuming, as I must in the light of the Court's decision, that the Court does have jurisdiction of the appeal, I join Part II of Mr. Justice Black's opinion and the judgment of the Court.

Item No. 14

juris. postponed to hearing on merits, 401 U.S ___ (May 3, 1971) (No. 808, 1970 Term; renumbered No. 70-18, 1971 Term)

Jane ROE, Plaintiff,

v.

Henry WADE, Defendant,

v.

James Hubert HALLFORD, M.D., Intervenor.

John DOE and Mary Doe, Plaintiffs,

v.

Henry WADE, Defendant.

Civ. A. Nos. 3-3690-B, 3-3691-C.

United States District Court,
N. D. Texas,
Dallas Division.

June 17, 1970.

Action for judgment declaring Texas abortion laws unconstitutional and to enjoin their enforcement. The three-judge District Court held that laws prohibiting abortions except for purpose of saving life of the mother violated right secured by the Ninth Amendment to choose whether to have children and were unconstitutionally overbroad and vague, but Court would abstain from issuing injunction against enforcement of the laws.

Order accordingly.

1. Constitutional Law ⇐42

Physician challenging constitutionality of Texas abortion laws had standing to raise rights of his patients, single women and married couples, as well as rights of his own. Vernon's Ann.Tex. P.C. arts. 1191–1194, 1196.

2. Constitutional Law ⇐42

Logical nexus existed between status asserted by plaintiffs, a married couple, single woman and practicing physician challenging constitutionality of Texas abortion laws, and claim sought to be adjudicated, and plaintiffs had standing. Vernon's Ann.Tex.P.C. art. 1196; 28 U.S.C.A. § 2201.

3. Courts ⇐300

Contentiousness between pregnant woman, physician and district attorney of Dallas County was sufficient to establish a "case of actual controversy" with respect to constitutionality of Texas abortion laws. 28 U.S.C.A. § 2201.

See publication Words and Phrases for other judicial constructions and definitions.

4. Courts ⇐260.4

In absence of possibility that adjudication in state courts would eliminate necessity for federal district court to pass upon plaintiffs' Ninth Amendment claim respecting constitutionality of Texas abortion laws or physician's attack on laws for vagueness, abstention as to plaintiffs' request for declaratory judgment was unwarranted. Vernon's Ann. Tex.P.C. arts. 1191–1194, 1196; U.S.C.A. Const. Amend. 9.

5. Abortion ⇐1

Texas laws prohibiting abortions except for purpose of saving life of mother deprived single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children. Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196; U.S.C.A.Const. Amend. 9.

6. Constitutional Law ⇐48

District attorney had burden to demonstrate that infringement by state abortion laws upon plaintiffs' fundamental right to chose whether to have children was necessary to support compelling state interest. Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196.

7. Constitutional Law ⇐38

Fact that statutory scheme serves permissible or even compelling state interests will not save it from consequences of unconstitutional overbreadth.

8. Abortion ⇐1

While Ninth Amendment right to choose to have abortion is not unqualified or unfettered, statute designed to regulate circumstances of abortions must restrict its scope to compelling state interests. Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196; U.S.C.A.Const. Amend. 9.

9. Abortion ⇐1

Texas laws prohibiting abortions except for purpose of saving life of mother are unconstitutionally overbroad in failing to limit scope to compelling state interests. Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196; U.S.C.A.Const. Amend. 9.

10. Criminal Law ⇐13

Texas laws prohibiting abortions except for purpose of saving life of mother are unconstitutionally vague in failing to provide physicians with proper notice of what acts in their daily practice and consultation will subject them to criminal liability. Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196.

11. Courts ⇐508(7)

Federal policy of noninterference with state criminal prosecutions must be followed except in cases where statutes are justifiably attacked on their face as abridging free expression, or where statutes are justifiably attacked as applied for the purpose of discouraging protected activities. U.S.C.A.Const. Amends. 1, 9.

12. Courts ⇐508(7)

Texas abortion laws, although unconstitutional in depriving single women and married couples of right secured by Ninth Amendment to choose whether to have children and as being vague and overbroad, could not be justifiably at-

tacked on their face as abridging free expression or as being applied for purpose of discouraging protected activities, and federal court would abstain from enjoining enforcement of the laws. Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196; U.S. C.A.Const. Amends. 1, 9.

Linda N. Coffee, Dallas, Tex., Sarah Weddington, Austin, Tex., for plaintiffs.

Fred Bruner, Daugherty, Bruner, Lastelick & Anderson, Ray L. Merrill, Jr., Dallas, Tex., for intervenor.

John B. Tolle, Asst. Dist. Atty., Dallas, Tex., Jay Floyd, Asst. Atty. Gen., Austin, Tex., for defendant.

Before GOLDBERG, Circuit Judge, and HUGHES and TAYLOR, District Judges.

1. On March 3, 1970, plaintiff Jane Roe filed her original complaint in CA-3-3690-R under the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution. She alleged jurisdiction to be conferred upon the Court by Title 28, United States Code, Sections 1331, 1343, 2201, 2202, 2281, and 2284 and by Title 42, United States Code, Section 1983. On April 22, plaintiff Roe amended her complaint to sue "on behalf of herself and all others similarly situated."

On March 23, James Hubert Hallford, M. D., was given leave to intervene. Hallford's complaint recited the same constitutional and jurisdictional grounds as the complaint of plaintiff Roe. According to his petition for intervention, Hallford seeks to represent "himself and the class of people who are physicians, licensed to practice medicine under the laws of the State of Texas and who fear future prosecution."

On March 3, 1970, plaintiffs John and Mary Doe filed their original complaint in CA-3-3091-C. The complaint of plaintiffs Doe recited the same constitutional and jurisdictional grounds as had the complaint of plaintiff Roe in CA-3-3690 and, like Roe, plaintiffs Doe subsequently amended their complaint so as to assert a class action.

Plaintiffs Roe and Doe have adopted pseudonyms for purposes of anonymity.

PER CURIAM:

Two similar cases are presently before the Court on motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The defendant in both cases is Henry Wade, District Attorney of Dallas County, Texas. In one action plaintiffs are John and Mary Doe, and in the other Jane Roe and James Hubert Hallford, M.D., intervenor.[1]

[1] From their respective positions of married couple, single woman, and practicing physician, plaintiffs attack Articles 1191, 1192, 1193, 1194, and 1196 of the Texas Penal Code,[2] hereinafter referred to as the Texas Abortion Laws. Plaintiffs allege that the Texas Abortion Laws deprive married couples and single women of the right to choose whether to have children, a right secured by the Ninth Amendment.

2. *Article 1191 Abortion*

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

Article 1192 Furnishing the Means

Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

Article 1193 Attempt at Abortion

If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

Article 1194 Murder in Producing Abortion

If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

Article 1196 By Medical Advice

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

Defendant challenges the standing of each of the plaintiffs to bring this action. However, it appears to the Court that Plaintiff Roe and plaintiff-intervenor Hallford occupy positions *vis-a-vis* the Texas Abortion Laws sufficient to differentiate them from the general public. Compare Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), and Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965),[3] with Frothingham v. Mellon, 262 U.S. 447, 43 S.Ct. 597, 67 L. Ed. 1078 (1923). Plaintiff Roe filed her portion of the suit as a pregnant woman wishing to exercise the asserted constitutional right to choose whether to bear the child she was carrying. Intervenor Hallford alleged in his portion of the suit that, in the course of daily exercise of his duty as a physician and in order to give his patients access to what he asserts to be their constitutional right to choose whether to have children, he must act so as to render criminal liability for himself under the Texas Abortion Laws a likelihood. Dr. Hallford further alleges that Article 1196 of the Texas Abortion Laws is so vague as to deprive him of warning of what produces criminal liability in that portion of his medical practice and consultations involving abortions.

[2] On the basis of plaintiffs' substantive contentions,[4] it appears that there then exists a "nexus between the status asserted by the litigant[s] and the claim[s] [they present]." Flast v. Cohen, 392 U.S. 83, 102, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

[3] Further, we are satisfied that there presently exists a degree of contentiousness between Roe and Hallford and the defendant to establish a "case of actual controversy" as required by Title 28, United States Code, Section 2201. Golden v. Zwickler, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969).

Each plaintiff seeks as relief, *first*, a judgment declaring the Texas Abortion Laws unconstitutional on their face and, *second*, an injunction against their enforcement. The nature of the relief requested suggests the order in which the issues presented should be passed upon.[5] Accordingly, we see the issues presented as follows:

I. Are plaintiffs entitled to a declaratory judgment that the Texas Abortion Laws are unconstitutional on their face?

II. Are plaintiffs entitled to an injunction against the enforcement of these laws?

I.

Defendants have suggested that this Court should abstain from rendering a decision on plaintiffs' request for a declaratory judgment. However, we are guided to an opposite conclusion by the authority of Zwickler v. Koota, 389 U.S. 241, 248–249, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967):

> "The judge-made doctrine of abstention * * * sanctions * * * escape only in narrowly limited 'special circumstances.' * * * One of the 'special circumstances' * * * is the susceptibility of a state statute of a construction by the state courts that would avoid or modify the constitutional question."

The Court in Zwickler v. Koota subsequently quoted from United States v. Livingston, 179 F.Supp. 9, 12–13 (E.D. S.C.1959):

> "Regard for the interest and sovereignty of the state and reluctance

3. By the authority of *Griswold*, Dr. Hallford has standing to raise the rights of his patients, single women and married couples, as well as rights of his own.

4. "[I]n ruling on standing, it is both appropriate and necessary to look to the substantive issues * * * to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." Flast v. Cohen, 392 U.S. 83, 102, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

5. Zwickler v. Koota, 389 U.S. 241, 254, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); Cameron v. Johnson, 390 U.S. 611, 615, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968).

needlessly to adjudicate constitutional issues may require a federal District Court to abstain from adjudication if the parties may avail themselves of an appropriate procedure to obtain state interpretation of state laws requiring construction. * * * The decision in [Harrison v. N.A.A.C.P., 360 U.S. 167, 79 S.Ct. 1025, 3 L.Ed.2d 1152], however, is not a broad encyclical commanding automatic remission to the state courts of all federal constitutional questions arising in the application of state statutes. * * * Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it. Any other course would impose expense and long delay upon the litigants without hope of its bearing fruit." [6]

[4] Inasmuch as there is no possibility that state question adjudication in the courts of Texas would eliminate the necessity for this Court to pass upon plaintiffs' Ninth Amendment claim or Dr. Hallford's attack on Article 1196 for vagueness, abstention as to their request for declaratory judgment is unwarranted. Compare City of Chicago v. Atchison, T. & S. F. R. Co., 357 U.S. 77, 84, 78 S.Ct. 1063, 2 L.Ed.2d 1174 (1958), with Reetz v. Bozanich, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970).

[5] On the merits, plaintiffs argue as their principal contention [7] that the Texas Abortion Laws must be declared unconstitutional because they deprive single women and married couples of their right, secured by the Ninth Amendment,[8] to choose whether to have children. We agree.

The essence of the interest sought to be protected here is the right of choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of individuals. The manner by which such interests are secured by the Ninth Amendment is illustrated by the concurring opinion of Mr. Justice Goldberg in Griswold v. Connecticut, 381 U.S. 479, 492, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965):

> "[T]he Ninth Amendment shows a belief of the Constitution's authors that *fundamental* rights exist that are not expressly enumerated in the first eight amendments and intent that the list of rights included there not be deemed exhaustive." * * *
>
> "The Ninth Amendment simply shows the intent of the Constitution's authors that other *fundamental* personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments." (Emphasis added.) [9]

Relative sanctuaries for such "fundamental" interests have been established

6. 389 U.S. at 250-251, 88 S.Ct. at 396-397. (Citations omitted.)

7. Aside from their Ninth Amendment and vagueness arguments, plaintiffs have presented an array of constitutional arguments. However, as plaintiffs conceded in oral argument, these additional arguments are peripheral to the main issues. Consequently, they will not be passed upon.

8. "The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people."

9. At 492, 85 S.Ct. at 1686 the opinion states: "In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] * * * as to be ranked as fundamental'. Snyder v. [Commonwealth of] Massachusetts, 291 U.S. 97, 105 [54 S.Ct. 330, 78 L.Ed. 674]. The inquiry is whether a right involved 'is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."' * * *' Powell v. Alabama, 287 U.S. 45, 67 [53 S.Ct. 55, 77 L.Ed. 158]."

for the family,[10] the marital couple,[11] and the individual.[12]

Freedom to choose in the matter of abortions has been accorded the status of a "fundamental" right in every case coming to the attention of this Court where the question has been raised. Babbitz v. McCann, 312 F.Supp. 725 (E.D. Wis.1970); People v. Belous, 80 Cal. Rptr. 354, 458 P.2d 194 (Cal.1969); State v. Munson, (South Dakota Circuit Court, Pennington County, April 6, 1970). *Accord*, United States v. Vuitch, 305 F.Supp. 1032 (D.D.C.1969). The California Supreme Court in *Belous* stated:

> "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." 80 Cal.Rptr. at 359, 458 P.2d at 199.

The District Court in *Vuitch* wrote:

> "There has been * * * an increasing indication in the decisions of the Supreme Court of the United States that as a secular matter a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy." 305 F.Supp. at 1035.

Writing about Griswold v. Connecticut, *supra*, and the decisions leading up to it, former Associate Justice Tom C. Clark observed:

> "The result of these decisions is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution." [13]

[6] Since the Texas Abortion Laws infringe upon plaintiffs' fundamental right to choose whether to have children, the burden is on the defendant to demonstrate to the satisfaction of the Court that such infringement is necessary to support a compelling state interest.[14] The defendant has failed to meet this burden.

10. Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); and Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944).

11. Loving v. Commonwealth of Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); and Buchanan v. Batchelor, 308 F.Supp. 729 (N.D.Tex.1970).

12. Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); and Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).

13. Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola Univ. L.Rev. 1, 8 (1969). Mr. Justice Clark goes on to write, "* * * abortion falls within that sensitive area of privacy—the marital relation. One of the basic values of this privacy is birth control, as evidenced by the *Griswold* decision. Griswold's act was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent contraception, why can he not nullify that conception when prevention has failed?" *Id.* at 9.

14. "In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' Bates v. [City of] Little Rock, 361 U.S. 516, 524 [80 S.Ct. 412, 4 L.Ed.2d 480]." Griswold v. Connecticut, 381 U.S. 479, 497, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (concurring opinion of Mr. Justice Goldberg). *See also* Kramer v. Union Free School District, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969).

To be sure, the defendant has presented the Court with several compelling justifications for state presence in the area of abortions. These include the legitimate interests of the state in seeing to it that abortions are performed by competent persons and in adequate surroundings. Concern over abortion of the "quickened" fetus may well rank as another such interest. The difficulty with the Texas Abortion Laws is that, even if they promote these interests,[15] they far outstrip these justifications in their impact by prohibiting *all* abortions except those performed "for the purpose of saving the life of the mother." [16]

[7-9] It is axiomatic that the fact that a statutory scheme serves permissible or even compelling state interests will not save it from the consequences of unconstitutional overbreadth. *E. g.*, Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940); Buchanan v. Batchelor, 308 F.Supp. 729 (N.D.Tex. 1970). While the Ninth Amendment right to choose to have an abortion is not unqualified or unfettered, a statute designed to regulate the circumstances of abortions must restrict its scope to compelling state interests. There is unconstitutional overbreadth in the Texas Abortion Laws because the Texas Legislature did not limit the scope of the statutes to such interests. On the contrary, the Texas statutes, in their monolithic interdiction, sweep far beyond any areas of compelling state interest.

[10] Not only are the Texas Abortion Laws unconstitutionally overbroad, they are also unconstitutionally vague. The Supreme Court has declared that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888 (1939). *See also* Giaccio v. Pennsylvania, 382 U.S. 399, 402-403, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). Under this standard the Texas statutes fail the vagueness test.

The Texas Abortion Laws fail to provide Dr. Hallford and physicians of his class with proper notice of what acts in their daily practice and consultation will subject them to criminal liability. Article 1196 provides:

> "Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

It is apparent that there are grave and manifold uncertainties in the application of Article 1196. How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How *imminent* must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years? These questions simply cannot be answered.

The grave uncertainties in the application of Article 1196 and the consequent uncertainty concerning criminal liability under the related abortion statutes are more than sufficient to render the Texas Abortion Laws unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment.

15. It is not clear whether the Texas laws presently serve the interests asserted by the defendant. For instance, the Court gathers from a reading of the challenged statutes that they presently would permit an abortion "for the purpose of saving the life of the mother" to be performed *anywhere* and quite possibly by *one other than a physician*.

16. Article 1196.

II.

We come finally to a consideration of the appropriateness of plaintiffs' request for injunctive relief. Plaintiffs have suggested in oral argument that, should the Court declare the Texas Abortion Laws unconstitutional, that decision would of itself warrant the issuance of an injunction against state enforcement of the statutes. However, the Court is of the opinion that it must abstain from granting the injunction.

Clearly, the question whether to abstain concerning an injunction against the enforcement of state criminal laws is divorced from concerns of abstention in rendering a declaratory judgment. Quoting from Zwickler v. Koota,

> "[A] request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against enforcement of that statute. We hold that a federal district court has the duty to decide the appropriateness and merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction." 389 U.S. at 254, 88 S.Ct. at 399.

[11] The strong reluctance of federal courts to interfere with the process of state criminal procedure was reflected in Dombrowski v. Pfister, 380 U.S. 479, 484–485, 85 SCt. 1116, 1120–21, 14 L.Ed. 2d 22 (1965):

> "[T]he Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."

This federal policy of non-interference with state criminal prosecutions must be followed except in cases where "statutes are justifiably attacked on their face as abridging free expression," or where statutes are justifiably attacked "as applied for the purpose of discouraging protected activities." Dombrowski v. Pfister, 380 U.S. at 489–490, 85 S.Ct. at 1122.

[12] Neither of the above prerequisites can be found here. While plaintiffs' first substantive argument rests on notions of privacy which are to a degree common to the First and Ninth Amendments, we do not believe that plaintiffs can seriously argue that the Texas Abortion Laws are vulnerable "on their face as abridging free expression."[17] Further, deliberate application of the statutes "for the purpose of discouraging protected activities" has not been alleged. We therefore conclude that we must abstrain from issuing an injunction against enforcement of the Texas Abortion Laws.

CONCLUSION

In the absence of any contested issues of fact, we hold that the motions for summary judgment of the plaintiff Roe and plaintiff-intervenor Hallford should be granted as to their request for declaratory judgment. In granting declaratory relief, we find the Texas Abortion Laws unconstitutional for vagueness and overbreadth, though for the reasons herein stated we decline to issue an injunction. We need not here delineate the factors which could qualify the right of a mother to have an abortion. It is sufficient to state that legislation concerning abortion must address itself to more than a bare negation of that right.

17. "[T]he door is not open to all who would test the validity of state statutes or conduct a federally supervised pre-trial of a state prosecution by the simple expedient of alleging that the prosecution somehow affects First Amendment rights." Porter v. Kimzey, 309 F.Supp. 993, 995 (N.D.Ga.1970).

JUDGMENT

This action came on for hearing on motions for summary judgment before a three-judge court composed of Irving L. Goldberg, Circuit Judge, Sarah T. Hughes and W. M. Taylor, Jr., District Judges. The defendant in both cases is Henry Wade, District Attorney of Dallas County, Texas. In one action plaintiffs are John and Mary Doe, husband and wife, and in the other Jane Roe and James Hubert Hallford, M.D., intervenor.

The case having been heard on the merits, the Court, upon consideration of affidavits, briefs and arguments of counsel, finds as follows:

Findings of Fact

(1) Plaintiff Jane Roe, plaintiff-intervenor James Hubert Hallford, M.D., and the members of their respective classes have standing to bring this lawsuit.

(2) Plaintiffs John and Mary Doe failed to allege facts sufficient to create a present controversy and therefore do not have standing.

(3) Articles 1191, 1192, 1193, 1194 and 1196 of the Texas Penal Code, hereinafter referred to as the Texas Abortion Laws, are so written as to deprive single women and married persons of the opportunity to choose whether to have children.

(4) The Texas Abortion Laws are so vaguely worded as to produce grave and manifold uncertainties concerning the circumstances which would produce criminal liability.

Conclusions of Law

(1) This case is a proper one for a three-judge court.

(2) Abstention, concerning plaintiffs' request for a declaratory judgment, is unwarranted.

(3) The fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment.

(4) The Texas Abortion Laws infringe upon this right.

(5) The defendant has not demonstrated that the infringement of plaintiffs' Ninth Amendment rights by the Texas Abortion Laws is necessary to support a compelling state interest.

(6) The Texas Abortion Laws are consequently void on their face because they are unconstitutionally overbroad.

(7) The Texas Abortion Laws are void on their face because they are vague in violation of the Due Process Clause of the Fourteenth Amendment.

(8) Abstention, concerning plaintiffs' request for an injunction against the enforcement of the Texas Abortion Laws, is warranted.

It is therefore ordered, adjudged and decreed that: (1) the complaint of John and Mary Doe be dismissed; (2) the Texas Abortion Laws are declared void on their face for unconstitutional overbreadth and for vagueness; (3) plaintiffs' application for injunction be dismissed.

WEST KEY NUMBER SYSTEM

juris. postponed to hearing on merits, 401 U.S. ___(May 3, 1971) (No. 971, 1970 Term; renumbered No. 70-40, 1971 Term)

Mary DOE et al.,

v.

Arthur K. BOLTON, as Attorney General of the State of Georgia, Lewis R. Slaton as District Attorney of Fulton County, Georgia and Herbert T. Jenkins, as Chief of Police of the City of Atlanta.

Civ. A. No. 13676.

United States District Court,
N. D. Georgia,
Atlanta Division.

July 31, 1970.

Supplemental Opinion Oct. 14, 1970.

Class action attacking validity of state abortion statute. A Three-Judge District Court held that claims by physicians and nurses that because of state abortion statute they were not free to perform or counsel obtaining of abor-

tions and were therefore unconstitutionally restricted in practice of their professions did not present justiciable controversy and that statute was invalid to extent it limited cases in which abortion could be performed.

Order accordingly.

1. Federal Civil Procedure ⇐9

State Attorney General who was required to represent state in legal proceedings or to give opinion on abortion statute when requested by Governor and who was head of department which was vested with jurisdiction in all matters of law relating to governmental departments, boards and agencies was proper defendant in class action attacking state abortion statute. 28 U.S.C.A. §§ 1343, 2201, 2202; 42 U.S.C.A. § 1983; Code Ga. §§ 26–1201 et seq., 40–1602, 40–1614; Const.Ga. art. 6, § 10, par. 2.

2. Declaratory Judgment ⇐292

Physicians, nurses, ministers and social workers who claimed that because of state statute they were not free to perform or counsel obtaining of abortions and were therefore unconstitutionally restricted in practice of their professions had standing to bring action seeking declaratory judgment as to validity and injunction against enforcement of statute. 28 U.S.C.A. §§ 1343, 2201, 2202; 42 U.S.C.A. § 1983; Code Ga. § 26–1201 et seq.

3. Declaratory Judgment ⇐274

For federal courts to have jurisdiction in declaratory judgment proceeding attacking validity of state statute, there must be actual controversy in which constitutionality of statute is drawn into question in truly adversary context. U.S.C.A.Const. art. 3, § 2.

4. Declaratory Judgment ⇐121

Where plaintiff's request for therapeutic abortion had been denied by hospital committee on ground that her situation did not come within terms of state abortion statute, there was actual interference with claimed constitutional right by decision of body which state had vested with power to grant or deny legal abortions and plaintiff's declaratory judgment action attacking statute presented justiciable controversy. 28 U.S.C.A. §§ 1343, 2201, 2202; 42 U.S.C.A. § 1983; Code Ga. §§ 26–1201, 26–1202, 26–1202(a) (1–3), (b).

5. Declaratory Judgment ⇐123

Claims by physicians and nurses that because of state abortion statute they were not free to perform or counsel obtaining of abortions and were therefore unconstitutionally restricted in practice of their professions did not present justiciable controversy. 28 U.S.C.A. §§ 1343, 2201, 2202; 42 U.S.C.A. § 1983; Code Ga. §§ 26–1201, 26–1202, 26–1202(a) (1–3), (b).

6. Courts ⇐489(1)

There is no requirement that litigant in federal court exhaust state judicial remedies, where he is asserting claim in proceeding other than habeas corpus involving subject over which federal and state courts have concurrent jurisdiction.

7. Abortion ⇐1

State may not unduly limit reasons for which woman may obtain abortion but may legitimately require that decision to terminate her pregnancy be one reached only on consideration of more factors than desires of woman and her ability to find willing physician. U.S.C.A.Const. Amends. 9, 14; Code Ga. § 26–1201 et seq.

8. Constitutional Law ⇐82

Concept of personal liberty embodies right to privacy which apparently is also broad enough to include decision to abort pregnancy. U.S.C.A.Const. Amend. 9.

9. Abortion ⇐1

Once embryo has formed, decision to abort its development cannot be considered purely private one affecting only man and woman and state may assert legitimate area of control short of invasion of personal right of initial decision. U.S.C.A.Const. Amends. 9, 14; Code Ga. § 26–1201 et seq.

10. Constitutional Law ⇐250

Mere fact that physicians and psychiatrists are more accessible to rich people than to poor people, making abortions more available to wealthy than to indigent, is not in itself a violation of equal protection. U.S.C.A.Const. Amend. 14; Code Ga. § 26–1201 et seq.

11. Abortion ⇐1

Reasons for abortion may not be prescribed but quality of decision as well as manner of its execution are properly within realm of state control. U.S.C.A. Const. Amends. 9, 14; Code Ga. § 26–1201 et seq.

12. Abortion ⇐1

Declaratory Judgment ⇐22

State abortion statute to extent it limited cases in which physician could legally perform abortion to cases where continuation of pregnancy would endanger life of woman, fetus would very likely be born with irremediable mental or physical defect or pregnancy resulted from forcible or statutory rape in which case woman must give written statement under oath as to time and place of rape and name of rapist, if known with copy of statement going to law enforcement officials and to extent it provided for declaratory judgment action as to validity of abortion to be performed was unconstitutional. U.S.C.A.Const. Amends. 9, 14; Code Ga. § 26–1202(a) (1–3), (b) (3, 6), (c).

13. Courts ⇐508(7)

Although federal court found that state abortion statute was unconstitutional in certain respects, injunction against state prosecutions which had not been instituted would be denied. 28 U.S.C.A. §§ 1343, 2201, 2202; 42 U.S.C.A. § 1983; Code Ga. § 26–1201 et seq.

Supplemental Opinion

14. Federal Civil Procedure ⇐331

Where hospital which had previously denied application for abortion reconsidered and granted application, motion by party seeking abortion to intervene in class action attacking state abortion statute would be denied.

15. Federal Civil Procedure ⇐331

In absence of showing that pregnant woman who had been denied abortion at one hospital because of state statute could not adequately represent tangential interest of another pregnant woman who had been denied abortion at another hospital, motion by latter woman to intervene in class action attacking state abortion statute would be denied.

16. Abortion ⇐1

Where court declared state abortion statute invalid to extent it limited reasons for granting of abortion but upheld requirement of approval by hospital committee before abortion is performed, any action of committee in adopting same reasons for permitting abortion as had been declared invalid was itself invalid.

Margie Pitts Hames, Tobiane Schwartz, Elizabeth Rindskopf, Bettye Kehrer, Atlanta, Ga., for plaintiffs.

Arthur K. Bolton, Atty. Gen., Tony H. Hight, Asst. Dist. Atty., Atlanta, Ga., for Slaton.

Ralph H. Witt, Atlanta, Ga., for Jenkins.

Ferdinand Buckley, Atlanta, Ga., for unborn child of Mary Doe.

Before MORGAN, Circuit Judge, and SMITH and HENDERSON, District Judges.

PER CURIAM.

This is an action for declaratory and injunctive relief brought pursuant to 28 U.S.C.A. §§ 2201 and 2202, and 42 U.S.C.A. § 1983 and 28 U.S.C.A. § 1343. It is a class action attacking Ga. Code Ann. § 26–1201 et seq. (1969) Georgia's "Abortion Act."

Plaintiffs claim to represent four sub-classes: pregnant women, single or married, wishing legal abortions; licensed physicians who wish to perform or counsel performance of legal abortions; registered nurses who desire to participate in performing or counsel

performance of legal abortions; and ministers and social workers who wish to be free to advise abortion in counselling pregnant women.

Plaintiffs seek an order declaring Georgia's Abortion Statute unconstitutional and enjoining its enforcement on various grounds:

(1) the Statute is unconstitutionally vague and indefinite on its face and as applied, failing to provide sufficient warning of the conduct proscribed, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

(2) Georgia's Abortion Statute unconstitutionally abridges a woman's right to decide to terminate an unwanted pregnancy, in restricting that fundamental liberty without an overriding compelling state interest;

(3) the Statute unconstitutionally restricts the right of the physicians, nurses, ministers and social workers to practice their professions;

(4) Georgia's Abortion Statute produces discrimination against poor and non-white women in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

PENDING MOTIONS

Arthur K. Bolton, sued in his official capacity as Attorney General of Georgia has moved for an order dismissing the claim against him on the ground that no relief could be granted against him since he is not charged generally with the enforcement, application or administration of the Georgia criminal statutes.

[1] As plaintiffs observe, Article VI, § X, Par. II of the Georgia Constitution, Ga. Code Ann. § 2-4502 (1933) requires the Attorney General to represent the State in any civil or criminal case when required by the Governor. Furthermore, he may be required to give the Governor advisory opinions on the abortion statute. Ga. Code Ann. § 40-1602 (1933). Finally, the Attorney General is head of the Department of Law, which is vested with authority and jurisdiction in all matters of law relating to governmental departments, boards and agencies. Ga. Code Ann. § 40-1614 (1943). The Attorney General has sufficient connection with enforcement of the statutes attacked to justify retaining him as a party.[1] See Arneson v. Denny, 25 F.2d 993 (W.D.Wash.1928); Jackson v. Colorado, 294 F.Supp. 1065, 1072 (D.Colo.1968); James v. Almond, 170 F.Supp. 331, 341-342 (E.D.Va.1959); International Longshoremen's & Warehousemen's Union v. Ackerman, 82 F. Supp. 65, 124 (D.Haw.1948), rev'd on other grounds 187 F.2d 860 (9th Cir. 1951); Bevins v. Prindable, 39 F.Supp. 708, 710 (E.D.Ill.1941). Accordingly, that motion is denied.

The Attorney General has also objected to interrogatories which plaintiffs served for answer by a witness, Roger Rochat, M. D. In view of the disposition of this case made below, no ruling on this motion is necessary.

The motion of Ferdinand Buckley, Esquire, for reconsideration of the revocation of his appointment as guardian ad litem will be dealt with in connection with the discussion under MERITS below.

The motion of the National Legal Program on Health Problems of the Poor to submit a brief as *amicus curiae* is granted.

The defendant Lewis R. Slaton, District Attorney of Fulton County, filed motions seeking orders requiring disclosure of plaintiff's identity, granting a continuance for discovery for a reasonable time thereafter, and requiring plaintiff to submit to a physical and mental examination. In view of the reasons for which it is held that the complaint of this plaintiff presented a justi-

1. The Court is also aware that the Attorney General regularly interprets State criminal laws and decisions in published opinions and circulars to State judges and law enforcement officers.

ciable controversy, these motions are directed toward obtaining information which is not relevant to the case. Accordingly, they are denied.

JURISDICTION

A. *Substantial Constitutional Question.*

A three-judge court was convened pursuant to 28 U.S.C.A. §§ 2281 and 2284. Such action is proper where plaintiffs attack the constitutionality of a state statute, raising a substantial constitutional question, and seek equitable relief against its enforcement. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715, 82 S.Ct. 1294, 8 L.Ed.2d 794 (1962).

Plaintiffs here attack the constitutionality of Ga. Code Ann. § 26-1201 et seq. (1969) on the grounds that it infringes rights protected by various Amendments to the United States Constitution. They seek an injunction against enforcement. In light of recent cases on the subject of the Constitutional right to an abortion, this Constitutional question appears substantial. *See* Roe v. Wade, 314 F.Supp. 1217 (N.D.Tex., June 17, 1970); Doe v. Randall, 314 F.Supp. 32 (D.Minn., May 19, 1970); Doe v. Scott, 310 F.Supp. 688 (N.D.Ill., March 27, 1970); Babbitz v. McCann, 310 F.Supp. 293 (E.D. Wis.1970); United States v. Vuitch, 305 F.Supp. 1032 (D.D.C.1969), app. docketed, No. 1155 (February 5, 1970); California v. Belous, 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194 (1969), cert. den. 397 U.S. 915, 90 S.Ct. 920, 25 L. Ed.2d 96 (1970).

B. *Justiciability.*

Standing

By motion to dismiss, Lewis R. Slaton, District Attorney of Fulton County, contends that all plaintiffs other than Mary Doe lack standing to maintain this action. The basis for the claims of these plaintiffs is that because they are not free to perform or counsel the obtaining of abortions, they are unconstitutionally restricted in the practice of their professions.

There are certainly instances in which any of these plaintiffs would have standing to claim a constitutional right to practice his profession, and infringement thereof. For instance, few would dispute that a social worker being prosecuted for conspiracy because he (or she) counselled obtaining an abortion, and referred the client to a physician for the abortion, would have standing to seek a declaratory judgment of his (or her) asserted constitutional right and infringement thereof. *See* Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L. Ed.2d 510 (1965).

But absent prosecution or indictment, that these plaintiffs do have standing is more difficult to see. Whether their claim is otherwise justiciable is irrelevant. Flast v. Cohen, 392 U.S. 83, 100 n. 21, 99 S.Ct. 1942, 20 L.Ed.2d 947 (1968). The sole issue is whether there is a logical link between the status they assert (physician, nurse) and the claim they seek adjudicated, or between their status and both the type of enactment attacked and the nature of the constitutional infringement alleged. 392 U.S. at 102, 88 S.Ct. 1942.

[2] Under either test, all the plaintiffs have standing. As physicians, nurses, ministers or social workers they attack a criminal statute potentially applicable to them, on the grounds that it unconstitutionally restricts their right to practice. Accordingly, the motion to dismiss for lack of standing is denied.

Collision of Interests

[3] Article III of the United States Constitution limits the jurisdiction of the federal courts to cases and controversies. And it is well established that in actions for declaratory judgments, a District Court may not render an advisory opinion on the constitutionality of a state statute. Rather there must be "exigent adversity," an actual controversy in which the constitutionality of the statute is drawn into question in a truly adversary context. *See* Golden v. Zwickler, 394 U.S. 103, 108, 89 S.Ct. 956, 22

L.Ed.2d 113 (1969); Poe v. Ullman, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961); United Public Workers of America v. Mitchell, 330 U.S. 75, 89, 67 S.Ct. 556, 91 L.Ed. 754 (1947).

Most akin to the instant case is Poe v. Ullman, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961). There, a married couple, a married woman and their physician sought a declaratory judgment that Connecticut's statutes prohibiting the use of contraceptive devices and the giving of medical advice in the use of such devices violated plaintiffs' Fourteenth Amendment rights, depriving them of life and liberty without due process of law. None of the plaintiffs had been indicted or prosecuted under the statutes. There had been only one recorded prosecution for violation of the statutes in the seventy-five years since their enactment, and that single instance occurred twenty years before the declaratory judgment action was brought. The Supreme Court suggested that the lack of a pending prosecution or immediate threat of such prosecution against the particular plaintiffs made the claims non-justiciable, citing United Public Workers of America v. Mitchell, 330 U. S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). Poe v. Ullman, 367 U.S. at 501, 81 S.Ct. 1752. But the Justices went on to find that the lack of recorded prosecutions, the unchallenged, open, ubiquitous public sales of contraceptive devices showed a deeply embedded State policy against enforcement, amounting to a tacit agreement not to prosecute violators of the statutes. The majority therefore held:

> "It is clear that the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting." 367 U.S. at 507, 81 S.Ct. at 1758.

However, these three cases seem precedent for the proposition that in the absence of a pending or threatened indictment or prosecution of the particular plaintiffs bringing a declaratory judgment action, a federal court cannot consider the constitutionality of the challenged criminal statute.

However in 1968, the Supreme Court decided Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968), in which a public school teacher argued that the Arkansas statute prohibiting the teaching of evolution was unconstitutional. There was no pending or threatened indictment or prosecution against the teacher. There was no record of any prosecutions under the challenged statute. The teacher's dilemma was solely that (1) the new biology textbooks she was supposed to use in the approaching term contained a chapter on evolution, and (2) her action for a declaratory judgment in state court, granted on the trial level, had been reversed by the Arkansas Supreme Court. The United States Supreme Court majority reached the merits and reversed the decision of the Arkansas Supreme Court in an opinion which summarily brushed aside the question of justiciability. 393 U.S. at 101–102, 89 S.Ct. 266. Apparently, then, the majority felt that the appeal presented a "substantial controversy * * * of sufficient immediacy and reality." Golden v. Zwickler, 394 U.S. 103, 108, 89 S.Ct. 956, 959–960 (1969).

In the instant case, the plaintiff Mary Doe alleges that having properly applied to the Abortion Committee of Grady Memorial Hospital for a legal therapeutic abortion allowed by Ga. Code Ann. § 26–1202 (1969), she was denied an abortion solely on the grounds that her present situation did not come within the terms of Ga. Code Ann. § 26–1202(a) (1) (1969).

Georgia's Abortion Act defines a criminal abortion as the act performed by a person who administers a substance or uses an instrument or other means with intent to produce a miscarriage or abortion. Ga. Code Ann. § 26–1201 (1969). However, Ga. Code Ann. § 26–1202(a) establishes three circumstances

under which an abortion shall not be considered a criminal abortion. And Ga. Code Ann. § 26-1202(b) (1969) prescribes procedure which *must* be followed if an abortion is to be authorized by or performed under 1202(a).

Ga. Code Ann. § 26-1202(b) (1969) provides in relevant part:

> "No abortion is authorized or shall be performed under this section unless each of the following conditions is met:
>
> * * * * * *
>
> (5) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose."

[4, 5] Thus, the denial of plaintiff's application for an abortion, on the grounds alleged, was not the decision of a private physician declining to render professional services, occasioned by the mere existence of Georgia's Abortion Act. The statute confers upon the hospital committee power to grant or deny abortions. A decision denying an application for abortion on the ground that the woman's situation does not fall within one of the three enumerated exceptions is an exercise of that power, which allegedly violated plaintiff's constitutional rights. To this extent then, this statute has been invoked against the plaintiff Mary Doe, causing an alleged constitutional deprivation. Here, there has been actual interference with a claimed constitutional right by the decision of a body which the State has vested with power to grant or deny legal abortions. These circumstances put plaintiff and the defendants on opposite sides of a very real and lively controversy, amenable to judicial resolution.

Accordingly, it appears that Mary Doe's complaint, in this context, presents a justiciable controversy. Since the claims of the other plaintiffs do not stand in such a posture, the Attorney General's motion to dismiss must be granted to that extent.

C. *Exhaustion.*

[6] There is no merit to the defendant Slaton's motion to dismiss for failure to exhaust state remedies. It does not appear that there are any administrative remedies for the denial by a hospital committee of an application for an abortion. And however desirable such a requirement might be for orderly judicial administration, there is no requirement that a litigant in federal court exhaust state judicial remedies, where he is asserting a claim in proceedings other than *habeas corpus* involving a subject over which the federal and state courts have concurrent jurisdiction. As will appear below, the instant case does not involve granting injunctive relief.

THE MERITS

[7] Plaintiff asserts that certain cases leading up to and following Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L.Ed.2d 510 (1965) establish a Constitutional right to privacy broad enough to encompass the right of a woman to terminate an unwanted pregnancy in its early stages, by obtaining an abortion. *See* Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); Loving v. Virginia, 388 U. S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (dissenting opinion of Mr. Justice Brandeis); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). While the Court agrees that the breadth

of the right to privacy encompasses the decision to terminate an unwanted pregnancy, we are unwilling to declare that such a right reposes unbounded in any one individual. Rather, we are of the view that although the state may not unduly limit the reasons for which a woman seeks an abortion, it may legitimately require that the decision to terminate her pregnancy be one reached only upon consideration of more factors than the desires of the woman and her ability to find a willing physician.

In Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), the Supreme Court held that the decision to use contraceptive devices is an aspect of a relationship lying within a penumbral zone of privacy created by several fundamental constitutional guarantees, and that a state law forbidding the use of such devices unduly invades that area of protected freedoms with maximum destructive effect upon that relationship. 381 U.S. at 485, 85 S.Ct. 1678. In a concurring opinion, Mr. Justice Goldberg differed with the majority only to the extent stipulating that the right to marital privacy is encompassed in his concept of personal liberty because of the Ninth Amendment, rather than because of penumbral emanations of specific constitutional guarantees.

[8] For whichever reason, the concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy.[2] Like the decision to use contraceptive devices, the decision to terminate an unwanted pregnancy is sheltered from state regulation which seeks broadly to limit the reasons for which an abortion may be legally obtained. However, unlike the decision to use contraceptive devices, the decision to abort a pregnancy affects other interests than those of the woman alone, or even husband and wife alone.

[9] Once conception takes place and an embryo forms, for better or for worse the woman carries a life form with the *potential* of independent human existence.[3] Without positing the existence of a new being with its own identity and federal constitutional rights, we hold that once the embryo has formed, the decision to abort its development cannot be considered a purely private one affecting only husband and wife, man and woman.

A potential human life together with the traditional interests in the health, welfare and morals of its citizenry under the police power grant to the state a legitimate area of control short of an invasion of the personal right of initial decision.

[10] The whole thrust of the present Georgia statute[4] is to treat the problem as a medical one. Such approach is reasonable and seemingly sound inasmuch as medical practitioners are in the best position by virtue of training to judge concurrently the basis as well as the risk inherent in such a decision. In this respect, the state moreover has a legitimate interest in seeing to it that the decisions—personal and medical—is not one

2. We see no connection between this theory and the claimed unlimited right of a woman "to use her body in any way she wishes" read into Griswold by some. There are obvious limitations to the latter such as self abuse, *e. g.* disease, drugs, suicide, etc. and the rights of others in which the state clearly has an interest. Any such theory in its ultimate is flatly rejected.

3. This view of the impact of conception on the decision not to have children implies that the distinction between a quick and unquick fetus, and even that between embryo and fetus is not relevant here. And since the Court does not postulate the existence of a new being with federal constitutional rights at any time during gestation, the motion of Mr. Ferdinand Buckley for reconsideration of the order revoking his appointment as guardian *ad litem* for the embryo (or fetus) is denied. Mr. Buckley's motion to intervene in such capacity is also denied. However, he has the Court's appreciation for his participation in this litigation as *amicus curiae*.

4. Apparently patterned after the American Law Institute, Model Penal Code § 230.3 (Proposed Official Draft, 1962)

undertaken lightly and without careful consideration of all relevant factors, whether they be emotional, economic, psychological, familial or physical. For example, the legislature might require any number of conditions such as consultation with a licensed minister or secular guidance counselor as well as the concurrence of two licensed physicians or any system of approval related to the quality and soundness of the decision in all its aspects. It certainly has a clear right to circumscribe a decision made by a woman alone or by a woman and a single physician and to guard against the establishment of transient "abortion mills" by the occasional opportunistic or unethical practitioner and the concomitant dangers to his patrons and the public. Such controls and requirements, so long as they do not restrict the reasons for the initial decisions and do not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment, are properly within the sphere of legislative discretion. In that respect, where abortions may be obtained only from licensed physicians and surgeons, and only after psychiatric consultation, the mere fact that physicians and psychiatrists are more accessible to rich people than to poor people, making abortions more available to the wealthy than to the indigent, is not in itself a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Cf.* Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); MacQuarrie v. McLaughlin, 294 F.Supp. 176 (D.Mass. 1968), aff'd 394 U.S. 456, 89 S.Ct. 1224, 22 L.Ed.2d 417 (1969).

Moreover, there is an overriding interest in the manner of performance as well as the quality of the final decision to abort. Obvious need for control through licensing, sanitation requirements and proper medical standards in the execution of a legal abortion are examples. Again such decisions address themselves to legislative decision based upon informed judgment.

[11] Having decided that the reasons for an abortion may not be proscribed, but that the quality of the decision as well as the manner of its execution are properly within the realm of state control, the present statute must be examined in such light.

Rather than regulating merely the quality of the decision to have an abortion, and the manner of its performance, the Georgia statute also limits the number of reasons for which an abortion may be sought. This the State may not do, because such action unduly restricts a decision sheltered by the Constitutional right to privacy. *See* Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); California v. Belous, 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194 (1969), cert. den. 397 U.S. 915, 90 S.Ct. 920, 25 L.Ed.2d 96 (1970). The question becomes a matter of statutory overbreadth.

[12] Based upon the above, the court finds the following portions of Georgia Code § 26–1202 to be in violation of the constitutional rights of petitioner:

A. Section (a) beginning with the word "because" on line 5 and through subsection (a) (3) in its entirety.

B. Section (b) subsection (3) beginning with the word "because" on line 6 and through the end of said subsection.

C. Section (b) subsection (6) in its entirety.

D. Section (c) in its entirety.

There being no showing to the contrary, the court further finds the remainder of said Code § 26–1202 to constitute a proper exercise of state power within the context of this opinion.[5]

5. It is not thereby implied that those provisions constitute the only or best means of state control. On the whole, the present system appears unnecessarily cumbersome, a potential hazard under due process and equal protection considerations.

An appropriate formal declaratory judgment may be presented upon request of any party.

ABSTENTION

[13] It is recognized that there is no pending state court proceeding against which the injunction prayed by plaintiff would operate. Nevertheless, the request for injunctive relief is denied, on the same basis as such a prayer would be denied were a state proceeding actually in progress:

> "* * * the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted * * * that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court." City of Greenwood v. Peacock, 384 U.S. 808, 828, 86 S.Ct. 1800, 1812, 16 L.Ed.2d 944 (1968).

However under the authority of Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967), the Court has proceeded to issue the declaratory relief, in spite of its unwillingness to broadly enjoin future prosecutions under the Act. Accordingly, plaintiff's request for a declaratory judgment is hereby granted. Judgment shall issue in the form described above.

It is so ordered.

SUPPLEMENTAL OPINION

Since the Court's opinion of July 31, 1970, several motions have been filed necessitating this opinion and order.

MOTION OF AMICUS CURIAE

Ferdinand Buckley filed a motion on September 3, 1970, to alter or amend the Court's judgment of August 25, 1970, to rule on several of his earlier motions and prayers. Accordingly, that judgment is hereby amended in the following (See FN) respect:

Mr. Buckley's motion for reconsideration of the order revoking his appointment as guardian *ad litem* for the embryo (or fetus), and his motion to intervene in any representative capacity on behalf of the embryo or fetus is denied. This ruling makes it unnecessary, and the Court declines, to rule on the prayers in the answer and counterclaim Mr. Buckley filed before revocation of his appointment as guardian *ad litem*.

MOTIONS OF JANE ROE

Jane Roe petitions for leave to intervene as a plaintiff, moves for a temporary restraining order, and asks that the Court clarify and enforce its opinion of July 31, 1970. Said petition, and accordingly also the motion and the request are denied for two reasons.

[14] First, the Court is informed by counsel for all concerned that Georgia Baptist Hospital has reconsidered its earlier decision and subsequently granted Jane Roe's application for an abortion. Said action renders the petition of Jane Roe moot, there now being no sufficient collision of interests between Jane Roe and the defendants.

[15] Second, Jane Roe's petition to intervene makes it clear that her controversy was with Georgia Baptist Hospital, and only tangentially with the defendants in this case. Under such circumstances there is no showing that Mary Doe—representing the class of pregnant women denied abortions because of the Georgia statute attacked—could not adequately represent the tangential interest of Jane Roe in this action. *See* Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137, 141, 64 S.Ct. 905, 88 L.Ed. 1188 (1944); Durkin v. Pet Milk Co., 14 F.R.D. 374 (W.D.Ark.1953).

In spite of the above, the motion presents an aspect of the case which justifies some amplification of the previous declaratory judgment. The court concludes that this should be done by way of amendment sua sponte. Rule 60(b)(6); Klapprott v. United States, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266 (1948); Bros. Incorporated v. W. E.

Grace Mfg. Co., 320 F.2d 594 (5th Cir. 1963).

The problem relates to the role and function of the "abortion committees" in the several hospitals. Ga. Code § 26-1202b(5). The thrust of the original opinion was to carry out the apparent intent of the Georgia legislature by making the ultimate decision on individual abortions a medical one. However, in line with constitutional principles, the ultimate decision cannot be restricted to the three reasons stated in the statute. This left the abortion committee free to decide whether an abortion was "necessary" on the broader medical basis, namely, the totality of circumstances surrounding each patient.

[16] From the motion it is apparent that those committees who have voluntarily adopted the standards promulgated by the American College of Obstetricians and Gynecologists as controlling have placed themselves in the position of being restricted by the same reasons stated in the statute.[1] What is denied directly cannot be accomplished indirectly. It follows that the abortion committees cannot be limited to the stated reasons as the sole basis for approval of an individual abortion, nor can they so limit themselves by the adoption of such standards. Any such action by a hospital committee is declared to be an unconstitutional exercise of delegated power.

In sum, the statutory processes of approval are left standing. The patient is required to obtain the approval of (1) the certifying physician, (2) the two consulting physicians, and (3) the abortion committee of the admitting hospital. Failure to obtain approval at any level necessarily precludes abortion on that application. A majority of the abortion committee shall control its action, whether for approval or for disapproval.

To the extent stated herein, the original opinion is modified.

It is so ordered.

1. The Georgia statute requires the hospital to apply standards promulgated by the Joint Commission on the Accreditation of Hospitals. No such restrictive reasons for approval of an abortion are contained therein. However, the voluntary standards promulgated by the American College of Obstetricians and Gynecologists in part limit the grounds for abortion to the three stated statutory reasons: injury to health of the mother; danger of grave physical or mental defect to the child; and pregnancy due to rape. Any such limiting restrictions, as seen, must fail. Likewise, lack of consent by the husband, while it may freely be considered by the committee, may not be automatically established as an absolute bar.
By way of additional comment, good faith administration of the statute as now constituted would prohibit a committee from secretly restricting abortions to those statutory reasons, which the court has already deleted. To the contrary, all relevant factors should be considered and an informed medical judgment made.

458 P.2d 194

The PEOPLE, Plaintiff and Respondent,

v.

Leon Phillip BELOUS, Defendant and Appellant.

Cr. 12739.

Supreme Court of California, In Bank.

Sept. 5, 1969.

Rehearing Denied Oct. 1, 1969.

cert. denied, 397 U.S. 915 (1970)

Defendant was convicted in the Superior Court, Los Angeles County, John G. Barnes, J., of abortion and conspiracy to commit an abortion, and he appealed. The Supreme Court, Peters, J., held that statute making a person who performs abortion punishable unless abortion is necessary to preserve mother's life as statute read before amended in 1967 was invalid where term "necessary to preserve" was not susceptible to a construction which, while satisfying legislative intent, was sufficiently certain to satisfy due process requirements without improperly infringing on fundamental constitutional rights of mother to life and to choose whether to bear children, and convictions of abortion and conspiracy to commit abortion could not stand.

Judgment reversed with directions to dismiss indictment.

Burke, McComb, and Sullivan, JJ., dissented.

1. Criminal Law ⇐13

Requirement of certainty in legislation is greater where criminal statute is a limitation on constitutional rights, but mathematical certainty is not required.

2. Constitutional Law ⇐83(1)

A woman has the fundamental right to choose whether to bear children.

3. Constitutional Law ⇐82

That a fundamental right is not enumerated in either Federal or State Constitutions is no impediment to its existence.

4. Constitutional Law ⇐38

Fact that abortion law was valid when first enacted in 1850 would not resolve issue of whether law was presently constitutionally valid. West's Ann.Pen.Code, § 274.

5. Constitutional Law ⇐253

Delegation of decision-making power to a directly involved individual violates Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

6. Abortion ⇐1
Constitutional Law ⇐258

Statute making a person who performs abortion punishable unless abortion is necessary to preserve mother's life as statute read before amended in 1967 was invalid where term "necessary to preserve" was not susceptible to a construction which, while satisfying legislative intent, was sufficiently certain to satisfy due process requirements without improperly infringing on fundamental constitutional rights of mother to life and to choose whether to bear children, and convictions of abortion and conspiracy to commit abortion could not stand. West's Ann.Pen.Code, §§ 182, 274, 276; West's Ann.Health & Safety Code, §§ 25950–25954, 25951(a, b), (c) (1, 2), 25952(c); U.S.C.A.Const. Amend. 14.

A. L. Wirin, Fred Okrand, Zad Leavy and Beilenson & Leavy, Los Angeles, for defendant and appellant.

Thomas C. Lynch, Atty. Gen., William E. James, Asst. Atty. Gen., and Phillip G. Samovar, Deputy Atty. Gen., for plaintiff and respondent.

McCutchen, Doyle, Brown & Enersen, Burnham Enersen, Robert A. Blum, Terry J. Houlihan, San Francisco, Norma G. Zarky, Howard H. Jewel, Oakland, Paul N. Halvonik, San Francisco, William Kelly, Barbara N. Armstrong, Charles E. Beardsley, Los Angeles, George A. Blackstone, A. Stevens Halsted, Jr., Roderick M. Hills, Leonard S. Janofsky, Los Angeles, Herma Hill Kay, Berkeley, Frederick R. McBrien, Charles T. Munger, Stuart T. Peeler, Samuel O. Pruitt, Jr., Charles E. Rickershauser, Jr., Graham L. Sterling, Charles E. Stimson, Jr., Los Angeles, and Francis M. Wheat as amici curiae on behalf of defendant and appellant.

Charles H. Clifford, Walter R. Trinkaus, J. J. Brandlin, Los Angeles, Thomas J. Arata, Santa Rosa, Richard D. Andrews, Fresno, Cyril A. Coyle, Sacramento, Mazzera, Snyder & DeMartini, Stockton, John F. Duff, San Francisco, William R. Kennedy, Richard G. Logan, Oakland, and Curran, Golden, McDevitt & Martin, San Diego, as amici curie on behalf of plaintiff and respondent.

PETERS, Justice.

Dr. Leon Phillip Belous was convicted in January 1967, after a jury trial, of abortion, in violation of section 274 of the Penal Code, and conspiracy to commit an abortion, in violation of section 182 of the Penal Code, both felonies. The court suspended proceedings, imposed a fine of $5,000, and placed Dr. Belous on probation for two years. He appeals from the order granting probation.

Dr. Belous is a physician and surgeon, licensed since 1931 to practice medicine in the State of California, and specializing in obstetrics and gynecology. He has been on the attending staff of the gynecology department of Cedars of Lebanon Hospital in Los Angeles since 1931, is a fellow of the Los Angeles Gynecology and Obstetrical Society, the American College of Obstetrics and Gynecology, the Abdominal Surgical Society, and the Geriatric Society, and a member of the American Board of Obstetrics and Gynecology. He is on the Board of Directors of the California Committee on Therapeutic Abortion, an organization which seeks to liberalize abortion laws. He is considered by his associates to be an eminent physician in his field.

The prosecution's witnesses, a young woman and her husband, Cheryl and Clifton, testified to the following:

In 1966, Cheryl, then unmarried, believed she was pregnant. A family physician had

given her pills which would induce menstruation if she were not pregnant, but the pills did not work. She and Clifton had sometime earlier seen Dr. Belous on television, advocating a change in the California abortion laws. They had never heard of Dr. Belous before. Clifton obtained the doctor's phone number from the television station and phoned Dr. Belous; he explained the problem and that they both were "pretty disturbed," and at their "wits' end" and asked for Dr. Belous' help. Dr. Belous told him there was nothing he could do, but Clifton "continued pleading," and threatened that Cheryl would go to Tijuana for an abortion. Finally the doctor agreed to see them at his office.

Dr. Belous examined Cheryl at his Beverly Hills office and confirmed that she was possibly pregnant. Cheryl was otherwise in good health. The visit lasted about 45 minutes and was very emotional. Both Clifton and Cheryl pleaded for help, cried, insisted they were going to have an abortion "one way or another." The doctor lectured them on the dangers of criminal abortions, and Tijuana abortions in particular, and suggested that they get married. He insisted he did not perform abortions. He refused to recommend anyone in Tijuana. Finally, in response to their pleadings, Dr. Belous gave them a piece of paper with a Chula Vista phone number. He told them an abortion would cost about $500. He gave Cheryl a prescription for some antibiotics and instructed her to return for an examination.

Dr. Belous testified that he was very familiar with the abortion business in Tijuana. He had visited the clinics there to learn about conditions and knew that women who went to Tijuana were taking their lives in their hands. He met Karl Lairtus while in Tijuana and knew from personal observation that Lairtus, licensed to practice in Mexico but not in California, was performing skilled and safe abortions in Mexico. Lairtus wanted to obtain a California license, and sought out Belous' help on a number of occasions. When Lairtus moved from Mexico to Chula Vista, he gave Dr. Belous his address and phone number. When Lairtus moved to Los Angeles, he gave the doctor a Hollywood address, and made it known to the doctor that he was performing abortions. It was Lairtus' number that Belous gave to Cheryl and Clifton. Although he had given out Lairtus' number before, in similar situations, where distraught pregnant women insisted they would do anything, Dr. Belous had no idea how many women actually went to Lairtus.

Cheryl and Clifton made arrangements with Lairtus, and went to the address which Lairtus gave them on the phone. After the abortion was performed, while Cheryl was resting, the police, having been advised by another woman that Lairtus was performing abortions at that address, came to his apartment, followed another couple into the apartment and arrested Lairtus. They found two notebooks containing women's names, ages, dates of last menstruation, and physician's names, including Dr. Belous' name, which the police interpreted as the referring doctor with whom Lairtus was to split his fees. On the basis of this information, Dr. Belous was arrested at his office. Lairtus pleaded guilty. At Dr. Belous' trial, he testified that, although not solicited, he sent Dr. Belous about $100 as a professional courtesy in about half the cases that he had performed abortions on Dr. Belous' patients. Dr. Belous denied receiving any money from Lairtus.

The substance of Dr. Belous' defense was that he gave Lairtus' phone number to Cheryl and Clifton only because he believed that they would, in fact, do anything to terminate the pregnancy, which might involve butchery in Tijuana or self-mutilation; that in face of their pleading and tears, he gave out the phone number of someone whom he knew to be a competent doctor, although unlicensed in this state. The doctor believed that if the young couple carried out their threats, Cheryl's very life was in danger.

Section 274 of the Penal Code, when the conduct herein involved occurred, read: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the State prison not less than two nor more than five years."

The statute was substantially unchanged since it was originally enacted in 1850.[1] In 1967, the statute was amended and sections 25950 through 25954 ("Therapeutic Abortion Act") added to the Health and Safety Code. The act extends the lawful grounds for obtaining an abortion.[2] Section 274 is directed towards the abortionist. Under section 275 of the Penal Code (also amended by the Therapeutic Abortion Act), a woman who solicits or submits to an abortion is punishable by up to five years' imprisonment; similarly, under section 276, any person who solicits a woman to submit to an abortion is punishable by up to five years' imprisonment.

We have concluded that the term "necessary to preserve" in section 274 of the Penal Code is not susceptible of a construction that does not violate legislative intent and that is sufficiently certain to satisfy due process requirements without improperly infringing on fundamental constitutional rights.

"The requirement of a reasonable degree of certainty in legislation, especially in the criminal law, is a well established element of the guarantee of due process of law. 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. * * * "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."' Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888; see also Connally v. General Const. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322. Such also is the law of the State of California. People v. McCaughan, 49 Cal.2d 409, 414, 317 P.2d 974.

[1] "The required meaning, certainty and lack of ambiguity may appear on the face of the questioned statute or from any demonstrably established technical or common law meaning of the language in ques-

1. Stats.1850, ch. 99, § 45, at p. 233: "[E]very person who shall administer or cause to be administered or taken, any medicinal substances, or shall use or cause to be used any instruments whatever, with the intention to procure the miscarriage of any woman then being with child, and shall be thereof duly convicted, shall be punished by imprisonment in the State Prison for a term not less than two years, nor more than five years: *Provided*, that no physician shall be affected by the last clause of this section, who, in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life."

2. Penal Code, section 274, as amended reads: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, * * * *except as provided in the Therapeutic Abortion Act * * * of the Health and Safety Code*, is punishable by imprisonment in the state prison * * *." (Stats.1967, ch. 327, § 3, at p. 1523; italics added.)

The Therapeutic Abortion Act (Health & Saf.Code, §§ 25950–25954) authorizes abortions "only" if the abortion takes place in an accredited hospital (§ 25951, subd. (a)); the abortion is approved by a hospital staff committee consisting of at least three licensed physicians and surgeons (§ 25951, subd. (b)); and there is "substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother" (§ 25951, subd. (c) (1)); the pregnancy resulted from rape or incest (§ 25951, subd. (c) (2)); or the woman is under 15 years of age (§ 25952, subd. (c)).

tion. People v. McCaughan, *supra*, 49 Cal. 2d 409, 414, 317 P.2d 974; Lorenson v. Superior Court, 35 Cal.2d 49, 60, 216 P.2d 859." (In re Newbern, 53 Cal.2d 786, 792, 3 Cal.Rptr. 364, 368, 350 P.2d 116, 120.) The requirement of certainty in legislation is greater where the criminal statute is a limitation on constitutional rights. (See Smith v. California (1959) 361 U.S. 147, 151, 80 S.Ct. 215, 4 L.Ed.2d 205.) On the other hand, mathematical certainty is not required; "some matter of degree" is involved in most penal statutes. (Nash v. United States (1913) 229 U.S. 373, 377, 33 S.Ct. 780, 57 L.Ed. 1232.)

Dictionary definitions and judicial interpretations fail to provide a clear meaning for the words, "necessary" or "preserve." There is, of course, no standard definition of "necessary to preserve," and taking the words separately, no clear meaning emerges. "Necessary" is defined as: "1. Essential to a desirable or projected end or condition; not to be dispensed with without loss, damage, inefficiency, or the like; * * *" (Webster's New International Dictionary (2d ed.), unabridged.) The courts have recognized that "'necessary' has not a fixed meaning, but is flexible and relative." (Westphal v. Westphal, 122 Cal. App. 379, 382, 10 P.2d 119, 120; see also, City of Dayton v. Borchers (Ohio Common Pleas, 1967) 13 Ohio Misc. 273, 232 N.E.2d 437, 441 ["A *necessary* thing may supply a wide range of wants, from mere convenience to logical completeness."].)

The definition of "preserve" is even less enlightening. It is defined as: "1. To keep or save from injury or destruction; to guard or defend from evil; to protect; save. 2. To keep in existence or intact; * * * To save from decomposition, * * * 3. To maintain; to keep up; * * *" (Webster's New International Dictionary, *supra*.) The meanings for "preserve" range from the concept of maintaining the status quo—that is, the woman's condition of life at the time of pregnancy—to maintaining the biological or medical definition of "life"—that is, as opposed to the biological or medical definition of "death".

Since abortion before quickening was not a crime at common law (Perkins, Criminal Law (1957) 101; Means, The Law of New York Concerning Abortion and the Status of the Foetus, 1664–1968: A Case of Cessation of Constitutionality (1968) 14 N.Y.L. F. 411, 419–422; Stern, Abortion: Reform and the Law (1968) 59 J.Crim.L.C. & P.S. 84, 85) we cannot rely on common law meanings or common law referents (see Lorenson v. Superior Court, *supra*, 35 Cal. 2d 49, 60, 216 P.2d 859; People v. Agnello, 259 Cal.App.2d 785, 790–791, 66 Cal.Rptr. 571).[3]

Various possible meanings of "necessary to preserve * * * life" have been suggested. However, none of the proposed definitions will sustain the statute.

Respondent asserts: "If medical science feels the abortion should be performed as it is necessary to preserve her life, then it may be performed; that is, unless it is performed the patient will die."

Our courts, however, have rejected an interpretation of "necessary to preserve" which requires certainty or immediacy of death. (People v. Abarbanel, 239 Cal.App. 2d 31, 32, 35, 48 Cal.Rptr. 336; People v. Ballard, 218 Cal.App.2d 295, 298, 32 Cal. Rptr. 233; People v. Ballard, 167 Cal.App. 2d 803, 807, 335 P.2d 204.) Justice Fourt, in People v. Ballard, *supra*, 167 Cal.App. 2d 803, 814, 335 P.2d 204, 212, stated: "Surely, the abortion statute (Pen.Code, § 274) does not mean by the words 'unless the same is necessary to preserve her life' that the peril to life be imminent. It ought to be enough that the dangerous condition 'be potentially present, even though its full

3. Compare United States v. Harriss (1954) 347 U.S. 612, 634, 74 S.Ct. 808, 820, 98 L.Ed. 989 (dissenting opinion): "Whoever kidnaps, steals, kills, or commits similar acts of violence upon another is bound to know that he is inviting retribution by society, and many of the statutes which define these long-established crimes are traditionally and perhaps necessarily vague."

development might be delayed to a greater or less extent. Nor was it essential that the doctor should believe that the death of the patient would be otherwise *certain* in order to justify him in affording present relief.' [Citations.]" The above language was quoted in People v. Abarbanel, *supra*, 239 Cal.App.2d 31, 34, 48 Cal.Rptr. 336.

In People v. Ballard, *supra*, 167 Cal.App. 2d 803, 813–814, 335 P.2d 204, 211, the evidence established that the woman was "extremely nervous * * * upset, had headaches, was unable to sleep, and thought that she was pregnant. She was agitated, disturbed and had many problems." (Italics omitted.) In People v. Ballard, *supra*, 218 Cal.App.2d 295, 307, 32 Cal.Rptr. 233, it was established that at the time each of the women went to the defendant doctor she was in a "bad state of health" because of self-imposed abortive practices. And in People v. Abarbanel, *supra*, 239 Cal.App.2d 31, 48 Cal.Rptr. 336, the obstetrician performed the abortion after receiving letters from two psychiatrists to the effect that abortion was indicated as necessary to save the woman's life from the "possibility" of suicide. In each of the cases the conviction was reversed.

If the fact of ill health or the mere "possibility" of suicide is sufficient to meet the test of "necessary to preserve her life," it is clear that a showing of immediacy or certainty of death is not essential for a lawful abortion. Two other jurisdictions have also rejected an interpretation of "necessary to preserve" which would require certainty or immediacy of death. (State v. Dunklebarger (1928) 206 Iowa 971, 221 N. W. 592, 596; State v. Hatch (1917), 138 Minn. 317, 164 N.W. 1017.)

After the decision in *Ballard*, the Legislature did not amend the statute to repudiate the rule suggested by that case and to establish a definition requiring certainty of death.[4]

It would be anomalous to uphold a criminal statute against a charge of vagueness by adopting a construction of the statute rejected by the courts of this state as not reflecting legislative intent unless there was a clear showing of a strong public policy or legislative intent requiring adoption of the rejected construction. No such showing has been made with regard to the construction urged by respondent.

Moreover, a definition requiring certainty of death would work an invalid abridgment of the woman's constitutional rights. The rights involved in the instant case are the woman's rights to life and to choose whether to bear children.[5] The woman's right to life is involved because childbirth involves risks of death.[6]

[2, 3] The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a "right of privacy" or "liberty" in matters related to marriage, family, and sex. (See, e. g., Griswold v. Connecticut, *supra*, 381 U.S. 479, 485, 486, 500, 85 S.Ct. 1678, 14 L.Ed.2d 510; Loving v. Virginia (1967) 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 [statute prohibiting interracial marriages, violative of Due Process Clause]; Skinner v. Oklahoma ex rel. Williamson (1942) 316 U.S. 535, 536, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 [sterilization laws; marriage and procreation involve a "basic liberty"]; Pierce v. Society of Sisters (1925) 268 U.S. 510, 534–535, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R.

4. The definitions suggested by the two *Ballard* cases and by *Abarbanel* will be discussed later in this opinion.

5. Dr. Belous' standing to raise this right is unchallenged. (Cf. Griswold v. Connecticut (1965) 381 U.S. 479, 481, 85 S.Ct. 1678, 14 L.Ed.2d 510; Barrows v. Jackson (1953) 346 U.S. 249, 257, 73 S.Ct. 1031, 97 L.Ed. 1586; Parrish v. Civil Service Commission, 66 Cal.2d 260, 264, 57 Cal.Rptr. 623, 425 P.2d 223.)

6. E. g., The maternal death rate in 1966 was 0.5 per 100,000 population and 29.1 per 100,000 births. (Statistical Abstract of the United States (1968) table 73, at p. 58, table 68, at p. 55.) In California in 1966 the maternal death rate was 2.1 per 10,000 live births. (California Statistical Abstract (1968) table E–3, at p. 67.) As to a particular pregnant woman the risk of death may be greater or lesser.

468 [prohibition against nonpublic schools; same]; Meyer v. Nebraska (1923) 262 U.S. 390, 399–400, 43 S.Ct. 625, 67 L.Ed. 1042 [prohibition against teaching children German language; same]; Perez v. Sharp, 32 Cal.2d 711, 715, 198 P.2d 17; see also Custodio v. Bauer, 251 Cal.App.2d 303, 317–318, 59 Cal.Rptr. 463.) That such a right is not enumerated in either the United States or California Constitutions is no impediment to the existence of the right. (See, e. g., Carrington v. Rash (1965) 380 U.S. 89, 96, 85 S.Ct. 775, 13 L.Ed.2d 675 [fundamental but nonenumerated right to vote]; Aptheker v. Secretary of State (1964) 378 U.S. 500, 505–506, 84 S.Ct. 1659, 12 L.Ed.2d 992 and Kent v. Dulles (1958) 357 U.S. 116, 125, 78 S.Ct. 1113, 2 L.Ed.2d 1204 [right to travel]; Bolling v. Sharpe (1954) 347 U.S. 497, 500, 74 S.Ct. 693, 98 L.Ed. 884 [right to attend federal unsegregated schools]; Otsuka v. Hite, 64 Cal.2d 596, 602, 51 Cal.Rptr. 284, 414 P.2d 412 [right to vote]; cf. Finot v. Pasadena City Bd. of Education, 250 Cal. App.2d 189, 199, 58 Cal.Rptr. 520.) It is not surprising that none of the parties who have filed briefs in this case have disputed the existence of this fundamental right.

The critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state (Shapiro v. Thompson (1969), 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600; Sherbert v. Verner (1963) 374 U.S. 398, 403, 83 S.Ct. 1790, 10 L.Ed.2d 965), whether the regulation is "necessary * * * to the accomplishment of a permissible state policy" (McLaughlin v. Florida (1964) 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 L.Ed.2d 222; see also, N.A.A.C.P. v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405; Bates v. City of Little Rock (1960) 361 U.S. 516, 527, 80 S.Ct. 412, 4 L.Ed.2d 480; Huntley v. Public Util. Comm., 69 A.C. 62, 69, 69 Cal.Rptr. 605, 442 P.2d 685; Vogel v. County of Los Angeles, 68 Cal.2d 18, 21, 64 Cal. Rptr. 409, 434 P.2d 961; People v. Woody, 61 Cal.2d 716, 718, 40 Cal.Rptr. 69, 394 P.2d 813), and whether legislation impinging on constitutionally protected areas is narrowly drawn and not of "unlimited and indiscriminate sweep" (Shelton v. Tucker (1960) 364 U.S. 479, 490, 81 S.Ct. 247, 5 L.Ed.2d 231; see also, Cantwell v. Connecticut (1940) 310 U.S. 296, 308, 60 S.Ct. 900, 84 L.Ed. 1213; In re Berry, 68 Cal.2d 137, 151, 65 Cal.Rptr. 273, 436 P.2d 273; In re Hoffman, 67 Cal.2d 845, 853–854, 64 Cal.Rptr. 97, 434 P.2d 353).

It is possible that the definition suggested by respondent, requiring that death be certain, was that intended by the Legislature when the first abortion law was adopted in 1850 and that, in the light of the then existing medical and surgical science, the great and direct interference with a woman's constitutional rights was warranted by considerations of the woman's health. When California's first anti-abortion statute was enacted, any surgical procedure which entered a body cavity was extremely dangerous. Surgeons did not know how to control infection, and mortality was high. (Haagensen & Lloyd, A Hundred Years of Medicine (1943) p. 19.) In 1867, Joseph Lister first published his findings on antiseptic surgery (*id.*, at pp. 241–242), but even in 1883 the techniques he developed were condemned (*id.*, at p. 245), and as late as 1895 were not well understood or properly applied by even leaders of the medical profession. (*Id.*, at p. 246; see also, H. Robb (1895) Aseptic Surgical Technique.)

Although development was slow, techniques of antisepsis and asepsis became major general advances in surgery at and after the turn of the century. In due course safe procedures were developed for specific operations. Curettage, used for abortion in the first trimester, became a safe, accepted and routinely employed medical technique, especially after antibiotics were developed in the early 1940's. (Douglas, Toxic Effects of the Welch Bacillus in Postabortal Infections (1956) 56 N.Y.State J.Med. 3673.) It is now safer for a woman to have

a hospital therapeutic abortion during the first trimester than to bear a child.[7]

Although abortions early in pregnancy and properly performed present minimal danger to the woman, criminal[8] abortions are "the most common single cause of maternal deaths in California." (Fox, Abortion Deaths in California (1967) 98 Am.J.Obst. & Gynec. 645, 650.) In California, it is estimated that 35,000 to 100,000 such abortions occur each year. (Fox, *supra*, at p. 645.)

The incidence of severe infection from criminal abortion is very much greater than the incidence of death. The Los Angeles County Hospital alone, for example, in 1961 admitted over 3,500 patients treated for such abortions. (Kistner, Medical Indications for Contraception: Changing Viewpoints (editorial) (1965) 25 Obst. & Gynec. 285, 286.) Possibly more significant than the mere incidence of infection caused by criminal abortions is the result of such infection. "Induced Illegal Abortion * * * is one of the important causes of subsequent infertility and pelvic disease." (Kleegman & Kaufman, Infertility in Women (1966) p. 301; see also Curtis & Huffman, Gynecology (6th ed. 1950) pp. 564–566.)[9]

Amici for appellant, 178 deans of medical schools, including the deans of all California medical schools, chairmen of medical school departments, and professors of medical schools state: "These recorded facts bring one face-to-face with the hard, shocking—almost brutal—reality that our statute designed in 1850 to protect women from serious risks to life and health has in modern times become a scourge."[10]

7. C. Tietze & H. Lehfeldt, Legal Abortion in Eastern Europe (April 1961) 175 J.A.M.A. 1149, 1152; see also V. Kolblova, Legal Abortion in Czechoslovakia (April 1966) 196 J.A.M.A. 371; K.-H. Mehland, Combatting Illegal Abortion in the Socialist Countries of Europe (1966) 13 World Med.J. 84. There are, of course, no comparable data in the United States. However, in California from November 1967 through September 1968, 3,775 therapeutic abortions were reported without a maternal death. (See Annual Report on the Implementation of the Therapeutic Abortion Act, Department of Public Health, Bureau of Maternal and Child Health (January 1969), table 1.)

The only data contrary to the conclusions above is provided by amicus for respondent, relying on Swedish data showing that maternal mortality from abortion is slightly higher than maternal mortality from giving birth. The Swedish figures are, however, explainable by the fact that abortions in Sweden are often performed during late pregnancy. (See Tietze & Lehfeldt, *supra*, 175 J.A.M.A. 1149, 1152 (e. g., in 1949, 35 percent of Swedish abortions were performed after the first trimester); Hoffmeyer, Medical Aspects of the Danish Legislation on Abortions (1965) 17 W.Res.L.Rev. 529, 544–545.)

8. The phrases "criminal abortion" and "illegal abortion" are used by the medical profession—and by legal commentators—to encompass all abortions obtained other than from a physician in an accepted surgical environment. Any use of the phrase "criminal abortion" or "illegal abortion" in this opinion merely adopts the common phraseology; no legal conclusion is intended.

9. There is considerable literature describing the experience of various hospitals with infected abortion. Hospital experience, however, can be assumed to be only the tip of the iceberg. Many badly infected women will be treated at home or in a doctor's office. (Reid, Assessment and Management of the Seriously Ill Patient Following Abortion (March 1967) 199 J.A.M.A. p. 805.) See, for hospital data, Goodno, Cushner, Molumphey, Management of Infected Abortion (1963) 85 Am.J.Obst. & Gynec. 16 [Baltimore City Hospitals]; Knapp, Platt and Douglas, Septic Abortion (1960) 15 Obst. & Gynec. 344 [The New York Hospital]; Moritz & Thompson, Septic Abortion (1966) 95 Am.J.Obst. & Gynec. 46 [Miami Valley Hospital, Dayton, Ohio]; Stevenson & Yang, Septic Abortion With Shock (1962) 83 Am.J.Obst. & Gynec. 1229 [Detroit Receiving Hospital]; Studdiford & Douglas, Placental Bacteremia: A Significant Finding in Septic Abortion Accompanied by Vascular Collapse (1956) 71 Am.J. Obst. & Gynec. 842 [Bellevue Hospital, New York].)

10. One of the amici in support of respondent agrees: "There is a substantial risk that abortions performed by persons un-

[4] Although we may assume that the law was valid when first enacted, the validity of a law in 1850 does not resolve the issue of whether the law is constitutionally valid today. (Compare, e. g., Gray v. Sanders (1963) 372 U.S. 368, 381, 83 S.Ct. 801, 9 L.Ed.2d 821, with South v. Peters (1950) 339 U.S. 276, 277, 70 S.Ct. 641, 94 L.Ed. 834; Baker v. Carr (1962) 369 U.S. 186, 237, 82 S.Ct. 691, 7 L.Ed.2d 663, with Colegrove v. Green (1946) 328 U.S. 549, 556, 66 S.Ct. 1198, 90 L.Ed. 1432; Brown v. Board of Education (1954) 347 U.S. 483, 495, 74 S.Ct. 686, 98 L.Ed. 873; with Plessy v. Ferguson (1896) 163 U.S. 537, 550–551, 16 S.Ct. 1138, 41 L.Ed. 256.)

Constitutional concepts are not static. Our United States Supreme Court said, regarding the equal protection clause of the Fourteenth Amendment: "We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment 'does not enact Mr. Herbert Spencer's Social Statics.' [Citation.] Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be authorized to practice surgery, carried out the limits of fundamental rights. * * *." (Harper v. Virginia State Bd. of Elections (1966) 383 U.S. 663, 669, 86 S.Ct. 1079, 1082, 16 L.Ed.2d 169; see also, Perez v. Sharp, *supra*, 32 Cal.2d 711, 727, 198 P.2d 17; Galyon v. Municipal Court, 229 Cal. App.2d 667, 671–672, 40 Cal.Rptr. 446, and cases cited therein ["[A] statute valid when enacted may become invalid by change in the conditions to which it is applied."]. See also, Means, *supra*, 14 N.Y.L.F. 411, 514–515.)

In the light of modern medical surgical practice, the great and direct infringement of constitutional rights which would result from a definition requiring certainty of death may not be justified on the basis of considerations of the woman's health where, as here, abortion is sought during the first trimester.

It is next urged that the state has a compelling interest in the protection of the embryo and fetus [11] and that such interest warrants the limitation on the woman's constitutional rights. Reliance is placed upon several statutes and court rules which assertedly show that the embryo or fetus is equivalent to a born child. However, all of the statutes and rules relied upon require a live birth or reflect the interest of the parents.[12]

in unregulated places, will bring injury or even death to the mother."

Authorities recognizing and discussing the tragic health problem created by illegal abortions are legion. (See, e. g., Bates, The Abortion Mill: An Institutional Study (1954) 45 J.Crim.L.C. & P.S. 157; Eastman, Expectant Motherhood (3d ed.1957) 106 et seq.; Gold, Erhardt, Jacobziner & Nelson, Therapeutic Abortions in New York City: A 20-Year Review (1965) 55 Am.J.Pub.Health 964, 970–971; Guttmacher (ed.1967) The Case for Legalized Abortion Now; Lader (1966) Abortion; Leavy & Kummer, Criminal Abortion: Human Hardship and Unyielding Laws (1962) 35 So.Cal.L.Rev. 123; Lucas, Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes (1968) 46 N.C.L.Rev. 730; Niswander, Medical Abortion Practices in the United States (1965) 17 W.Res.L.Rev. 403.)

11. It has been pointed out that "embryo" is more accurately descriptive than "fetus" in the instant case. Webster's New International Dictionary, *supra*, states: "* * * In mammals * * * *embryo* is applied only to early stages passed within the mother's body; later (in human embryology, usually after the third month of development) the young is called a *fetus*. * * *" (Italics in original.)

12. Statutes classifying the unborn child as the same as the born child require that the child be born alive for the provisions to apply. (E.g., Civ.Code, § 29 ["A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth; * * *"]; Prob.Code, § 250 ["A posthumous child

In any event, there are major and decisive areas where the embryo and fetus are not treated as equivalent to the born child. Probably the most important is reflected by the statute before us. The intentional destruction of the born child is murder or manslaughter. The intentional destruction of the embryo or fetus is never treated as murder, and only rarely as manslaughter but rather as the lesser offense of abortion. (Perkins, Criminal Law, *supra*, p. 103; Means, *supra*, 14 N.Y.L.F. at p. 445.)[13]

Furthermore, the law has always recognized that the pregnant woman's right to life takes precedence over any interest the state may have in the unborn. The California abortion statutes, as to the abortion laws of all 51 United States jurisdictions, make an exception in favor of the life of the prospective mother. (See Stern, Abortion: Reform and the Law, *supra*, 59 J. Crim.L.C. & P.S. 84, 86–87; George, Current Abortion Laws: Proposals & Movements for Reform (1965) 17 W.Res.L.Rev. 366, 375.) Although there may be doubts as to whether the state's interest may ever justify requiring a woman to risk death, it is clear that the state could not forbid a woman to procure an abortion where, to a medical certainty, the result of childbirth would be death. We are also satisfied that the state may not require that degree of risk involved in respondent's definition, which would prohibit an abortion, where death from childbirth although not medically certain, would be substantially certain or more likely than not. Accordingly, the definition of the statute suggested by respondent must be rejected as an invalid infringement upon the woman's constitutional rights.

is considered as living at the death of the parent."]; Prob.Code, § 255 [An illegitimate child is the heir of his mother, "whether born or conceived."].)

Similarly, cases holding that a child can recover for injuries caused before his birth require that the child be born alive. The interest protected is that of the child; and the right attaches, not to the embryo or fetus, but to the living child. (Scott v. McPheeters, 33 Cal.App.2d 629, 637, 92 P.2d 678, 93 P.2d 562 [child injured at birth can bring action for injuries]; see also, Carroll v. Skloff (1964), 415 Pa. 47, 202 A.2d 9, 11; Tomlin v. Laws (1922) 301 Ill. 616, 134 N.E. 24, 25; Prosser, Law of Torts (3d ed.1964) at p. 356 ["The child, provided that he is born alive, is permitted to maintain an action * * *."].)

Where the embryo or fetus is allowed to assert rights before birth it is the prospective mother or parents who are bringing the action; thus it is their interest that the law protects. (Kyne v. Kyne, 38 Cal.App.2d 122, 127–128, 100 P.2d 806 [action on behalf of unborn child for support and to establish paternity]; People v. Sinnes, 134 Cal.App. 355, 357–358, 25 P.2d 487 [criminal action for nonsupport against father of unborn child]; People v. Yates, 114 Cal. App.Supp. 782, 788, 298 P. 961 [same].) Similarly, in those jurisdictions which recognize a cause of action for the loss of an unborn child, it is the parents' "distressing wrong in the loss of a child" that the law has recognized. (Prosser, *supra*, § 56, at p. 357; Torigian v. Watertown News Co. Inc. (1967) 352 Mass. 446, 448, 225 N.E.2d 926.)

In a case involving a pregnant woman who refused a blood transfusion, in ordering the transfusion the court made clear that it was concerned with the woman, rather than the fetus: "* * * Mrs. Jones wanted to live." (Application of President & Directors of Georgetown Col. (1964) 118 U.S.App.D.C. 90, 331 F.2d 1000, 1009, cert. denied, 377 U.S. 978, 84 S.Ct. 1883, 12 L.Ed.2d 746, but see Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson (1964) 42 N.J. 421, 201 A.2d 537, 538, cert. denied, 377 U.S. 985, 84 S.Ct. 1894, 12 L.Ed.2d 1032, suggesting that an 8-month pregnant woman could be required to have blood transfusions to protect the unborn child.)

Although sections 3705 and 3706 of the Penal Code, which provide for suspending the execution of a pregnant woman, reflect an interest in the unborn child, the sections do not affect any other significant private interests and thus furnish no basis to evaluate the interest protected or to conclude that the embryo or fetus is equivalent to a born child.

13. One case has held that, for purposes of the manslaughter and murder statutes, human life may exist where childbirth has commenced but has not been fully completed. (People v. Chavez, 77 Cal.App.2d 621, 624, 626, 176 P.2d 92.)

Another definition of the term "necessary to preserve" is suggested by People v. Abarbanel, *supra*, 239 Cal.App.2d 31, 32, 34, 48 Cal.Rptr. 336, where the court held that an abortion was not unlawful where the obstetrician performed the abortion based on the "possibility" of suicide. *Abarbanel* might be understood as meaning that "necessary to preserve" refers to a possibility of death different from or greater than the ordinary risk of childbirth. To so interpret "necessary to preserve" would mean that in nearly every case, if not all, a woman who wished an abortion could have one. A woman who is denied a desired lawful abortion and forced to continue an unwanted pregnancy would seem to face a greater risk of death, because of psychological factors, than the average woman, because the average includes all those women who wish to bear the child to term. The psychological factor alone, which under *Abarbanel* is a proper consideration, would seem to be decisive. Such a construction of the statute permitting voluntary abortions would render the statute virtually meaningless. Moreover, to determine the right to an abortion solely on the basis of the dangers of childbirth without regard to the relative dangers of the abortion would be contrary to good medical practice.

Nor can the statute be made certain by reading it as "substantially or reasonably" necessary to preserve the life of the mother. In the present context those terms are not sufficiently precise and would be subject to such different interpretations as to add little or nothing to "necessary." Thus, many people may feel that an abortion is reasonably or substantially necessary to preserve life where the risk of death is double or triple the ordinary risk in childbirth. Others may believe that anything which increases the possibility of death is a substantial risk which is not to be undertaken in the absence of countervailing considerations, so that "reasonably necessary" or "substantially necessary" becomes as destructive of the statute as "possibility of death." On the other hand, there may be those who feel that there is no reasonable or substantial necessity until it is more likely than not that the pregnant woman will not survive childbirth. Although in other contexts the implication of words such as "reasonably" and "substantially" may add certainty and avoid other due process objections, in the instant situation the implication of such words would merely increase the uncertainty.

There is one suggested test which is based on a policy underlying the statute and which would serve to make the statute certain. The test is probably in accord with the legislative intent at the time the statute was adopted. The Legislature may have intended in adopting the statute that abortion was permitted when the risk of death due to the abortion was less than the risk of death in childbirth and that otherwise abortion should be denied. As we have seen, at the time of the adoption of the statute abortion was a highly dangerous procedure, and under the relative safety test abortion would be permissible only where childbirth would be even more dangerous. In light of the test and the then existing medical practice, the question whether abortion should be limited to protect the embryo or fetus may have been immaterial because any such interest would be effectuated by limiting abortions to the rare cases where they were safer than childbirth.

The suggested test would involve an application of medical principles. Medical science may be able to tell us the proper method to treat a patient to minimize the risk of death, but without resort to matters outside medical competence, it cannot tell us the circumstances in which the safest treatment should be rejected and a more dangerous treatment followed in order to protect an embryo or fetus.

The new Therapeutic Abortion Act (Health & Saf.Code, §§ 25950–25954), has adopted a test analogous to the suggested one. Under the new statute, abortion is permissible during the first 20 weeks of pregnancy by a licensed physician in an accredited hospital (Health & Saf.Code, §§

25951, 25953) if it is determined under prescribed procedures either that "There is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother" (Health & Saf.Code, § 25951, subd. (c) (1)), or that "The pregnancy resulted from rape or incest." (Health and Saf.Code, § 25951, subd. (c) (2).) Mental health includes mental illness to the extent that the woman would be dangerous to herself. (Health & Saf.Code, § 25954.) By limiting the abortion to the first 20 weeks, the Legislature has taken into account the danger to the mother of the later abortion and, by requiring the abortion to be performed by a licensed physician in an accredited hospital, has recognized the danger to the mother of other procedures. The further criteria for determining whether an abortion is permissible is the pregnant woman's physical and mental health. Thus, the test established is a medical one, whether the pregnant woman's physical and mental health will be furthered by abortion or by bearing the child to term, and the assessment does not involve considerations beyond medical competence. There is nothing to indicate that in adopting the Therapeutic Abortion Act the Legislature was asserting an interest in the embryo.

Although the suggested construction of former section 274, making abortion lawful where it is safer than childbirth and unlawful where abortion is more dangerous, may have been in accord with legislative intent, the statute may not be upheld against a claim of vagueness on the basis of such a construction. The language of the statute, "unless the same is necessary to preserve her life," does not suggest a relative safety test, and no case interpreting the statute has suggested that the statute be so construed. None of the parties or numerous amici who have filed briefs in the instant case suggest that the statute applies a relative safety test; to the contrary, the position of the parties and amici, including numerous lawyers, doctors, educators, clergymen and laymen, implies that the statute does not apply that standard. Thus, those claiming the statute is invalid urge that the only valid standard would be a relative safety test and that the statute fails to adopt such a test, and those urging the validity of the statute either state or imply that the standard applied is more restrictive. In the circumstances, we are satisfied that the statute may not be construed to adopt the relative safety test as against a claim of vagueness, because the language does not suggest that test and because of the practical evidence before us that men of "common" intelligence, indeed of uncommon intelligence, have not guessed at this meaning.[14]

14. The practical aspects of the need to guess at the meaning of the abortion statute is shown by Packer & Gampell, Therapeutic Abortion: A Problem in Law and Medicine (1959) 11 Stan.L.Rev. 417. A questionnaire survey directed to 29 San Francisco Bay Area and Los Angeles hospitals (*id.*, at p. 423) based on hypothetical cases involving pregnant women seeking abortions yielded the following results (*id.*, at p. 444):

Case No.	Authors' Evaluation of Legality of Abortion	Hospital Would Perform Abortion	
		Yes	No
1	Yes	21	1
2	No	10	12
3	No	6	16
4	No	15	7
5	No	8	13
6	No	8	14
7	Yes	17	4
8	No	5	17
9	Prob. Yes	10	11
10	Maybe	17	4
11	No	1	20

[5] The problem caused by the vagueness of the statute is accentuated because under the statute the doctor is, in effect, delegated the duty to determine whether a pregnant woman has the right to an abortion and the physician acts at his peril if he determines that the woman is entitled to an abortion. He is subject to prosecution for a felony and to deprivation of his right to practice medicine (Bus. & Prof.Code, § 2377) if his decision is wrong. Rather than being impartial, the physician has a "direct, personal, substantial, pecuniary interest in reaching a conclusion" that the woman should not have an abortion. The delegation of decision-making power to a directly involved individual violates the Fourteenth Amendment. (Tumey v. Ohio (1927) 273 U.S. 510, 523, 47 S.Ct. 437, 71 L.Ed. 749; see also State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, 40 Cal.2d 436, 448, 254 P.2d 29 ["[T]he statute assumes to confer legislative authority upon those who are directly interested in the operation of the regulatory rule * * *."]; Blumenthal v. Board of Medical Examiners, 57 Cal.2d 228, 235, 18 Cal.Rptr. 501, 504, 368 P.2d 101, 104.)

The inevitable effect of such delegation may be to deprive a woman of an abortion when under any definition of section 274 of the Penal Code, she would be entitled to such an operation, because the state, in delegating the power to decide when an abortion is necessary, has skewed the penalties in one direction: *no* criminal penalties are imposed where the doctor refuses to perform a necessary operation, even if the woman should in fact die because the operation was not performed.

The pressures on a physician to decide not to perform an absolutely necessary abortion are, under section 274 of the Penal Code, enormous, and because section 274 authorizes—and requires—the doctor to decide, at his peril, whether an abortion is necessary, a woman whose life is at stake may be as effectively condemned to death as if the law flatly prohibited all abortions.

To some extent the Therapeutic Abortion Act reduces these pressures. The act specifically authorizes an abortion by a licensed physician in an accredited hospital where the abortion is approved in advance by a committee of the medical staff of the hospital, applying medical standards. (Health & Saf.Code, § 25951.) At least in cases where there has been adherence to the procedural requirements of the statute, physicians may not be held criminally responsible, and a jury may not subsequently determine that the abortion was not authorized by statute.

[6] We conclude that the validity of section 274 of the Penal Code before amendment cannot be sustained.[15]

Since section 274 is invalid, Dr. Belous' conviction for violation of section 182 of the Penal Code, conspiracy to commit abortion, must likewise fall. The judgment is reversed with directions to the trial court to dismiss the indictment.

TRAYNOR, C. J., TOBRINER, J., and PIERCE,* J. pro tem., concur.

BURKE, Justice (dissenting).

I dissent.

The defendant was found guilty by jury trial of a wilful violation of the abortion statute as it existed at the time of the offense. That he violated the statute is all but conceded in the briefs filed in his behalf. Although he testified that he directed the young couple to a doctor, unlicensed in California, because he believed that if they

15. It has been urged that the Therapeutic Abortion Act is unconstitutional because it contains uncertainties similar to those in the repealed statute, because it infringes on the woman's right to choose whether to bear children, and because the act does not expressly permit an abortion where there is a likelihood that a deformed child will be born. Since the act was adopted after the abortion in the instant case, we do not reach the issue of its validity.

* Assigned by the Chairman of the Judicial Council.

carried out their threats of going to Tijuana to procure an abortion the young woman's life would be in danger, he acknowledged upon cross-examination that her life would not have been endangered if she were not aborted. His assertions that he acted in good faith and out of compassion are tainted somewhat by the evidence which showed that he had referred other women to the same unlicensed physician on a number of occasions and that he had participated on at least one-half of those occasions in the fee paid the abortionist.

Had the doctor truly believed that the young woman's life was in danger he could have done what was the common practice of taking the patient to one of the several hospitals in which therapeutic abortions were being performed. To my knowledge there is not one single instance of a decision of the appellate courts of this state in which a doctor or a hospital has been prosecuted for the performance of an abortion where an independent hospital committee deemed the abortion to be necessary to preserve the woman's life. The plain fact is, as the jury found it to be, that this doctor, whatever his motive, possessed the intent to assist in procuring the miscarriage of the woman for reasons other than to preserve her life. This is the specific intent which the law requires for conviction.

He supplied to the jury the answer an independent hospital committee undoubtedly would have given him had he seen fit to seek its approval for an abortion—the patient could bear the child without endangering her life; therefore, to abort her would violate the law.

The threatened danger to the woman's life arose only from the couple's assertions that they would seek an illegal abortion by an unlicensed person. To assist them in attaining this goal was to flaunt his profession's own standards and to aid in bringing about a direct violation of the law.

The majority would reverse the conviction by declaring the statute unconstitutional because of asserted uncertainty in the phrase, "necessary to preserve [the woman's] life."[1] This phrase has been an integral part of the California law against illegal abortions from the time of its enactment in 1872 until the 1967 amendment to the section, and similar language was in the original statute adopted in 1850.[2] Thus for over a hundred years in this state doctors, hospital committees, judges, lawyers and juries have been called upon to give the phrase the common sense interpretation which the words appear to me to suggest. For this court over a hundred years later to find the language unconstitutionally vague and uncertain is a "negation of experience and common sense." (United States v. Ragen, 314 U.S. 513, 524, 62 S.Ct. 374, 379, 86 L.Ed. 383.)

Not only was the phrase long used in the California statute, it was also employed at common law (see, e. g., Perkins on Criminal Law (2d ed.) p. 145; Clark and Marshall, Crimes 6th ed.) pp. 688–689) and is or has been in the abortion statutes of many states (see, e. g., Am.Jur.2d, Abortion, § 9, p. 192; 153 A.L.R. 1218, 1266; Smith, Abortion and the Law (1967) p. 7). Implicit in the decisions of this court, as well as those of countless other courts, is the view that the phrase does not render such a statute invalid (see, e. g., People v. Davis, 43 Cal.2d 661, 276 P.2d 801; People v. Gallardo, 41 Cal.2d 57, 257 P.2d 29; People v. Powell, 34 Cal.2d 196, 208 P.2d 974; Peo-

1. Section 274 then read: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is *necessary to preserve her life*, is punishable * * *." (Italics added.)

2. The 1850 statute (ch. 99, § 45, p. 233) provided that every person who did any of the enumerated acts with a specified intent shall be punishable "*Provided*, that no physician shall be affected * * * who, in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life."

ple v. Wilson, 25 Cal.2d 341, 153 P.2d 720; People v. Rankin, 10 Cal.2d 198, 74 P.2d 71). In State v. Moretti, 52 N.J. 182, 244 A.2d 499, 504 [cert. den. 393 U.S. 952, 89 S.Ct. 376, 21 L.Ed.2d 363] the court stated that when the phrase "lawful justification," as used in a statute prohibiting abortions done maliciously or without lawful justification, is confined "to the preservation of the mother's life," the statute is not subject to constitutional attack on the ground of vagueness. (See also State v. Elliott, 234 Or. 522, 383 P.2d 382, 384–385.)

The proper test as to certainty was stated by this court in People v. Howard, 70 A.C. 659, 665, 75 Cal.Rptr. 761, 764, 451 P.2d 401, 404, to be: "'A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language. As stated in Pacific Coast Dairy v. Police Court, 214 Cal. 668, at page 676, 8 P.2d 140, 143, 80 A.L.R. 1217, "Mere difficulty in ascertaining its meaning, or the fact that it is susceptible of different interpretations will not render it nugatory. Doubts as to its construction will not justify us in disregarding it." [Citation.]'"

The meaning of the phrase "necessary to preserve [the woman's] life" was considered in People v. Ballard, 167 Cal.App.2d 803, 814–815, 335 P.2d 204, 212, wherein the court stated, "Surely, the abortion statute (Pen.Code, § 274) does not mean by [this phrase] that the peril to life be imminent. It ought to be enough that the dangerous condition 'be potentially present, even though its full development might be delayed to a greater or less extent. Nor was it essential that the doctor should believe that the death of the patient would be otherwise *certain* in order to justify him in affording present relief.' (State v. Dunklebarger, 206 Iowa 971, 221 N.W. 592, 596; see also Rex v. Bourne, 1 K.B. 687 * * *; Commonwealth v. Wheeler, 315 Mass. 394, 53 N.E.2d 4; 23 So. Cal.L.Rev. 523.) In State v. Powers * * 155 Wash. 63, 67, 283 P. 439, 440, the court satisfied itself with an interpretation of 'necessity to save life' by stating, '*If the appellant in performing the operation did something which was recognized and approved by those reasonably skilled in his profession practicing in the same community * * * then it cannot be said that the operation was not necessary to preserve the life of the patient.*'" (Italics added.) (See also People v. Abarbanel, 239 Cal.App. 2d 31, 34, 48 Cal.Rptr. 336; People v. Ballard, 218 Cal.App.2d 295, 307, 32 Cal.Rptr. 233.)

Amici for appellant, 178 deans of medical schools, state that the italicized sentence quoted from People v. Ballard, *supra*, 167 Cal.App.2d 803, 814–815, 335 P.2d 204, is in error because "the medical profession has 'approved' abortions in cases [in which the objective was not to preserve the life of the woman and therefore] clearly outside of Penal Code section 274. Packer & Gampell, Therapeutic Abortion: A Problem in Law and Medicine, 11 Stan.L.Rev. 417, 447. * * *" However, that sentence must be understood to mean recognized and approved by such persons as being required to preserve the life of the patient.

The word "preserve" is defined in the dictionary as "1. To keep or save from injury or destruction; * * * to protect; save. 2. To keep in existence or intact; * * * To save from decomposition * *." (See Webster's New Internat. Dict. (3d ed. 1961).) As used in section 274, the word "preserve" has been regarded as synonymous with "save" (see, e. g., People v. Kutz, 187 Cal.App.2d 431, 436, 9 Cal.Rptr. 626; People v. Malone, 82 Cal.App.2d 54, 59, 185 P.2d 870; Stern v. Superior Court, 78 Cal.App.2d 9, 18, 177 P.2d 308), and to save a life ordinarily is understood as meaning to save from destruction, i. e. dying—not merely from injury. Thus the precipitation of a psychosis in the absence of a genuine threat of suicide is not a threat to life under section 274. (See Packer and Gampell, Therapeutic Abortion: A

Problem in Law and Medicine, 11 Stan. L.Rev. 417, 433, 436.)

That the Legislature used the word "preserve" in the sense of save from destruction also appears from the purpose of the section. The law historically in various contexts has regarded the unborn child as a human being. (See Louisell, Abortion, The Practice of Medicine, and the Due Process of Law, 16 U.C.L.A. L.Rev. 233, 234–244.) Louisell (at p. 244) quotes from Prosser on Torts (3d ed. 1964) that "[M]edical authority has recognized long since that the child is in existence from the moment of conception, and for many purposes its existence is recognized by the law. The criminal law regards it as a separate entity, and the law of property considers it in being for all purposes which are to its benefit, such as taking by will or descent. * * * All writers who have discussed the problem have joined * * in maintaining that the unborn child in the path of an automobile is as much a person in the street as the mother." In Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, 538 [cert. den. 377 U.S. 985, 84 S.Ct. 1894, 12 L.Ed.2d 1032] it was held that an unborn child of a woman who did not wish blood transfusions because they were contrary to her religious convictions was entitled to the law's protection and that an order would be made to insure such transfusions to the mother in the event they are necessary in the opinion of the attending physician.

Several statutes show that the California law has been in accord in regarding the unborn child as a human being for various purposes. (See, e. g., Pen.Code, §§ 3706 and 270; Civ.Code, § 29.)[3] In Scott v. McPheeters, 33 Cal.App.2d 629, 634, 92 P.2d 678, 681, the court declared: "The respondent asserts that the provisions of section 29 of the Civil Code are based on a fiction of law to the effect that an unborn child is a human being separate and distinct from its mother. We think that assumption of our statute is not a fiction, but upon the contrary that it is an established and recognized fact by science and by everyone of understanding."

It is reasonable to believe that section 274, as it read at the time in question, was not an exception to the law's attitude respecting the unborn child as a human being and that it was designed to protect not only the mother's life but also that of the child. In view of that purpose it would appear that the Legislature intended that the child would be deprived of his right to life only if in the absence of an abortion there was a danger of the mother's death—not merely of injury to her.

"'[T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices * * *.' United States v. Petrillo, 332 U.S. 1, 7–8, 67 S.Ct. 1538, 91 L.Ed. 1877." (Roth v. United States, 354 U.S. 476, 491, 77 S.Ct. 1304, 1312, 1 L.Ed.2d 1498.) The phrase in question, when applied according to the standard heretofore stated (namely, whether persons reasonably skilled in their profession practicing in the same community recognized and approved the act as being required to save the patient from dying) clearly gives such warning.

Furthermore, section 274 punishes only those who act with "'* * * the intent to commit a criminal abortion, that is, an abortion for a purpose other than to preserve [i. e. save from destruction] the life of the mother.'" (People v. Abar-

3. Penal Code section 3706 requires that the execution of a death penalty be suspended if the defendant is pregnant and without regard to the stage of pregnancy.

Penal Code section 270 makes punishable a father's wilful failure to provide a minor child with necessary items and provides that "A child conceived but not yet born is to be deemed an existing person in so far as this section is concerned."

Civil Code section 29 provides in part that "A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth * * *."

banel, *supra*, 239 Cal.App.2d 31, 34–35, 48 Cal.Rptr. 336, 339; People v. Ballard, *supra*, 167 Cal.App.2d 803, 817, 335 P.2d 204.) The requirement of such an intent eviscerates much of the majority's claim that the section is impermissibly vague. (See generally Mishkin v. New York, 383 U.S. 502, 507, fn. 5, 86 S.Ct. 958, 16 L.Ed.2d 56; Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 342, 72 S.Ct. 329, 96 L.Ed. 367.) A person who performs an abortion with such an intent has fair warning that his conduct may violate the law even though he may not be certain where the jury will draw the line on the matter of necessity.

The principal cases relied upon by the majority, in which statutes have been declared unconstitutionally vague, do not support such a finding when applied to the abortion statute. In People v. McCaughan, 49 Cal.2d 409, 317 P.2d 974, the statute prohibited, among other conduct, "harsh" or "unkind" treatment of a mentally ill person. These words were held not to have an established meaning either at common law or as a result of adjudication. They were held unconstitutionally vague. On the other hand, the phrase "neglect of duty" and the word "cruel" were upheld because they did have such well established meanings, just as do the words utilized in the phrase under attack here.

Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888, construed a statute defining "gangster" and making it a crime for anyone to be such a person. The phrase "consisting of two or more persons" was all that purported to define "gang," and the word "gang" was held so vague and uncertain as to violate the Fourteenth Amendment.

Connally v. General Const. Co., 269 U.S. 385, 395, 46 S.Ct. 126, 128, 129, 70 L.Ed. 322, involved a statute requiring a contractor to pay his employees "not less than the *current rate of* * * * *wages* in the *locality* where the work is performed," and the court held the italicized words unconstitutionally vague. Unlike the statute involved here, the statute in question was a new statute and the court noted that its application "depends, not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition * * *."

In contrast to these cases, here the challenged statute has a fixed meaning, frequently applied and impliedly interpreted by the courts in the more than one hundred years of its existence. In addition, the statute requires proof of the specific intent to commit a criminal abortion before a person may be successfully prosecuted under it.

There is, of course, a presumption in favor of constitutionality, and the invalidity of a legislative act must be clear before it can be declared unconstitutional. (In re Anderson, 69 Cal.2d 613, 628, 73 Cal.Rptr. 21, 447 P.2d 117.)

The majority cite no authority holding that the term "necessary to preserve [the woman's] life" is impermissibly vague, and I agree with the conclusion as to the constitutionality of the section that is implicit in the multitude of past decisions affirming convictions for illegal abortion, and for murder where death was the result of such an act.

I would affirm the judgment.

McCOMB and SULLIVAN, JJ., concur.

SULLIVAN, Justice (dissenting).

I concur in the views of Justice BURKE. Reading the majority's attack on Penal Code section 274, one would think that the English language which has been the sensitive instrument of our system of law for over 500 years, has lost, by the mere passage of time, all capacity for clarity of expression. The majority strike down the statute solely because they find so vague and uncertain as to offend constitutional standards of due process, a single brief clause of nine words of long and common usage: "unless the same is necessary to preserve her life." There is no mystique enveloping the statute and, as Justice BURKE points

out, the clause now challenged has stood the test of over a hundred years, and presumably of countless human incidents falling within its scope, apparently without evoking a single whimpering cry against it.

The mandate of the section is plain and clear, and simply means this: no one shall intentionally procure the miscarriage of a woman unless it is necessary to save her life. "The criminal intent necessary to support a conviction of illegal abortion must show that it was performed for a purpose other than to save [the abortee's] life." (People v. Abarbanel (1965) 239 Cal.App. 2d 31, 34, 48 Cal.Rptr. 336, 338.) I dare say that the average man in the street, confronted with this law, would have little trouble in extracting its sense (we hold him accountable to much more complicated enactments); and the doctor, with his professional training and expertise would have even less. We have said that "[i]t is a cardinal rule, to be applied to the interpretation of particular words, phrases, or clauses in a statute or a Constitution, that the entire substance of the instrument or of that portion thereof which has relation to the subject under review should be looked to in order to determine the scope and purpose of the particular provision therein of which such words, phrases, or clauses form a part, and in order also to determine the particular intent of the framers of the instrument in that portion thereof wherein such words, phrases, or clauses appear." (Wallace v. Payne (1925) 197 Cal. 539, 544, 241 P. 879, 881). In the case before us, the challenged clause when so examined, is clear in meaning.

Yet the majority, by engaging in a process of elaborate and lavish analysis, transform that which is simple and lucid into something complex and arcane. Actually the analysis is focused on only three words: "necessary to preserve." Their fair equivalent is "necessary to save" (see People v. Abarbanel, *supra*, 239 Cal.App.2d 31, 34, 48 Cal.Rptr. 336; People v. Ballard (1959) 167 Cal.App.2d 803, 814, 817, 335 P.2d 204). Rather than evaluate these words in the light of "the entire substance" (see Wallace v. Payne, *supra*, 197 Cal. 539, 544, 241 P. 879), the majority resort to a dissection: "There is, of course, no standard definition of 'necessary to preserve,' and taking the words separately, no clear meaning emerges." (Majority opn., p. 358.) In support of this thesis, it is asserted that the word "necessary" does not have a "fixed meaning." In general, few words do.[1] It is futher insisted that the definition of "preserve" is "even less enlightening." Accordingly, the majority discard its obvious meaning, that is, "save," as used in the context "to save a life." From such analysis, the opinion concludes "that the term 'necessary to preserve' in section 274 of the Penal Code is not susceptible of a construction that does not violate legislative intent and that is sufficiently certain to satisfy due process requirements without

1. "Words, however, do not have absolute and constant referents. 'A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry. * * *.' (Pearson v. State Social Welfare Board (1960) 54 Cal.2d 184, 195, 5 Cal.Rptr. 553, 559, 353 P.2d 33, 39.) The meaning of particular words or groups of words varies with the '* * * verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). * * * A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning.' (Corbin, The Interpretation of Words and the Parole Evidence Rule (1965) 50 Cornell L.Q. 161, 187.)" (Pacific Gas & E. Co. v. G. W. Thomas Drayage Etc. Co. (1968) 69 Cal.2d 33, 38, 69 Cal.Rptr. 561, 564, 442 P.2d 641, 644.)

"Words are used in an endless variety of contexts. Their meaning is not subsequently attached to them by the reader but is formulated by the writer and can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words." (Universal Sales Corp. v. Cal. etc. Mfg. Co. (1942) 20 Cal.2d 751, 776, 128 P.2d 665, 679, Traynor, J. concurring.)

improperly infringing on fundamental constitutional rights." (Majority opn., p. 357) Actually the gist of this is that the three words "necessary to preserve" are so shrouded in darkness that the average man cannot detect what they mean although average men and men above average have had no trouble with them for a hundred years.

I cannot accept so tortured a conclusion, wrenched from a statute which has had its roots in the law's historic solicitude for the priceless gift of life. The statute plainly prohibits an abortion unless it is necessary to save the mother's life. It strains reason to say that this crystal-clear exception to the law is "so vague that men of common intelligence must necessarily guess at its meaning * * *." (Lanzetta v. New Jersey (1939) 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888—see majority opn., p. 357.) And it strains credulity to assume that this defendant, who under the evidence wilfully violated the statute, had to engage in any such guesswork with respect to the law governing his conduct.

I would affirm the judgment.

McCOMB, J., concurs.

Rehearing denied; McCOMB, BURKE and SULLIVAN, JJ., dissenting.

PIERCE, J., sitting pro tem. in place of MOSK, J., who deemed himself disqualified.

Item No. 17

STATE of Kansas, Appellee,

v.

Austin Lyrrell JAMIESON, Appellant.

No. 45000.

Supreme Court of Kansas.

Jan. 23, 1971.

Defendant was convicted of procuring an abortion. The Johnson District Court, Division No. 1, Herbert W. Walton, J., rendered judgment, and defendant appealed. The Supreme Court, Hatcher, C., held that information attempting to charge abortion was fatally defective for failure to negative exception of abortion statute providing that "unless the same shall have been necessary to preserve the life of such woman."

Defendant discharged from judgment and sentenced.

1. Indictment and Information ⇐111(1)

Since there is exception in abortion statute providing that statute will not apply if abortion is necessary to preserve life of woman, information charging abortion must negative exception in order to charge offense. K.S.A. 21-437.

2. Indictment and Information ⇐80

If allegations of information may be true, and defendant still is innocent of of-

fense defined by statute on which information is based, information is jurisdictionally defective.

3. Abortion ⇐2

Manner of performance of abortion may be unlawful and still not constitute offense under abortion statute, if abortion is necessary to save life of mother. K.S.A. 21-437.

4. Indictment and Information ⇐111(1)

Information attempting to charge abortion was fatally defective for failure to negative exception of abortion statute providing that "unless the same shall have been necessary to preserve the life of such woman." K.S.A. 21-437.

Syllabus by the Court

1. Where there is an exception in a statute defining abortion, and the exception forms an integral part of the offense defined, the information must negative the exception in order to charge the offense.

2. A governing rule is that if the allegations of an information may be true and the defendant still be innocent of the offense defined by the statute the information is jurisdictionally defective.

3. An information attempting to charge the offense of abortion as defined by K.S.A. 21-437 is examined and found to be fatally defective for failure to negative the exception—"unless the same shall have been necessary to preserve the life of such woman."

Roy Lucas, New York City, argued the cause, and James C. Thompson and Anthony R. Russo, Kansas City, were with him on the brief for appellant.

David Zook, Asst. County Atty., argued the cause, and Kent Frizzell, Atty. Gen., James W. Bouska, County Atty., and Mark L. Bennett, Jr., Asst. County Atty., were with him on the brief for appellee.

HATCHER, Commissioner.

This is an appeal from a verdict and judgment convicting the defendant of the offense of procuring an abortion contrary to the provisions of K.S.A. 21-437.

Defendant's motion for a new trial was overruled and he was sentenced to confinement in the Johnson County jail for one year. He has appealed.

Although the constitutionality of the Kansas Abortion Act is challenged, we need only to consider appellant's first contention which reads:

"The trial court erred in failing to grant defendant's motion to dismiss because the information under which defendant was charged was jurisdictionally defective in that it failed to negatively aver the statutory exception—that the act charged was not 'necessary to preserve the life of such woman'. Omission of an essential element of the offense renders appellant's conviction void for lack of jurisdiction over the subject matter."

We are inclined to agree with appellant's contention. The information, with formal parts omitted, states:

"I, Hugh H. Kreamer the undersigned, Assistant County Attorney of said County, in the name, and by the authority, and on behalf of the State of Kansas, come now here, and give the Court to understand and be informed that on or about the 15th day of June A.D., 1969, in said County of Johnson, and State of Kansas, one Austin Lyrrell Jamieson did then and there Unlawfully and willfully administer to Susan Thoms, a pregnant woman, certain substance and did use or employ certain instruments, commonly known as a catheter tube and others, the names of which are unknown, with the intent thereby to procure an abortion or miscarriage of said woman.

"Contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Kansas, as he is informed and verily believes."

The abortion act (K.S.A. 21–437) in effect at the time of the offense attempted to be charged reads:

"Every physician or other person who shall willfully administer to any pregnant woman any medicine, drug, or substance whatsoever, or shall use or employ any instrument or means whatsoever, with intent thereby to procure abortion or the miscarriage of any such woman, *unless the same shall have been necessary to preserve the life of such woman*, or shall have been advised by a physician to be necessary for that purpose, shall upon conviction be adjudged guilty of a misdemeanor, and punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment." (Emphasis supplied.)

There have been numerous rules stated in an attempt to determine when an exception in a criminal statute must be stated in the information.

One of the earlier rules relied on by appellant placing emphasis on the location of the exception in the statute, was repudiated by this court in State v. Eary, 121 Kan. 339, 246 P. 989, where it is said:

"The rule that exceptions contained in the clause of a statute creating an offense must be negatived, was adopted by this court at a very early day, from Archbold's Criminal Pleading and Evidence, and regarded form rather than substance:

" 'The law on this point is plain and is well stated in Archbold's Criminal Practice and Pleading, page 118, as follows: "If there be any exception contained in the same clause of the act which creates the offense, the indictment must show negatively that the defendant or the subject of the indictment does not arise within the exception. If, however, the exception or proviso be in a subsequent clause or statute, or although in the same section, yet if it be not incorporated with the enacting clause by any words of reference, it is in that case matter of defense for the other party, and need not be negatived in the pleading." ' State of Kansas v. Thompson, 2 Kan. 432, 436 [1864].

"We now regard substance instead of form, and unless the exception, wherever found, inheres so integrally in the offense that liability would necessarily be precluded unless the exception were expressly negatived, it is a matter of defense. * * *" (P. 343, 246 P. p. 991.)

[1] The well established rule in all jurisdictions is that there must be negative averment of an exception where it constitutes an integral part of the offense defined in the statute.

In State v. Hill, 189 Kan. 403, at page 410, 369 P.2d 365, at page 370, 91 A.L.R.2d 750, we stated:

"* * * The office of an exception in a statute is well understood. It is intended to exempt something from the scope of the general words of a statute or to qualify or restrain the generality of the substantive enactment to which it is attached. The relative position of an exception is unimportant since the act must be construed as a whole. It may, as here, appear in a section by itself, and when that is done it has precisely the same meaning that it would have if the exception were appropriately incorporated in the other section. (50 Am.Jur., Statutes, § 431, p. 451.) *We conclude that 21–956 is not merely defensive as the state contends, but constitutes an integral part of the offense defined.* As thus construed, the burden rests upon the state to allege and prove that the articles sold or exposed to sale on Sunday were of the kind and character included in the statute's prohibition and were not those excepted." (Emphasis supplied.)

The general rule may be found in 1 C.J.S. Abortion § 21, p. 327:

"Following the rules applicable to indictments and informations generally, where there is an exception in the stat-

ute defining abortion, which exception forms a part of the description of the offense so that the ingredients thereof cannot be accurately stated if the exception is omitted, the indictment must negative the exception, otherwise the offense defined by the statute is not charged. This averment should be made in terms which are direct and certain, and it should not be set out parenthetically or in ambiguous terms."

[2] There may sometimes be a dispute as to just when an exception constitutes an integral part of the offense. In State v. Ferron, 122 Kan. 845, 253 P. 402, this court announced in a very concise rule for determining just when an exception is an integral part of the offense charged. We stated:

"* * * A governing rule is that if the allegations of the information may be true and the defendant still be innocent, the information is bad. * * *" (P. 847, 253 P. p. 403.)

The defendant in the present case might be found guilty of the abortion and still be innocent under the language of the statute creating the exception.

The appellee in its brief stresses the use of the word "unlawful," stating:

"* * * The information filed herein alleges that the acts performed were performed in an 'unlawful' manner, which although failing to recite all the details, which utmost certainty might require, still fully apprised the defendant of the crime with which he was charged. * * *"

[3] The manner of the performance of the abortion might be unlawful and still not constitute an offense under the statute if necessary to save the life of the mother. It was stated in State v. Bridges, (Mo.) 412 S.W.2d 455, at page 458:

"* * * It does not follow, however, from the fact that the abortion was unlawful and felonious that the abortion was not necessary to save the mother's life. The necessity might exist and the act yet be unlawful and felonious by reason of the manner in which the defendant performed the act. A charge that the act was done unlawfully and feloniously does not supply the missing required allegation that the abortion was not necessary to preserve her life."

It might also be noted here that the appellee cites cases dealing with the burden of proof. We make no comment other than to say that we are now dealing with the allegations of an information.

The appellee also relies on the case of State v. Perello, 102 Kan. 695, 171 P. 630, where this court held that an exception in the intoxicating liquor law need not be stated in the information. In the *Perello* case this court went to considerable pains to state why the case was an exception to the general rule. It stated at page 697 of the opinion, at page 631 of 171 P.:

"The statute we are considering defines the offense, and in the same clause uses the language, 'except druggists or registered pharmacists as hereinafter provided.' Section 5 of the act enumerates the particular condition under which liquor may be delivered to certain persons engaged in the whole drug business and to registered pharmacists actually and in good faith engaged in the retail drug business, these exceptions being coupled with elaborate provisions designed to prevent evasion of the law. The language in section 1, 'except druggists or registered pharmacists as hereinafter provided,' does not set forth, nor does it purport to state, except in most general terms, the nature of the exceptions in favor of druggists and registered pharmacists. It is a mere parenthetical expression thrown in to show that in another part of the act provisions will be found which except certain classes of persons from the operation of the statute. As held in the Oklahoma case just cited [Smythe v. State, 2 Okl.Cr. 286, 101 P. 611.], we think the rule contended for by the appellant should never apply where the

matter of such exception or proviso does not enter into and become a material part of the description of the offense. * * *"

In 1 Am.Jur.2d, Abortion, § 18, p. 198, we find the general rule stated as follows:

"Under statutes which provide in effect for the punishment of anyone who supplies or administers a medicine, drug, or substance to a pregnant woman, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless such act is necessary to preserve her life, the authorities generally hold that the indictment must allege that production of a miscarriage was not necessary to save her life. * * *"

[4] We are forced to conclude that the exception in KSA 21-437—"unless the same shall have been necessary to preserve the life of such woman"—is an integral part of the definition of the offense of abortion, and the failure to negatively aver the exception in the information constituted a fatal defect.

It necessarily results that the conviction must be set aside and the defendant discharged from the judgment and sentence.

It is so ordered.

Approved by the Court.

appeal docketed sub nom. Hanrahan v. Doe, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (No.1522, 1970 Term: renumbered No. 70-105, 1971 Term), stay issued (Marshall, J. Sup. Ct. Feb. 10, 1971)

Jane DOE and Sally Roe, suing on behalf of themselves and all others similarly situated, and David N. Danforth, M.D., Charles Fields, M.D., Ralph M. Wynn, M.D., and Frederick P. Zuspan, M.D., suing on behalf of themselves and all others similarly situated, Plaintiffs,

Mary Poe, by her mother, Pauline Poe, suing on behalf of herself, and all others similarly situated, Intervening Plaintiff,

v.

William J. SCOTT, Attorney General of the State of Illinois, and Edward V. Hanrahan, State's Attorney of Cook County, Illinois, Defendants,

Dr. Bart Heffernan, Intervening Defendant.

Civ. A. No. 70 C 395.

United States District Court,
N. D. Illinois, E. D.

Jan. 29, 1971.

Action for declaratory and injunctive relief challenging constitutionality of Illinois abortion statute. The three-judge District Court, Swygert, Chief Circuit Judge, held that the Illinois abortion statute, by forcing the birth of every fetus, no matter how defective or how intensely unwanted by its future parents, displayed no legitimately compelling state interest in fetal life which would justify intrusion on woman's privacy which is involved in forcing her to bear an unwanted child; consequently, during the early stages of pregnancy—at least during the first trimester—the state may not prohibit, restrict or otherwise limit women's access to abortion procedures performed by licensed physicians operating in licensed facilities.

Plaintiffs' motion for summary judgment granted and defendants' motion denied.

Campbell, Senior District Judge, dissented and filed opinion.

See also, D.C., 310 F.Supp. 688.

1. Declaratory Judgment ⇐303
Injunction ⇐114(3)

The Illinois Attorney General, although not made the chief prosecutor by criminal statutes, was a proper party defendant in action for declaratory and injunctive relief challenging constitutionality of the Illinois abortion statute. S.H.A.Ill. ch. 38, § 23-1; 28 U.S.C.A. §§ 1331, 1343, 2201, 2202, 2281, 2284; 42 U.S.C.A. § 1983.

2. Constitutional Law ⇐42

Female plaintiffs who alleged that operation of Illinois abortion statute deprived them of asserted right to terminate unwanted pregnancies in the state of their residence and who asserted that they had been injured either by having been forced to bear unwanted children or by having to travel to foreign states to obtain abortions had standing to raise claims respecting constitutionality of the abortion statute. S.H.A.Ill. ch. 38, § 23-1; 28 U.S.C.A. § 1331, 1343, 2201, 2202, 2281, 2284; 42 U.S.C.A. § 1983.

3. Constitutional Law ⇐42

Physician plaintiffs had standing to raise claims of their patients with respect to constitutionality of Illinois abortion statute. S.H.A.Ill. ch. 38, § 23-1; 28 U.S.C.A. §§ 1331, 1343, 2201, 2202, 2281, 2284; 42 U.S.C.A. § 1983.

4. Criminal Law ⇐13

Illinois statute prohibiting all abortions except those performed by physician in licensed medical facility because "necessary for the preservation of the woman's life" was unconstitutionally vague. S.H.A.Ill. ch. 38, § 23-1(b).

5. Constitutional Law ⇐82

Matters pertaining to procreation, as well as to marriage, the family, and sex are surrounded by a zone of privacy which protects activities concerning such matters from unjustified governmental intrusion. S.H.A.Ill. ch. 38, § 23–1(b); U.S.C.A.Const. Amend. 14.

6. Abortion ⇐1

Illinois abortion statute, by requiring a woman to risk physical and emotional harm short of death when a therapeutic abortion would remove that risk, did not bear scrutiny as a health measure for the benefit of women. S.H.A.Ill. ch. 38, § 23–1(b).

7. Abortion ⇐1

Illinois abortion statute, by forcing the birth of every fetus, no matter how defective or how intensely unwanted by its future parents, displayed no legitimately compelling state interest in fetal life which would justify intrusion on woman's privacy which is involved in forcing her to bear an unwanted child; consequently, during the early stages of pregnancy—at least during the first trimester—the state may not prohibit, restrict or otherwise limit women's access to abortion procedures performed by licensed physicians operating in licensed facilities. S.H.A.Ill. ch. 38, § 23–1(b); U.S.C.A.Const. Amend. 14.

Sybille Fritzsche, The Roger Baldwin Foundation of ACLU, Inc., Susan Grossman, Chicago, Ill., for plaintiffs; Marshall Patner, Patner & Karaganis, Chicago, Ill., of counsel.

Gordon H. S. Scott, Legal Aid Bureau, Chicago, Ill., for intervening plaintiff Mary Poe.

William J. Scott, Atty. Gen., Bernard Genis, Asst. Atty. Gen., Edward V. Hanrahan, State's Atty., Daniel Coman, James C. Murray, Asst. State's Attys., for defendants.

Dennis J. Horan, Thomas M. Crisham and Jerome A. Frazel, Hinshaw, Culbertson, Moelmann, Hoban & Fuller, Chicago, Ill., for intervening defendant Bart Heffernan.

Before SWYGERT, Chief Circuit Judge, ROBSON, Chief District Judge, and CAMPBELL, Senior District Judge.

MEMORANDUM OPINION

SWYGERT, Chief Circuit Judge.

This is an action for declaratory and injunctive relief brought to declare that the Illinois abortion statute [1] is violative of the United States Constitution for one or more reasons.[2] After a three-judge district court was convened the parties were ordered to restrict their arguments to the allegations that the statute is unconstitutionally vague and unconstitutionally invades the privacy of pregnant women. Oral argument was heard, and the case is now before us on a multiplicity of motions including cross-motions of plaintiffs and defendants for summary judgment.

Plaintiffs Doe and Roe, suing anonymously on behalf of themselves and all other women similarly situated, assert that they were unable to obtain legal, medically safe abortions in Illinois because their physicians reasonably believed that they could not perform such an operation upon the plaintiffs without fear of prosecution by defendant law enforcement officials pursuant to the challenged statute. Plaintiff Doe, a woman of means, subsequently had a successful abortion performed in Great Britain, while plaintiff Roe, who is indigent, was compelled to bear an unwanted child since the option of a foreign abortion was economically foreclosed. Plaintiffs Danforth, Fields, Wynn and Zuspan, all licensed physicians, sue on behalf of themselves, and all other similarly situated physicians, alleging that the existence of the challenged statute interferes with and adversely affects their

1. Ill.Rev.Stat., ch. 38, § 23–1 (1969).

2. Jurisdiction is based upon 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343, 2201, 2202, 2281 and 2284.

ability to conduct their medical practices with proper regard for their patients' best interests. Intervening plaintiff Poe is a high school girl who was pregnant as a result of a forcible rape and sues anonymously by her mother as next friend, asserting the same claims as Doe and Roe.[3]

The principal defendants are William J. Scott, Attorney General of the State of Illinois, and Edward V. Hanrahan, State's Attorney of Cook County, Illinois. Both are law enforcement officials of the State of Illinois who are charged with enforcing its laws, including the challenged statute. Intervening defendant Heffernan is a licensed physician who has been granted leave to appear herein as guardian *ad litem* for those conceived but not yet born.

[1] Defendant Scott asserts that he is not a proper party to this action. Although the Illinois statutes do not make the attorney general the chief prosecutor pursuant to the state's criminal statutes, the leading Illinois case clothes his office with the same authority as attorneys general at the common law. In Fergus v. Russel, 270 Ill. 304, 110 N.E. 130 (1915), the Illinois Supreme Court held that, although the state legislature may confer powers additional to those inherent in the common law office of attorney general, it may not deprive the office of any of its historical powers and duties as chief legal representative of the state.[4] The court further stated, "[A]t common law the Attorney General was the law officer of the crown and its chief representative in the courts."[5] Furthermore, the attorney general has conceded that he is required to represent the people of the state before the supreme court in all matters in which their interests are apparent and to assist in the prosecution of any criminal trial when he believes the people's interest requires it.[6] Indeed, the overlap of the powers and duties of the state's attorneys of the several counties and the attorney general is such that it appears that, where their powers are concurrent, either officer may initiate appropriate proceedings in the name of the state if the other has not acted.[7] We hold, therefore, that the attorney general is a proper party defendant in this action.

[2, 3] Defendants challenge the standing of the plaintiffs to raise the claims which they assert. The female plaintiffs allege that the operation of the statute deprived them of their asserted right to terminate unwanted pregnancies in the state of their residence. They assert that they have been injured either by having been forced to bear unwanted children or by having to travel to foreign states to obtain abortions by qualified medical personnel. We have no doubt that, "On the basis of plaintiffs' substantive contentions, * * * there * * * exists a 'nexus between the status asserted by the [female plaintiffs] and the claim(s) (they present).'"[8] The standing requirements of Flast v. Cohen, 392 U.S. 83, 102, 88 S.Ct. 1942, 20 L.Ed. 2d 947 (1968), are thus satisfied by the litigative posture of the female plaintiffs. Moreover, the physician-plaintiffs have standing to raise the claims of their

3. On March 23, 1970, Poe moved for leave to intervene and for the issuance of a temporary restraining order enjoining the defendants from attempting to enforce the Illinois statute against Poe's physician for terminating her pregnancy. On March 27 Poe was allowed to intervene, but her request for a restraining order was denied. On March 30 the Court of Appeals for the Seventh Circuit issued the temporary restraining order requested by Poe.

4. 270 Ill. at 337–339, 110 N.E. at 143–144.

5. 270 Ill. at 336, 110 N.E. at 143.

6. Ill.Rev.Stat. ch. 14, § 4 (1969).

7. *E. g.*, People ex rel. Kunstman v. Shinsaku Nagano, 389 Ill. 231, 59 N.E.2d 96 (1945); People ex rel. Miller v. Fullenwider, 329 Ill. 65, 160 N.E. 175 (1928). *But see* People v. Flynn, 375 Ill. 366, 368, 31 N.E.2d 591, 593 (1940).

8. Roe v. Wade, 314 F.Supp. 1217, 1220 (N.D.Tex.1970) (citing Flast v. Cohen, 392 U.S. 83, 102, 88 S.Ct. 1942, 20 L.Ed. 2d 947 (1968)).

patients even if we assume that no independent claim of theirs could withstand a motion for judgment on the pleadings.[9] All plaintiffs thus have standing to raise the claims which they assert.

I

[4] Plaintiffs contend that the Illinois abortion statute must be adjudged unconstitutionally vague. We agree. The statute prohibits all abortions except those "performed by a physician * * * in a licensed hospital or other licensed medical facility because *necessary for the preservation of the woman's life.*" [10] Plaintiffs point to the italicized language as the basis for their assertion that the statute is invalid under the due process clause of the fourteenth amendment because of its imprecision. It is clear that, as the Supreme Court has said:

> No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. * * * "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." [11]

The question thus becomes whether men of ordinary intelligence must guess at the meaning of the words, "necessary for the preservation of the woman's life."

We note at the outset that these words, or substantially identical ones, have convinced some courts that they are incapable of certain interpretation,[12] and other courts have disagreed.[13] If courts cannot agree on what is the essential meaning of "necessary for the preservation of the woman's life" and like words, we fail to see how those who may be subject to the statute's proscriptions can know what it prohibits. On the issue of vagueness, we are in agreement with the reasoning of People v. Belous [14] and Roe v. Wade.[15] One need not inquire in great depth as to the meaning of such words as "necessary" and "preserve" to conclude that the holdings of those cases are correct. "Necessary" has been characterized as vague by the United States Supreme Court [16] and has been similarly described by other courts.[17] It is "a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, proper, or conducive to the end sought." [18]

9. Griswold v. Connecticut, 381 U.S. 479, 481, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Barrows v. Jackson, 346 U.S. 249, 257, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953).

10. Ill.Rev.Stat., ch. 38, § 23-1(b) (1969) (emphasis added).

11. Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939); *accord*, Jordan v. DeGeorge, 341 U.S. 223, 71 S.Ct. 703, 95 L.Ed. 886 (1951); Connally v. General Constr. Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

12. *E. g.*, Roe v. Wade, 314 F.Supp. 1217, 1223 (N.D.Tex.1970); United States v. Vuitch, 305 F.Supp. 1032, 1034 (D.D.C. 1969); People v. Belous, 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194, 197 (1969), cert. denied, 397 U.S. 915, 90 S.Ct. 920, 25 L.Ed.2d 96 (1970).

13. *E. g.*, Babbitz v. McCann, 310 F.Supp. 293, 298 (E.D.Wis.1970); Rosen v. Louisiana State Board of Medical Examiners, 318 F.Supp. 1217, (E.D.La.1970); Steinberg v. Rhodes, 321 F.Supp. 741 (N.D. Ohio, filed Dec. 18, 1970).

14. 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194 (1969), cert. denied, 397 U.S. 915, 90 S.Ct. 920, 25 L.Ed.2d 96 (1970).

15. 314 F.Supp. 1217 (N.D.Tex.1970).

16. Yu Cong Eng v. Trinidad, 271 U.S. 500, 517-518, 46 S.Ct. 619, 70 L.Ed. 1059 (1926).

17. *E. g.*, Phillips v. Borough of Folcroft, 305 F.Supp. 766, 770-771 (E.D.Pa.1969); Westphal v. Westphal, 122 Cal.App. 379, 382, 10 P.2d 119, 120 (1932).

18. Black's Law Dictionary 1181 (4th ed. 1957).

The word "preserve" is similarly susceptible of so broad a range of connotations as to render its meaning in the statute gravely amorphous, since it may mean anything from maintaining something in its status quo to preventing the total destruction of something.[19] The treating physician who believes an abortion is medically or psychiatrically indicated thus finds himself threatened with becoming a felon as well as with the possibility of losing his right to practice his profession if he errs in the legal interpretation of a penal statute, the words of which have not been sufficiently definite for courts to agree on their meaning.[20] This is precisely the kind of situation that the void-for-vagueness doctrine is intended to prevent.

II

[5] Aside from the fact that the statute is vague, its practical effect is to make abortion unavailable to women unless there is a reasonable certainty that death will result from a continuation of pregnancy. This practical effect of the statute constitutes an intrusion on constitutionally protected areas too sweeping to be justified as necessary to accomplish any compelling state interest. These protected areas are women's rights to life, to control over their own bodies, and to freedom and privacy in matters relating to sex and procreation.

The Supreme Court has long recognized that a person possesses a fundamental, constitutionally protected right to privacy and freedom in certain personal and intimate matters, especially those pertaining to the home and family.[21] This right was developed and applied by the Supreme Court to strike down a state's birth control statute in Griswold v. Connecticut.[22] The Court there held that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. * * * Various guarantees create zones of privacy."[23] *Griswold* set out in broad terms the right of married couples to be free from governmental intrusion into their intimate affairs:

> We cannot distinguish the interests asserted by the plaintiffs in this case from those asserted in *Griswold*. In both, "[t]he essence of the interest sought to be protected * * * is the right of choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of individuals."[24] It is as true after conception as before that "there is no topic more closely interwoven with the intimacy of the home and marriage than that which relates to the conception and bearing of progeny."[25] We believe that *Griswold* and related cases establish that matters pertaining to procreation, as

19. Webster's Third New International Dictionary 1794 (1961).

20. The problem faced by a treating physician in Illinois is as described in Roe v. Wade, 314 F.Supp. 1217, 1223 (N.D.Tex. 1970):

> How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How *imminent* must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years? These questions simply cannot be answered.

21. *See, e. g.*, Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 534, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944); Loving v. Virginia, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); and Stanley v. Georgia, 394 U.S. 557, 564, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).

22. 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

23. *Id.* at 484, 85 S.Ct. at 1681.

24. Roe v. Wade, 314 F.Supp. 1217, 1221 (N.D.Tex.1970).

25. Babbitz v. McCann, 310 F.Supp. 293, 299 (E.D.Wis.1970).

well as to marriage, the family, and sex are surrounded by a zone of privacy which protects activities concerning such matters from unjustified governmental intrusion.[26]

We do not agree with the defendants that the choice whether to have a child is protected before conception but is not so protected immediately after conception has occurred.[27] A woman's interest in privacy and in control over her body is just as seriously interfered with by a law which prohibits abortions as it is by a law which prohibits the use of contraceptives. The majority of courts which have considered the question have so held, concluding that a woman has a fundamental interest in choosing to terminate a pregnancy. In People v. Belous, *supra*, the California Supreme Court struck down that state's abortion statute, holding:

> The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a "right of privacy" or "liberty" in matters related to marriage, family, and sex.[28]

In United States v. Vuitch, *supra*, a single district court judge struck down a portion of the District of Columbia abortion statute, saying:

> There has been, moreover, an increasing indication in decisions of the Supreme Court of the United States that as a secular matter a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy. * * * Matters have certainly reached a point where a sound, informed interest of the state must affirmatively appear before the state infringes unduly on such rights.[29]

More recently, in Babbitz v. McCann,[30] and in Roe v. Wade,[31] three-judge courts found that the right to choose whether to bear a child was fundamental and struck down state abortion statutes.

[6] Of course, the determination that women have a fundamental interest in choosing whether to terminate pregnancies does not establish that the Illinois statute is unconstitutional. The critical issue is whether the state has a compelling interest in preventing abortions in the early stages of pregnancy except where the death of the woman is reasonably certain.[32] A stat-

26. As former Supreme Court Justice Tom C. Clark has said:
> The result of [Griswold and its predecessors] is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children, and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution.

Clark, Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola Univ. (L.A.) L.Rev. 1, 8 (1969).

27. Again, Mr. Justice Clark observed:
> [A]bortion falls within that sensitive area of privacy—the marital relation. One of the basic values of this privacy is birth control, as evidenced by the *Griswold* decision. Griswold's act was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent conception, why can he not nullify that conception when prevention has failed?

Id. at 9.

28. 71 Cal.2d 954, 963, 80 Cal.Rptr. 354, 359, 458 P.2d 194, 199 (1969), cert. denied, 397 U.S. 915, 90 S.Ct. 920, 25 L.Ed.2d 96 (1970).

29. 305 F.Supp. 1032, 1035 (D.D.C.1969).

30. 310 F.Supp. 293 (E.D.Wis.1970).

31. 314 F.Supp. 1217 (N.D.Tex.1970).

32. As the court stated in Roe v. Wade, 314 F.Supp. 1217, 1222 (N.D.Tex.1970):
> Since the Texas Abortion Laws infringe upon plaintiffs' fundamental right to choose whether to have children, the burden is on the defendant to demonstrate to the satisfaction of the Court that such infringement is necessary to support a compelling state interest.

ute which requires a woman to risk physical and emotional harm short of death when a therapeutic abortion would remove that risk does not bear scrutiny as a health measure for the benefit of women.

[7] Moreover, a statute which forces the birth of every fetus, no matter how defective or how intensely unwanted by its future parents, displays no legitimately compelling state interest in fetal life, especially when viewed with regard for the countervailing rights of pregnant women. We do not believe that the state has a compelling interest in preserving all fetal life which justifies the gross intrusion on a woman's privacy which is involved in forcing her to bear an unwanted child. We therefore rule that during the early stages of pregnancy—at least during the first trimester—the state may not prohibit, restrict or otherwise limit women's access to abortion procedures performed by licensed physicians operating in licensed facilities.

In holding that the state has not shown sufficient justification to permit us to uphold its abortion statute in its entirety, we are in agreement with the court's statement in Babbitz v. McCann:

> The defendants urge that the state's interest in protecting the embryo is a sufficient basis to sustain the statute. Upon a balancing of the relevant interests, we hold that a woman's right to refuse to carry an embryo during the early months of pregnancy may not be invaded by the state without a more compelling public necessity than is reflected in the statute in question.[33]

Accordingly, the Illinois abortion statute, Illinois Revised Statutes, Chapter 38, Section 23–1, is unconstitutional because it is impermissibly vague and unduly infringes women's right to privacy insofar as it restricts or prohibits the performance of abortions during the first trimester of pregnancy by licensed physicians in a licensed hospital or other licensed medical facility.

ORDER

1. The foregoing opinion shall stand as findings of fact and conclusions of law.

2. The motion of plaintiffs for summary judgment is hereby granted, and the motion of defendants for summary judgment is hereby denied.

3. The motion of defendant Scott to dismiss this action as against him is hereby denied.

4. All other motions presently outstanding are hereby denied to the extent not expressly granted herein or mooted by or subsumed in the foregoing opinion or this order.

It is therefore ordered, adjudged and decreed:

1. That the Illinois abortion statute, Illinois Revised Statutes, Chapter 38, Section 23–1, be and the same is hereby declared to be violative of the Constitution of the United States and is null and void insofar as it restricts or prohibits the performance of abortions during the first trimester of pregnancy by licensed physicians in a licensed hospital or other licensed medical facility.

2. That the defendants, their officers, agents, servants, employees, and attorneys, and those persons who act in active concert or participation with them be and the same are hereby permanently enjoined, without bond, from executing or enforcing, or threatening to execute or enforce, the Illinois abortion statute, Illinois Revised Statutes, Chapter 38, Section 23–1 against physicians licensed to practice medicine and surgery in all its branches performing abortions during the first trimester of pregnancy in a licensed hospital or other licensed medical facility.

See also Bates v. Little Rock, 361 U.S. 516, 524, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960); Griswold v. Connecticut, 381 U.S. 479, 497, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (Goldberg, J., concurring).

33. 310 F.Supp. 293, 301 (E.D.Wis.1970).

CAMPBELL, Senior Judge (dissenting).

The typically erudite opinion of our distinguished Chief Judge Swygert excellently presents some philosophical reasons for amendment to or repeal of the existing abortion statute by the Illinois Legislature. I must respectfully disagree however when these reasons are advanced to support a judicial determination that the statute "is unconstitutional because it is impermissibly vague and unduly infringes women's right to privacy." Neither the wisdom of this statute nor its conformity to the accepted mores of Illinois in 1971 is the issue before us. As a federal court we are concerned only with the limited question of whether in enacting this statute the people of Illinois have exceeded the limitations of the United States Constitution.

By their foregoing decision and order in this case concluding that those limits have been exceeded, my learned brothers strike down a state statute which has been enforced for one hundred years [1] and impose upon the people of Illinois their own views on this most important and controversial issue concerning public health and morals. In my view this unwarranted intrusion by the federal judiciary into the affairs of Illinois in the name of constitutional interpretation is far beyond properly limited federal powers and is not supported by the facts of this case nor the precedents cited by my brethren.

The basis of the majority decision is twofold: (1) the Illinois statute (and particularly the exception found therein) is so vague as to render it unconstitutional; and (2) by prohibiting the destruction of fetal life the statute invades the privacy of the women and the family entities of Illinois.

On the vagueness question I first observe that we have before us no contention by any party that an actual situation exists where a licensed physician acting in good faith is in jeopardy of prosecution for performing an abortion he believed to be "necessary for the preservation of the woman's life." In other words we are presented with no actual circumstance where the vagueness question is in issue. The rather forced game of semantics urged by plaintiffs and adopted by the majority has not presented any *actual* controversy but is merely a convenient vehicle for these plaintiffs to challenge a law which they believe is unwise and which they have thus far despite heroic efforts been unable to repeal or amend by the legislative process.[2]

A perusal of state and federal criminal codes reveals numerous examples of statutes which have been held constitutional and which are not as clear and definite as this one. Indeed Chief Judge Swygert, in writing his court's opinion upholding the constitutionality of the Illinois disorderly conduct statute, found that the language of that statute prohibiting any act done in "such unreasonable manner as to alarm or disturb another" was not unconstitutionally vague. As stated by him in that opinion: "The Constitution does not require impossible standards of specificity in penal statutes. It requires only that the statute convey 'sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'" United States v. Woodard, 376 F.2d 136, 140 (7th Cir. 1967).

His opinion goes on to state, "The statute proscribes conduct that is so unreasonable as to 'alarm or disturb' another and provoke a 'breach of the peace'. The term 'breach of the peace' has never had a precise meaning in relation to specific conduct. Yet from its early common law origin to the present it has received a fairly well defined gloss." (Id. at 141). In our case, how-

1. The present statute is essentially the same as that enacted in 1874. (R.S. 1874, Ch. 38, Div. 1, § 3.)

2. Attempts to amend or repeal the present statute failed in the last (1969) session of the General Assembly. New proposals have already been introduced in the present (1971) session.

ever, the same judge concludes that men and women of ordinary intelligence cannot understand the essential meaning of the words, "necessary for the preservation of the woman's life." I find it difficult to reconcile the reasoning in the *Woodard* case with that set forth in the opinion of the majority herein.

The words of the Illinois Abortion Statute taken in their ordinary meaning sufficiently convey definite warning as to the proscribed conduct and "have over a long period of years proved entirely adequate to inform the public, including both lay and professional people, of what is forbidden." Steinberg v. Rhodes, 321 F.Supp. 741, 745 (N.D.Ohio, 1970); Babbitz v. McCann, 310 F.Supp. 293, 297 (E.D.Wis.1970). The statement of the court in the *Steinberg* opinion is appropriate here:—"The problem of the plaintiffs is not that they do not understand, but that basically they do not accept, its proscription." 321 F.Supp. at p. 745.

I find the second conclusion of the majority, that the statute is not supported by a sufficient legitimate state interest, even more disconcerting. As the majority correctly points out, the determination that women have a fundamental interest in choosing whether to terminate pregnancies does not in and of itself establish that the Illinois statute is unconstitutional. The critical issue is whether the state has a sufficient interest in preventing abortion to justify its prohibition. My brothers conclude that the State of Illinois does not have a sufficient interest in preserving fetal life to support the statute before us, when the same is viewed with regard for countervailing rights to terminate pregnancies. It is at this juncture that I again part company with my brothers.

We, as did the Illinois Legislature, have before us the following undisputed facts relating to fetal life. Seven weeks after conception the fertilized egg develops into a well proportioned small scale baby. It bears all of the familiar external features and all the internal organs of an adult human being. It has muscles; hands with fingers and thumbs; and the legs have recognizable knees, ankles and toes.

The brain is operative and sends out impulses that coordinate the function of the other organs. Brain waves have been noted at 43 days. The heart beats; the stomach produces digestive juices; the liver manufactures blood cells; and the kidneys begin to function by extracting uric acid from the blood.

In the third month it can kick its legs, turn its feet, curl and fan its toes, make a fist, move its thumb, bend its wrist, turn its head, and even open its mouth and swallow and drink the amniotic fluid that surrounds it. Thumb sucking has been noted at this age and the first respiratory motions move fluid in and out of its lungs with inhaling and exhaling respiratory movements.

In the twelfth week it can move its thumb, in opposition to its fingers. It swallows regularly. It has active reflexes. The facial expressions of a fetus in its third month are already similar to the facial expression of its parents. By the end of that first trimester the fetus is a sentient moving being.

In the third month finger nails appear; sexual differentiation is apparent in both internal and external organs; and vocal chords are completed.

From the twelfth to the sixteenth week the child grows to eight or ten inches in height and receives oxygen and food from its mother through the placental attachment. In the fifth month it gains two inches in height and ten ounces in weight. A doctor will soon hear the heart beat with his stethoscope. It sleeps and wakes and may be awakened by external vibrations.

In the sixth month the fetus develops a strong muscular grip with its hands; starts to breathe regularly and can maintain a respiratory response for twenty-four hours if born prematurely. It may even have a slim chance of surviving in an incubator. A child has been known to survive between twenty to twenty-five weeks old. Indeed, as medical science progresses in the field of de-

tection the date of potential viability moves continually closer to earlier stages of gestation.

Dr. Arnold Gesell, in his publication. "*The Embryology of Behavior*,[3] notes:—

"Our own repeated observation of a large group of fetal infants (an individual born and living at any time prior to forty weeks gestation) left us with no doubt that psychologically they were individuals. Just as no two looked alike, so no two behaved precisely alike. One was impassive when another was alert. Even among the youngest there were discernible differences in vividness, reactivity and responsiveness. These were genuine individual differences, already prophetic of the diversity which distinguishes the human family."

Similar facts of fetal life are discussed in detail in a recently published Law Review article, Byrn, Abortion-On-Demand: Whose Morality? 46 N.D. Law. 5 (1970). Professor Byrn concludes:—

"In summary: at eight weeks, after which the great majority of abortions are performed, the fetus is irreversibly organized into a recognizable human-child, is responsive to stimulation, and is possessed of a pumping heart, a functioning circulatory system, an active brain and all other internal organs. From the practical scientific point of view, 'By the eighth week the embryo or fetus, as we now call it, is an unmistakable human being * * *.'"

This author also points out that abortion is a violent procedure regardless of the stage of pregnancy. Byrn, Supra, p. 32.

Professor Byrn also relates (at pp. 8–9) the following experience of Paul E. Rockwell, M.D., Director of Anesthesiology at Leonard Hospital, Troy, New York:

"Eleven years ago while giving an anesthetic for a ruptured ectopic pregnancy (at two months gestation) I was handed what I believe was the smallest living human being ever seen. The embryo sac was intact and transparent. Within the sac was a tiny (approx. 1 cm.) human male swimming extremely vigorously in the amniotic fluid, while attached to the wall by the umbilical cord. This tiny human was perfectly developed, with long, tapering fingers, feet and toes. It was almost transparent, as regards the skin, and the delicate arteries and veins were prominent to the ends of the fingers.

"The baby was extremely alive and swam about the sac approximately one time per second, with a natural swimmer's stroke. This tiny human did not look at all like the photos and drawings and models of 'embryos' which I have seen, nor did it look like a few embryos I have been able to observe since then, obviously because this one was alive!

"* * * When the sac was opened, the tiny human immediately lost its life and took on the appearance of what is accepted as the appearance of an embryo at this age (blunt extremities, etc.)

"It is my opinion that if the lawmakers and people realized that very vigorous life is present, it is possible that abortion would be found much more objectionable than euthanasia."

In my opinion the undisputed medical facts of record herein establish a sufficient state interest in the preservation of life to support the constitutionality of the statute before us.

The majority opinion does not hold that the Illinois Statute is void in its entirety or that every statute that prohibits the destruction of fetal life is unconstitutional. Rather, it seems to hold that the people of this State have a legitimate legislative interest in protecting *some* fetal life, but that the present statute which protects, "every fetus, no matter

3. Harper and Brothers, Publishers (1945), at p. 172.

how defective or how intensely unwanted by its future parents, displays no legitimately compelling state interest." I believe what the majority is suggesting is that if the Illinois Legislature had adopted a statute which, while prohibiting abortions generally, permitted the destruction of the "defective" fetus or one that is "intensely unwanted" it would have displayed a legitimate state interest. It seems to me apparent, however, that if the legislature has the power to decide that a *non defective* fetus may not be destroyed, it can also decide that a *defective* fetus may not be destroyed. How much latitude shall judicially be given the legislature in its determination as to what is and what is not a sufficient "defect" to warrant destruction? How unwanted must a potential child be before its parents can demand destruction under the suggested judicial "intensely unwanted" standard? Merely stating these propositions illustrates the extent to which my brothers have wandered into the legislative domain in reaching their decision in this case.

But the majority does not rest its conclusion of unconstitutionality on such a tenuous base. Instead, the majority states: "We therefore rule that during the early stages of pregnancy—at least during the first trimester—the state may not prohibit, restrict or otherwise limit women's access to abortion procedures * * *" The opinion does not explain or even intimate how it arrived at this constitutional conclusion. It appears to me that my brothers have, by judicial fiat, successfully amended the Illinois statute to permit abortions in the first three months of pregnancy. Ironically, their amendment does not even meet sound legislative standards. No where do they explain how the "first trimester" test was arrived at, or what relationship it might have to the previously discussed notions of defectiveness or unwantedness. What rational basis supports their conclusion that the people of Illinois may have a sufficient interest in protecting the life of a fetus which has matured to the first trimester, but that no legitimate interest exists for protecting a life of a fetus a few days younger? I believe the Illinois Legislature, in adopting the present statute, was less arbitrary even if not as competent as my brothers on these social and moral matters. In my opinion, however, the legislature alone should determine what value society will place on this form of life, regardless of the age of development.

Thus far I have avoided any discussion of the sensitive subject of whether fetal life is "human" life. Admittedly physicians argue as to what point in the fetal development human life commences. As former Supreme Court Justice Tom C. Clark states in the Law Review article quoted by the majority, "Some physicians argue that abortion should be permitted with impunity at any time up to the sixth month of pregnancy since prior to that time the fetus is no more than a growing plant. On the other hand, many eminent physicians believe that the fertilized ovum has human life from the time of conception. In support of this argument they refer to the International Code of Medical Ethics, which states that a physician will maintain the utmost respect for human life, from the time of its conception." Clark, Religion, Morality and Abortion: A Constitutional Appraisal, 2 Loy.U.L.Rev. 1, 5 (1969). Assuming *arguendo* that fetal life is human life, can there be any question but that the State of Illinois has a sufficient legislative interest in its protection? And, in view of the varied opinions in medical science, is not the determination of when human life commences better left to the legislature, rather than the courts? This was the conclusion reached by Mr. Justice Clark in the above quoted article. Significantly, while liberally quoting Justice Clark's article on the subject of abortion (see notes 26 and 27), the majority conveniently ignores its conclusion and admonition as follows:—

"Accommodation of conflicting doctrine is more difficult to achieve in

the judicial than in the legislative process. Courts cannot reach out to reform our society. A problem comes to the Court in the form of a justiciable issue and is narrowly drawn, rendering the Court's ruling contracted and finespun. Legislatures, on the other hand, have such facilities for investigation as hearings and may address themselves to the necessities of broad social needs and the correction of evils, both probable and existing. As Mr. Justice Cardozo said, 'Legislation can eradicate a cancer, right some hoary wrong, correct some definitely established evil, which defies the feebler remedies, the distinctions and the fictions familiar to the judicial process.'

"The courts work on a case-by-case system which deals with the past rather than the future. Society would not have the benefit of the sweeping effect of a statute, nor would the doctor have the protection that he is entitled to receive. The case method would be slow, expensive, and possibly disastrous. It is for the legislature to determine the proper balance, i. e., that point between prevention of conception and viability of the fetus which would give the State the compelling subordinating interest so that it may regulate or prohibit abortion without violating the individual's constitutionally protected rights." (At pp. 10–11).

To support their conclusion that the people of Illinois have exceeded the proper bounds of legislative interest, the majority primarily rely on the rationale of the Supreme Court in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510. But *Griswold* held only that a statute which forbade the use of contraceptives by married couples violated their right to privacy. In writing the opinion of the Court, Mr. Justice Douglas indicated that the Connecticut statute was "unnecessarily broad" and prevented activities which might otherwise be subject to state regulation. (381 U.S. 485, 85 S.Ct. 1678). The more thorough concurring opinion, written by Mr. Justice Goldberg, stressed that there was in that case no showing that the statute was necessary to accomplish a permissible state interest.

In this case, however, there is in my opinion a valid and permissible state interest—the protection of human life or at least the protection of potential human life in the fetus. In my opinion the statute in question is no broader than is necessary to accomplish this valid and permissible state interest even though it does not distinguish or provide exceptions, as my brothers would prefer, for those which are "defective" or "intensely unwanted," or have not matured to "the first trimester of pregnancy."

In citing *Griswold*, the majority concludes: "we cannot distinguish the interests asserted by the plaintiffs in this case from those asserted in *Griswold*." In other words, in their views, there is no distinction that can be made between prohibiting the use of contraceptives and prohibiting the destruction of fetal life, which as explained above may reasonably be construed to be human life. I find this assertion incredible. Contraception prevents the creation of new life. Abortion destroys existing life. Contraception and abortion are as distinguishable as thoughts or dreams are distinguishable from reality.

As for myself I am confronted with and bound by the plain facts before us in this case and I must conclude that the people of Illinois have a legitimate and sufficient interest in protecting fetal life to support the statute here considered. I find nothing in the Court's teachings in *Griswold* to the contrary.

No individual right or freedom is ever advanced in this country through an unwarranted intrusion of the judiciary into the proper province of the legislature. Indeed, in these days of pressure groups regularly seeking from courts that which only legislatures can properly give, constitutional government is weakened each time courts place their personal philosophical views above the law.

I would grant the motion of defendants for summary judgment and leave the plaintiffs' cause where under the Constitution it belongs—in the Illinois Legislature.

Item No. 19

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

JANE DOE, Plaintiff, vs. CALVIN L. RAMPTON, Governor of the State of Utah; and VERNON B. ROMNEY, Attorney General of the State of Utah, Defendants.	TEMPORARY RESTRAINING ORDER No. C-234-70

The above entitled matter having come duly before the above entitled Court, the Honorable Willis W. Ritter presiding, on Monday, the 14th day of September, 1970, upon the plaintiff's Application for a Temporary Restraining Order, and the plaintiff being represented by counsel, David S. Dolowitz, Esq., and the defendants being represented by counsel, Joseph P. McCarthy, Esq., and the Court having considered the records, files, papers and the arguments of counsel in the foregoing matter, this Court enters the following findings of fact:

FINDINGS OF FACT

1. That plaintiff Jane Doe is pregnant, being, upon her doctor's advice, in her tenth to twelfth week of pregnancy.

2. That plaintiff Jane Doe has three children.

3. That plaintiff Jane Doe is currently receiving public welfare assistance from the State of Utah.

4. That plaintiff Jane Doe desires to be aborted from her pregnancy.

5. That the danger in performing an abortion increases substantially after the twelfth week.

6. That plaintiff Jane Doe desires and Dr. X is willing to perform, a therapeutic abortion, aborting and terminating the current pregnancy of the plaintiff.

From the foregoing findings of fact, this Court makes the following conclusions of law:

CONCLUSIONS OF LAW

1. That the plaintiff Jane Doe will suffer immediate and irreparable injury if the defendants are not enjoined and restrained from enforcing the provisions of Sections 76-2-1 and 76-2-2, Utah Code Annotated 1953.

2. That the issues presented in this case are substantial issues of federal constitutional law and it appears from examination of the applicable cases, to wit: ***Griswold v. Connecticut,*** 381 U.S. 479; ***People v. Bellous,*** 80 Cal. Rptr. 354, 458 P.2d 194 (1969), ***cert. den.*** 38 L.W. 3320, 3325; ***Babbitz v. McCann,*** 310 F. Supp. 293 (E.D. Wis. 1970); and ***United States v. Vuitch,*** 305 F. Supp. 1032 (D.D.C. 1969); see ***Doe v. Scott***, 310 F. Supp. 689 (N.D. Ill. 1970), ***reversed*** ___ F.2d ___ (7th Cir. 1970), that the plaintiff is likely to prevail on the merits.

3. That no security should be required of the plaintiff for the issuance of this Order.

Accordingly, IT IS HEREBY ORDERED that the Governor of the State of Utah, the Honorable Calvin L. Rampton, and the Attorney General of the State of Utah, the Honorable Vernon R. Romney, defendants in the above entitled matter, are hereby enjoined and restrained from enforcing the provisions of Sections 76-2-1 and 76-2-2, Utah Code Annotated 1953, to plaintiff Jane Doe for securing and to her physician, Dr. X, from providing a therapeutic abortion, aborting and terminating her current pregnancy. This Order shall run for ten days from the signing hereof.

IT IS FURTHER ORDERED that said Order shall be entered without the requirement of the posting of security.

Dated this 14th day of September, 1970.

BY THE COURT:

/s/ WILLIS W. RITTER
Chief Judge

appeal dismissed for want of juris., 400 U.S. 1 (1970) (per curiam)

Wisconsin statute making it a criminal offense to perform an abortion except a therapeutic abortion which is necessary to save life of mother is not unconstitutionally vague or a denial of equal protection of the laws, but is an unconstitutional invasion of woman's private right to refuse to carry unquickened embryo during the early months of pregnancy.

Declaratory judgment for plaintiff and injunctive relief denied.

1. Courts ⇐101

Three-judge federal district court had jurisdiction of suit by physician, who was charged with violation of Wisconsin abortion statute, challenging the constitutionality of such statute and seeking injunctive and declaratory relief. 28 U.S.C.A. §§ 1343, 2201, 2202; 42 U.S.C.A. § 1983.

2. Courts ⇐280.4, 508(7)

Notwithstanding determination of three-judge federal district court that certain portions of Wisconsin abortion statute are unconstitutional, there were no special circumstances which would entitle plaintiff physician, challenging validity of statute, to enjoin pending Wisconsin prosecution against him for violation of abortion statute and doctrine of abstention was applied. 28 U.S.C.A. § 2283; W.S.A. 940.04.

3. Courts ⇐280.4

Although three-judge federal district court, applying doctrine of abstention declined to enjoin pending criminal proceedings against plaintiff for violation of Wisconsin abortion statute, court was required to decide merits of request that statute be declared unconstitutional irrespective of its conclusion as to propriety of issuance of injunction. 28 U.S.C.A. §§ 2281, 2283; W.S.A. 940.04.

4. Abortion ⇐1
Constitutional Law ⇐83(1), 250
Criminal Law ⇐13

Wisconsin statute making it a criminal offense to perform an abortion except a therapeutic abortion which is necessary to save life of mother is not unconstitutionally vague or a denial of

Sidney G. BABBITZ, M. D., Plaintiff,

v.

E. Michael McCANN, District Attorney of Milwaukee County, F. Ryan Duffy, Jr., Judge of the County Court, Milwaukee County, Defendants.

No. 69-C-548.

United States District Court, E. D. Wisconsin.

March 5, 1970.

A physician brought an action challenging constitutionality of Wisconsin abortion statute and sought injunctive and declaratory judgment relief. A Three-Judge District Court held that

equal protection of the laws, but is an unconstitutional invasion of woman's private right to refuse to carry an unquickened embryo during the early months of pregnancy. W.S.A. 940.04, U.S.C.A.Const. Amends. 1, 9, 14.

5. Federal Civil Procedure ⇐1164

Court took judicial notice of fact that there are a number of places throughout world where legal abortions are available.

6. Constitutional Law ⇐83(1)

To justify regulation of such fundamental private rights as marriage, home, children and day-to-day living habits, state must show a compelling need. U.S.C.A.Const. Amend. 9.

7. Parent and Child ⇐1

When measured against claimed rights of an embryo of four months or less, mother's right to refuse to carry an embryo during the early months of pregnancy transcends those of the embryo. W.S.A. 940.04; U.S.C.A.Const. Amend. 9.

8. Abortion ⇐1

It is permissible for state to require that abortions be conducted by qualified physicians. U.S.C.A.Const. Amend. 9.

Nathaniel Rothstein, Milton R. Bordow and Roy O. Conen, Milwaukee, Wis., for plaintiff.

E. Michael McCann, Dist. Atty., Milwaukee, Wis., for defendants.

Before KERNER, Circuit Judge, and REYNOLDS and GORDON, District Judges.

PER CURIAM.

The plaintiff is a physician who challenges the constitutionality of the Wisconsin abortion statute. He seeks an injunction restraining the defendants from enforcing a part of Wis.Stat. § 940.04 and a judgment declaring it unconstitutional.

A temporary restraining order was denied by the order of a single-judge district court, 306 F.Supp. 400, and the instant three-judge district court was convened to consider the other issues presented. We hold that portions of the statute are constitutionally invalid, but we decline to enjoin the pending state prosecution of the plaintiff.

The plaintiff is being prosecuted by the district attorney of Milwaukee county for allegedly having performed an abortion in violation of § 940.04, Wis. Stats. The statute provides in part as follows:

"(1) Any person, other than the mother, who intentionally destroys the life of an unborn child may be fined not more than $5,000 or imprisoned not more than 3 years or both.

"(2) any person, other than the mother, who does either of the following may be imprisoned not more than 15 years:

"(a) Intentionally destroys the life of an unborn quick child; or

* * * * * *

"(5) This section does not apply to a therapeutic abortion which:

"(a) Is performed by a physician; and

"(b) Is necessary, or is advised by 2 other physicians as necessary, to save the life of the mother; and

"(c) Unless an emergency prevents, is performed in a licensed maternity hospital.

"(6) In this section 'unborn child' means a human being from the time of conception until it is born alive."

The state warrant issued against Dr. Babbits reads as follows:

"That the above named Defendant on the 6th day of September, 1969, in the County of Milwaukee, Wisconsin, did feloniously destroy the life of an unborn child of one, [woman], said offense occurring at number 231 West Wisconsin Avenue, Milwaukee, Wisconsin, said abortion not being advised by two other physicians as necessary to save the life of [woman], the mother of said child, said information being obtained by sworn testimo-

ny of [woman] before the Honorable Christ T. Seraphim, County Judge, acting as magistrate."

[1] The complaint asserts that there is jurisdiction in this court pursuant to 28 U.S.C. § 1343, 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2202; we agree with such position.

The complaint charges that the Wisconsin statute is unconstitutional for violating the first and fourteenth amendments of the United States Constitution and for abridging the mother's right of privacy. Dr. Babbitz has not been charged with having destroyed an unborn child which was "quick", and therefore subsections (2) and (2) (a) of the statute quoted above are not applicable in the instant case. There is no allegation that the state officials are acting in bad faith in prosecuting Dr. Babbitz.

I. ABSTENTION

[2] The plaintiff has alleged a deprivation of rights secured by the Constitution, and serious federal questions are raised here concerning the constitutionality of certain portions of the Wisconsin abortion statute. Since the complaint seeks injunctive relief and since the statute in question has state-wide operation, the designation of a three-judge court was appropriate under 28 U.S.C. § 2281.

The request for an injunction raises a threshold problem of abstention. Congress, in 28 U.S.C. § 2283, has stated a strong policy of abstention, as follows:

"Stay of State court proceedings. A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Except for those rather recent cases which have noted exceptions to the scope of § 2283, the federal courts have generally given the statute literal application. In addition, the policy of abstention has found expression in a long history of judge-made rules of federal judicial forebearance. Mr. Justice Frankfurter's expressions in Railroad Commission of Texas v. Pullman Co., 312 U.S. 496, 500–501, 61 S.Ct. 643, 645, 85 L.Ed. 971 (1941), typify these court-fashioned rules of abstention:

"Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, Fenner v. Boykin, 271 U.S. 240, 46 S.Ct. 492, 70 L.Ed. 927; Spielman Motor Co. v. Dodge, 295 U.S. 89, 55 S.Ct. 678, 79 L.Ed. 1322; or the administration of a specialized scheme for liquidating embarrassed business enterprises, Pennsylvania v. Williams, 294 U.S. 176, 55 S.Ct. 380, 79 L.Ed. 841, 96 A.L.R. 1166; or the final authority of a state court to interpret doubtful regulatory laws of the state, Gilchrist v. Interborough Co., 279 U.S. 159, 49 S.Ct. 282, 73 L.Ed. 652; cf. Hawks v. Hamill, 288 U.S. 52, 61, 53 S.Ct. 240, 77 L.Ed. 690. These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion', restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary."

The abstention policy has also played a role in the development of the law of removal of pending state cases to the federal courts. In City of Greenwood, Miss. v. Peacock, 384 U.S. 808, 828, 86 S.Ct. 1800, 1812, 16 L.Ed.2d 944 (1966), the Supreme Court observed:

"* * * the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court."

The approach to abstention which this policy requires has been followed by many federal courts without any general exception being recognized for cases arising under 42 U.S.C. § 1983. Boyle v. Landry, 422 F.2d 631 (7th Cir. February 5, 1970); Goss v. Illinois, 312 F.2d 257, 259 (7th Cir. 1963); Smith v. Village of Lansing, 241 F.2d 856 (7th Cir. 1957); Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964); Vick v. Schiro, 296 F.Supp. 173 (E.D.La.1969). Cf. Cooper v. Hutchinson, 184 F.2d 119 (3rd Cir. 1950).

One of the reasons underlying this practice of refusing to enjoin pending state prosecutions is particularly apposite to the case at bar. In Stefanelli v. Minard, 342 U.S. 117, 72 S.Ct. 118, 96 L.Ed. 138 (1951), a federal court was petitioned to enjoin the use of illegally seized evidence in a state criminal trial. Denying relief, the Supreme Court said, at page 123, 72 S.Ct. at page 121–122:

> "The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts."

Notwithstanding the impressive authority which would bar our enjoining the prosecution of Dr. Babbitz, he presses us to issue such an injunction. Perhaps he draws comfort from the fact that the United States Supreme Court has on two separate occasions expressly reserved ruling on the question whether the Civil Rights Act suspends the anti-injunction provisions of § 2283. Cameron v. Johnson, 390 U.S. 611, 614, n. 3, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968); Dombrowski v. Pfister, 380 U.S. 479, 484, n. 2, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965).

Also, the plaintiff may arguably find support for his position from expressions by several of the justices of the United States Supreme Court. For example, in Gorun v. Fall, 393 U.S. 398, 399, 89 S.Ct. 678, 679, 21 L.Ed.2d 628 (1969), four members of the Court referred to "our recent decisions saying over and over again that a federal claim in a federal court should be decided by the federal court and not relegated to a state tribunal".

Finally, it may seem somewhat anomalous that a court may find a state statute unconstitutional and yet deny an injunction against its enforcement by the state. In effect, such a ruling might protect all persons from prosecution except the very man who has persuaded us of the statute's unconstitutionality.

Notwithstanding these arguments, we do not believe that the circumstances of this case justify an exception to the oft-repeated and strong policy of federal abstention, especially in a criminal case. The forebearance required under § 2283 is not lifted in the case at bar by the teachings of Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). We have already noted that the case at bar does not involve a bad faith enforcement of the abortion statute. In addition, we doubt that the prosecution of Dr. Babbitz has resulted in a chilling of his first amendment rights. A first amendment right is more than a personal right; it is also a public right. When such a right is impinged, the general public is hurt, and the effective functioning of our free society is encum-

bered. This may explain why § 2283 is not strictly applied in first amendment cases. We do not accept the plaintiff's claim that his prosecution under the state abortion statute dampened his first amendment rights.

Although the subject of abortion is fraught with highly emotional pressures, we do not find here any "special circumstances" as discussed in Cameron v. Johnson, 390 U.S. 611, 618, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968), which would entitle Dr. Babbitz to injunctive action. Cf. Machesky v. Bizzell, 414 F. 2d 283 (5th Cir. 1969); Romero v. Weakley, 226 F.2d 399 (9th Cir. 1955); 80 Harv.L.Rev. 604, 608–9 (1967).

We believe we must apply the standard established in Douglas v. City of Jeanette, 319 U.S. 157, 163, 63 S.Ct. 877, 87 L.Ed. 1324 (1943); there the Supreme Court observed that it was Congressional policy to leave to the state courts the trial of state criminal cases, and that such proceedings should be enjoined only in exceptional circumstances. We do not regard this as an exceptional case, and Dr. Babbitz is not entitled to injunctive relief. In the event that the state persists in the prosecution of Dr. Babbitz, we have no reason to doubt that the state courts of Wisconsin will fully vindicate his federal constitutional rights. See Zwicker v. Boll, 270 F.Supp. 131 (W.D.Wis.1967), aff'd 391 U.S. 353, 88 S.Ct. 1666, 20 L.Ed.2d 642 (1968); Soglin v. Kauffman, 286 F.Supp. 851 (W.D.Wis.1968).

[3] Notwithstanding our denial of injunctive relief, a federal court is obliged to weigh separately the issue of declaratory relief. In Zwickler v. Koota, 389 U.S. 241, 254, 88 S.Ct. 391, 399, 19 L.Ed.2d 444 (1967), the Supreme Court held that the federal district court must decide the "merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction". Although it was the application for an injunction which triggered the appointment of this three-judge court under § 2281, we do not understand that the denial of injunctive relief precludes us from resolving the declaratory judgment application.

II. VAGUENESS

[4] The plaintiff urges that § 940.04(5), Wis.Stats., is vague and nebulous upon its face. That subsection, quoted above, excepts a therapeutic abortion when it is performed under specified terms. We have examined the challenged phraseology and are persuaded that it is not indefinite or vague. In our opinion, the word "necessary" and the expression "to save the life of the mother" are both reasonably comprehensible in their meaning.

The United States Supreme Court has ruled that a criminal statute must be definite enough to acquaint those who are subject to it with the conduct which will render them liable to its penalties. Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888 (1939); Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). See also Unconstitutional Uncertainty—An Appraisal, 40 Cornell Law Quarterly, 195, 196 (1955).

We believe that § 940.04(5) sets forth with reasonable clarity and sufficient particularity the kind of conduct which will constitute a violation. Jordan v. De George, 341 U.S. 223, 71 S.Ct. 703, 95 L.Ed. 886 (1951); United States v. Ragen, 314 U.S. 513, 62 S.Ct. 374, 86 L.Ed. 383 (1942). In United States v. Wurzbach, 280 U.S. 396, 399, 50 S.Ct. 167, 169, 74 L.Ed. 508 (1930), Mr. Justice Holmes stated:

> "Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so, it is familiar to the criminal law to make him take the risk."

In People v. Belous, 80 Cal.Rptr. 354, 458 P.2d 194 (1969), the California court found that the words "necessary to preserve her life" in that state's abortion statute were unconstitutionally

vague. While the Wisconsin statute uses slightly different language ("necessary to save"), we doubt that the distinction between the words used in the two statutes is significant. However, we do not share the view of the majority in *Belous* that such language is so vague that one must guess at its meaning.

Slightly different language was before the court in United States v. Vuitch, 305 F.Supp. 1032 (D.D.C.1969), which invalidated an abortion law. That statute contained the following expression: "necessary for the preservation of the mother's life or health". The court concluded that the word "health" was vague both in interpretation and in practice. That precise problem is not presented under the terms of the Wisconsin statute.

Our reading of the Wisconsin statute persuades us that it meets the test set forth by the United States Supreme Court in *Connally*, cited above, 269 U.S. at page 391, 46 S.Ct. at page 127:

> "And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

The plaintiff also charges that there is confusion in subsection (6), which provides that the words "unborn child" mean "a human being from the time of conception until it is born alive". The plaintiff may have medical or even practical justification for his disagreement with the correctness of this statutory definition of an unborn child, but he fails in his effort to convince us that the Wisconsin legislature was vague or indefinite in its choice of language.

III. EQUAL PROTECTION OF THE LAWS

The plaintiff contends that the statute denies to him equal protection of the laws as guaranteed by the fourteenth amendment. It is urged that medical facilities are not constant throughout the state and that a doctor in a rural area in Wisconsin might be justified in performing a "necessary" abortion, whereas a doctor treating the same patient in Milwaukee would be unwarranted in performing the abortion because of the availability in Milwaukee of superior medical facilities.

[5] We find more cogency in the argument that a wealthy woman, but not a poor one, is able, upon demand, to secure a safe and legal abortion in Japan or some other locale in which abortion is permitted. We take judicial notice of the fact that there are a number of places throughout the world where legal abortions are available. We have also considered the argument that an affluent woman, unlike the poor one, may enjoy a long-standing, personal relationship with a well-paid physician, who might more likely be willing or able to persuade his fellow doctors to authorize a therapeutic abortion. We are reluctant to equate these types of inequality with a denial of a protected right under the fourteenth amendment. We know of no analogous situation which goes as far as the plaintiff would have us go in applying the fourteenth amendment to the case at bar.

There is presently pending in the United States Supreme Court a challenge to the practice of imposing a jail term upon a defendant who is unable to pay an assessed fine. Williams v. Illinois, 396 U.S. 1036, 90 S.Ct. 689, 24 L.Ed. 2d 680, probable jurisdiction noted January 19, 1969, being an appeal from People v. Williams, 41 Ill.2d 511, 244 N.E.2d 197 (1969). We cannot anticipate that the decision in the *Williams* case will buttress the plaintiff's contention that there is a denial of equal protection of the laws implicit within the Wisconsin abortion statute.

IV. INVASION OF PRIVATE RIGHTS

The ninth amendment to the United States Constitution provides:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

An examination of recent Supreme Court pronouncements regarding the ninth amendment compels our conclusion that the state of Wisconsin may not, in the manner set forth in § 940.04(1) and (5), Wis.Stats., deprive a woman of her private decision whether to bear her unquickened child.

In terms of the Wisconsin statute, we do not purport to decide the question of a woman's aborting a fetus which has already quickened. We received into evidence the view of a gynecologist that a fetus normally becomes quick at about four and a half months after conception. Dorland's Illustrated Medical Dictionary (24th ed. 1965) defines "quick" as "Pregnant and able to feel the fetal movements." "Quickening" is defined as "The first recognizable movements of the fetus in utero, appearing usually from the sixteenth to the eighteenth week of pregnancy." The plaintiff is being prosecuted under § 940.04(1) and (5); he is not being prosecuted under those portions of § 940.04 which relate to the abortion of a quickened child; therefore, the validity of such provisions are beyond the scope of this opinion.

While problems of over-population, ecology and pollution have been brought to our attention, we deem them secondary as decisional factors in a judicial resolution of the issues at hand. So, too, we find it necessary to set aside arguments involving theological and ecclesiastical considerations.

Obviously, there is no topic more closely interwoven with the intimacy of the home and marriage than that which relates to the conception and bearing of progeny. Recent court cases have considered the sanctity of the right to privacy in home, sex and marriage; however, the concept of private rights, with which the state may not interfere in the absence of a compelling state interest, is one of long standing.

As long ago as 1891, in Union Pacific Railway Co. v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891), the court said:

> "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right to one's person may be said to be a right of complete immunity: to be let alone.' "

In Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923), the United States Supreme Court held that the private right "to marry, establish a home and bring up children" was protected under the fourteenth amendment as an essential liberty. In Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944), the court spoke of the "private realm of family life which the state cannot enter".

In Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), there was a challenge to the constitutionality of a state statute which purported to restrict marriages solely on the basis of race. While the Supreme Court observed, at page 7, 87 S.Ct. at page 1821, that "marriage is a social relation subject to the State's police power," the court held, at page 12, 87 S.Ct. at page 1824:

> "The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State."

See also Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); Farrington v. T. Tokushige, 273 U.S. 284, 47 S.Ct. 406, 71 L.Ed. 646 (1927); Pierce v. Society of the Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). See, generally, Warren and Brandeis, "The Right to Privacy," 4 Harv.L.Rev. 193 (1890).

Recent decisions have asserted a judicial application of the ninth amendment

to the matter of privacy in marital relations and contraception. In Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), the court struck down the Connecticut statute which forbade the use of contraceptives. In so doing, the Court noted that the Bill of Rights contains both specific and penumbral guarantees which protect an individual from governmental invasion of the sanctity of his home and the privacies of his life. In the words of the Court, at page 485, 85 S.Ct. at page 1682, many decisions by the Supreme Court "bear witness that the right of privacy which presses for recognition here is a legitimate one." Three of the justices in a concurring opinion stated, at page 491, 85 S.Ct. at page 1685:

> "To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever."

In People v. Belous, 80 Cal.Rptr. 354, 458 P.2d 194 (1969), the California supreme court invalidated a state statute which made it illegal to perform an abortion on a woman unless it was necessary to preserve her life. The court said, 80 Cal.Rptr. at page 359, 458 P.2d at page 199:

> "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex."

The *Belous* court pointed out, 80 Cal. Rptr. at page 360, 458 P.2d at page 200, that although this protected area of privacy is not explicitly stated in the Constitution, it is a fundamental liberty that is implicit in the penumbrae of the Bill of Rights, and is supported, by analogy, in many past decisions.

In United States v. Vuitch, 305 F. Supp. 1032, 1035 (D.D.C.1969), the court further observed:

> "There has been, moreover, an increasing indication in decisions of the Supreme Court of the United States that as a secular matter a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy."

Although no final decision has as yet been rendered, a three-judge court has been convened in New York in a case involving the same issues under consideration here. Hall v. Lefkowitz, 305 F. Supp. 1030 (S.D.N.Y.1969).

In 2 Loyola University Law Review 1, 8 (April, 1969), former Supreme Court Justice Tom C. Clark concluded from a study of *Griswold* and its predecessor cases:

> "The result of these decisions is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution."

[6] It is clear that in order to justify the regulation of such fundamental private rights, the state must show a compelling need. In Bates v. City of Little Rock, 361 U.S. 516, 524, 80 S.Ct. 412, 417, 4 L.Ed.2d 480 (1960), the Court stated:

> "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."

The Supreme Court, in *Griswold*, said, 381 U.S. at page 485, 85 S.Ct. at 1682:

> "The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than

regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' NAACP v. Alabama, 377 U.S. 288, 307, 84 S.Ct. 1302, 1314, 12 L.Ed.2d 325."

A comparable viewpoint was set forth by the California supreme court in *Belous*, 80 Cal.Rptr. at page 360, 458 P.2d at page 200, where that court said:

"The critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state * * *."

Similarly, in the case at bar, we must decide whether the state of Wisconsin has a sufficiently compelling interest to justify the broad restriction on a woman's inherently personal right that is contained in § 940.04(1) and (5), Wis. Stats.

[7] The defendants urge that the state's interest in protecting the embryo is a sufficient basis to sustain the statute. Upon a balancing of the relevant interests, we hold that a woman's right to refuse to carry an embryo during the early months of pregnancy may not be invaded by the state without a more compelling public necessity than is reflected in the statute in question. When measured against the claimed "rights" of an embryo of four months or less, we hold that the mother's right transcends that of such an embryo.

We also find no compelling state interest in a need to protect the mother's life. At common law, abortion was not a crime unless the mother was quick with child. People v. Belous, supra, 80 Cal.Rptr. at 358, 458 P.2d at 198. This position was reflected in the original Wisconsin abortion statute, Wis.R.S. 1849, c. 133, §§ 10 and 11, enacted in 1849, which made abortion a punishable offense only if performed upon an unborn quick child. However, in 1858 the abortion statute was revised by elimination of the word "quick," thereby making it an offense to perform an abortion at any time during pregnancy. This change reflected an interest in protecting the life of the mother, for in 1858 any surgical procedure done inside the body was extremely dangerous. Today, many types of surgery, including abortion in the first trimester, are safe and routinely employed medical techniques. People v. Belous, supra, 80 Cal.Rptr. at 360, 458 P.2d at 200. Thus, the result of this court's decision that a mother has the right to determine whether to carry or reject an embryo that has not quickened is a return to the common law definition of abortion; this is not a position without well-established precedent in the common law.

We are persuaded that a medical abortion during early pregnancy is not inherently dangerous to the mother. Nor do we find a compelling state interest in connection with the discouragement of non-marital sexual intercourse. The statute involved does not purport to distinguish between married and unmarried women.

We are invited to resolve the philosophical question, raised in some of the amicus curiae briefs, as to when an embryo becomes a child. For the purposes of this decision, we think it is sufficient to conclude that the mother's interests are superior to that of an unquickened embryo, whether the embryo is mere protoplasm, as the plaintiff contends, or a human being, as the Wisconsin statute declares.

There are a number of situations in which there are especially forceful reasons to support a woman's desire to reject an embryo. These include a rubella or thalidomide pregnancy and one stemming from either rape or incest. The instant statute does not distinguish these special cases, but in our opinion, the state does not have a compelling in-

terest even in the normal situation to require a woman to remain pregnant during the early months following her conception.

[8] Under its police power, the state can regulate certain aspects of abortion. Thus, it is permissible for the state to require that abortions be conducted by qualified physicians. The police power of the state does not, however, entitle it to deny to a woman the basic right reserved to her under the ninth amendment to decide whether she should carry or reject an embryo which has not yet quickened. The challenged sections of the present Wisconsin statute suffer from an infirmity of fatal overbreadth.

V. CONCLUSION

The plaintiff is entitled to a declaratory judgment declaring § 940.04(1) and (5) violative of the United States Constitution. The plaintiff is not entitled to an injunction enjoining the defendants or their successors in office from prosecuting the plaintiff under § 940.04(1) and (5).

It is so ordered.

vacated, 402 U.S.___ (1971)

under a state abortion statute should not be enjoined. Previously the court had adjudged portions of the statute unconstitutional. The Court held that where the court in declaring the abortion statute unconstitutional had hoped that state would forebear from further prosecution thereunder, but the state prosecutor publicly announced in effect that the court's judgment would not deter the state from prosecuting others under the statute and the state even declined to postpone trial of the doctor in question until a possible appeal to the Court of Appeals was determined, "special circumstances" required issuance of an injunction previously denied.

Judgment in accordance with opinion.

1. Courts ⇐405(15)

While motions were pending in Court of Appeals regarding propriety of docketing appeal from three-judge district court, three-judge district court had jurisdiction to grant interlocutory judgment pending such appeal and also to issue permanent injunction, against state court proceedings, to protect and effectuate court's judgment, under statute prohibiting federal court's stay of state court proceedings except where necessary in aid of federal court's jurisdiction or to protect or effectuate its judgments. 28 U.S.C.A. §§ 1253, 2283; Fed.Rules Civ.Proc. rule 62(c), 28 U.S.C.A.

2. Judgment ⇐829(1)

Although decision of three-judge district court declaring state abortion statute unconstitutional was perhaps not literally binding on state, fair application of comity doctrine required state authorities to desist from prosecuting doctor pending appeals which were taken from such declaratory judgment and also to desist from threatening prosecutions of others until such appeals could be resolved.

3. Courts ⇐508(1)

Where protected interests involve freedom of speech or assembly, three-

Sidney G. BABBITZ, M.D., Plaintiff,

v.

E. Michael McCANN, District Attorney of Milwaukee County, F. Ryan Duffy, Jr., Judge of the County Court, Milwaukee County, Defendants.

No. 69-C-548.

United States District Court, E. D. Wisconsin.

Nov. 18, 1970.

Proceeding upon order, issued by a three-judge District Court on its own motion, to show cause why prosecutions

judge district court is empowered to enjoin any chilling impact upon such First Amendment rights, and Ninth Amendment rights are equally deserving of federal protection. Fed.Rules Civ.Proc. rule 62(c), 28 U.S.C.A.; U.S.C.A.Const. Amends. 1, 9.

4. Courts ⇐508(7)

Where three-judge district court in declaring abortion statute unconstitutional had hoped that state would forebear from further prosecution thereunder, but state prosecutor publicly announced in effect that court's judgment would not deter state from prosecuting others under statute and state even declined to postpone trial of doctor in question until possible appeal to Court of Appeals was determined, "special circumstances" required issuance of injunction previously denied. Fed.Rules Civ. Proc. rule 62(c), 28 U.S.C.A.; 28 U.S. C.A. § 2283; W.S.A.Wis. 940.04(1, 5).

Nathaniel D. Rothstein, Milton R. Bordow and Roy O. Conen, Milwaukee, Wis., Joseph L. Nellis, Washington, D.C., for plaintiff.

Michael Ash, Asst. Dist. Atty., Milwaukee, Wis., for defendants.

Before KERNER, Circuit Judge, and REYNOLDS and GORDON, District Judges.

PER CURIAM.

On October 28, 1970, a hearing was held pursuant to an order to show cause issued by this court on its own motion. At such hearing, arguments were heard on the question of our enjoining the defendants from prosecuting under §§ 940.04(1) and (5), Wis.Stats. Previously, this court had adjudged those portions of the Wisconsin statute unconstitutional. Our decision was filed on March 5, 1970 and is reported in 310 F. Supp. 293 (E.D.Wis.1970). An amended judgment, filed a few days later, on March 11, 1970, provided that the "injunctive relief sought by the plaintiff be and hereby is denied".

Subsequently, the plaintiff commenced another action in this federal district seeking an order restraining the prosecution. On May 11, 1970, as reported in 312 F.Supp. 725 (E.D.Wis.1970), a single-judge district court denied such relief, relying upon the prior analysis of the recent opinion and judgment of this three-judge court.

A direct appeal was taken from the judgment of the three-judge court to the United States Supreme Court, under 28 U.S.C. § 1253, which provides, in part, that "*any party* may appeal to the Supreme Court from an order granting *or denying*" (emphasis added) an injunction by a three-judge district court. That appeal was dismissed by the United States Supreme Court on October 12, 1970, and a few days thereafter this court issued the instant order to show cause.

[1] At the time of the hearing on this order to show cause, an appeal which had been taken from this court's judgment to the court of appeals for the seventh circuit had not as yet been docketed by the latter court; motions regarding the propriety of such docketing were then pending before the court of appeals. The defendants urge that this court does not have jurisdiction to amend its judgment of March 11, 1970, but they concede that we can temporarily restrain the prosecution of Dr. Babbitz under Rule 62(c), Federal Rules of Civil Procedure.

In our opinion, this court not only has jurisdiction to grant an interlocutory judgment pending such appeal, but also has jurisdiction to issue a permanent injunction in order to protect and effectuate the court's judgment under 28 U. S.C. § 2283, which provides:

"§ 2283. *Stay of State court proceedings*

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its juris-

diction, or *to protect or effectuate its judgments.*" (emphasis added)

In American Insurance Company v. Lucas, 38 F.Supp. 926, 932 (W.D.Mo. 1941), it was held that a three-judge court has the power to protect its judgments from imposition. Indeed, we believe that the competence of the court to reconsider its previous order, in the absence of a stay or supersedeas, is one that is inherent in a court. In Illinois Printing Co. v. Electric Shovel Coal Corp., 20 F.Supp. 181, 184 (E.D.Ill. 1937), the court said:

"Every court has power to control, vacate, or correct its own decrees in the interests of justice. It may do so in the furtherance of justice and its power does not depend upon statute but is inherent. Freeman on Judgments, §§ 200 and 220."

We also find authority to re-examine the question of an injunction under 28 U.S.C. § 2202, which provides:

"§ *2202. Further relief*

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

In Vermont Structural Slate Co. v. Tatko Bros. Slate Co., 253 F.2d 29, 30 (2d Cir. 1958), the court ruled that although the original declaratory decree did not contain a permanent injunction, such provision could be added later under the court's "residual power".

In our decision of March 5, 1970, we discussed the "impressive authority" which favored forebearance from enjoining pending state prosecutions; with reference to Dr. Babbitz, we indicated our expectation that the state courts would "fully vindicate his federal constitutional rights".

At the hearing in this case held prior to the time that the court filed its decision of March 5, 1970, one of the defendants, Mr. McCann, the district attorney of Milwaukee county, urged us not to issue an injunction. Thereupon, a member of this three-judge court asked him, from the bench, what difference it would make "whether we enjoin you from proceeding or enter a declaratory judgment that the law is unconstitutional? Does it have any practical difference?" The district attorney then responded, in part:

"*Probably not a great deal*, except I would urge upon the Court in a declaratory judgment action, even more than otherwise, the principles of comity and abstention should be considered. * * *" (emphasis added)

The record now before this court demonstrates that our previous forecast regarding the state's response to our judgment has not been met; we find that our declaration and judgment have been completely disregarded by the state authorities. For example, shortly after our decision, the state attorney general issued a statement in a publication entitled "The Prosecutors' Bulletin" in which he asserted that our declaratory judgment "legally affected only the rights of Dr. Babbitz". In effect, this is a public announcement that the judgment of this court will not deter the state from prosecuting others under the statute.

The record before this court also discloses that in a press release dated April 7, 1970, the attorney general stated that the case had been appealed to the United States Supreme Court and that "doctors performing abortions in reliance on *Babbitz* run the risk of prosecution in the event the decision is reversed." The chilling impact of this statement is patently clear.

At the hearing on the present order to show cause, defendants' counsel candidly acknowledged that the district attorney of Milwaukee county and the attorney general of the state of Wisconsin, not only believe that the statute in question is fully constitutional but that they intend to take no other stance until there is a contrary decision by the United States Supreme Court. It thus is unmistakably clear, both from the defend-

ants' conduct and from their counsels' statements, that the Wisconsin prosecutors will steadfastly ignore a declaration of unconstitutionality emanating from either this three-judge district court or from the federal court of appeals.

Because of the state's tacit threats of prosecution, it follows that the general citizenry of Wisconsin will be obliged to disregard our judgment of unconstitutionality. In this sense, we regretfully observe that our hope that the state would "vindicate" the constitutional rights of Dr. Babbitz and others in his position has not been realized. Indeed, the state even declined to postpone the trial of Dr. Babbitz until a possible appeal to the court of appeals was determined. Unless we enjoin this prosecution, the trial of Dr. Babbitz in the state court will commence on November 30, 1970 under a statute which we have declared unconstitutional.

The state's insistence on going forward with the trial of Dr. Babbitz and the prosecutors' tacit threats to the medical profession completely change the context of this case with reference to injunctive relief. We are now in precisely the converse situation to that described in Dombrowski v. Pfister, 380 U.S. 479, 485, 85 S.Ct. 1116, 1120, 14 L.Ed.2d 22 (1965), where the court discussed Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943):

> "Since injunctive relief looks to the future, and it was not alleged that Pennsylvania courts and prosecutors would fail to respect the *Murdock* ruling, the Court found nothing to justify an injunction."

We now find that there are "special circumstances" as discussed in Cameron v. Johnson, 390 U.S. 611, 618, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968), and Dombrowski v. Pfister, 380 U.S. 479, 485, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965), requiring the issuance of an injunction. Upon the present posture of this case, the state authorities have no reasonable expectation of securing a *valid* conviction of Dr. Babbitz.

[2] We are fully aware that our judgment could be reversed upon appeal. We are also mindful that it is arguable that our judgment may not be literally "binding" on the state. See United State ex rel. Lawrence v. Woods, 432 F.2d 1072 (7th Cir. 1970). Nevertheless, we believe that a fair application of the doctrine of comity required the state authorities to desist from prosecuting Dr. Babbitz pending the appeals which were taken in this case and also to desist from threatening prosecutions of others until such appeals could be resolved. In the case at bar, comity has proved to be a one-way street. The continued prosecution of Dr. Babbitz and the admonishments by the state officers meet the language of Cameron v. Johnson, 390 U.S. 611, 621, 88 S.Ct. 1335, 1341, 20 L.Ed2d 182 (1968), where the court said:

> "* * * the statute was enforced against them with no expectation of convictions but only to discourage exercise of protected rights."

[3] It is clear from *Dombrowski* that if the protected interests involve freedom of speech or assembly, this court is empowered to enjoin any chilling impact upon such first amendment rights. We believe that the ninth amendment rights of those involved are equally deserving of federal protection. See Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). Indeed, it is arguable that the right to privacy of one's person is of even greater stature and magnitude than the meritorious rights included within the first amendment. As noted in *Griswold* (381 U.S. p. 491, 85 S.Ct. 1678), ninth amendment rights are fundamental ones, "deep-rooted in our society".

[4] In enforcing the statute in question, the state authorities are impinging not only on Dr. Babbitz' ninth amendment rights but upon those of the general public.

Unfortunately, it is apparent that the state judiciary has failed to discourage the prosecutors from trespassing on the federal rights in question. The reaction of the state authorities to our judgment relegates our ruling to nothing more than a gratuitous, advisory opinion. Zwickler v. Koota, 389 U.S. 241, 254, 88 S.Ct. 391, 399, 19 L.Ed.2d 444 (1967), places an affirmative duty on this court to weigh a request for a declaratory judgment that a state statute is unconstitutional:

> "We hold that a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction."

In Romero v. Weakley, 226 F.2d 399, 401 (9th Cir. 1955), the court quoted from Willcox v. Consolidated Gas Co., 212 U.S. 19, 40, 29 S.Ct. 192, 53 L.Ed. 382 (1909), as follows:

> " 'When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction * * *. The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.' "

The United States Supreme Court does not automatically review the judgments of lower tribunals as a matter of course; the case at bar appears to be a good example of that situation. Nevertheless, the state authorities have taken the position that they will refuse to respect our judgment of unconstitutionality or even that of the court of appeals and will be bound only by a ruling of the United States Supreme Court. Did the United States Supreme Court contemplate on the one hand that a federal three-judge district court must declare the constitutionality or unconstitutionality of a state statute and, on the other hand, that the state authorities may wholly dishonor such judgment?

Under all the circumstances of the instant case, we conclude that the only effective way to protect or effectuate our judgment is forthwith to issue an injunction permanently enjoining the pending prosecution of Dr. Babbitz and also permanently enjoining the defendants from henceforth prosecuting others under §§ 940.04(1) and (5), Wis.Stats.

It is ordered that the clerk enter an appropriate judgment.

Amanda HARLING, Petitioner,
v.
DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Respondent.
No. 69-C-560.

United States District Court,
E. D. Wisconsin.
March 11, 1971.

Habeas corpus case by Wisconsin parolee. The District Court, Myron L. Gordon, J., held that a nonphysician's conviction for abortion could not stand in light of federal three-judge District Court ruling declaring Wisconsin abortion statute under which she was convicted to be unconstitutional.

Petition for writ of habeas corpus granted.

1. Habeas Corpus ⇐29

A petition for writ of habeas corpus is a proper means to attack constitutionality of a statute under which a petitioner had been convicted.

POOR COPY

2. Abortion ⇐1

A nonphysician's conviction for abortion could not stand in light of federal three-judge district court ruling declaring that Wisconsin abortion statute under which she was convicted is unconstitutional. W.S.A. 940.04(1, 5).

Shellow & Shellow, Milwaukee, Wis., for petitioner.

Robert P. Warren, Atty. Gen. of Wis., by William A. Platz, Asst. Atty. Gen., Madison, for respondent.

DECISION and ORDER

MYRON L. GORDON, District Judge.

The petitioner was convicted by a state court on November 14, 1968, of the commission of an abortion in violation of § 940.04(1), Wis.Stats. (1967). She was sentenced on the same day to a term of three years in the Wisconsin Home for Women at Taycheedah. Her conviction was affirmed by the state supreme court in State v. Harling, 44 Wis.2d 266, 170 N.W.2d 720 (1969). After the present petition for a writ of habeas corpus was filed, Mrs. Harling was released from confinement and now is on parole.

Mrs. Harling's petition initially set forth two rather broad bases which she argued warranted the granting of her application. However, after her petition was filed, and while it still was pending, the case of Babbitz v. McCann, 310 F. Supp. 293 (E.D.Wis.1970), was decided. In *Babbitz*, upon the application of a physician who was undergoing prosecution for the commission of an allegedly illegal abortion, a three-judge district court declared that § 940.04(1) and (5) are unconstitutional.

On the basis of the *Babbitz* ruling, Mrs. Harling submitted a petition for a writ of habeas corpus to the Wisconsin supreme court; such petition was denied on April 13, 1970. Her petition to the federal court for a writ of habeas corpus subsequently was amended and the petitioner now contends that her state conviction on November 14, 1968, is void. It is this contention which will be considered in the present decision.

In an earlier time, it was generally held that a statute which was declared to be unconstitutional was void ab initio. Norton v. Shelby County, 118 U.S. 425, 6 S.Ct. 1121, 30 L.Ed. 178 (1886); Ex parte Siebold, 100 U.S. (10 Otto) 371, 376, 25 L.Ed. 717 (1880). In the latter case, at pages 376–377, the court said:

> "An unconstitutional law is void and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that, as we have seen, the question of the court's authority to try and imprison the party may be reviewed on *habeas corpus*, by a superior court or judge having authority to award the writ. We are satisfied that the present is one of the cases in which this court is authorized to take such jurisdiction. We think so, because, if the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes. Its authority to indict and try the petitioners arose solely upon these laws."

The breadth of this rule was questioned in several subsequent decisions. See, e. g., Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 374, 60 S.Ct. 317, 84 L.Ed. 329 (1940). Cf. Butts v. Merchants & Miners Transportation Co., 230 U.S. 126, 33 S.Ct. 964, 57 L.Ed. 1422 (1913); Campbell v. Sherman, 35 Wis. 103 (1874); Annot., 167 A.L.R. 517 (1947); Crawford, The Legislative Status of an Unconstitutional Statute, 49 Mich.L.Rev. 645, 650 (1951).

This latter group of cases, however, generally does not deal with statutes in-

volving penal liability, and, in my opinion, they do not obviate the problem of whether Mrs. Harling's conviction can stand in light of a ruling declaring the statute under which she was convicted to be unconstitutional.

At no point prior to the time of the *Babbitz* decision did the petitioner raise the question of the constitutionality of § 940.04(1). In addition, it is to be noted that Mrs. Harling is not a physician, unlike the plaintiff in *Babbitz*. These two factors must be considered in resolving the present petition. However, it is clear that Mrs. Harling has exhausted her state remedies, for the supreme court denied her post-*Babbitz* petition for a writ of habeas corpus, concluding that *Babbitz* was not "binding upon this court or controlling."

It is arguable that the doctrine of the *Chicot County* case might preclude the granting of the relief sought in the case at bar. See Note, The Effect of the Unconstitutionality of a Statute, 37 Geo.L.J. 574, 584 (1949), in which the author suggests that Gayes v. New York, 332 U.S. 145, 67 S.Ct. 1711, 91 L.Ed. 1962 (1947), supports the view that if a petitioner has not raised the issue of the unconstitutionality of a statute at his trial, the court can refuse to consider his petition for a writ of habeas corpus. However, the precise scope of *Gayes* has been the subject of some discussion, and I have difficulty in applying it to the present action. Cf. Farnsworth v. United States, 98 U.S.App.D.C. 59, 232 F.2d 59 (1956), and United States v. Moore, 166 F.2d 102 (7th Cir. 1948).

[1, 2] A petition for a writ of habeas corpus is a proper means to attack the constitutionality of a statute under which a petitioner had been convicted. Furthermore, the few cases involving a petitioner who had been convicted under a statute later held to be unconstitutional in another case have generally granted relief by way of discharge upon a writ of habeas corpus. See, e. g., Ex parte Rose, 122 N.J.L. 507, 6 A.2d 389 (Sup.Ct.1939); Ex parte Downing, 7 Cal.App.2d 731, 47 P.2d 322 (Cal.App. 1935); Ex parte Barrett, 25 Okl.Cr. 431, 221 P. 124 (Okla.Crim.App.1923); cf. Desist v. United States, 394 U.S. 244, 261 n. 2, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969) (dissenting opinion); but see Dowd v. Grazer, 233 Ind. 68, 116 N.E.2d 108 (Ind.1953).

In 1 Sutherland, Statutes and Statutory Construction (Supp.1971 § 111, at 6), the author states:

> "[The] tenderness with which our system regards individual liberty has caused an exception to the rule of estoppel to be made for criminal statutes. Where a statute which declares conduct to be a crime is held unconstitutional, a person who was previously convicted under it may procure his release by habeas corpus."

Babbitz is clear that the state legislature may impose reasonable restrictions on the right of a woman to abort an unquickened fetus. Thus, in 310 F.Supp. at 302, the court stated:

> "Under its police power, the state can regulate certain aspects of abortion. Thus, it is permissible for the state to require that abortions be conducted by qualified physicians."

The declaration in *Babbitz* that § 940.04(1) and (5) are unconstitutional was based upon the premise that the statute is overbroad. On the other hand, rules of severability preclude "saving" a portion of the statute in question so as to accommodate the fact that Mrs. Harling is not a physician or to accommodate a construction that the declaration of unconstitutionality was meant only to extend to Dr. Babbitz or others in his precise position. This conclusion is buttressed by the rules of strict construction generally applied to penal statutes, and they are generally found to be void in their entirety whenever one portion is clearly unconstitutional.

Now, therefore, it is ordered that the petition for a writ of habeas corpus be and hereby is granted. The execution of the writ will be stayed for thirty days to allow the respondent an opportunity to seek appellate court review.

IN THE UNITED STATE

FOR THE WESTERN DIST

ALFRED L. KENNAN, M.D.,
ADRIENNE H. CAMPBELL,
RITA W. SMIRNOFF, and
ANN W. BASHORE,

Plainti

v.

GERALD C. NICHOL, Individuall
and as District Attorney, Dan
County, State of Wisconsin; h
agents, assistants, and all t
acting in concert or cooperat
with him to enforce Wisconsin
Statutes 940.04(1) and (5);

Defenda

Plaintiffs attack Sectio
Wisconsin Statutes, contendi
Constitution of the United St
provides that any person, oth
tentionally destroys the life
punished by fine or imprisonm
940.04(5) excepts from the pr
abortion," which it defines.
sections (1) and (5), an unbo
"a human being from the time
born alive."

In verified pleadings fi
tiffs Kennan, Smirnoff, and B
April 19, 1971, at the direct
attorney and pursuant to a se
of a state court of Wisconsin
offices occupied by plaintiff
his specialized practice in t
in which office plaintiffs Sm
employed as social workers, a
number of pieces of equipment
allege that on April 19 and 2
statements threatening their
Section 940.04(1). They alle
the defendant caused a crimin

No. 23

DISTRICT COURT

RICT OF WISCONSIN

- - -

fs

s
ose
on

ts

- - -

OPINION

AND

TEMPORARY RESTRAINING

ORDER

71-C-118

s 940.04(1) and (5) of the
g that they violate the
tes. Section 940.04(1)
r than the mother, who in-
of an unborn child may be
nt or both. Section
hibition a "therapeutic
For the purposes of sub-
n child is defined as
f conception until it is

ed April 26, 1971, plain-
shore, allege that on
on of the defendant district
rch warrant issued by a judge
police entered the medical
Kennan in connection with
e performance of abortions,
rnoff and Bashore were
d that the police seized a
and files and records. They
, the defendant made public
mminent arrest under
e that on April 21, 1971,
l prosecution to be in-

61

itiated against them by causing to be filed in a state court criminal complaints against them alleging violations of Section 940.04(1).

A complaint was filed in this court by the plaintiff Kennan on April 20, 1971, alleging that he was threatened with a criminal prosecution in the state court under the anti-abortion statute and asserting its unconstitutionality under the United States Constitution. On April 20, I entered an order to the defendant district attorney to show cause on April 26 why he should not be restrained from enforcing Section 940.04(1) against Kennan. On April 26, 1971, an amended complaint was filed by plaintiff Kennan, and another plaintiff Campbell, and on April 26, 1971, plaintiffs Smirnoff and Bashore moved for leave to intervene, were granted leave in the absence of objection, and filed a complaint.

In her verified complaint, plaintiff Campbell alleges that she is a married woman living in this district and bearing an unquickened child by her husband, that she and her husband do not wish to have the child, that she was scheduled to have an abortion on May 3, 1971, at the offices of the plaintiff Kennan in the city of Madison in this district, that she cannot afford to go to New York or elsewhere out of state where abortions can be performed legally, and that the criminal prosecution against plaintiff Kennan and the seizure of the medical equipment are preventing her from obtaining the abortion in this district. She undertakes to sue on behalf of a class consisting of members similarly situated.

By affidavit, plaintiff Kennan alleges that the effect of the seizure of the records and equipment in his office is to prevent him from continuing to perform abortions, and that there are over 300 females for whom appointments for the performance of abortions are presently scheduled.

For the purpose of deciding the motion for a temporary restraining order, and for no other purpose, I find the facts to be as I have summarized them above.

In *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970), a three-judge court consisting of Circuit Judge Kerner and District Judges Reynolds and Gordon, entered judgment declaring that Sections 940.04(1) and (5) violate the Constitution of the United States. My understanding is that this declaratory judgment has not been reversed or modified by any appellate court. In the same

action, the same three-judge court later in 1970 enjoined the district attorney of Milwaukee County and a judge of a county court of Milwaukee County from continuing or initiating prosecutions under Secs. 940.04(1) and (5). 320 F. Supp. 219. On April 19, 1971, the Supreme Court of the United States vacated this injunctive judgment and remanded the case to the three-judge court in the Eastern District of Wisconsin for reconsideration in light of *Younger v. Harris*, 401 U.S. 37 (1971); and *Samuels v. Mackell* and *Fernandez v. Mackell*, 401 U.S. 66 (1971).

In view of the declaratory judgment by the three-judge court in *Babbitz*, and also in view of a similar decision with respect to a similar Illinois statute by a three-judge United States District Court in *Doe v. Scott*, 321 F. Supp. 1385, 1390 (N.D. Ill. 1971), appeal pending, Supreme Court Docket No. 1522, 1523, I conclude that plaintiffs here enjoy a reasonable good chance for ultimate success in this lawsuit on the merits, if it eventuates that a federal three-judge court is free to pass, and does pass, upon the federal constitutional contention.

I find that jurisdiction in this court is present. 28 U.S.C. § 1343(3); 42 U.S.C. § 1983.

The principal question, with respect to the availability of temporary injunctive relief, is whether the plaintiffs have a reasonably good chance ultimately to persuade a federal three-judge court that it should not abstain from acting on the merits of their constitutional claim, and from granting appropriate relief if they prevail on the merits. This question of abstention is rendered unusually difficult by reason of the opinions and orders entered by the Supreme Court of the United States on February 23, 1971, in *Younger v. Harris*, No. 2; *Boyle v. Landry*, No. 4; *Samuels v. Mackell*, Nos. 7 and 9; *Perez v. Ledesma*, No. 60; *Dyson v. Stein*, No. 41; and *Byrne v. Karalexis*, No. 83.

The complaint by plaintiff Kennan was filed in this court on April 20, when he was clearly threatened with a criminal prosecution in the state court but before that prosecution had been commenced. Thus this case presents a situation which was expressly excluded from consideration by the Supreme Court of the United States in its February 23, 1971, decisions. See *Younger v. Harris*, slip opinion at pp. 3-4 and, the concurring opinion by Mr. Justice Brennan in *Perez v. Ledesma*, slip opinion at

p. 25, n. 9. It is contended here by the defendant that this chronological sequence of the commencement of the federal suit and the state court prosecution is too artificial to serve as a basis for determining whether a federal court should abstain. However, from the point of view of those who had sought a federal forum in the cases decided by the Supreme Court of the United States on February 23, 1971, the chronological sequence also appeared to be artificial, but a majority of the Supreme Court was prepared to regard it as decisive in those cases.

Of course, even if a federal court is not otherwise bound to abstain, in order to obtain temporary injunctive relief, a plaintiff must demonstrate that irreparable injury will occur if the relief is denied. Assuming that there is a federal constitutional right vested in a physician to perform abortions upon an unquickened embryo and a federal constitutional right vested in a pregnant woman to decide whether she should carry or reject an unquickened embryo (and I have concluded above that the plaintiffs enjoy a reasonably good chance to prevail in these contentions if the merits are reached by a three-judge federal court), then it clearly follows that to withhold a temporary restraining order is to permit this constitutional right to be lost irreparably with respect to the physician and those women for whom he could otherwise perform the operation in the meantime. For the present, I need not decide, finally, whether the interests of pregnant women can be considered in a suit to which only the physician is a party (only plaintiff Kennan's complaint was filed prior to the commencement of the criminal prosecution in the state court), but should this become a critical issue in this suit, *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965), causes me to conclude that plaintiffs enjoy a reasonable good chance ultimately to prevail in the contention that the physician does enjoy standing to raise the constitutional rights of his patients and potential patients.

For the reasons stated, I conclude that the plaintiffs enjoy a reasonably good chance to prevail in their contention that a three-judge federal court should not abstain in this action,[1] and in their contention that Sections 940.04(1) and (5) violate the Constitution of the United States, and that injunctive relief is necessary to avoid irreparable injury.

Upon the entire record herein, and pursuant to 28 U.S.C. § 2284(3), it is hereby ordered that, until further order of the court:

(1) the defendant, and any and all persons acting in concert with him or at his direction or under his control, are hereby restrained from further enforcement, against the plaintiffs herein, of Sections 940.04(1) and (5), Wisconsin Statutes, in any case involving "an embryo of four months or less" (*Babbitz v. McCann*, 310 F. Supp. 293, 301); and

(2) the defendant, and any and all persons acting in concert with him or at his direction or under his control, are hereby ordered to deliver to the plaintiff Kennan, on or before April 30, 1971, either the originals, or true and complete copies, of all of the documents seized April 19, 1971, which relate to persons who are or may be candidates for abortions on and after that date, and also the two Gomco vacuum pump machines seized April 19, 1971; and

(3) the plaintiffs, and each of them, and all persons acting in concert or cooperation with them, or at their direction, or under their control, are to refrain from destroying or mutilating any of the items, documentary or otherwise, covered by (2), above, unless authorized to do so by further order of the court; and

(4) if the defendant believes that he is unable to comply with the provisions of subparagraph (2), above, he may show cause, on or before April 30, 1971, why he should be relieved of the duty to comply therewith.

ENTERED this 27th day of April, 1971.

BY THE COURT:

/s/ JAMES E. DOYLE
JAMES E. DOYLE
District Judge

---

[1] I would be strengthened in this view if it appeared that the Supreme Court of Wisconsin had already had the chance to pass upon the federal constitutionality of Section 940.04 (1) and had rejected the challenge. From the incomplete information available to me, it appears that the Supreme Court of Wisconsin has had such an opportunity, *State ex rel. Harling v. Superintendent*, April 13, 1970, but its opinion in that case leaves me uncertain whether the Court intended to reject the constitutional challenge on its merits.

Item No. 24

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

ALFRED L. KENNAN, M.D., Plaintiff v. ROBERT WARREN, Attorney General for the State of Wisconsin; and WISCONSIN STATE MEDICAL EXAMINING BOARD, Defendants	OPINION AND TEMPORARY RESTRAINING ORDER 71-C-132

This action (commenced April 28, 1971) relates to certain facets of a controversy centering upon the alleged operation by the plaintiff and his staff of a medical center in the City of Madison in this district, in which, it is alleged, abortions have been performed in violation of Sections 940.04(1) and (5), and 448.18(1)(a), Wis. Stat.

It appears that there are at least three legal facets of this controversy: (1) a criminal prosecution against Dr. Kennan and certain members of his staff which was commenced on April 21 or April 22, 1971, by the District Attorney of Dane County, Wisconsin, in the County Court for Dane County, charging violations of Sections 940.04(1) and (5); (2) a civil action commenced by the Attorney General of Wisconsin (by the service of a summons and complaint on April 21, 1971) in the Circuit Court for Dane County, Wisconsin, in which the State of Wisconsin is the plaintiff and Dr. Kennan is the defendant (No. 133151 in that court), which action purports to have been brought pursuant to Section 448.19, Wis. Stat., in which it is alleged that Dr. Kennan has repeatedly violated Sections 940.04(1) and 448.18(1)(a), Wis. Stat., and in which judgment is sought permanently enjoining Dr. Kennan and his staff from activity relating to the performance of other than "therapeutic" abortions as defined in Section 940.04(5), Wis. Stat.; and (3) a written warning by the Medical Examining Board of the State of Wisconsin, addressed to Dr. Kennan by the Board on April 27, 1971, that the Board will immediately suspend his license, pursuant to Section 448.18(7), Wis. Stat., unless he ceases to perform abortions "except in strict conformity to the exception to the criminal abortion law

as stated in sec. 940.04(5), Stats., and in strict conformity with accepted medical and surgical standards." I will refer to these three facets herein as "the state court criminal action," "the state court civil injunction action," and "the Medical Board proceeding."

(1) The state court criminal action.

In an action initiated by Dr. Kennan in this court on April 20, 1971, under 42 U.S.C. § 1983 (*Kennan et al., v. Nichol*, W. D. Wis., No. 71-C-118), I entered a temporary restraining order April 27, 1971, pursuant to 28 U.S.C. § 2284(3). I initiated the convening of a three-judge court by the Chief Judge of the Circuit. A three-judge court has been convened by the Chief Judge of the Circuit. It consists of Circuit Judge Kerner, and District Judges Reynolds and Gordon. I have withdrawn from the action, and Judge Gordon is acting as the single United States District Judge for the Western District of Wisconsin in the action, as well as acting as a member of the three-judge court.

The temporary restraining order entered April 27, 1971, enjoined the defendant District Attorney of Dane County, "and any and all persons acting in concert with him or at his direction or under his control" from further enforcement of Sections 940.04(1) and (5), Wis. Stat., against Dr. Kennan and his staff, in any case involving an embryo of four months or less.

At a hearing in this court on May 4, 1971, in the present case (71-C-132), counsel for Dr. Kennan contended that by pursuing the state court civil injunction action, the Attorney General of Wisconsin is "acting in concert" with the District Attorney of Dane County, in violation of the temporary restraining order entered April 27, 1971, in 71-C-118. I permitted counsel for Dr. Kennan to state the contention, and I provided the opportunity for the Assistant Attorney General to respond. However, it is clear that I have no authority to deal with such a contention. If there is a desire to pursue it, it must be directed to the three-judge court which has been convened in 71-C-118, the action in which the temporary restraining order of April 27, 1971, was entered.

(2) The state court civil injunction action.

The complaint by Dr. Kennan against the Attorney General and the Medical Board in this present action, 71-C-132, alleges, among other things, that the Attorney

General, acting as counsel for the Board, has commenced an action in state court to enjoin the operation of Dr. Kennan's clinic. The verified complaint prays for a temporary restraining order restraining the Attorney General and the Board from suspending, revoking or otherwise interfering with Dr. Kennan's license, "or from any other method of further enforcement against [Dr. Kennan] of Sections 940.04(1) and (5) and 448.18, Wis. Stat., in any case involving an embryo of four months or less," and prays for such other relief as the court deems just and proper. I entered an order to show cause on April 28, 1971, in the form submitted by counsel for Dr. Kennan, returnable May 4, 1971, requiring the Attorney General and the Board to show cause why they should not be restrained temporarily from interfering with Dr. Kennan's license, and temporarily "suspending and restraining the operation, enforcement, or execution of Chapter 448 of the Wisconsin Statutes...."

On May 3, 1971, there was filed in this action in this court a verified "amended complaint" in which the defendants (the Attorney General and the Board) remained as they were in the original complaint, but in which a second plaintiff, Adrienne H. Campbell, is shown. Parties may be added to an action only by order of the court. Rule 21, Federal Rules of Civil Procedure. No such order has been sought or entered. Dr. Kennan was free to amend his complaint, without leave of court, since no responsive pleading had been served. Rule 15(a), Federal Rules of Civil Procedure. I treat the amended complaint as an amended complaint by Dr. Kennan, verified by him, and since it is also verified by Adrienne Campbell, I treat it as an affidavit by her, in support of Dr. Kennan's motion for a temporary restraining order. However, Mrs. Campbell is not presently a party to this action.

The amended complaint includes more detailed allegations concerning the history of the state court civil injunction suit, and I will turn to them in a moment. The relief prayed for includes: a temporary restraining order preventing the defendants from interfering with Dr. Kennan's license or from any other method of further enforcement of Sections 940.04(1) and (5) and 448.18(1)(a) against Dr. Kennan, whether civil or criminal, in cases involving an embryo of four months or less; a temporary restraining order preventing the Attorney General from pursuing the state court civil injunction action and from seeking to enforce an order entered by the state court in that action April 30, 1971; the convening of a three-judge court; consolidation in this court of this action (71-C-132) with the earlier action (71-C-118); and permanent declaratory and injunctive judgments.

At the May 4 hearing in this action in this court on the order to show cause with respect to the motion for a temporary restraining order, counsel for the Attorney General and the Board objected to consideration of any temporary relief other than that specifically described in the order to show cause. That is, they contended that the hearing was limited to the Board's warning that Dr. Kennan's license may be suspended, and that it could not reach the matter of the state court civil injunction action. At the time of the hearing I expressed the view that there was merit to this contention, but I permitted argument on the matter of the state court civil injunction action, and provided an opportunity for the Attorney General to present evidence on the point if he so elected. Subsequently, I have concluded that the Attorney General's contention concerning the scope of the May 4 hearing was without merit. This is because I have since ascertained clearly that the state court civil injunction action was commenced pursuant to Section 448.19, Wis. Stat. The temporary relief sought, as stated in the order to show cause, included an order "suspending and restraining the operation, enforcement, or execution of Chapter 448 of the Wisconsin Statutes." The Attorney General and the Board were thus fairly warned that the May 4 hearing would reach the subject of the state court civil injunction action.

From the entire record herein, and by the exercise of judicial notice of the proceedings in the state court civil injunction action and in the earlier action in this court (71-C-118), I make the following findings of fact, for the purpose of acting upon Dr. Kennan's motion for a temporary restraining order, and for no other purpose.

I find that on April 19, 1971, pursuant to a search warrant issued by a judge of a state trial court, and at the direction of the District Attorney of Dane County, police entered the medical offices occupied by Dr. Kennan and his staff, in the city of Madison in this district, in connection with his specialized practice in the performance of abortions, that the police seized equipment and records, and that the practical effect of the seizure was to prevent the continuation of Dr. Kennan's abortion practice for some period of time. On April 19 and 20 the District Attorney made public statements threatening the imminent arrest of Dr. Kennan under Section 940.04(1), Wis. Stat. On April 21 or 22, 1971, the District Attorney commenced a criminal action against Dr. Kennan, alleging violations of Section 940.04(1).

An action (71-C-118) was commenced in this court by Dr. Kennan on April 20, 1971, seeking to enjoin the District Attorney from enforcing Sections 940.04(1) and (5).

On April 21, 1971, expressly pursuant to Section 448.19, Wis. Stat., the Board and the Attorney General commenced, in the name of the state, the state court civil injunction action against Dr. Kennan. No order was entered by the court in that action prior to April 30, 1971.

On April 27, 1971, this court entered a temporary restraining order, pursuant to 28 U.S.C. § 2284(3), preventing the District Attorney and those acting in concert with him, from further enforcement of Sections 940.04(1) and (5) against Dr. Kennan in any case involving an embryo of four months or less. The order was not limited to criminal prosecutions.

Following the issuance of the April 27, 1971, temporary restraining order in this court, in the action commenced here on April 20 by Dr. Kennan against the District Attorney, the Attorney General renewed his application to the court in the state court civil injunction action for an order to show cause and for an ex parte restraining order. On April 30, 1971, the state court entered an order to show cause returnable May 5, 1971, at 3:00 p.m., on the question whether Dr. Kennan should be enjoined from his abortion practice pending the final outcome of the state court action, and an order enjoining Dr. Kennan during the period from April 30, 1971, to May 5.

For reasons stated in some fullness in the opinion I entered in 71-C-118 on April 27, 1971, I conclude that in this present action, 71-C-132, Dr. Kennan enjoys a reasonably good chance of ultimate success in this lawsuit on the merits, if it eventuates that a federal three-judge court is free to pass, and does pass, upon the federal constitutional contention. My April 27 opinion related strictly to Sections 940.04(1) and (5), Wis. Stat. However, I conclude that Sections 448.18(1)(a) and 448.19 depend wholly upon Sections 940.04(1) and (5), since Section 448.18(1)(a) proscribes as "immoral or unprofessional conduct," "procuring, aiding or abetting a criminal abortion" (emphasis added).

With respect to the relief sought in this action in this court concerning the state court civil injunction action, I find that jurisdiction here is present. 28 U.S.C. § 1343(3); 42 U.S.C. § 1983.

Assuming that there is a federal constitutional right vested in a physician to perform abortions upon an unquickened embryo and a federal constitutional right vested in a pregnant woman to decide whether she should carry or reject an unquickened embryo (and I have concluded above that the plaintiff enjoys a reasonably good chance to prevail in these contentions if the merits are reached by a three-judge federal court), then it clearly follows that to withhold a temporary restraining order against state court interference with these rights is to permit them to be lost irreparably with respect to the physician and those women for whom he could otherwise perform the operation in the meantime. For the present, I need not decide, finally, whether the interests of pregnant women can be considered in a suit to which only the physician is a party, but should this become a critical issue in this suit, *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965), causes me to conclude that plaintiffs enjoy a reasonably good chance to prevail in the contention that the physician does enjoy standing to raise the constitutional rights of his patients and potential patients. In accordance with 28 U.S.C. § 2284(3), I specifically find that irreparable damage will result if a state court restraint continues to prevent Dr. Kennan from performing any abortions except in compliance with Sections 940.04(1) and (5), in that time is of the essence for those women for whom Dr. Kennan would otherwise be free to perform abortions and for whom alternative opportunities for this procedure are unavailable, and that the support for this finding and conclusion is to be found in the verified amended complaint.

The principal question with respect to the availability of temporary injunctive relief affecting the state court civil injunction action, is whether the plaintiff has a reasonably good chance ultimately to persuade a federal three-judge court that it should not abstain from acting on the merits of his constitutional claim, and from granting appropriate relief if he prevails on the merits. On this question of abstention, I consider particularly the opinions and orders entered by the Supreme Court of the United States on February 23, 1971, in *Younger v. Harris*, No. 2; *Boyle v. Landry*, No. 4; *Samuels v. Mackell*, Nos. 7 and 9; *Perez v. Ledesma*, No. 60; *Dyson v. Stein*, No. 41; and *Byrne v. Karalexis*, No. 83.

The *Younger* group of cases involved state court prosecutions for alleged violations of criminal statutes and municipal ordinances. Whether the *Younger* doctrine is applicable to a state court civil injunctive action under Section 448.19, Wis. Stat., is a difficult question. However, under the view I take of this situation, this distinction is not critical.

The *Younger* doctrine places heavy emphasis upon whether a state action has actually been commenced prior to the time that the aggrieved party commences an action in the federal district court to vindicate his asserted federal constitutional rights. In the present situation, Dr. Kennan sought a forum here on April 20 (71-C-118). The state court criminal prosecution by the District Attorney was commenced on April 21 or 22, and the state court civil injunction action under Section 448.19 was commenced on April 21. However, in the action commenced by Dr. Kennan in this court on April 20 (71-C-118), only the District Attorney was named as a defendant. Dr. Kennan's present action (71-C-132) against the Attorney General and the Board was not commenced until April 28. The question, in terms of abstention, appears to require an evaluation of this time sequence.

I believe that the specific provisions of Section 448.18(1)(a) and 448.19 are critical to this evaluation. Section 448.18(1)(a) defines "immoral or unprofessional conduct" to include "procuring, aiding or abetting a criminal abortion." Section 448.19 provides that if it appears to the Board upon complaint, or if it is known to the Board, that any person is violating Section 448.18(1)(a) -- or other provisions of Chapter 448 -- the Board or "the district attorney of the proper county may investigate and may, in addition to any other remedies, bring action in the name and on behalf of the state against any such person to enjoin such person from such violation. . . ." Had the District Attorney commenced the state court civil injunctive action against Dr. Kennan on April 21, the *Younger* doctrine would have been inapplicable since Dr. Kennan's action against him (71-C-118) had been filed here April 20. Thus, it must be determined whether *Younger's* heavy emphasis upon the time sequence can be escaped by having the Board, with the Attorney General as its attorney, initiate an action to enjoin Dr. Kennan from "procuring, aiding or abetting a criminal abortion." As I have observed above in another connection, the contention that Dr. Kennan has violated Section 448.18(1)(a) turns on whether the abortions he has performed have been "criminal," and this in turn depends upon whether they were in violation of Sections 940.04(1) and (5), the enforcement of which against Dr. Kennan had been prohibited by the April 27 order.[1]

---

1 I am aware that the complaint in the state court civil injunction action recites that the State Assembly by resolution "authorized" the Attorney

I believe that the *Younger* doctrine should not be amplified to deny a federal forum to an otherwise qualified plaintiff, to assert a federal constitutional challenge to Sections 940.04(1) and (5), solely because his action in the federal court, filed April 20, failed to anticipate every means by which some state or local governmental officer or agency might subsequently attempt to enforce those very statutory provisions against him. I conclude that Dr. Kennan enjoys a reasonably good chance ultimately to persuade a federal three-judge court not to abstain for this reason.

(3) The Medical Board proceeding

With respect to this branch of the present case, I incorporate and reaffirm all of those findings of fact and conclusions of law set forth in part (2) of this opinion, and I add the following findings of fact, solely for the purpose of deciding the motion for a temporary restraining order.

I find that on or about March 29, 1971, the Board decided to initiate an investigative hearing under Section 448.17, at its next regularly scheduled meeting on April 23, 1971, concerning whether Dr. Kennan's activities in operating an abortion clinic were inimical to public health; that such an investigative hearing was held on April 23; that the testimony presented at said hearing persuaded the Board to continue the investigative hearing, and that the Board voted to warn Dr. Kennan; that by letter dated April 27, 1971, the Board did warn Dr. Kennan that it would immediately suspend his license, pursuant to Section 448.18(7), Wis. Stat., unless he ceased "performing abortions except in strict conformity to the exception to the criminal abortion law as stated in 940.04(5), Stats., and in strict conformity with accepted medical and surgical standards"; and that on April 30, 1971, the Board decided that the April 27 warning would continue to stand as issued.

---

[1] continued

General to commence it, and that the action was brought pursuant to Section 165.25(1), Wis. Stat., as well as Section 448.19. I note that the resolution "requests" him to "institute proceedings in the appropriate court to obtain an injunction." I note that under Section 165.25(1), when requested by a branch of the legislature, the Attorney General

In accordance with 28 U.S.C. § 2284(3), I specifically find that if the Board is not temporarily restrained from suspending Dr. Kennan's license for a period of not to exceed three months, and a possible like period thereafter, pursuant to Sec. 448.18(7), irreparable injury will result. I find that this irreparable injury consists of that described in part (2) of this opinion, as well as in an inability to practice any kind of medicine during the suspension or suspensions, as well as the damage to Dr. Kennan's reputation and standing. I find support for these findings in the verified amended complaint. I conclude that there is no basis for abstention by a federal district court with respect to the Medical Board proceeding. The *Younger* doctrine is unrelated to state administrative proceedings, as distinguished from state court proceedings. In an action under 42 U.S.C. § 1983, a plaintiff is not required to exhaust either state administrative remedies or state judicial remedies. *Monroe v. Pape*, 365 U.S. 167 (1961); *McNeese v. Board of Education*, 373 U.S. 668 (1963); *Damico v. California*, 389 U.S. 416 (1967).

---

[1] continued

shall "appear for the state and prosecute . . . in any court . . . any cause or matter, civil or criminal, in which the state or the people thereof may be in anywise interested." I find nothing in Section 165.25(1) to create any cause of action. Therefore, I consider that the state court civil injunction action must rest solely on Section 448.19. In any event, whether the state court civil injunction action is viewed as having been brought by the Board or independently by the Attorney General, it is an action to enforce Sections 940.04 (1) and (5).

ORDER

Like the temporary restraining order entered April 27, 1971 in 71-C-118, this order is intended to be a temporary restraining order entered pursuant to 28 U.S.C. § 2284(3), and it is to remain in force only until the hearing by a full three-judge court if the Chief Judge of the Circut convenes such a court in response to my notification to him under 28 U.S.C. § 2284(1).

Upon the entire record herein, and pursuant to 28 U.S.C. §2284(3), IT IS HEREBY ORDERED that:

(1) the defendant Attorney General and the defendant Board and the defendant members of said Board, and any and all persons acting in concert with any of them or at the direction of any of them, are restrained from:

(a) further proceedings under Sections 165.25(1), 448.19, 940.04(1), or 940.04(5), Wis. Stat., whether civil or criminal, to enforce against the plaintiff Alfred L. Kennan, the provisions of Sections 940.04(1) and (5) and Section 448.18(1)(a) in any case involving "an embryo of four months or less" *Babbitz v. McCann*, 310 F. Supp. 293, 301 (E.D. Wis. 1970)); and

(b) further proceedings under Sections 448.18 (I)(a) and 448.18(7), Wis. Stat., and any other provision of any statute and Board regulation, to suspend or to revoke the license of plaintiff Kennan to practice medicine and surgery under Section 448.06, Wis. Stat., for the sole reason that he has performed abortions, or intends or threatens to perform abortions, otherwise than in conformity with Section 940.04(5), Wis. Stat., in any case involving "an embryo of four months or less."

IT IS FURTHER ORDERED that at any time prior to the convening of a three-judge court in this action by the Chief Judge of the Circuit, any party hereto may apply to the single judge of this district for an order modifying or amending the terms of this order.

ENTERED this 5th day of May, 1971.

BY THE COURT:

/s/ JAMES E. DOYLE
JAMES E. DOYLE
District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

ALFRED L. KENNAN, M. D., Plaintiff v. ROBERT WARREN, Attorney General for the State of Wisconsin; and WISCONSIN STATE MEDICAL EXAMINING BOARD, Defendants	SUPPLEMENTAL OPINION 71-C-132

This opinion is intended to supplement the opinion I entered herein on May 5, 1971, in conjunction with the entry of a temporary restraining order. It supplements that portion of the May 5 opinion which dealt with the state court civil injunction action by the State of Wisconsin against Dr. Kennan in the Circuit Court for Dane County.

(1)

In *Goss v. State of Illinois*, 321 F.2d 257 (7th Cir. 1963), and *Smith v. Village of Lansing*, 241 F.2d 856(7th Cir. 1957), the Seventh Circuit Court of Appeals held that 42 U.S.C. § 1983 is not an exception to 28 U.S.C. § 2283, a provision which generally prevents a federal court from staying state court proceedings. In my dissent from the majority opinion in *Zwicker v. Boll*, 270 F. Supp. 131 (W.D. Wis. 1967), I expressed the view that intervening decisions of the United States Supreme Court were inconsistent with the earlier Seventh Circuit opinions. This view also has been expressed by the United States District Court of the Northern District of Illinois in *Landry v. Daley*, 288 F. Supp. 200 (N.D. Ill. 1968).

The Court of Appeals for the Seventh Circuit, in one portion of its opinion in *Boyle v. Landry*, 422 F.2d 631 (7th Cir. 1970), appears to reaffirm its holdings in *Goss* and *Smith*, that injunctions to stay proceedings in a state court have not been "expressly authorized" by 42

U.S.C. § 1983. However, if this were the holding in *Boule*, it would follow that in a § 1983 action, 28 U.S.C. § 2283 would constitute an absolute bar to an injunction against proceedings in a state court. I am obliged to conclude that this was not the intended holding in *Boule* because the bulk of the opinion was devoted to a discussion of whether the district court's injunction was "an abuse of discretion" (422 F.2d at 634); whether the district court had made a finding that the state court prosecution was in "bad faith" (*id.*); whether the state court "prosecutions are so great and extensive as to result in a chilling effect on First Amendment rights" "sufficient to justify federal intervention" (*id.*); and whether there had been a showing that any federal question arising in the state court trial would not be adequately disposed of in the state courts or ultimately on review in the United States Supreme Court. *Boule*, therefore, appears to mean that in an appropriate case under § 1983, an injunction against state court proceedings is permissible.

The Supreme Court of the United States has expressly refrained from passing on this question on at least three separate occasions. *Dombrowski v. Pfister*, 380 U.S. 479, 484, n.2 (1965); *Cameron v. Johnson*, 390 U.S. 611, 613, n.3 (1968); *Younger v. Harris* (No. 2, October Term, 1970, February 23, 1971), pp. 16-17 of slip opinion.

For these reasons, as well as those expressed in *Landru v. Daley*, 288 F. Supp. 200, 224 (N.D. Ill. 1968) and my dissent in *Zwicker v. Boll*, 270 F. Supp. 131, 144-146 (W.D. Wis. 1967), I conclude that a temporary restraining order is permissible in some circumstances, and I conclude further that the circumstances of the present case render such an order appropriate.

(2)

My principal purpose in entering the opinion and order in *Kennan v. Nichol*, 71-C-118, on April 27, 1971, and the opinion and order in *Kennan v. Warren*, 71-C-132, on May 5, 1971, is to prepare the way for a federal three-judge court to consider all of the implications of the state court criminal prosecution of Dr. Kennan, the state court civil injunction action against him, and the Medical Board proceedings in his case, all of which are grounded in the state's criminal statutes on abortion, Sections 940.04(1) and (5). It will be for the three-judge court to determine whether jurisdiction is present; if so, whether it should nevertheless abstain; if it should not abstain, whether plaintiff is entitled to the relief sought.

It is wholly understandable and proper in a situation of this kind that state and local prosecutors and opposing parties and counsel should bring what they consider to be appropriate proceedings in what they consider to be the appropriate judicial forums, and that when such a proceeding is commenced in a state court, the state court should respond as it may feel obliged to respond under the law as it has been determined, or, if the law has not yet been determined, then under the law as the state court believes it should be. I suggest that when a party commences a proceeding in a federal court, it is equally understandable and proper that the federal court should respond as it may feel obliged to respond under the law as it has been determined, or, if the law has not yet been determined, then under the law as the federal court believes it should be.

These questions of the relationships between the state and federal courts have a long and significant history which was most recently the subject of extended and discrepant discussion by various members of the United States Supreme Court in opinions filed February 23, 1971, in *Younger v. Harris*, No. 2, and several related cases. They are profound questions, and their resolution requires a weighing of many competing values.

For the present I undertake to say only that the question of when and under what circumstances the doors of the federal district courts will be open to plaintiffs seeking to vindicate rights claimed to be secured by the federal constitution is a *national* question. When the question is finally answered, the doors of the federal courts will be open or closed, not only to a physician or a pregnant married woman in Madison, Wisconsin, but to blacks in Mississippi, slum dwellers in Harlem, and grape pickers in California. A federal court must not be headstrong. But amenity among state and federal judicial officers must never cause a federal court to close its door to those to whom the door should open.

ENTERED this 6th day of May, 1971.

BY THE COURT:

/s/ James E. Doyle
JAMES E. DOYLE
District Judge

Circuit Judge, held that North Carolina statute, which, with certain statutory exceptions, assigned right to be born to human organism in its early prenatal development as embryo and fetus, did not place unconstitutional burden on fundamental liberty, but that four months' residency requirement for obtaining therapeutic abortion unconstitutionally limited right to travel.

Judgment entered accordingly.

Elizabeth CORKEY, Charles Hendricks, Roy Parker, Richard Burt and Arthur Jones, Plaintiffs,

v.

Dan K. EDWARDS, Thomas D. Cooper, Jr., Thomas W. Moore, Jr. and Jerry W. Whitley, Defendants.

Civ. No. 2665.

United States District Court, W. D. North Carolina, Charlotte Division.

Argued Nov. 5, 1970.

Decided Feb. 1, 1971.

Class action seeking to have state abortion statute declared unconstitutional and its enforcement enjoined. The Three Judge District Court, Craven,

1. Courts ⇐260.4

Class action seeking to have state abortion statute declared unconstitutional and its enforcement enjoined was not proper case in which to apply doctrine of abstention, absent state court interpretation of statute that would alter statute's constitutional impact. G. S.N.C. §§ 14–44 to 14–45.1.

2. Declaratory Judgment ⇐292, 305

County family planning clinic medical director, who was medical expert in obstetrics and contraception and former medical missionary, chairmen of departments of obstetrics and gynecology at teaching hospitals at various universities, and state General Assembly member, who was largely responsible for passage of amendment to state abortion statute, all had standing to bring action seeking to have such statute declared unconstitutional and its enforcement enjoined and could sufficiently represent rights of class whose members they sought to protect. G.S.N.C. §§ 14–44 to 14–45.1.

3. Abortion ⇐1

North Carolina abortion statute, which, with certain statutory exceptions, assigns right to be born to human organism in its early prenatal development as embryo and fetus, does not place unconstitutional burden on fundamental liberty. G.S.N.C. §§ 14–44 to 14–45.1.

4. Constitutional Law ⇐82

Generally women possess fundamental right under Constitution to determine whether they shall bear children before they have become pregnant and state

can interfere with such right of choice only in special circumstances, and may not forbid practice of contraception.

5. Abortion ⇐1
Constitutional Law ⇐83(1)

Four months' residency requirement as condition precedent to obtaining therapeutic abortion under North Carolina abortion statute unconstitutionally limited right to travel. G.S.N.C. § 14-45.1.

6. Abortion ⇐8

Burden of proof, in prosecution for violation of North Carolina abortion statute, is on state to show that abortion did not come within statutory exemptions. G.S.N.C. §§ 14-44 to 14-45.1.

George S. Daly, Jr., Charlotte, N. C., Michael Katz, Evanston, Ill., and Roy Lucas, New York City, for plaintiffs.

James L. Blackburn, Raleigh, N. C., Staff Atty. for Attorney General's Office, and Arnold H. Loewy, Chapel Hill, N. C., for defendants.

Before CRAVEN, Circuit Judge, and JONES and McMILLAN, District Judges.

CRAVEN, Circuit Judge:

This is a class action brought before a three-judge court, 28 U.S.C. § 2281, to have the North Carolina Abortion Statute,[1] G.S. §§ 14-44 to 14-45.1, de-

1. The statute reads:

§ 14-44. Using drugs or instruments to destroy unborn child.—If any person shall wilfully administer to any woman, either pregnant or quick with child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or other substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy such child, he shall be guilty of a felony, and shall be imprisoned in the State's prison for not less than one year nor more than ten years, and be fined at the discretion of the court.

§ 14-45. Using drugs or instruments to produce miscarriage or injure pregnant woman.—If any person shall administer to any pregnant woman, or prescribe for any such woman, or advise and procure such woman to take any medicine, drug or anything whatsoever, with intent thereby to procure the miscarriage of such woman, or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes, he shall be guilty of a felony, and shall be imprisoned in the jail or State's prison for not less than one year nor more than five years and shall be fined, at the discretion of the court.

§ 14-45.1. When abortion not unlawful.—Notwithstanding any of the provisions of G.S. 14-44 and 14-45, it shall not be unlawful to advise, procure, or cause the miscarriage of a pregnant woman or an abortion when the same is performed by a doctor of medicine licensed to practice medicine in North Carolina, if he can reasonably establish that:

There is substantial risk that continuance of the pregnancy would threaten the life or gravely impair the health of the said woman, or

There is substantial risk that the child would be born with grave physical or mental defect, or

The pregnancy resulted from rape or incest and the said alleged rape was reported to a law-enforcement agency or court official within seven days after the alleged rape, and

Only after the said woman has given her written consent for said abortion to be performed, and if the said woman shall be a minor or incompetent as adjudicated by any court of competent jurisdiction then only after permission is given in writing by the parents, or if married, her husband, guardian or person or persons standing in loco parentis to said minor or incompetent, and

Only when the said woman shall have resided in the State of North Carolina for a period of at least four months immediately preceding the operation being performed except in the case of emergency where the life of the said woman is in danger, and

Only if the abortion is performed in a hospital licensed by the North Carolina Medical Care Commission, and

Only after three doctors of medicine not engaged jointly in private practice, one of whom shall be the person performing the abortion, shall have examined said woman and certified in writing the circumstances which they believe to justify the abortion, and

Only when such certificate shall have been submitted before the abortion to the hospital where it is to be performed; provided, however, that where an emergency exists, and the certificate so states, such certificate may be submitted within twenty-four hours after the abortion.

clared unconstitutional and its enforcement enjoined.

Although the law is no respecter of persons, plaintiffs' very occupations lend credence to their contention that the state may not constitutionally prevent or circumscribe the fundamental right of a woman to choose whether or not to bear children and to prevent it by abortion if she and her physician should decide to do so.

Dr. Elizabeth Corkey is the Medical Director of the Mecklenburg County Family Planning Clinic, a medical expert in obstetrics and contraception, and formerly a medical missionary. Plaintiffs Hendrix, Parker and Burt are also doctors of medicine and respectively the Chairmen of the Departments of Obstetrics and Gynecology at the teaching hospitals of the University of North Carolina, Duke University and Wake Forest University. Each is a registered and licensed physician and surgeon under North Carolina law and each is certified as a specialist in the field of obstetrics and gynecology. Plaintiff Jones is a member of the North Carolina General Assembly and was largely responsible for the passage of the 1967 amendment to the statutes challenged in this law suit. For many years he has been an interested student of contraception, abortion and family planning. It is interesting that he asks the court to invalidate a statute for which he is largely responsible. His position is that it is the least restrictive legislation he could get enacted but that even so it is an unconstitutional burden on fundamental liberty.

Unquestionably, every one of the five plaintiffs is a qualified and informed expert on the problem of abortion in North Carolina. Indeed, each of them is doubtless qualified to testify as an expert witness in this very case. Although we deeply respect their informed opinions that the state has no justifiable interest in interfering with a woman's fundamental right to choose whether or not to bear children and implementing that right by choosing to abort, we think such a conclusion necessarily involves a value judgment we may not properly make. It seems to us the legislature may not unreasonably conclude that there is a sufficient public interest in protecting the embryo to permit limited statutory intrusion into what would otherwise be a protected zone of privacy. In only one minor respect do we hold the statute unconstitutional: the residency requirement as a condition precedent to obtaining a therapeutic abortion unconstitutionally, we think, limits the right to travel.

We avoid another serious constitutional problem by interpretation. We think the legislature did not intend to reverse the presumption of innocence, and that the burden of proof in a prosecution is on the state to show that an abortion did not come within the exemptions of G.S. § 14-45.1.

[1, 2] Despite the several assertions made by the state concerning matters of jurisdiction, we decline to dismiss on these grounds. The issues have been exhausted in other actions considering abortion laws, and we therefore deal with them summarily. First, we find that this is not a proper case in which to apply the doctrine of abstention, there being no state court interpretation of the statute that would alter the statute's constitutional impact. Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); Doe v. Randall, 314 F. Supp. 32 (D.Minn.1970). Nor do we accept the argument that justiciability fails for lack of standing. Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed. 2d 947 (1968); Roe v. Wade, 314 F. Supp. 1217, 1220 (N.D.Tex.1970); see Berger, Standing to Sue in Public Actions, Is It a Constitutional Requirement? 78 Yale L.J. 816 (1969). Finally, we agree that the plaintiffs are able to represent the rights of the class whose members they seek to protect. See Griswold v. Connecticut, 381 U.S. 479, 481, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Roe v. Wade, *supra*, 314 F.Supp. at 1219-1220.

I.

[3, 4] There is nothing in the United States Constitution about birth, contraception or abortion. But in Griswold v. Connecticut, *supra*, the Supreme Court derived from the several amendments to the Constitution a right of privacy. We are urged to extend Griswold v. Connecticut, *supra*, and its zone of privacy to insulate abortion from legislative control. In *Griswold* the Supreme Court recognized a zone of marital privacy into which the state may not constitutionally intrude where its only interest in doing so was said to be the discouragement of extramarital sexual relations. Thus, the court struck down Connecticut's law forbidding the giving of information and instruction and advice to married persons as to the means of preventing conception.

We agree with plaintiffs that there is no more precious aspect of the concept of liberty than the right to be left alone. As Mr. Justice Brandeis said dissenting in Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928):

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Even earlier, in Union Pacific Railway Company v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 36 L.Ed. 734 (1891), the Court said:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint and interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right to one's person may be said to be a right of complete immunity: to be let alone'.

We also agree with plaintiffs that whether or not to bear a child is ordinarily and up to a point within the zone of privacy of a woman and that she has the right to be let alone in making that determination. In short, it is none of the state's business whether a woman chooses to become pregnant, and beyond its province to forbid the practice of contraception. Griswold v. Connecticut, *supra*.

But that is not quite the question in this case. We think it is this: Can the State of North Carolina constitutionally assign to the human organism in its early prenatal development as embryo and fetus the right to be born (with certain exceptions as set out in the statute)? We think the answer must be "yes".

For the purposes of this case we assume, if we are not required to recognize, *e. g.*, Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678 (1965); Baird v. Eisenstadt, 1 Cir., 1970, 429 F.2d 1398, that as a general matter women possess under our Constitution a "fundamental right" to determine whether they shall bear children before they have become pregnant. A state may interfere with this right of choice only in special circumstances. *E. g.*, Buck v. Bell, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927). We deal in this case, however, not merely with whether a woman has a generalized right to choose whether to bear children, but instead with the more complicated question whether a pregnant woman has the right to cause the abortion of the embryo or fetus she carries in her womb. We do not find that an equation of the generalized right of the woman to determine whether she shall bear children with the asserted right to abort an embryo or fetus is compelled by fact or logic. Exercise of the right to an abortion on request is not essential to

an effective exercise of the right not to bear a child, if a child for whatever reason is not wanted. Abstinence, rhythm, contraception and sterilization are alternative means to this end. The first is, of course, infallible; the latter three are reliable to varying degrees approaching certainty. Before the "moment" of conception has occurred, *see generally* Ziff, Recent Abortion Law Reforms (Or Much Ado About Nothing), 60 J.Crim. L.C. & P.S. 3, 20–21 (1969), the choice whether or not to bear children is made in circumstances quite different from those in which such a choice might be made after conception. Apart, the sperm and the unfertilized egg will die; neither has the capacity to grow and develop independently as does the fertilized egg. During fertilization, sperm and egg pool their nucleii and chromosomes. Biologically, a living organism belonging to the species homo sapiens is created out of this organization. Genetically, the adult man was from such a beginning all that he essentially has become in every cell and human attribute. *See generally* Gray, Anatomy of the Human Body 21–60 (Goss 27th ed. 1959); 5 Lawyers' Medical Cyclopedia § 37.1 (1960). The basic distinction between a decision whether to bear children which is made before conception and one which is made after conception is that the first contemplates the creation of a new human organism, but the latter contemplates the destruction of such an organism already created. To some engaged in the controversy over abortion, this distinction is one without a difference. These men of intelligence and good will do not perceive the human organism in the early part of its life cycle as a human "being" or "person". In their view, the granting to such an organism of the right to survive on a basis of equality with human beings generally should be delayed until a later stage in its development. To others, however, the "moment" of conception or some stage of development very close to this "moment" is the point at which distinctively human life begins. In their view, the difference between the decision not to conceive and the decision to abort is of fundamental, determinative importance. Thus the root problem in the controversy over abortion is the one of assigning value to embryonic and fetal life. *See* Giannella, The Difficult Quest for a Truly Humane Abortion Law, 13 Vill.L.Rev. 257 (1968).

"In considering the problem of valuing prenatal life, we heed the words of Mr. Justice Holmes:

> 'It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong * * *.'

Holmes, Collected Legal Papers 295 (1920). When distinctively human life begins is a matter about which reasonable, fair-minded men are in basic disagreement. Thus this case does not concern simply whether the pregnant woman has a fundamental right to be let alone in the control of her body processes, *cf.* Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 11 S.Ct. 1000, 35 L. Ed. 734 (1891) (submission to surgical examination), for it is unresolved whether, in the common understanding of the society in which she lives, choice of the destiny of the human organism developing within her is a matter directly affecting only her individual rights." Rosen v. Louisiana State Board of Medical Examiners, 318 F.Supp. 1217, 1224 (E.D.La.1970) (footnotes omitted).

Our inquiry must focus on the nature and extent of the state interest necessary to justify an invasion of the fundamental right of privacy. We are mindful of Holmes' admonition in his now vindicated[2] dissent in Lochner v. State

2. *See, e. g.,* Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955); Giboney v. Empire Storage and Ice Company, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834 (1949); Lincoln Federal Labor Union

of New York, 198 U.S. 45, 74, 25 S.Ct. 539, 49 L.Ed. 937 (1905), that the Constitution "is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." 198 U.S. at 76, 25 S.Ct. at 547.

The concept of state interest is one that has evaded specific definition.[3]

> An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determination addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.
>
> * * * * * *
>
> Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.

Berman v. Parker, 348 U.S. 26, 32, 75 S.Ct. 98, 99 L.Ed. 27 (1954).

To determine the state interest we shall not attempt to choose between extreme positions. Whether possessing a soul from the moment of conception or mere protoplasm, the fertilized egg is, we think, "unique as a physical entity," Lucas, Federal Constitutional Limitations of the Enforcement and Administration of State Abortion Statutes, 46 N.C.L.Rev. 730, 744 (1968), with the potential to become a person. Whatever that entity is, the state has chosen to protect its very existence. The state's power to protect children is a well established constitutional maxim. See, Shelton v. Tucker, 364 U.S. 479, 485, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); Prince v. Massachusetts, 321 U.S. 158, at 166–168, 64 S.Ct. 438, 88 L.Ed. 645. That this power should be used to protect a fertilized egg or embryo or fetus during the period of gestation embodies no logical infirmity, but would seemingly fall within the "plenary power of government." Poe v. Ullman, 367 U.S. 497, at 539, 81 S.Ct. 1752, 6 L.Ed.2d 989 (Harlan, J., dissenting). That there is a state interest has until recently been taken for granted. History sides with the state.[4]

In Babbitz v. McCann, 310 F.Supp. 293 (E.D.Wis.1970), a three-judge court sitting in judgment of Wisconsin's abortion law recognized the interest of the unborn child as well as that of the mother. That court chose to weigh the two: "For the purposes of this decision, we think it is sufficient to conclude that the mother's interests [before quickening] are superior to that of an unquickened embryo, * * *" *Id.* at 301. See also, Roe v. Wade, 314 F.Supp. 1217 (N.D.Tex.1970). Striking such a balance is not unreasonable. It may, indeed, be wide, humane and enlightened, but we

No. 19129 A.F. of L. v. Northwestern Iron & Metal Company, 335 U.S. 525, 69 S.Ct. 251, 93 L.Ed. 212 (1949); Olsen v. Nebraska, 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305 (1941); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937).

3. *See, e. g.*, United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

4. Under the common law in England, and in the early periods of this country's existence, it was a crime to commit acts leading to an abortion only after "quickening", but the scope of the prohibited period was extended to cover the entire time from conception to natural birth by statute in this country beginning in the latter part of the nineteenth century. Lucas, Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes, 46 N.C.L.Rev. 730, 731–35 (1968). The North Carolina statute in question was enacted in its original form in 1881 and thereafter not amended until 1967.

submit it is a value judgment not committed to the discretion of judges but reposing instead in the representative branch of government. Although there is a difference between social due process and the discredited economic due process of *Lochner, supra*, there is, we think, no real distinction. Both involve values. As Mr. Justice Frankfurter wrote:

> Courts can fulfill their responsibility in a democratic society only to the extent that they suceed in shaping their judgments by rational standards, and rational standards are both impersonal and communicable. Matters of policy, however, are by definition matters which demand the resolution of conflicts of value, and the elements of conflicting values are largely imponderable. Assessment of their competing worth involves differences of feeling; it is also an exercise in prophesy. Obviously the proper forum for mediating a clash of feelings and rendering a prophetic judgment is the body chosen for those purposes by the people.

American Federation of Labor v. American Sash & Door Co., 335 U.S. 538, 557, 69 S.Ct. 258, 267, 93 L.Ed. 222 (1949).

Persuasive, therefore, as the host of statistics, facts and opinions plaintiffs urge upon us appear to be, and as commendable as the efforts plaintiffs have shown in their attempt to right what is considered by many a social wrong are, we must decline what we consider to be an invitation to decide what is best for North Carolina.[5] The legislature is the proper arena for the resolution of "fundamentally differing views." [6]

II.

[5] The plaintiffs also challenge the constitutionality of the residency requirement contained in G.S. § 14-45.1 limiting the availability of therapeutic abortions to those women who have "resided in the State of North Carolina for a period of at least four months immediately preceding the operation being performed except in the case of emergency where the life of the said woman is in danger." The basis of the attack on the constitutionality of this provision is that it unduly infringes upon the fundamental right to travel guaranteed to all citizens. Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1968); United States v. Guest, 383 U.S. 745, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966). See also, Keenan v. Board of Law Examiners of State of North Carolina, 317 F.Supp. 1350 (E.D.N.C.1970).

The state expresses a fear that has not materialized; taxation of our hospital facilities by an influx of out of state patients seeking abortions. We think our law is not so liberal. But if any protection is needed, the sweep of the provisions in 14-45.1 far exceeds the scope of the interest by penalizing those who enter North Carolina with the bona fide intent of making the state their permanent residence. "[T]he effect of the waiting-period requirement * * * is to create two classes * * * indistinguishable from each other except that one is composed of residents * * *." Shapiro v. Thompson, *supra*, at 627, 89 S.Ct. at 1327.

We conclude that the requirement is overbroad. The interest of the state in maintenance of quality medical treatment for its citizens can be effected without such unnecessary discrimination against other citizens of the United States. In the unlikely event medical facilities should become overtaxed, some fair system of priority, short of flat

5. Since the state's interest in the protection of the embryo is sufficient to support the legislation, we need not consider the interest in protecting the mother's health except to say we think that interest is exhausted with the sensible requirement that no unlicensed practitioner may perform an abortion. Apparently, abortions by competent medical doctors within the first three months are no more dangerous to life and health than live births. *See*, People v. Belous, 80 Cal.Rptr. 354, 302, 458 P.2d 194, 200-201 (1969).

6. Holmes, J., dissenting in Lochner, *supra*, at 74, 25 S.Ct. 539.

exclusion of non-residents, may be devised.

III.

[6] G.S. § 14–44 makes it a felony to willfully administer to any woman who is pregnant or quick with child any substance whatever with intent to destroy *such child*. G.S. § 14–45 is virtually identical but the evil intent proscribed is to procure a miscarriage or injure or destroy *the woman*. The thrust of 14–44 is to protect the unborn child and the thrust of 14–45 to protect the pregnant woman.

G.S. § 14–45.1, enacted in 1967, provides that G.S. §§ 14–44 and 14–45 do not apply when an abortion is performed by a doctor of medicine, licensed in North Carolina, "if he can reasonably establish that":

(1) There is substantial risk that continuation of the pregnancy would threaten the life or gravely impair the health of the woman or;

(2) substantial risk the child would be born with grave physical or mental defect or;

(3) the pregnancy resulted from rape or incest.

The foregoing are the three reasons that will suffice under North Carolina law to make abortion lawful. The rest of 14–45.1 establishes certain procedures that must be followed:

(1) the woman, or if she is a minor or incompetent, someone acting for her, must give her written consent to the abortion;

(2) the abortion must be performed in a hospital licensed by the North Carolina Medical Care Commission;

(3) three doctors must have certified in writing the circumstances they believe to justify the abortion and the certificate furnished to the hospital. There is a provision that in an emergency the certificate may be submitted to the hospital within 24 hours after the abortion.

Although we may not interpret a state statute with finality, for that is the province of North Carolina's highest court, we think the words in G.S. § 14–45.1 authorizing abortion by a medical doctor "* * * if he can reasonably establish that * * *" simply means that the doctor must establish *to his own satisfaction* that one of the three statutory reasons for abortion exists before he may lawfully proceed. We would not lightly assume that the legislature meant to make all abortions unlawful unless in a criminal prosecution the medical doctor could reasonably establish his innocence. The presumption of innocence is deeply rooted in our fundamental law. To read the statute so as to place the burden of proof upon the defendant in a criminal prosecution would offend a maxim implicit in due process—that the accused is presumed innocent until proven guilty. Coffin v. United States, 156 U.S. 432, 453–460, 15 S.Ct. 394, 39 L.Ed. 481 (1895). See also, United States v. Vuitch, 305 F. Supp. 1032, 1034 (D.D.C.1969). The burden of proof must be upon the state to show that the conditions for performing therapeutic abortions, a substantial risk to the life or the health of the mother, or a substantial risk that the child would be born with grave physical or mental defect, or rape or incest, were not present. Due process forbids that the accused be required to establish to the court and jury that the abortion performed came within the exemptions of the statute.

We think this was unquestionably the legislative intent, and since the statute can be saved only by such an interpretation, we do not hesitate to put that construction upon it.

An appropriate judgment will be entered declaring the statutes constitutional except for the residency requirement.

A. H. STEINBERG, M.D. and R. Vance Fitzgerald, M.D. and Sandra Frank and Waldemar Agrow and Mary Doe, for and on behalf of all persons similarly situated, Plaintiffs,

v.

Paul BROWN, Att'y General of Ohio, Defendants, and Harry Friberg, Prosecuting Att'y of Lucas County, Ohio, and Anthony Bosch, Chief of Police, Toledo, and Intervening Defendant Homer Schroeder, M.D.

No. C 70-289.

United States District Court, N. D. Ohio, W. D.

Dec. 18, 1970.

Action for injunctive and declaratory relief, attacking validity of Ohio abortion statute. The three-judge Dis-

trict Court, Don J. Young, J., held that the statute is not unconstitutionally vague and does not violate protected right of privacy, the equal protection clause, or the cruel and unusual punishment prohibition.

Judgment for defendants.

Ben C. Green, J., dissented and filed opinion.

1. Constitutional Law ⇐42

Plaintiffs, including physicians, social worker, clergyman, and mother who had been pregnant at time of commencement of action, had standing to challenge constitutionality of Ohio abortion statute. R.C.Ohio § 2901.16.

2. Courts ⇐508(7)

Plaintiffs attacking constitutionality of Ohio abortion statute were not entitled to injunction against enforcement of statute where it did not appear that prosecution of any plaintiff was commenced or even threatened.

3. Criminal Law ⇐13

Ohio abortion statute is not unconstitutionally vague. R.C.Ohio § 2901.16.

4. Abortion ⇐1
Constitutional Law ⇐82

Ohio abortion statute does not deprive persons of privacy protected by Federal Constitution. R.C.Ohio § 2901.16; U.S.C.A.Const. Amends. 1, 5, 14.

5. Abortion ⇐1

State has legitimate interest to legislate for purpose of affording embryonic or fetal organism an opportunity to survive, and this interest is superior to claimed right of pregnant woman or anyone else to destroy fetus except when necessary to preserve her own life. R.C.Ohio § 2901.16.

6. Constitutional Law ⇐82

Right and power of man or woman to determine whether or not to participate in process of creation is private and personal one with which law cannot and should not interfere.

7. Abortion ⇐1
Constitutional Law ⇐250

Ohio abortion statute does not violate equal protection clause, despite claim that under it wealthy persons are better able to procure abortions than the poor. R.C.Ohio § 2901.16; U.S.C.A. Const. Amend. 14.

8. Constitutional Law ⇐211

Equal protection clause is not designed to prevent that inequality which is often found in life and nature. U.S.C.A.Const. Amend. 14.

9. Criminal Law ⇐1213

Ohio abortion statute does not violate Eighth Amendment proscription of cruel and unusual punishment. R.C.Ohio § 2901.16; U.S.C.A.Const. Amend. 8.

Gerald B. Lackey, Harland M. Britz, Louise Jacobson, Toledo, Ohio, for plaintiffs.

Wm. J. Lee, Asst. Atty. Gen., Columbus, Ohio, for Paul Brown.

John Hayward, Toledo, Ohio, for Harry Friberg.

Frank Pizza, Toledo, Ohio, for Anthony Bosch.

David J. Young, Columbus, Ohio, for Homer Schroeder.

Before WEICK, Circuit Judge, GREEN and YOUNG, District Judges.

OPINION

DON J. YOUNG, District Judge.

This is another in a series of cases which have been and are being filed in various courts throughout the United States attacking the constitutionality of state statutes forbidding abortions. This particular action was brought under Title 28 U.S.C. §§ 1331–1343, Title 28 U.S.C. §§ 2201 and 2202, Title 28 U.S.C. §§ 2281 and 2284, and Title 42 U.S.C. § 1983. The plaintiffs seek a declaratory judgment that Ohio's abortion statute, Section 2901.16 Ohio Rev.

Code,[1] is unconstitutional under the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the Constitution of the United States. They also seek injunctive relief against the enforcement of the statute. Hence a three judge court was convened to hear and determine the matter.

The plaintiffs claim that each of them represents a class of persons who are affected by the Ohio statute complained of. One plaintiff is a physician specializing in obstetrics and gynecology; one is a psychiatrist; one is a social worker; one is a minister of religion; and the final one is a young woman, married but separated from her husband, the mother of one child born in wedlock, and at the time of commencement of the action early in September, 1970, eight to ten weeks pregnant with another child conceived in wedlock.

The defendants named in the amended complaint are the Governor and Attorney General of the State of Ohio, the Prosecuting Attorney of Lucas County, Ohio, wherein this Division of the District Court sits, and the Chief of Police of the City of Toledo, the county seat of Lucas County.

The amended complaint seeks a declaratory judgment that Section 2901.16 Ohio Rev.Code is in violation of the rights of the plaintiffs under the six amendments to the Constitution listed above and for injunctive relief.

A motion for a temporary restraining order was heard and overruled by the single judge of the Western Division of the Northern District of Ohio, and a motion to intervene as a party defendant on behalf of the unborn child of the plaintiff Mary Doe, and the class of unborn children of the women of the class represented by Mary Doe, filed by Homer Schroeder, M. D. was granted by this single judge.

Dr. Schroeder also filed a motion to be appointed as Guardian ad Litem for the unborn child, and motions for leave to file briefs *amicus curiae* were filed by a group of some forty organizations and individuals supporting the plaintiffs, and by the Ohio Right to Life Society, Inc. supporting the defendants. Various other motions were filed, including motions by all of the defendants except the intervening defendant Schroeder to dismiss the complaint, and a motion of the plaintiff to dismiss the intervening defendant Schroeder.

The motions to dismiss were overruled, as were the motion to appoint a guardian ad litem for the unborn child and children, and the other technical motions. The two principal motions for leave to file briefs *amicus curiae* were granted.

The case was submitted upon the evidence offered at the hearing on the motion for a temporary restraining order, certain stipulations, the deposition of John F. Hillabrand, M. D., the briefs, and arguments of counsel.

The evidence indicated that the plaintiffs Steinberg and Fitzgerald had been consulted by the plaintiff Mary Doe. When Dr. Steinberg examined her on October second, she appeared to be eight to ten weeks pregnant, but he testified that another doctor might think she was twelve to fourteen weeks pregnant. He also testified that she was in normal physical condition, and that her previ-

1. Ohio's abortion statute provides:

> No person shall prescribe or administer a medicine, drug, or substance, or use an instrument or other means with intent to procure the miscarriage of a woman, unless such miscarriage is necessary to preserve her life, or is advised by two physicians to be necessary for that purpose.
>
> Whoever violates this section, if the woman either miscarries or dies in consequence thereof, shall be imprisoned not less than one nor more than seven years.

This statute or one very similar to it has been in effect since at least 1834. Section 1 of the Act of February 7, 1834, S & C Stat. 440. Wilson v. State, 2 Ohio St. 319 (1853). There have been many prosecutions under it but until the present case, so far as we have been able to ascertain, no one has ever challenged its constitutionality.

ous pregnancy had been normal, with no complications. He further testified that at that stage of her pregnancy, abortion would present less hazard to life than to carry the child to term, but this situation would not continue, as the hazards of abortion increase later in pregnancy.

The plaintiff psychiatrist, Dr. Fitzgerald, testified that Mary Doe had a serious defect in her ability to make judgments about people and situations; that her daydreams influenced her more than the actual facts; that she was moderately depressed and withdrawn; that she was seriously disturbed, and presented gross or serious defects in her ego-functioning; that she could become a child-battering mother; and that she irrationally rejected the alternative to abortion of carrying the child to term and then consenting to adoptive placement. However, he did not predict that she would either die or kill herself if this pregnancy were carried to term, although it would do her grave psychological harm. He stated that the likelihood of great damage coming to the infant from neglect or abuse were high indeed. It was his conclusion that in such states as California or Colorado, Mary Doe could receive therapeutic approval for abortion on psychiatric and medical grounds.

The evidence revealed that Mary Doe was a welfare recipient in Wood County, Ohio, adjacent to Lucas County. She is twenty-one years old.

Both of the plaintiff doctors testified that they believed they would be violating the Ohio abortion statute if they advised the plaintiff Mary Doe to seek an abortion outside the State of Ohio, although it was stipulated in evidence that no physician had ever been prosecuted in Lucas County for a violation of Section 2901.16 Ohio Rev.Code as an aider and abettor on the ground that he counselled or procured an abortion, nor had any minister or social worker. It was also stipulated that no such prosecutions had ever been threatened, nor had any of the plaintiffs ever been warned by any law enforcement authorities.

The only other evidence in the case was the deposition of Dr. Hillabrand offered by the defendants. This concerned the development of unborn children from conception to birth. It also offered statistical evidence that the risk of maternal mortality was far higher from abortions performed even under clinical conditions than from carrying the child until natural childbirth. This testimony is, of course, in square conflict with that of the plaintiff Steinberg, but it is unnecessary for the purposes of this opinion to resolve this conflict, since it involves policy considerations which are properly legislative, rather than judicial, concerns.

This case presents threshold questions of the right to injunctive relief, standing of the plaintiffs to maintain the action, and the doctrine of abstention. These problems have been considered in other similar cases.

[1] The question of standing is considered in Roe v. Wade, 314 F.Supp. 1217 (N.D.Texas 1970), and Doe v. Bolton, 319 F.Supp. 1048 (N.D.Georgia 1970). Both cases resolved the question favorably to parties who stood in the positions of the plaintiffs here. We accept the conclusions in these cases, and hold that the plaintiffs herein have proper standing to maintain this action. *Cf.* Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

[2] The problem of abstention was considered and abstention denied in the case of Babbitz v. McCann, 310 F.Supp. 293 (E.D.Wis.1970) app. dis. 400 U.S. 1, 91 S.Ct. 12, 27 L.Ed.2d 1 (1970). See also, Doe v. Bolton, *supra*. There was no proof that prosecution of any of the plaintiffs was commenced or even threatened. Plaintiffs are therefore not entitled to injunctive relief. The prayer for injunction restraining the enforcement of the statute is therefore denied.

This then requires a resolution of the merits of the plaintiffs' request for

declaratory relief, to which we now address ourselves.

The plaintiffs' first contention is that Section 2901.16 Ohio Rev.Code is unconstitutionally vague and indefinite. This same contention has been raised in a number of cases, involving statutes of different states. There are differences in language among all of the various statutes that have been brought before the courts, and by using the same sort of hair-splitting semanticism that the plaintiffs have employed in argument, it would be possible to distinguish the Ohio statute from the others. It does not appear to us, however, that there is sufficient difference in substance among the various statutes involved in other cases to make it desirable to use so narrow and limited an approach to the problem. It seems preferable to take a stand with one group or the other of the divided authorities.

Abortion statutes have been held unconstitutionally vague in the cases of California v. Belous, (1969) 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194, cert. denied, 397 U.S. 915, 90 S.Ct. 920, 25 L.Ed.2d 96 (1970); United States v. Vuitch, 305 F.Supp. 1032 (D.D.C.1969), prob. juris. noted, 397 U.S. 1061, 90 S.Ct. 1497, 25 L.Ed.2d 683 (1970); and Roe v. Wade, 314 F.Supp. 1217 (N.D. Texas 1970). Contrary holdings are found in Babbitz v. McCann, *supra* and Rosen v. Louisiana State Board of Medical Examiners, 318 F.Supp. 1217 (E.D. La. New Orleans Div. 1970). The question was raised, but not decided, in Doe v. Bolton, *supra*.

[3] We believe that the better reasoning is found in those cases which hold that there is no unconstitutional vagueness in the abortion statutes which they consider. It appears to us that the vagueness which disturbs the plaintiffs herein results from their own strained construction of the language used, coupled with the modern notion among law review writers that anything that is not couched in numerous paragraphs of fine-spun legal terminology is too imprecise to support a criminal conviction. See Davis v. Toledo Metropolitan Housing Authority, 311 F.Supp. 795, 797 (N.D.Ohio W.D.1970). The words of the Ohio statute, taken in their ordinary meaning, have over a long period of years proved entirely adequate to inform the public, including both lay and professional people, of what is forbidden. The problem of the plaintiffs is not that they do not understand, but that basically they do not accept, its proscription.

The second contention of the plaintiffs and those *amicus curiae* who support their position is that the Ohio abortion statute deprives them of the right of privacy which is supposedly protected by several amendments to the Constitution of the United States. The arguments and authorities cited go on at inordinate length, but when the meringue is sluiced away, they come down to the contention that the decision of the Supreme Court in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), which recognized the right of marital privacy by voiding a statute preventing dissemination of contraceptive information and devices, must by extension protect the right to destroy the product of conception after it has taken place.

[4] Again the authorities are divided, some courts accepting the plaintiffs' view, and others refusing to do so. The majority of this Court do not accept the plaintiffs' contentions as constitutionally valid, but believes that the cases which do accept them have not been based on a proper legal or factual understanding. The plaintiffs' contentions seek to extend far beyond the holding in the *Griswold* case this "right of privacy", which is nowhere expressly mentioned in the Constitution or its amendments, but is only found in the "penumbra" of those articles. Rights, the provision of which is only implied or deduced, must inevitably fall in conflict with the express provisions of the Fifth and Fourteenth Amend-

ments that no person shall be deprived of life without due process of law. The difference between this case and *Griswold* is clearly apparent, for here there is an embryo or fetus incapable of protecting itself. There, the only lives were those of two competent adults.

[5] Without going into all of the myriad of cases and texts that deal with various aspects of this problem, the question resolves itself into whether or not the state has a legitimate interest to legislate for the purpose of affording an embryonic or fetal organism an opportunity to survive. We think it has and on balance it is superior to the claimed right of a pregnant woman or anyone else to destroy the fetus except when necessary to preserve her own life.

One of the great puzzles of the law is why its practitioners blithely argue their cases and make their decision in total disregard, if not ignorance, of the laws of nature. Automobile collision cases, for example, are often decided on the basis of facts which are completely impossible under the physical laws of motion and mechanics. So in this area, those decisions which strike down state abortion statutes by equating contraception and abortion pay no attention to the facts of biology.

The evidence offered by the defendants in this case shows clearly, conclusively, and in detail that neither the human ovum or spermatozoon are alive, or capable of independent life, in the accepted meaning of that word. One dictionary definition of the word "life" is

> that quality or character [that] distinguishes an animal or a plant from inorganic or dead organic bodies and which is especially manifested by metabolism, growth, reproduction and internal powers of adaptation to the environment. Webster's New International Dictionary of the English Language (2nd ed. 1934).

Biologically, when the spermatozoon penetrates and fertilizes the ovum, the result is the creation of a new organism which conforms to the definition of life just given. Although this is a definite beginning, there is no assurance in any particular case as to how long the life thus begun will continue. It may endure only a few hours or days, or it may continue in excess of a century, so far as human life is concerned. In other life forms it may continue for many measurable centuries, or even for an immeasurable and endless period. Thus when a new life comes into being with the union of human egg and sperm cells, it may terminate, or be terminated, at any moment after it commences, and before, at, or after the particular developmental process called "birth" takes place. Such terms as "quick" or "viable", which are frequently encountered in legal discussion, are scientifically imprecise and without recognized medical meaning, and hence irrelevant to the problem here presented. As scientific knowledge of prenatal physiological processes increases, medical intervention will have a greater chance of avoiding premature termination of lives of children, both before and after birth.

[6] Thus contraception, which is dealt with in *Griswold*, is concerned with preventing the creation of a new and independent life. The right and power of a man or a woman to determine whether or not to participate in this process of creation is clearly a private and personal one with which the law cannot and should not interfere.

It seems clear, however, that the legal conclusions in *Griswold* as to the rights of individuals to determine without governmental interference whether or not to enter into the processes of procreation cannot be extended to cover those situations wherein, voluntarily or involuntarily, the preliminaries have ended, and a new life has begun. Once human life has commenced, the consti-

tutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it.

Obviously, of course, there are limits to the protection which the state can and must extend to human life, but these are clear and well-marked in the law, and have been for centuries, essentially on the basis that "self-preservation is the first law of nature". Thus throughout the development of our law, self-defense has always been recognized as a justification for homicide. Hence the provision in the statute here in question that abortion is noncriminal when it is necessary, or declared by two physicians to be necessary, to preserve the life of the mother. One human life may legally be terminated when doing so is necessary to preserve or protect another or others.

There is authority for the proposition that human life commences at the moment of conception.

> Biologically speaking, the life of a human being begins at the moment of conception in the mother's womb. 42 Am.Jur.2d, Infants § 2 at p. 9 (1968).
>
> From the viewpoint of the civil law and the law of property, a child *en ventre sa mere* is not only regarded as human being, but as such from the moment of conception * * * which it is in fact. Bonbrest v. Kotz, 65 F.Supp. 138, 140 (D.D.C.1946).
>
> medical authority has recognized long since that the child is in existence from the moment of conception * * W. Prosser, The Law of Torts, § 56 at 355 (3rd ed. 1964).

In this connection it should be noted that Ohio never did follow Mr. Justice Holmes's opinion in Dietrich v. Inhabitants Northampton, 138 Mass. 14, 52 Am.Rep. 242 (1884), which for more than half a century fouled up the tort law with respect to pre-natal injuries, but is now pretty well abandoned by all courts except those which, once having made a mistake, cannot admit it, but expect the legislature to rescue the public from the consequences of their error. The courts of Ohio have never hesitated to protect a child merely because it was unborn at the time of injury.

If the law is in accord with science for the purpose of protecting property rights, how can it possibly not be in accord with science for the purpose of protecting life itself, without which no property right has any worth or value whatsoever?

It should perhaps be mentioned that the implication, or sometimes the express statement, found in arguments of persons in the position of the plaintiffs in this case, which equates the necessity of giving birth to a child with the necessity of rearing the child, has no foundation in law or fact. The law may take permanently from its natural parents a child who is neglected by them, and the frequent pusillanimity of courts and social agencies in this regard does not change the legal situation. The statutes of practically all states provide for the voluntary surrender of children. When the statutes are complied with, the child is legally and practically as dead to its natural parents as if it had been aborted, stillborn, or had died in infancy. The validity and effectiveness of surrender statutes have been upheld in every case in which they have been questioned. There is no need for parents to terminate an undesired pregnancy by killing the unborn child physically, when with less risk to themselves its legal death can so easily be procured.

It is our conclusion that Section 2901.16 Ohio Rev.Code is a valid and proper exercise of the power of the state.

[7] The plaintiffs' contention that the abortion statute is in violation of the equal protection clause of the Fourteenth Amendment requires little consideration. This statute, § 2901.16 Ohio Rev.Code is clearly non-discriminatory upon its face. There is nothing in the evidence before the Court to

show any official discrimination in the application of the statute, or in commencing prosecutions under it.

[8] Assuming, *arguendo*, that the contentions of the plaintiffs that wealthy persons can shop for more complaisant physicians, or can travel to remote places where abortion is legal, while poor people cannot, have a sound basis in fact, the situation is not inherent in the language of the statute. Neither is it caused, nor could it be cured, by either action or inaction on the part of the government, either state or national. The equal protection clause is not designed to prevent that inequality which is often found in life and in nature, nor could any law be framed to do so. So far as this case is concerned, on the evidence adduced, the social and economic conditions alleged by plaintiffs as a basis for their equal protection argument, do not affect any of the actual parties, and hence the classes they represent. In seeking a temporary restraining order the plaintiffs appeared to contend that only the force of the law stood in the way of plaintiff Mary Doe undergoing the abortion she desired, and the other plaintiffs desired her, to have. It was not claimed that her economic or social situation would prevent her from getting an abortion.

We do not find that § 2901.16 Ohio Rev.Code is in any way violative of the equal protection clause of the Fourteenth Amendment.

[9] The contention that the Ohio abortion statute contravenes the Eighth Amendment proscription of cruel and unusual punishment is unworthy of serious consideration. It may seem cruel to a hedonist society that "those who dance must pay the piper", but it is hardly unusual, and the language of the amendment is in the conjunctive, not the disjunctive. In the complexities of human life it is not always possible to foretell with exactitude the entire consequences of even the simplest or most innocent action. But if it is known generally that an act has possible consequences that the actor does not desire to incur, he has always the choice between refraining from the act, or taking his chance of incurring the undesirable consequences. There are no other alternatives. This is peculiarly true with respect to the bearing of children. If one gambles and loses, it is neither statute nor constitution that determines the price, or how it shall be paid. The result is not punishment, but merely the *quid pro quo*.

The controversial problems of the plaintiffs should be addressed to the state's legislature and not the courts for solution. The courts ought not to be expected to provide a remedy for all of the ailments afflicting society.

For the foregoing reasons, the plaintiffs are not entitled to a declaratory judgment invalidating Ohio's abortion statute, Section 2901.16 Ohio Rev.Code.

This opinion is adopted as findings of fact and conclusions of law. Judgment will be entered in favor of the defendants dismissing the amended complaint.

BEN C. GREEN, District Judge (dissenting):

I concur in the determination of the majority that plaintiffs herein have proper standing to maintain this action and that this Court should not abstain from the exercise of jurisdiction. However, I cannot agree with the decision on the merits of the declaratory judgment proceeding.

In its present form, the Ohio statute on abortion which emanates from legislation first enacted 136 years ago, provides as follows:

> *Ohio Revised Code* § 2901.16 *Attempt to procure abortion*
>
> No person shall prescribe or administer a medicine, drug, or substance, or use an instrument or other means with intent to procure the miscarriage of a woman, unless such miscarriage is necessary to preserve her life, or is advised by two physicians to be necessary for that purpose.

> Whoever violates this section, if the woman either miscarries or dies in consequence thereof, shall be imprisoned not less than one nor more than seven years.

Plaintiffs contend that this statute is unconstitutionally vague and indefinite. One of the criteria against which the validity of a criminal statute, such as O.R.C. § 2901.16, must be measured is reflected in the holding of the Supreme Court in Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926), that:

> * * * a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *Id.*, p. 391, 46 S.Ct. p. 127.

The majority opinion passes off the question of vagueness of this statute with the statement that:

> It appears to us that the vagueness which disturbs the plaintiffs herein results from their own strained construction of the language used, coupled with the modern notion among law review writers that anything that is not couched in numerous paragraphs of fine-spun legal terminology is too imprecise to support a criminal conviction.
>
> * * * The words of the Ohio statute, taken in their ordinary meaning, have over a long period of years proved entirely adequate to inform the public, including both lay and professional people, of what is forbidden. The problem of the plaintiffs is not that they do not understand, but that basically they do not accept, its proscription.

It is my opinion that the difficulty with the statute in question is not its failure to be phrased in "numerous paragraphs of fine-spun legal terminology", but rather its attempt to define a medical problem in terms that are not understandable by the medical profession. A continuing complaint of the medical profession is that the laws in general, and judicial decisions, are not responsive to the realities of medical science. It is interesting to note that while the body of the statute condemns the attempt to procure a "miscarriage", the statute is captioned "Attempt to procure abortion." This failure of this statute, and others like it, to observe the medical distinction between abortion and miscarriage has been noted (1 O.Jur.2d, Abortion, § 2; 1 Am.Jur.2d, Abortion, § 1), and it is said that the two terms are used indiscriminately by the courts. 1 O.Jur.2d, Abortion, § 2.

An excellent discussion of the vagueness of the phrase "necessary to preserve" is found in People v. Belous, 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194 (1969), cert. den. 397 U.S. 915, 90 S.Ct. 920, 25 L.Ed.2d 96 (1970), wherein an abortion statute similar to that of Ohio was held unconstitutional. Reiteration of all the considerations reviewed therein which led the court to find the statute unconstitutionally vague is not necessary. However, I should like to set forth what I believe to be a primary example of the vagueness of the Ohio statute: the suicidal patient.

A pregnant woman informs her physician that if her pregnancy goes to term she will take her own life. Is an abortion *necessary to preserve* the life of that patient? The patient will not die from any physiological condition related to her pregnancy. Suicide is an intentional act (although, perhaps, not truly a volitional one), and the patient may not, in fact, carry out her threat. Assuming that the physician has strong and valid reasons to believe that his patient will take her own life, does this statute tell him whether he may legally terminate the pregnancy?

There are other questions created by this statute. How imminent must the threat of death be to warrant an abortion "to preserve life?" If permitting a pregnancy to go to term would clearly shorten the mother's life by a substantial number of years, would a physician be justified in performing an abortion in

accordance with the term "necessary to preserve her life?"

An Ohio court has recently defined a "necessary thing" as follows:

> A necessary thing may supply a wide range of wants, from mere convenience to logical completeness. City of Dayton v. Borchers, 13 Ohio Misc. 273, 232 N.E.2d 437, 441, 42 O.O.2d 193, 197 (Ohio Com.Pl.1967)

Such a definition certainly does not advise what is permitted and what is forbidden.

With regard to the assertion that the lessons of time have compensated for the deficiencies of the statute, I do not find that to be the case. I have endeavored to examine all recorded Ohio decisions construing O.R.C. § 2901.16 and the predecessor thereto, and find that not one of the cases I have reviewed construes the statutory phrase "necessary to preserve her life", or the language of similar import in the earlier statutes. (A listing of the said decisions in appended hereto). A study of the Ohio case histories offers little guidance to the physician searching for the meaning of the language "necessary to preserve her life."

No person may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids. Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888 (1939). It is my opinion that O.R.C. § 2901.16 is unconstitutionally vague. Cf. Roe v. Wade, 314 F. Supp. 1217 (D.C.N.D.Tex., 1970); United States v. Vuitch, 305 F.Supp. 1032 (D.C.D.C.1969); People v. Belous, supra.

I am also of the opinion that the statute suffers from the constitutional vices of over-breadth and violation of equal protection of the law. Roe v. Wade, supra; People v. Belous, supra. In reaching this conclusion, I find the applicable law to be well stated in People v. Belous, supra, 80 Cal.Rptr. 354, 362, 458 P.2d 194, 202:

> Although we may assume that the law was valid when first enacted, the validity of a law in 1850 does not resolve the issue of whether the law is constitutionally valid today. [Citations omitted]
>
> Constitutional concepts are not static. Our United States Supreme Court said, regarding the equal protection clause of the Fourteenth Amendment: "We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment 'does not enact Mr. Herbert Spencer's Social Statics.' [Citation] Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be authorized to practice surgery, carried out the limits of fundamental rights. * * *" (Harper v. Virginia State Bd. of Elections (1966) 383 U.S. 663, 669, 86 S. Ct. 1079, 1082, 16 L.Ed.2d 169; see also, Perez v. Sharp, *supra*, 32 Cal.2d 711, 727, 198 P.2d 17; Galyon v. Municipal Court, 229 Cal.App.2d 667, 671–672, 40 Cal.Rptr. 446, and cases cited therein ["[A] statute valid when enacted may become invalid by change in the conditions to which it is applied:"]. See also, Means, *supra*, 14 N.Y.L.F. 411, 514–515.)

Virtually all the cases which have considered this question recognize that when the abortion statutes were enacted the surgical procedure required in an abortion presented a substantial risk of death to the woman involved. It is also recognized that this situation no longer exists with today's medical advances. Protection of the mother from unsafe surgical procedures may well have been in the legislators' minds when they enacted the Ohio statute in 1834. Modern day medicine, however, makes induced miscar-

riage in the first trimester of pregnancy a safer procedure than delivery at full term. See, People v. Belous, supra, 80 Cal.Rptr. 360–361, 458 P.2d 200–201. In many areas the mortality rate from therapeutic abortion is less than that occasioned by childbirth. Note, Abortion Reform: History, Status and Prognosis, 21 Case W.Res.L.Rev. 521, 522–523 (1970).

Under each of the statutes enacted by the Ohio Legislature regulating the right to abortion there was exempted therefrom a classification of pregnant women whose interests were deemed superior to those of the child she was carrying. Having thus recognized that there are pregnant women whose interests rise above all others, the state may not unreasonably restrict the right of pregnant women to be included in such classification.

Viewed in its historical perspective, the Ohio statute could well have been considered as a reasonable measure when it was adopted 136 years ago. At that time the risk of death on the operating table for any surgical procedure was extremely serious, and the state, to protect the interests of its citizens, could reasonably restrict the availability of abortion to those women who faced an equally serious risk of death if the operation was not performed.

When this statute was first enacted, the discipline of psychiatry was unknown in the medical profession. Today, it is recognized that mental illness is, at least, as great a threat to human well-being as is physical illness. We also know that many factors can precipitate a permanent and incurable mental disorder, among them the strain of childbirth or the inability of the mother to cope with the responsibilities of caring for an infant.

In my opinion, the continuance of the sole exception to the abortion statute of the necessity to save life is a refusal to recognize the advance of medical science in its understanding of the mind, and can no longer be considered as representing a reasonable classification. In effect, this statute says that a woman whose continued physical life is threatened by pregnancy may secure appropriate medical help, but that a woman whose sanity is equally threatened must be condemned to a continuing existence without the human attributes of intellect and reason. I do not believe that our society can condone such a classification as reasonable when, with minimal risk to the physical well-being of the woman, the dire potential psychiatric consequences can be avoided.

Similarly, I have serious reservations regarding the exclusion from the right to abortion of the victims of forcible rape or the minor who is pregnant as the result of an uninvited incestuous relationship. The innocent victim of such a crime did not have the opportunity to refrain from the act which resulted in pregnancy. To suggest that, in the case of such an unfortunate circumstance, pregnancy is a *quid pro quo* or that "those who dance must pay the piper" strikes me an inhumane. I believe that the interests of such women in being relieved from the consequences of the violations of their body should, in a civilized society, be deemed superior to the interests of the unborn child conceived in violence or lust.

I now turn to the contention of plaintiffs' covering the question of the invasion of the right of privacy, and the relationship of the decision of the United States Supreme Court in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), to the validity of the Ohio abortion statute, O.R.C. § 2901.16.

Regarding the application of *Griswold* to the instant case, the majority distinguishes *Griswold* on the basis that the decision, which struck down a state ban on the dissemination of contraceptive information and devices, involved only the interests of two competent adults, whereas in this case "there is an embryo or fetus incapable of protecting itself." In my opinion, such an approach to *Griswold* totally disregards the constitutional doctrine enunciated therein, and looks

merely to the narrow fact issue before the Supreme Court.

The majority opinion states:

> Without going into all of the myriad of cases and texts that deal with various aspects of this problem, the question resolves itself into whether or not the state has a legitimate interest to legislate for the purpose of affording an embryonic or fetal organism an opportunity to survive. We think it has and on balance it is superior to the claimed right of a pregnant woman or anyone else to destroy the fetus except when necessary to preserve her own life.

It appears from a further reading of the majority opinion that the basis for their conclusion is a finding that human life exists from the time of conception.

I will not debate the biological or philosophical conclusion of the majority that, from the moment of conception a human life has commenced, although retired United States Supreme Court Justice Tom C. Clark does appear to take issue therewith, Clark, Religion, Morality and Abortion: A Constitutional Appraisal, 2 Loyola Univ. (L.A.) L.Rev. 1, 9–10 (1969). I am, however, more inclined to the view expressed in Doe v. Bolton, 319 F.Supp. 1048, 1055 (D.C.N.D.Ga., filed July 31, 1970) that "once conception takes place and an embryo forms, for better or for worse the woman carries a life form with the potential of independent human existence."

In my opinion, the question of whether once conception occurs life is present is not controlling on the right to abort such existence. I believe that the *Griswold* decision stands for the proposition that the interests of the embryo or foetus must be balanced against the interests of the pregnant woman, and the resolution of the ultimate question of the right to abortion hinges on the balancing of such interests. Under the principles of constitutional law enunciated in *Griswold*, the state bears the burden of demonstrating a compelling interest in restricting the rights of the pregnant woman by the enforcement of statutes limiting the availability of abortion. Accord, Doe v. Bolton, supra; Roe v. Wade, 314 F.Supp. 1217, 1222 (D.C.N.D.Tex., 1970); Babbitz v. McCann, 310 F.Supp. 293, 301 (D.C.E.D.Wis., 1970); United States v. Vuitch, 305 F.Supp. 1032, 1035 (D.C.D.C.1969). Justice Clark, in his analysis of the *Griswold* doctrine, states:

> The result of these decisions is the evolution of the concept that there is a zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children, and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution. No one will deny that a State has a valid interest in regulating the well-being of its inhabitants, especially when it is dealing with children, who are more susceptible to undesirable influences. We have also seen that a State may not unreasonably interfere with the intimate relations of its inhabitants. When deciding on the constitutional restraints imposed on a State's interference with individual rights, the vital question becomes one of balancing. It must be determined at what point the State is interfering with individuals and at what point it is exercising valid authority by regulating the well-being of children. 2 Loyola Univ. (L.A.) L. Rev. 1, 8.

As previously indicated herein, I do not consider the protection of an embryo in its early stages of existence as a compelling state interest sufficient to justify the sweeping scope of the statute in this modern era. In reaching the conclusion that "once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it", the majority opinion does not consider the countervailing consideration of the rights of the pregnant wom-

an which are impinged upon by such legislation.

Further, I do not find that the history of this statute, its interpretation by the Ohio courts, and the recognition of rights of unborn children by the Ohio courts, supports the argument that the state has evidenced a compelling interest in the *total* protection of fetal life.

When the Ohio abortion legislation was first enacted, it was part of a six-section statute, 32 v Stat. 20. The first section declared it to be a misdemeanor to administer drugs or use an instrument with the intent to procure the miscarriage of any pregnant woman. The second part of the statute declared it to be a high misdemeanor, subject to imprisonment for seven years, to do the same acts with regard "to any woman, pregnant with *a quick child*" in the case of the death of such child or mother. The third section made it an offense for a physician, or other person, while in a state of intoxication to prescribe any poison, drug or medicine to another person, so as to endanger such latter person's life. The fourth section made it an offense for any physician, or person, to prescribe a drug or composition, the true nature and composition of which was unknown, on the representation that the same was a secret medicine. The fifth and sixth sections were venue and the effective date of the legislation.

It thus seems that the first Ohio abortion law was part of a package intended to regulate the proper practice of the medical profession. It is plain that the more serious offense thereunder was restricted to those instances where the condemned practices were practiced upon a woman pregnant with a *quick child*, that is, a child whose uterine movements could be felt by the mother, and did not apply prior thereto. Wilson v. State, 2 Ohio St. 319 (1853).

The 1834 statute was amended effective April 13, 1867, by the repeal of section two of the original Act and enactment of a substitute therefor, 64 v Stat. 135. That amended statute, in pertinent part, provided:

> * * * that any physican or other person who shall administer, or advise to be administered, to any woman *pregnant with a vitalized embryo, or foetus, at any stage of utero-gestation*, any medicine, drug, or substance whatever, or who shall use or employ * * any instrument or other means with intent thereby to destroy such *vitalized embryo, or foetus*, unless the same shall have been necessary to preserve the life of the mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case of the death of such *vitalized embryo, or foetus*, or mother in consequence thereof, be deemed guilty of a high misdemeanor * * * (emphasis added)

It is argued that this change from the phrase "any woman, pregnant with a quick child" to the phrase "any woman pregnant with a vitalized embryo, or foetus, at any stage of utero-gestation" was:

> * * * in recognition of medical science findings that there was a live developing organism even before the mother was able to feel movement of the child [and that] the Ohio General Assembly [thereby] recognized that the child was alive prior to quickening and that an embryo became "vitalized" at the earliest stage of utero-gestation. Intervenor's brief, pp. 32–33.

In my opinion, the above argument is only partially correct.

The statute of 1867 speaks of a "vitalized embryo or foetus at any stage of utero-gestation." To accept the argument that this language applies to an embryo or foetus from the time of conception would render the word "vitalized" as used in the statute, surplusage. There is an embryo or foetus present from the earliest stage of utero-gestation, and, therefore, there would be no need to add the modifier of "vitalized" if the intent of the statute was to signify

fetal existence from the time of conception.

Webster's Third New International Dictionary (unabridged) sets forth the following definition of the word "vitalized":

> VITALIZE 1: to endow with vitality: give life or animation to: make vigorous or active * * *
>
> VITALIZE signifies to arouse, usually something more or less inert or lifeless, to vital activity * * *

The word "vital" is stated by Webster's to be "akin to Latin vivere to live—more at QUICK", and, in part, is defined as:

> * * * existing as a manifestation of life * * * having or characterized by life * * * full of life and vigor * * * characteristic of life or living beings: inhering in the living or organic.

Taking the usual meanings of the foregoing words into account, I would consider a "vitalized embryo or foetus" as one that, in the course of prenatal development, had reached the point of being capable of sustaining its own life form. The use of the term "vitalized" in the statute would then have some rational meaning, signifying the distinction between the embryo or foetus totally dependent on the mother for life support and that which had developed to the stage of capability of independent life. That state of existence is commonly referred to as viability, a viable unborn child being one that would be capable of sustaining life if removed from the womb. Such a construction fully comports with the contention that the statute was amended in light of advances of medical knowledge, for the old standard of quickening was based on the mother's totally subjective ability to feel life, whereas the new standard, so interpreted, would represent a more objective approach to the question of fetal development.

A further indication that the amendment of 1867 was not meant to cover all stages of pregnancy is the fact that only section two of the Act of 1834 was repealed. Section one, which had been construed as making it an offense to do like acts with regard to a pregnant woman at any stage of pregnancy, remained. The operative terms of the two statutes, however, were not the same. To assume that the legislature intended them to have the same reach would require one to ignore the plain differences in their language.

The abortion statute was again amended at the time of its incorporation into the Revised Statutes of Ohio, R.S. § 6815. In that enactment the reference to "vitalized embryo or foetus at any stage of utero-gestation" was dropped, and the statute read:

> Whoever, with intent to procure the miscarriage of any woman prescribes or administers to her any medicine, drug, or substance whatever, or, with like intent, uses any instrument or means whatever, unless such miscarriage is necessary to preserve her life, or is advised by two physicians to be necessary for that purpose shall, if the woman miscarries or dies in consequence thereof, be imprisoned in the penitentiary not more than seven years nor less than one year.

It is interesting to note that this statute, substantially the same as O.R.C. § 2901.16, was preceded in the Revised Statutes, Sections 6813 and 6814, by those portions of the original Act of 1834 concerning intoxicated physicians and the use of secret drugs, and was followed by the statute defining the offense of rape, R.S. § 6816.

There is no legislative history available which can enlighten us as to the intent of the Ohio Legislature in the adoption of the various versions of the abortion law. I find it difficult to accept the argument that such law historically represents the interest of the state in protecting fetal life from the time of conception when, as I believe to be true, the law originated as part of regulatory measures governing the practice of medicine and as a high misdemeanor was applicable only to the case of a woman pregnant with a quick child, and in its

first reenactment did not proscribe an offense prior to the time the embryo or foetus was "vitalized."

An indication that the State of Ohio's interest in the subject of abortion is as a matter of protection of public morality, rather than for protection of fetal life, is found in another section of the Ohio statutes. Chapter 2905 of the Ohio Revised Code is entitled "Offenses Against Chastity." Therein, matters relating to the subject of abortion are made the subject of three additional criminal offenses. It is a crime to sell or give away drugs for procuring abortion or miscarriage, O.R.C. § 2905.32, or to advertise the same, O.R.C. § 2905.33. Under O.R.C. § 2905.34, which is entitled "Selling, exhibiting, and possessing obscene literature or drugs for criminal purposes", included among the several offenses defined therein it is made a felony to:

> * * * knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away, * * * or have in his possession or under his control * * * *a drug, medicine, article or thing intended for causing an abortion*, or write, print, or cause to be written or printed a * * * notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained * * *. (emphasis added)

Prior to the 1965 decision of the United States Supreme Court in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), declaring unconstitutional a state ban on the dissemination of information on contraception, the specific references in Sections 2905.32, 2905.33 and 2905.34 of the Ohio Revised Code to the subject of abortion were each coupled with a similar proscription with regard to the prevention of conception. Thus, prior to *Griswold*, the language of O.R.C. § 2905.34 emphasized in the preceding paragraph read:

> * * * a drug, medicine, article, or thing intended for the prevention of conception or for causing an abortion.

Subsequent to the *Griswold* ruling each of the statutes was amended to delete the reference to contraceptive practices. The concomitant ban on abortion remains.

The most compelling evidence that the present Ohio statute is not aimed primarily at the protection of fetal life comes from the Ohio Supreme Court itself, State v. Tippie, 89 Ohio St. 35, 105 N.E. 75 (1913). The *Tippie* case involved the conviction of a physician under Section 12412 of the General Code, which was a recodification of Section 6815 of the Revised Statutes and the predecessor of O.R.C. § 2901.16.

In *Tippie*, the facts were that the woman had attempted to abort herself by the most primitive of methods, and when the resultant infection occurred, she sought medical assistance. Following three external examinations, Dr. Tippie had reason to believe that the foetus was dead. He then determined to make an internal examination and contemplated the possibility of performing an abortion. Chloroform was administered as an anesthetic, and the examination proceeded. Dr. Tippie then discovered that the foetus was not dead, and decided "to let the woman alone and give her the benefit of the doubt." As he was completing his procedures the patient died from the effects of the chloroform.

In the Court of Appeals it was urged that error had been committed by the trial court's refusal to instruct the jury that the doctor was entitled to an acquittal if he had undertaken the fatal procedure with an honest belief, based on his prior examinations, that the foetus was dead. The court agreed with that contention, Tippie v. State, 1 Ohio App. 13 (1913), stating:

> We think, therefore, that the removal of a dead foetus was not, in contemplation of the statute, producing a miscarriage.
>
> If done unlawfully, by unprofessional hands, or without reasonable grounds to believe the foetus to be dead, and death to the patient results, the opera-

tor would be guilty of manslaughter, but not of the crime charged.

* * * * * *

Intent is of the essence of the crime, and defendant should be allowed to show an innocent intent and have the jury instructed that the evidence with reference thereto may be considered. *Id.* p. 19

However, in the Ohio Supreme Court that holding was reversed. The Supreme Court postulated the question as:

Is the administering of chloroform (which is not an abortive drug) with the intent to produce anesthesia, as a preliminary step to carrying out the intent of removing the fetus, if it be found to be dead, administering a drug with intent to procure miscarriage? 89 Ohio St. 35, 39–40, 105 N.E. 75, 77.

The answer was in the affirmative. Without specifically considering the history of the statute, as had been done by the Court of Appeals, the Supreme Court held:

We remark, first, that the evolution of this statute of Ohio seems to show that it was enacted in its present form to cover any case of procuring the premature removal or expulsion of the fetus, *living or dead*, with other intent than to preserve the mother's life.

Second, the object of the statute is to prevent any operation, or use of drugs, for the purpose of producing an abortion upon a woman deemed to be pregnant, except to save her life. *The reason and policy of the statute is to protect women and unborn babes from dangerous criminal practice, and to discourage secret immorality between the sexes, and a vicious and craven custom amongst married pairs who wish to evade the responsibilities and burdens of rearing offspring.* *Id.* p. 40, 105 N.E. p. 77. (emphasis added)

It is inconceivable to me to accept the premise that the Ohio statute is primarily for the protection of *all* fetal life when the Ohio Supreme Court has declared that the existence of a live foetus is immaterial to a conviction under such statute. In my opinion, from the overall tenor of the Ohio Supreme Court's opinion, the protection of "unborn babes", enumerated as but one of the underlying objects of the statute, was secondary to the morality considerations inherent in the statute which were enunciated by that court.

It is also said that under the Ohio statute it is apparent that the offense defined by O.R.C. § 2901.16 may be committed although the woman was not actually pregnant, if the parties acted under a mistaken opinion to the contrary, and death resulted. 1 O.Jur.2d, Abortion, § 8. Such a view would indicate that the statute was intended to protect the woman involved, and certainly militates against the contention that the intent of the statute is to protect fetal life.

In the majority opinion certain rights accorded unborn children are reviewed, and it is then asserted that:

If the law is in accord with science for the purpose of protecting property rights, how can it possibly not be in accord with science for the purpose of protecting life itself, without which no property right has any worth or value whatsoever?

I do not find that the law of Ohio recognizes property rights of unborn children to such an extent that the reasonable corollary would be to recognize superior rights of such child, at all times subsequent to conception, to those of the mother.

While it is correct that Ohio law recognizes an unborn child as having a right of inheritance, and thus such child is, in law, considered in esse from the date of its conception, *the unborn child must be born alive* in order for the expectancy to fully vest. 56 O.Jur.2d, Wills, § 615.

The Ohio courts do not appear to have yet passed upon the question of the right of a child who sustained a prenatal injury to recover for such injury follow-

ing a live birth. There appears to be a split of authority on this question, some jurisdictions denying any recovery for injuries arising from prenatal negligence, others granting an unqualified right of action, while still others condition the right to recovery upon a showing that the injury was inflicted at a time when the unborn child was viable. Annot. 27 A.L.R.2d 1256.

The Ohio courts have, on the other hand, considered the civil responsibility of a person negligently causing the death of an unborn child. While recognizing a right of action under the Ohio wrongful death statute, O.R.C. § 2125.01, the Supreme Court expressly conditioned such right to the instance of a *viable* child. Peterson v. Nationwide Mutual Ins. Co., 175 Ohio St. 551, 197 N.E.2d 194 (1964); Jasinsky v. Potts, 153 Ohio St. 529, 92 N.E.2d 809 (1950); Williams, an Infant v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949). Such a limitation is in accord with the overwhelming weight of authority. Mace v. Jung, 210 F.Supp. 706 (D.C.Ala., 1962); Annot. 15 A.L.R.3d 992.

At common law it was held that no crime was committed by the causing of the death of a stillborn child, and that rule appears to prevail in the majority of jurisdictions in the United States, 40 Am.Jur.2d, Homicide, § 9. There is one Ohio Common Pleas decision to the contrary, State v. Dickinson, 18 Ohio Misc. 151, 248 N.E.2d 458 (1969). Therein, the court held, on the authority of the Ohio Supreme Court rulings on the civil question of wrongful death, that a *viable* unborn child was a "person" within the contemplation of the vehicular homicide statute, O.R.C. § 4511.18.1. It is clear from the court's opinion that such decision was controlled by the question of viability.

I therefore find that, under the law of Ohio, the property rights of unborn children, which the majority consider to be of great importance, either do not vest until viability occurs, or, if vested prior thereto, fail if the unborn child does not survive childbirth. Such a state of the law, in my opinion, affords little support for the Ohio abortion statute on the basis that, from the moment of conception, an unborn child is a person entitled to assert constitutional rights paramount to those of the mother. I cannot believe that under our system of constitutional law, a person who, in Ohio, maliciously or negligently terminates the existence of a non-viable foetus can do so without fear of criminal or civil sanctions, but that a physician who, exercising his best medical judgment, performs an abortion when the foetus has not yet reached viability can only do so facing the real possibility of criminal conviction if a lay jury disagrees with his opinion.

It has been suggested that the Ohio statute affords a safeguard to the individual doctor from being "second-guessed" by a jury, in that it provides that an abortion may be performed if such action "is advised by two physicians to be necessary" to save the mother's life, O.R.C. 2901.16. It was contended at oral argument that the "two physicians" rule is a complete defense to prosecution under the statute.

Disregarding the practical considerations of the economic burden that consultation with other doctors would impose upon the patient and the possibility that, under emergency conditions, such consultation might not be medically feasible, I do not find that argument to be sound. No Ohio case has been cited or found, nor has any been cited from any other jurisdiction having a similar statutory provision, which would vindicate that contention.

The "necessity" clause of the Ohio abortion law has been considered but once by the Ohio Supreme Court, in passing upon the issue of whether the prosecution had the burden of proving that the operation was not necessary, or whether the defendant had the burden of proving necessity as a matter of defense. Moody v. State, 17 Ohio St. 110 (1866). Therein, the court stated:

> * * * The statute does not declare every procurement of an abortion to

> be an offense, but does so only when it is not done for the purpose of saving the life of the mother * * *
>
> * * * * * * *
>
> It is the absence of the necessity of saving life, that is the essential part of the negative clauses, which enters into the statutory description of the offense; and in the contemplation of the statute, the advice of two physicians is *sufficient evidence* of the existence of such necessity.
>
> Since, then, such advice is *only evidence* of the necessity that forms the essential negative description of the crime in both negative clauses, and as it may usually be readily shown by the accused, and must ordinarily be so difficult, if not impossible, to be shown on the part of the prosecution, it might well be held, upon reason as well as authority, that it is unnecessary for the state to prove that the producing the abortion was not advised by two physicians further than such negative fact may be implied from the proof that it was not necessary to preserve the life of the mother. *Id.* pp. 112–113 (emphasis added)

As I read the *Moody* decision, the Ohio Supreme Court, by its use of the phrases "sufficient evidence" and "only evidence", has said that the defendant in an abortion prosecution bears the burden of proving necessity to save life, and proof that such abortion was advised by two physicians would be prima facie evidence of such fact. If proof that the abortion was advised by two physicians is only prima facie evidence of the necessity to save life, it necessarily follows that such evidence would be subject to rebuttal by the prosecution. Hence, the "two physicians" rule is not a complete defense to prosecution under the statute.

There is one other aspect to this litigation, not considered in the majority opinion, to which I wish to address myself: the impact of this statute on the medical profession, and to a lesser degree the rights of those other plaintiffs herein who contend that they are hampered in their professions by its existence. Plaintiffs Steinberg, Fitzgerald, Frank and Argow contend that this statute prevents them from the proper discharge of their professional responsibilities in the respective fields of obstetrics and gynecology, psychiatry, social work, and the ministry.

Defendants and intervenor contend that as to those persons who claim that they are prevented from orally disseminating information about abortion the statute imposes no restraints, in that it only reaches the actual attempt to procure an abortion. That position is plainly incorrect.

If an attempt to procure an abortion were made pursuant to such advice, the party not actually performing the operation would, under Ohio law, be deemed culpable as an aider and abettor. 1 O.Jur.2d, Abortion, § 3. Such a conviction of a physician has, in fact, been affirmed by the Ohio courts, State v. Smith, appeal dismissed 165 Ohio St. 247, 135 N.E.2d 63 (1956), and was the factual predicate from which the landmark case of People v. Belous, supra, arose.

Assuming for the sake of argument that the contention of defendants and intervenor was correct, this would place the physician in the position of saying to his patient that, in the exercise of his best medical judgment, an abortion was advisable but that the law prevented him from performing the same. I cannot conceive of placing a professional man in a more frustrating position.

The duty and judgment of the physician, the necessity and welfare of the patient, and the rights of both, cannot be subjected to arbitrary and unreasonable legislative interference, dictation and infringement. United States v. Freund, 290 F. 411, 414 (D.C.Mont., 1923); see also 70 C.J.S. Physicians and Surgeons § 3, p. 820 et seq. It is my belief that Section 2901.16 of the Ohio Revised Code, by virtue of its vagueness and lack of responsiveness to the realities of modern medicine, can no longer be considered as a reasonable regulatory

measure as it affects the practice of medicine.

In Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 126, 87 N.E.2d 334, 339 (1929), the Ohio Supreme Court expressed the hope that "the law will keep pace with science." In my opinion, continued enforcement of O.R.C. § 2901.16 keeps the law many years behind the medical profession.

The "chilling" effect of legislation of this scope upon the medical profession has been recognized. In Judge Neville's concurring opinion in Doe v. Randall, 314 F.Supp. 32 (D.C.Minn., 1970), he states:

> I subscribe to the view that the entire medical profession and innumerable pregnant women live under the sword of Damocles. The exercise of their best medical judgment, the giving of advice and the pregnants' freedom of choice is "chilled" by the cloud of a statute which renders their actions illegal and puts them in jeopardy of criminal prosecution with the resultant publicity, possible public disgrace, loss of hospital privileges, threat of license revocation, etc. *Id.* p. 36

In Babbitz v. McCann, 310 F.Supp. 293 (D.C.E.D.Wis., 1970) the court entered a declaratory judgment holding the Wisconsin abortion statute unconstitutional, but declined to enter an order enjoining the operation of said statute. That decision on the injunctive side of the suit has now been withdrawn, and a permanent injunction entered restraining further prosecutions under the abortion law (order of November 18, 1970). The Wisconsin authorities had announced that they would not abide by the declaratory judgment in pursuing further criminal actions under the challenged statute. It appears that a substantial factor influencing the court's decision to reverse its prior holding was the "chilling" effect it believed the state's determination to continue to enforce the abortion law would have upon the medical profession.

My dissent herein should not be construed as indicating a belief that the state has no right to adopt legislation controlling on the subject of abortion. I wish to make it quite clear that I recognize the right of the state to adopt and enforce reasonable regulations in this area. Such legislation, however, must be couched in precise and relevant terms, and must accord proper recognition to the interests of all persons concerned therewith. A number of states have adopted therapeutic abortion laws which, in my opinion, are a step in the right direction. Note, Abortion Reform: History, Status and Prognosis, 21 Case W.Res.L.Rev. 521–522 (1970).

It is suggested in the majority opinion that this problem is one for the legislature and not for the courts. Serious efforts to achieve legislative reform have been undertaken in recent years, have been subject to intensive lobbying by those interests opposing any liberalization of the abortion laws, and have failed. While the courts are not a panacea for all of society's ills, they cannot refuse to act simply because the legislature fails to do so. It took a decision of the United States Supreme Court to motivate the Ohio Legislature to remove from the Ohio statutes the archaic ban on the dissemination of information with regard to contraception.

The fatal flaw which I find in O.R.C. § 2901.16 is that it carries forward the constitutional standards of Nineteenth Century America into the complex and advanced structure of our Twentieth Century society. Such standards cannot withstand the changes created by the transition from the primitive frontier life of 1834 to the onmoving urban existence of 1970.

I am of the opinion that a woman has the private right to control her own person, which necessarily encompasses the fundamental right to choose whether to bear children.

I am also of the opinion that a physician has the right and duty to practice his chosen profession to the best of his ability, which necessarily includes the

discretion to perform those procedures which, in his expert medical judgment, he deems to be in his patient's best interests.

The question of producing a miscarriage during the early stages of a woman's pregnancy, and certainly prior to viability, should be a private matter between the woman and her physician. A woman who seeks therapeutic abortion and a physician who concurs in such course of treatment, or who in the first instance recommends the same, should not be subject to a virtually absolute threat of criminal prosecution and punishment unless the state has a compelling interest in regulating such conduct. I do not believe that this record, or those matters of which the court could take judicial notice, establish any compelling state interest which would justify the enforcement of legislation interfering with a woman's right to secure, and a physician's right to perform, a therapeutic abortion during the early stages of pregnancy.

I must respectfully enter my dissent from the opinion of the majority herein, as I believe the Ohio abortion statute, O.R.C. § 2901.16, to be unconstitutionally vague, overly broad, violative of equal protection of the law, and in conflict with the principles set forth by the Supreme Court in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). I would enter a declaratory judgment finding the said statute to be invalid for the reasons set forth herein.

APPENDIX

Ohio decisions under O.R.C. § 2901.16 and the predecessors thereto:

Ohio Supreme Court

Wilson v. State, 2 Ohio St. 319 (1853)

Robbins v. State, 8 Ohio St. 131 (1857)

Moody v. State, 17 Ohio St. 110 (1866)

Ohio v. Barker, 28 Ohio St. 583 (1876)

Tabler v. Ohio, 34 Ohio St. 127 (1877)

Benedict v. State, 44 Ohio St. 679, 11 N.E. 125 (1887)

State v. McCoy, 52 Ohio St. 157, 39 N.E. 316 (1894)

State v. Tippie, 89 Ohio St. 35, 105 N.E. 75 (1913)

Ohio v. Lehr, 97 Ohio St. 280, 281, 119 N.E. 730 (1918)

Ohio v. Karcher, 155 Ohio St. 253, 98 N.E.2d 308 (1951)

Ohio v. Smith, 165 Ohio St. 247, 135 N.E.2d 63 (1956)

Ohio Appellate

Florien v. Ohio, 18 Ohio Civ.Ct.R. 596 (1897)

Waite v. Ohio, 4 Ohio App. 451 (1915)

Jones v. State, 11 Ohio App. 441 (1919)

Schneider v. State, 1 Ohio Law Abst. 75 (1922)

Vargo v. State, 1 Ohio Law Abst. 830 (1923)

Schunn v. State, 2 Ohio Law Abst. 186 (1923)

Emery v. State, 3 Ohio Law Abst. 62 (1924)

Shellenberger v. Ohio, 26 Ohio Law Rep. 619 (1928)

Clyne v. Ohio, 32 Ohio Law Rep. 477 (1930)

Novaksky v. State, 18 Ohio Law Abst. 313 (1934)

State v. Hollos, 76 Ohio App. 521, 65 N.E.2d 144 (1944)

Ohio v. Jones, 80 Ohio App. 269, 70 N.E. 2d 913 (1946)

State v. Taylor, 83 Ohio App. 76, 77 N.E. 2d 279 (1947)

State v. Coran, 87 Ohio App. 238, 94 N.E.2d 562 (1948)

State v. McDaniel, 85 Ohio App. 529, 89 N.E.2d 664 (1949)

State v. Roche, Ohio App. 135 N.E.2d 789, 72 Ohio L.A. 462 (1955)

State v. Brown, Ohio App., 137 N.E.2d 609, 73 Ohio L.A. 349 (1955)

State v. Allgood, 84 Ohio L.A. 367 (1959)

Ohio v. Ball, 1 Ohio App.2d 297, 204 N.E.2d 557 (1964)

Common Pleas Court

State v. Springer, 4 Ohio Dec. 169

Geer v. Ohio, 16 Ohio Cir.Ct.R.,N.S., 151 (1909)

Bridge v. Ohio, 20 Ohio Cir.Ct.R.,N.S., 231 (1912)

Ohio v. Holden, 20 Ohio N.P.,N.S., 200 (1917)

I. I. ROSEN, M.D., Plaintiff,

v.

The LOUISIANA STATE BOARD OF MEDICAL EXAMINERS, Defendant.

Civ. A. No. 70-1304.

United States District Court,
E. D. Louisiana,
New Orleans Division.

Aug. 7, 1970.

Suit by physician seeking injunction restraining Louisiana State Board of Medical Examiners from enforcing, in proceedings being brought against him, statute authorizing removal of physician's certification for procuring, aiding, or abetting in procuring an abortion, unless done for the relief of woman whose life appears in peril, after due consultation with another licensed physician, and seeking judgment declaring such statute unconstitutional. The three-judge District Court, Ainsworth, Circuit Judge, held that it is the policy of the Louisiana abortion statutes that whatever interests the pregnant woman or others may have in terminating pregnancy must, except where life of the woman is threatened, be subordinated to afford embryo or fetus opportunity to develop toward natural birth, that Louisiana was empowered to place such value upon prenatal life, and that the statute in question is necessary to accomplishment of such permissible state policy and does not offend due-process clause of the Fourteenth Amendment.

Suit dismissed.

Cassibry, District Judge, dissented and filed opinion.

1. Courts ⇐260.4

Abstention was not warranted in suit wherein physician, against whom charges had been brought before Medical Board with respect to alleged illegal abortions, was seeking declaration that statute authorizing suspension or revocation of physician's certificate, when he has committed or participated in commission of abortion that is unnecessary to relief of woman whose life appears in peril, was unconstitutional. LSA-R.S. 37-1285(6).

2. Statutes ⇐47

Louisiana statute authorizing suspension or revocation of medical doctor's certificate when doctor has committed or participated in commission of abortion "unless done for the relief of a woman whose life appears in peril" is not unconstitutionally vague or indefinite. LSA-R.S. 37:1285(6).

3. Abortion ⇐2

Louisiana law does not suffer performance of all medically indicated abortions, but permits induced abortion of embryo or fetus only when the physician, after due consultation with another licensed physician, determines in good faith that continuation of the pregnancy will itself directly and proximately result in the death of the woman. LSA-R.S. 37:1285(6).

4. Constitutional Law ⇐82

Right of women to determine, before they have become pregnant, whether they shall bear children, may be interfered with by state only in special circumstances, but such right does not compel conclusion that woman has right to cause abortion of embryo or fetus carried by her.

5. Physicians and Surgeons ⇐4, 11(2)

In Louisiana, conviction of crime, including crime of abortion as proscribed in the criminal laws, and procuring, aiding or abetting in procuring abortion unless done to save the life of the mother are separate grounds upon which Medical Board may properly refuse to issue or may suspend or institute proceedings to revoke certificate to practice medicine to which physician would otherwise be entitled. LSA-R.S. 14:87, 37:1285(1, 6).

6. Abortion ⇐1

Louisiana law prohibits performance of certain acts if made with intent to destroy embryo or fetus before nat-

ural birth, without regard to viability, unless the actor is a physician and the acts are performed for the relief of a woman whose life appears in peril. LSA–R.S. 14:87, 37:1285(6).

7. Abortion ⇐1

As used in Louisiana statute proscribing abortion terms "embryo" and "fetus" refer to separate stages in prenatal development. LSA–R.S. 14:87.

8. Abortion ⇐3

In Louisiana, woman who procures abortion for herself is not criminally responsible. LSA–R.S. 14:87.

9. Abortion ⇐1

Though Louisiana has demonstrated greater concern for life after birth than for life before birth, it is the policy of the Louisiana abortion statute that whatever interests the pregnant woman or others may have in terminating pregnancy must be subordinated, except where the life of the woman is threatened, to afford the embryo or fetus the opportunity to develop toward natural birth. LSA–R.S. 14:87, 37:1285(6).

10. Abortion ⇐1

Louisiana has sufficiently manifested its interest in protecting the embryo or nonviable fetus that statute penalizing physician for procuring abortion except where woman's life appears to be in peril cannot be voided on the ground that the only legitimate purpose for which it was enacted was to protect lives and health of pregnant women and that, in view of advances in medical knowledge and surgical techniques, it is no longer wise legislation. LSA–R.S. 37:1285(6).

11. Constitutional Law ⇐38

Constitutional validity of statutes does not turn upon whether legislators have manifested their intent that the inevitable effect of such statutes, as viewed on their face, was meant to occur.

12. Constitutional Law ⇐70(3)

Federal courts will not strike down otherwise constitutional statute on basis of alleged wrongful legislative motive.

13. Constitutional Law ⇐70(3)

Federal courts will not void legislation which state had power to enact on more than one ground because the alleged dominant motive behind the statute is no longer served by its application.

14. Abortion ⇐1
Courts ⇐262.4(6)

Louisiana was empowered to place value upon prenatal human life, and such valuation, as manifested by its abortion statutes, could not be struck down by federal court. LSA–R.S. 14:87, 37:1285(6).

15. Courts ⇐262.4(5)

Review of state legislation by federal courts, whether such legislation is in exercise of state's police power or in provision for health, safety morals, or welfare of its people, concerns powers of government inherent in every sovereignty.

16. Constitutional Law ⇐81

Term "police power" connotes time tested conceptual limit of public encroachment upon private interests, and the definition thereof is essentially the product of legislative determination addressed to the purposes of government, which are themselves not capable of complete definition.

See publication Words and Phrases for other judicial constructions and definitions.

17. Courts ⇐262.4(5)

Federal courts may interfere with exercise of the plenary power of state governments in enactment of legislation only to the extent that the Constitution so requires.

18. Courts ⇐89

Principles of a judicial decision, while tending to expand themselves to the limits of their logic, must be contained by the historical frame of reference of their purpose.

19. Constitutional Law ⇐70(3)

Even where social undesirability of law is not disputed, invalidation of that

law by a court debilitates popular democratic government.

20. Constitutional Law ⇐82

Conclusion that pregnant woman's interests are superior to that of an unquickened embryo is not mandated by the Constitution.

21. Abortion ⇐1

The Louisiana abortion laws do not infringe any fundamental principle as understood by the traditions of our people. LSA–R.S. 14:87, 37:1285(6).

22. Constitutional Law ⇐81

Mere assertion that action of state finds justification in the realm of morals cannot justify any and every restriction it imposes.

23. Constitutional Law ⇐82

Asserted right of woman to choose to destroy embryo or fetus she carries is not so rooted in the traditions and collective conscience of our people that it must be ranked as fundamental.

24. Constitutional Law ⇐287
Physicians and Surgeons ⇐2

Louisiana statute providing that Medical Board may refuse to issue and may suspend or institute proceedings to revoke certificate to practice medicine if physician procures, aids, or abets in procuring an abortion, unless done for relief of woman whose life appears in peril after due consultation with another licensed physician, is necessary to the accomplishment of permissible state policy, and does not offend the due-process clause of the Fourteenth Amendment. LSA–R.S. 37:1285(6); U.S.C.A.Const. Amend. 14.

Roy Lucas, New York City, Benjamin E. Smith, Smith & Scheuermann, New Orleans, La., for plaintiff.

Sam A. LeBlanc III, Adams & Reese, New Orleans, La., for defendant.

Before AINSWORTH, Circuit Judge, and CASSIBRY and BOYLE, District Judges.

AINSWORTH, Circuit Judge:

Isadore I. Rosen, a physician licensed to practice medicine under the laws of Louisiana, challenges the constitutionality of the Louisiana statute authorizing the suspension or revocation of a medical doctor's certificate when the doctor has committed or participated in the commission of an abortion that is unnecessary to the relief of a woman whose life appears in peril. He seeks an injunction restraining the Louisiana State Board of Medical Examiners (Medical Board) from enforcing La.Rev.Stat.Ann. § 37:1285 in proceedings being brought against him and a judgment declaring section 37:1285(6) unconstitutional.

This three-judge district court was convened to consider the issues raised by Dr. Rosen's complaint, 28 U.S.C. § 2281, and a hearing was held on the merits of the case. We hold that section 37:1285(6) is constitutional and deny plaintiff's request for declaratory and injunctive relief.

I.

The Louisiana Medical Practice Act, La.Rev.Stat.Ann. § 37:1261 *et seq.*, authorizes the Medical Board to suspend or institute court proceedings to revoke a doctor's certificate to practice medicine in the State when the doctor has procured or aided or abetted in the procuring of an abortion, "unless done for the relief of a woman whose life appears in peril after due consultation with another licensed physician." La.Rev.Stat. Ann. § 37:1285(6). On November 12, 1969, the Medical Board informed Dr. Rosen of its intent to conduct a hearing on charges that Dr. Rosen has on several occasions committed or aided in the commission of abortions without legal justification for so doing. A hearing was originally scheduled for December 12, 1969. This lawsuit followed. We have jurisdiction to decide the case. *E. g.*, Roe v. Wade, N.D.Tex., 1970, 314 F. Supp. 1217; Babbitz v. McCann, E.D. Wis., 1970, 310 F.Supp. 293.

[1] The complaint charges that section 37:1285(6) of the Louisiana Revised Statutes is unconstitutional for violating the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution and for invading the pregnant woman's right of privacy. The Medical Board argues initially that this Court should abstain from making a decision on the merits of plaintiff's request for a declaratory judgment. Under the circumstances of this case, we conclude that abstention would not be warranted. *See, e. g.*, Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); Roe v. Wade, N.D. Tex., 1970, 314 F.Supp. 1217; Babbitz v. McCann, E.D.Wis., 1970, 310 F. Supp. 293. We therefore reach the merits of Dr. Rosen's argument. For reasons that follow, we conclude that the doctor's attack upon the constitutionality of section 37:1285(6) must fail.

II.

The doctor urges that section 37:1285 (6) of the Louisiana Revised Statutes is unconstitutionally vague and indefinite because it fails to provide both fair warning to doctors and sufficient precision to guide the Medical Board, judges, and juries regarding the physical or mental conditions that justify an induced abortion under Louisiana law. This section provides for the removal of a physician's certification for "[p]rocuring, aiding, or abetting in procuring an abortion unless done for the relief of a woman whose life appears in peril after due consultation with another licensed physician." Rosen argues that the words "relief of a woman whose life appears in peril" do not provide meaningful guidance to the ordinary physician since the statute forbids abortions in terms "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926); *accord*, Lanzetta v. State of New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939). He also argues that uncertainty in the medical profession regarding the legality of certain medically indicated abortions is a constitutional defect in the statute as applied.

[2, 3] We have examined the challenged language and are persuaded that it is neither vague nor indefinite, but is instead reasonably comprehensible in its meaning, with its reach delineated in words of common understanding. *See* Babbitz v. McCann, E.D.Wis., 1970, 310 F.Supp. 293, 297–298; *cf.* Cameron v. Johnson, 390 U.S. 611, 616, 88 S.Ct. 1335, 1338, 20 L.Ed.2d 182 (1968). The clause "unless done for the relief of a woman whose life appears in peril" requires no guessing at its meaning. Rosen focuses upon the words "relief," "appears," and "life." These are widely used and well understood words, particularly when read in the context of section 37:1285(6). We conclude that the statute was intended to permit an induced abortion of an embryo or fetus only when the physician, after due consultation with another licensed physician, determines in good faith that continuation of the pregnancy will directly and proximately result in the death of the woman. In our opinion, the statute so read provides fair warning that Louisiana does not suffer the performance of all medically indicated abortions, however wise in the physician's estimation such an operation might be in a particular case, but rather allows the induced abortion of an embryo or fetus to be performed without sanction only when the life of the mother is directly endangered by the condition of pregnancy itself.

Four recent cases dealing with the constitutionality of abortion statutes have considered the sort of void-for-vagueness argument that Rosen makes against the Louisiana statute. In People v. Belous, 71 Cal.2d 996, 80 Cal.Rptr. 354, 458 P.2d 194 (1969), the California Supreme Court found that the words "necessary to preserve her life" in the California abortion statute then in effect were unconstitutionally vague. The

words "for the purpose of saving the life of the mother" in the Texas abortion statute were declared to be similarly defective by a three-judge district court in Roe v. Wade, N.D.Tex., 1970, 314 F. Supp. 1217. The District of Columbia abortion statute was held invalid in United States v. Vuitch, D.D.C., 1969, 305 F.Supp. 1032, on the ground that the word "health" in the phrase "as necessary for the preservation of the mother's life or health" was vague both in interpretation and practice. The words "necessary to save the life of the mother" in the Wisconsin abortion statute, on the other hand, were held not to be vague or indefinite as to their meaning in Babbitz v. McCann, E.D.Wis., 1970, 310 F.Supp. 293.

Like the *Babbitz* court, we do not share the view of the majority in *Belous* that language such as "necessary to preserve [or save] life" is so vague that one must guess at its meaning. *See generally* Comment, To Be or Not to Be: The Constitutional Question of the California Abortion Law, 118 U.Pa.L.Rev. 643, 644–649 (1970). Consequently, *Belous* is not persuasive on the issue of vagueness presented in this case. We also do not share the view of the court in *Roe* that a statute worded similarly to either the Texas or Louisiana acts is unconstitutionally vague because of the difficulty encountered in applying it to particular cases. As the Supreme Court has stated,

> "Wherever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so, it is familiar to the criminal law to make him take the risk."

United States v. Wurzbach, 280 U.S. 396, 399, 50 S.Ct. 167, 169, 74 L.Ed. 508 (1930); *see* United States v. Petrillo, 332 U.S. 1, 7, 67 S.Ct. 1538, 1541–1542, 91 L.Ed. 1877 (1947). Moreover, the Louisiana statute makes express what is perhaps only implied in the Texas statute—that the abortion need only *appear* necessary, rather than actually be necessary to be permissible. *Vuitch* is readily distinguishable from the present case, since the court there concluded that the word "health," as distinct from the word "life," made the District of Columbia statute impermissibly vague. Thus the precise problem considered in *Vuitch* is not presented under the terms of the Louisiana statute.

In short, we conclude that although Rosen may have medical or even practical justification for his belief that the Louisiana statute too narrowly restricts the circumstances under which an abortion may be induced without sanction, he fails to convince this Court that the Louisiana Legislature was vague or indefinite in its choice of language.

III.

The doctor next contends that the Louisiana statute, even if assumed not to be lacking in either clarity or precision, is void for "overbreadth," that is, section 37:1285(6) offends the constitutional principle that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." Zwickler v. Koota, 389 U.S. 241, 250, 88 S.Ct. 391, 396, 19 L.Ed.2d 444 (1967), *citing* NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 307, 84 S.Ct. 1302, 1314, 12 L.Ed.2d 325 (1964). Rosen argues that the statute unnecessarily and impermissibly invades his right as a physician to prescribe for his patients in accordance with his best professional knowledge. Specifically, he contends that the statute makes removal of his license a likelihood if, in the course of performing his duties as a physician, he assists a pregnant woman —who has had contraceptive failure or did not utilize contraceptives—in the exercise of what he asserts to be her fundamental, constitutionally protected right to choose whether to bear children. In substance, his argument is that: (1) a woman has a fundamental right, ex-

cept in very limited circumstances, to be free from unwanted governmental interferences in matters that, by their character and consequences, bear in a basic way upon her privacy, that is, she has a right to be let alone in matters involving her individual privacy; (2) included within her right to be let alone is her right to choose whether to bear children; (3) since the Louisiana statute infringes upon her right of choice in this matter and operates directly upon the physician's role in the effective exercise of that choice, the statute may be upheld by this Court only upon a showing by the State that such infringement is necessary to support a subordinating state interest which is compelling; and (4) the Louisiana statute sweeps far beyond any areas of compelling, subordinating state interests and is, therefore, invalid. Thus the doctor would have us first determine whether the right to choose to bear or not to bear, children is a fundamental one and then determine whether, if this is a fundamental right, the State has demonstrated a compelling need to infringe upon its exercise.

In our opinion, the issues in dispute here do not resolve themselves neatly into the questions posed by Dr. Rosen. The issues presented are much more complex, for the current controversy over the wisdom and constitutional validity of existing abortion laws centers upon a problem in which attitudes toward life, being, and sexual activity are in tumultuous disagreement. The specifics of the conflict in courts, legislative halls, and journals have often been the details of statutory language. The root disagreement, however, among men of intelligence and good will on all sides of the controversy has arisen over the evaluation of competing interests affected by abortion and the manner in which these interests are to be protected by law in a democratic society. *See generally* George, Current Abortion Laws: Proposals and Movements for Reform, in Abortion and the Law 1 (Smith ed. 1967); Ziff, Recent Abortion Law Reforms (Or Much Ado About Nothing), 60 J.Crim.L.C. & P.S. 3 (1969). Nature alone is responsible for the spontaneous abortion, and she needs no justification. But there remains for the determination by society, by whatever means it has chosen for the making of such momentous decisions, the conditions, if any, under which the embryo or fetus of the species homo sapiens may be destroyed within the womb.

The most recent attacks on abortion legislation, like Dr. Rosen's, have focused upon the interests of the pregnant woman as being of primary importance. The interests of the family unit, if any, of which the pregnant woman is a part and the needs of the community have also been advanced as reasons for the relaxation or abolition of laws prohibiting abortions. Little or no importance has been attached by these arguments to whatever interests may be possessed by the embryo or fetus the pregnant woman carries. In at least four instances, arguments such as these have been urged successfully. Roe v. Wade, N.D.Tex., 1970, 314 F.Supp. 1217; Babbitz v. McCann, E.D.Wis., 1970, 310 F.Supp. 293; People v. Belous, 71 Cal.2d 996, 80 Cal.Rptr. 354, 458 P.2d 194 (1969); State v. Munson (S.D.Cir.Ct., Pennington County, April 6, 1970). *See also* United States v. Vuitch, D.D.C., 1969, 305 F.Supp. 1032. In all these cases, the right asserted by plaintiffs to be free from unwanted governmental interference—freedom of choice in the matter of abortions—was equated by the court with the "fundamental right to choose whether to have children."

[4] For the purposes of this case we assume, if we are not required to recognize, *e. g.*, Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Baird v. Eisenstadt, 1 Cir., 1970, 429 F.2d 1398, that as a general matter women possess under our Constitution a "fundamental right" to determine whether they shall bear children before they have become pregnant. A state may interfere with this right of choice only in special circumstances. *E.*

g., Buck v. Bell, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927). We deal in this case, however, not merely with whether a woman has a generalized right to choose whether to bear children, but instead with the more complicated question whether a pregnant woman has the right to cause the abortion of the embryo or fetus she carries in her womb. We do not find that an equation of the generalized right of the woman to determine whether she shall bear children with the asserted right to abort an embryo or fetus is compelled by fact or logic. Exercise of the right to an abortion on request is not essential to an effective exercise of the right not to bear a child, if a child for whatever reason is not wanted. Abstinence, rhythm, contraception, and sterilization are alternative means to this end. The first is, of course, infallible; the latter three are reliable to varying degrees approaching certainty. Before the "moment" of conception has occurred, *see generally* Ziff, Recent Abortion Law Reforms (Or Much Ado About Nothing), 60 J.Crim.L.C. & P.S. 3, 20–21 (1969), the choice whether or not to bear children is made in circumstances quite different from those in which such a choice might be made after conception. Apart, the sperm and the unfertilized egg will die; neither has the capacity to grow and develop independently as does the fertilized egg. During fertilization, sperm and egg pool their nucleii and chromosomes. Biologically, a living organism belonging to the species homo sapiens is created out of this organization. Genetically, the adult man was from such a beginning all that he essentially has become in every cell and human attribute. *See generally* Gray, Anatomy of the Human Body 21–60 (Goss 27th ed. 1959); 5 Lawyers' Medical Cyclopedia § 37.1 (1960). The basic distinction between a decision whether to bear children which is made before conception and one which is made after conception is that the first contemplates the creation of a new human organism, but the latter contemplates the destruction of such an organism already created. To some engaged in the controversy over abortion, this distinction is one without a difference. These men of intelligence and good will do not perceive the human organism in the early part of its life cycle as a human "being" or "person." [1] In their view, the granting to such an organism of the right to survive on a basis of equality with human beings generally should be delayed until a later stage in its development. To others, however, the "moment" of conception or some stage of development very close to this "moment" is the point at which distinctively human life begins.[2] In their view the difference be-

1. The views following are illustrative:
"My feeling is that the fetus, particularly during its early intra-uterine life, is simply a group of specialized cells that do not differ materially from other cells. * * * And I feel that if it is going to be for the welfare of the adult individual, and for society in certain instances, we are justified in eliminating those cells. I do not think that I could be catalogued as a murderer. I just feel that under certain conditions the elimination of life of this type is justified. If one can justify shooting a burglar who enters your room, or going to war and shooting an enemy, one can certainly justify the elimination of some cells, which, from my point of view, have not yet become a human being, but simply have the potentialities of life. * * *"
Statement of Dr. Alan F. Guttmacher, in Symposium—Law, Morality, and Abortion, 22 Rutgers L.Rev. 415, 436 (1968);
"* * * Physicians as a whole do not believe that a human being begins at conception. I know of no non-Catholic scientist who does. I know of no scientist at all, no scientist in any field of biological science, who would say that an acorn, the second that that acorn has been fertilized, is an oak. It is a potential oak; it is not an oak. And a fertilized ovum is not a human being. * * *"
Statement of Dr. Harold Rosen, in *id.* at 426.

2. For example, this is the official Roman Catholic position. E. g., Drinan, The Inviolability of the Right To Be Born, in Abortion and the Law 107 (Smith ed.

tween the decision not to conceive and the decision to abort is of fundamental, determinative importance. Thus the root problem in the controversy over abortion is the one of assigning value to embryonic and fetal life. *See* Giannella, The Difficult Quest for a Truly Humane Abortion Law, 13 Vill.L.Rev. 257 (1968).

In considering the problem of valuing prenatal life, we heed the words of Mr. Justice Holmes:

> "It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong * * *."

Holmes, Collected Legal Papers 295 (1920). When distinctively human life begins is a matter about which reasonable, fair-minded men are in basic disagreement. Thus this case does not concern simply whether the pregnant woman has a fundamental right to be let alone in the control of her body processes, *cf.* Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 11 S.Ct. 1000, 35 L.Ed. 734 (1891) (submission to surgical examination), for it is unresolved whether, in the common understanding of the society in which she lives, choice of the destiny of the human organism developing within her is a matter directly affecting only her individual rights. We phrase the question for decision as follows: Can the State of Louisiana, consistent with the Fourteenth Amendment, assign to the human organism in its early prenatal development as embryo and fetus a right to be "born" [3] unless the condition of pregnancy directly and proximately threatens the mother's life? Our inquiry extends to (1) whether, and the extent to which, the State has assigned value to prenatal life, (2) whether the State is empowered to make such an assignment, and (3) whether the State's valuation is to be recognized for the purposes of this case.

We consider first the pattern of the Louisiana statutes pertaining to abortion. In Louisiana, "abortion" has been a crime since 1870. The 1870 statute, as amended, La.Acts, 1888, No. 24, provided:

> "Whoever shall feloniously administer, or cause to be administered, any drug, potion, or any other thing, to any woman for the purpose of procuring a premature delivery, or whoever shall administer, or cause to be administered, to any woman pregnant with child, any drug, potion, or any other thing, for the purpose of procuring abortion or a premature delivery, or whoever by any means whatsoever shall feloniously procure abortion or premature delivery, shall be imprisoned at hard labor for not less than one nor more than ten years."

We have not been cited to or found any legislative history on this statute. As we read it, the statute made unlawful the described acts if performed with the specific intent to destroy a "child" before its natural birth, regardless of whether the woman was in fact pregnant; that is, attempts to perform the impossible were equated with and treated the same as actual performance. Reworded in 1942 and later amended, the statute reads today:

> "Abortion is the performance of any of the following acts, with the intent of procuring premature delivery of the embryo or fetus;
>
> (1) Administration of any drug, potion, or any other substance to a female; or
>
> (2) Use of any instrument or any other means whatsoever on a female.
>
> "Whoever commits the crime of abortion shall be imprisoned at hard labor for not less than one nor more than ten years."

1967); Statement of Thomas J. O'Donnell, S. J., in Symposium—Law, Morality, and Abortion, 22 Rutgers L.Rev. 415, 431–432 (1968).

3. As used here, the term "born" refers to delivery from the womb after the developing human organism is capable of sustaining life outside the womb. *See* La. Rev.Stat.Ann. § 40:142.

La.Rev.Stat.Ann. § 14:87 (Supp.1970). In substance, the Louisiana criminal law on abortion has been unchanged for one hundred years.[4]

[5–7] In Louisiana, conviction of a crime such as the crime of "abortion" proscribed by section 14:87, and procuring, aiding or abetting in procuring an "abortion" unless done to save the life of the mother are separate grounds upon which the Medical Board may properly refuse to issue, suspend, or institute court proceedings to revoke a certificate to practice medicine to which a physician would otherwise be entitled. La.Acts, 1914, No. 56, § 16, as amended, La.Acts, 1918, No. 54, § 10, codified, La.Rev.Stat. Ann. § 37:1285(1), (6). *See also* La. Rev.Stat.Ann. § 1271 (qualifications of applicants for certificates). Since sections 14:87 and 37:1285(6) deal with the same subject matter, we construe them together. So doing, we conclude that Louisiana prohibits the performance of certain acts if made with the intent to destroy an "embryo" or "fetus" before natural "birth," unless (1) the actor is a physician and (2) the acts are performed for the relief of a woman whose life appears in peril. As used in section 14:87, the terms "embryo" and "fetus" refer to separate stages in prenatal development. State v. Dore, 227 La. 282, 79 So.2d 309 (1955). In medical terminology, "embryo" refers to the developing human organism from one week after conception to approximately the end of the second month. "Fetus" refers to the organism from that point until termination of prenatal development. Dorland, Illustrated Medical Dictionary 439, 500 (23d ed. 1957).[5] From conception until the twentieth week of development, expulsion of the embryo or fetus from the womb is not considered by the State to be a "birth." La.Rev.Stat.Ann. § 40:-142(5).

[8, 9] From a reading of the Louisiana statutes, it is plain that the State has attempted to provide embryonic and fetal organisms with protection against destruction by other than natural causes in at least the second and succeeding weeks of prenatal development, without regard to whether the organism is capable of sustaining life outside the womb. This protection is qualified. The embryo or fetus may legally be destroyed by a physician if the condition of pregnancy, after due consultation with another licensed physician, appears directly and proximately to threaten the woman's life. Also, section 14:87, as construed, does not make the woman criminally responsible for the destruction of the embryo or fetus she once carried. *E. g.*, Simmons v. Victory Industrial Life Ins. Co. of Louisiana, 18 La.App. 660, 139 So. 68 (1932). With these qualifications, a principal effect of the Louisiana statutes has been a conferment upon the embryonic or fetal organism of a right to survive to a natural termination of prenatal development. Necessarily implicit in this conferment is a valuation of embryonic and fetal life in relation to the life of the infant, the child, and the adult. Regardless of whatever interests the pregnant woman or others may have in ending the life of the embryo or

4. Section 14:87 was amended in 1964 to provide, as did the 1870 statute, that commission of the crime of abortion does not depend upon whether the woman is actually pregnant, so long as the requisite unlawful intent is present. From 1942 until 1964, an attempt to perform an abortion on a woman who was not pregnant apparently was punishable as an "attempt," rather than as a crime of abortion.

5. Although Louisiana law is clear to the effect that "embryo" and "fetus" refer to separate stages of prenatal development, there is no Louisiana law on the question whether "embryo," as used in section 14:87, refers to the "zygote" as well as to the "embryo," as used in medical terminology. If the statute uses "embryo" in its technical medical sense, the induced expulsion of the "zygote" from the womb in the first week of development would not be an "abortion" under section 14:87, because the section deals with the "embryo" and the "fetus." We note this question without comment since its resolution is unnecessary to the disposition of this case.

fetus she carries, application of the Louisiana statutes, subject to the above qualifications, results in the subordination of such interests to the policy of the State that prenatal life must be afforded the opportunity to develop toward a natural birth.

[10] In medical terminology, "abortion" generally refers to the premature expulsion from the womb of the embryo or of the nonviable fetus. Dorland, Illustrated Medical Dictionary 4 (23d ed. 1957). As indicated, the Louisiana statutes make no distinction based upon viability in defining "abortion," that is, upon whether the fetal organism has developed to the stage in which it can sustain life outside the womb or, in the terminology adopted by the State, be "born." *See* La.Rev.Stat.Ann. § 40:142(5). Dr. Rosen argues that Louisiana has not expressed a policy of preferring the interests of an embryo or nonviable fetus as a "human being" over those of the pregnant woman, family unit, or community. To the contrary, he claims, Louisiana has expressed no interest in the embryo or nonviable fetus. Also, he urges that section 37:1285(6) is unconstitutional because the only "legitimate" purpose for which it, like the 1870 criminal statute and its successors, could have been enacted—protection of the lives and health of pregnant women—is no longer served by its application. Not persuaded by these arguments, we conclude that Louisiana has sufficiently manifested its interest in protecting the embryo or nonviable fetus and that section 37:1285 (6) cannot be voided essentially on the ground that it is no longer wise legislation.

The inevitable effect of the Louisiana statutes in question is to accord embryonic and fetal human life qualified protection against premeditated destruction by persons other than the mother. As we have said, implicit in this affording of protection is the assignment of value to the embryonic or fetal organism as a form of human life. "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms wellnigh conclusive."[6] Berman v. Parker, 348 U.S. 26, 32, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954). In our opinion, the State of Louisiana values embryonic or fetal human organisms to the extent that such organisms—forms of human life—are entitled to enjoy in at least some basic respects the right to survive on a basis of equality with human beings generally.

As we have indicated, the protection afforded by Louisiana to the embryo or fetus is not coextensive with the protection afforded to the infant, the child,

6. The abortion statutes are not the only laws in which Louisiana has manifested its concern with the problem of valuing prenatal life. In Louisiana, "Children in the mother's womb are considered, in whatever relates to themselves, as if they were already born; thus the inheritances which devolve to them before their birth, and which may belong to them, are kept for them, and curators are assigned to take care of their estates for their benefit." La.Civ.Code Ann. art. 29. In the matter of successions, for example, the "child in its mother's womb is considered as born for all purposes of its own interest; it takes all successions opened in its favor since its conception, provided it be capable of succeeding at the moment of its birth." La.Civ.Code Ann. art. 954. It is true, as Dr. Rosen points out, that the right to inherit vests only in children born alive, regardless of the mode of birth and the length of life after birth. La.Civ. Code Ann. arts. 956, 957, and "Children born dead are considered as if they had never been born or conceived." La.Civ. Code Ann. art. 28. From this the doctor argues that the abortion of an embryo or nonviable fetus would do no violence to the existing Louisiana law of successions. *See* Comment, Abortion and the Law: A Proposal for Reform in Louisiana, 43 Tul.L.Rev. 834, 850–851 (1969). Whether this argument is correct or not is beside the point. Read together, the abortion and succession statutes manifest a coherent policy: The "child in its mother's womb" (embryo or fetus) is afforded certain rights by the State, the enjoyment of which vests upon live birth; the abortion statutes afford the embryo or fetus a qualified opportunity to be born alive in order to enjoy rights such as that of inheritance.

and the adult. Historically and today, the State has demonstrated a greater concern for life after birth than for life before birth. For example, although Louisiana early adopted the common law as to the definition of crimes, La.Acts, 1805, No. 50, § 33, and abortions were not permitted at common law after fetal "quickening," *see, e. g.*, Stern, Abortion: Reform and the Law, 59 J.Crim.L. C. & P.S. 84, 85 (1968),[7] the principle that all crimes in Louisiana are statutory, *e. g.*, State v. Williams, 7 Rob. 252 (La.1844), meant that abortion was not a crime in this State until the 1870 statute was enacted. In terms of punishment and criminal responsibility also, the State has not equated the destruction of an embryo or fetus with the destruction of an infant, a child, or an adult. For example, the pregnant woman who causes the abortion of the "child" in her womb is not made criminally responsible, and those to whom she turns for an abortion may be imprisoned for no more than ten years for the offense. The mother who causes the death of her infant child, on the other hand, may be convicted of murder, manslaughter, or negligent homicide, as the case may be, with death as the ultimate penalty. La.Rev.Stat.Ann. §§ 14:30–32. These facts suggest, for example, that Louisiana does not equate the equality of the offense of "murder," La.Rev.Stat.Ann. § 14:30, with the quality of an act of abortion. In no meaningful way, however, do they rebut the Medical Board's contention that, for the past century, the State in its abortion laws has manifested a policy of protecting human life in its embryonic and fetal forms.[8]

Dr. Rosen argues that the purpose of the Louisiana abortion statutes—other than to compel adherence to specified moral norms[9]—is to protect the lives and health of women who believe themselves to be pregnant rather than to protect the embryo or fetus from destruction. Notwithstanding that these laws, when obeyed, do protect the embryo or fetus, it is suggested that, in light of the pattern of the Louisiana statutes and the history of abortion and the law generally, the Louisiana laws are, at best, health measures that no longer promote good health.[10]

[11–14] We decline to void section 37:1285(6) essentially on the ground that advances in medical knowledge and surgical techniques have made unwise

7. *See also* 3 Coke, Third Inst. 50 (1797); 1 Blackstone, Commentaries Comm. 1, 129–130 (4th ed. 1771); Perkins, Criminal Law 101 (1957).

8. In Louisiana, "homicide" is the killing of a "human being," and criminal homicide is either murder, manslaughter, or negligent homicide. La.Rev.Stat.Ann. § 14:29. Since the destruction of an embryo or fetus is not a homicide under Louisiana law, it has been argued that the State does not consider embryonic and fetal life forms as "human beings." Though destruction of an embryo or fetus under Louisiana law is not considered a homicide so that the perpetrator of its destruction is punishable as a "murderer," it does not follow from the principle that "murder" and "abortion" are distinct crimes under state law that the Louisiana Legislature did not consider embryo and fetus as forms of human life. We may not ascribe to the legislature ignorance of biological realities, nor should we, at the same time, require its express manifestation that it was aware of these realities.

9. The enactment of abortion legislation in the last century has been attributed to the influences of "comstockery." 5 Harv. Civ.Rights-Civ.Lib.L.Rev. 133, 144 (1970). Anthony Comstock, who inspired the use of the opprobrious word "comstockery," was, of course, a man to whom obscenity was "poison to soul and body, and anything remotely touching upon sex was * * * obscene." Broun & Leech, Anthony Comstock 265–266 (1927), *in* Poe v. Ullman, 367 U.S. 497, 520 n. 10, 81 S.Ct. 1752, 1764–1765 n. 10, 6 L.Ed.2d 989 (1961) (Brennan, J., concurring).

10. *See, e. g.*, Tietze, Mortality With Contraception and Induced Abortion, 45 Studies in Family Planning 6 (1969); Tietze, Abortion Laws and Abortion Practices in Europe, Excerpta Medica International Congress Series No. 207 (1969); People v. Belous, 71 Cal.2d 954, 965, 80 Cal.Rptr. 354, 361, 458 P.2d 194, 201 (1969).

legislation which the State of Louisiana had the power to enact, and we do not believe that the constitutional validity of statutes turns upon whether legislators make speeches or otherwise manifest their intent that the inevitable effect of statutes, viewed on their face alone, was indeed meant to occur. It is a familiar principle of constitutional law that the federal courts will not strike down an otherwise constitutional statute on the basis of an alleged wrongful legislative motive. *E. g.*, United States v. O'Brien, 391 U.S. 367, 383, 88 S.Ct. 1673, 1682, 20 L.Ed.2d 672 (1968); McCray v. United States, 195 U.S. 27, 56, 24 S.Ct. 769, 776, 49 L.Ed. 78 (1904). Similarly, the federal courts will not void legislation which a State had the power to enact on more than one ground because the alleged dominant motive behind the statute is no longer served by its application. In this case, we hold that the State of Louisiana was empowered to place a value upon prenatal human life and that the valuation manifested by the Louisiana abortion statutes may not be struck down by this Court.

At issue here is whether the Louisiana abortion statutes, in assigning a value to prenatal life relative to the interests of the pregnant woman, her family unit, if any, and the community, have invaded a realm of private morality which is not the State's business. *Compare* Committee on Homosexual Offenses & Prostitution (Wolfenden Committee), Report, CMD. No. 247, ¶ 62 (1957).[11] The crime of abortion in Louisiana is classified together with carnal knowledge of, or indecent behavior with, juveniles, prostitution, and the "crime against nature" as "offenses affecting sexual morality."[12] To many in Louisiana, as in other states, a woman who voluntarily causes an abortion of the embryo or fetus she carries "is guilty of a detestible and revolting offense against the laws of nature, which is universally condemned." Payne v. Louisiana Industrial Life Ins. Co., 33 So.2d 444, 445 (La.Ct.App.1948). *See also, e. g.*, Mills v. Commonwealth, 13 Pa. 631, 632 (1850). To others like Dr. Rosen, on the other hand, the failure to limit procreation by abortion is itself unconscionable and immoral if, for example, offspring are destined to be physically or mentally deformed in some fundamental way, to be undernourished, maleducated misfits or rebels against society, or to be unwanted or not cared for because of the economic, physical, and psychological dislocations their births and rearing cause in their parents' lives. We must ask whether abortion, a problem in which attitudes toward life, being, and sexual activity are in such turmoil, is the business of government and the law.

[15–17] The review of state legislation by the federal courts, whether such legislation is considered to be in the exercise of the State's police power or in provision for the health, safety, morals, or welfare of its people, concerns the "powers of government inherent in every sovereignty." The License Cases, 46 U.S. (5 How.) 504, 583, 12 L.Ed. 256, 291 (1847); Poe v. Ullman, 367 U.S. 497, 539, 81 S.Ct. 1752, 1775, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting). The definition of a State's police power is "essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition." Berman v. Parker, 348 U.S. 26, 32, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954). The term "police power" connotes the "time-tested conceptual limit of public encroachment upon private interests." Goldblatt v. Town of Hempstead, N.Y., 369 U.S. 590, 594, 82 S.Ct. 987, 990, 8 L.Ed.2d 130 (1962). The federal courts may interfere with

11. *See also* Devlin, The Enforcement of Morals 1–25 (1965); Sutherland, Constitutionalism in America 527–536 (1965); Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Colum.L.Rev. 391 (1963); Schwartz, Morals Offenses and the Model Penal Code, 63 Colum.L.Rev. 669 (1963).

12. La.Rev.Stat.Ann. §§ 14:80–89.

the exercise of this plenary power of government by the States only to the extent that the Constitution so requires. Barron, for Use of Tiernan v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243, 8 L.Ed. 672 (1833).

The abortion problem concerns the circumstances, if any, that justify the termination of the process of procreation after human life, genetically and biologically, has been conceived. This problem involves the condition of pregnancy and its likely consequence, the first entrance of a new player, "mewling and puking," onto the world stage. Shakespeare, As You Like It, Act ii, sc. 7, l. 139. In specific cases, the condition of pregnancy, if not terminated, may affect the essential welfare of the woman involved; it may cause her to die before her time, to suffer a serious impairment of her health, to waste her life, to be deeply unhappy, or to be happy in a way that society considers to be less than human.[13] Similarly affected may be the essential welfare of the unwanted player once born and the family into which it is born. If the healthy society is viewed as one that not only maintains itself as a going concern, but also, through its free and democratic character, moves in the direction of giving greater scope and expression to those wholesome attributes that set man above the lower species, it may be seen that the abortion problem, if not wisely handled, may in the end impair the good health of the society. But federal judges are not inevitably the source of the wise solution. Under our Constitution, federal judges play a limited role in reviewing the legislation of Congress and the States. We believe that if the passage of a law or a failure to effect its repeal "has ruined a state, there was a general cause at work that made the state ready to perish by a single * * * law." Holmes, Collected Legal Papers 295 (1920). Thus we view the Louisiana abortion laws.

At least with respect to abortion, as medically defined, in the early, nonviable stages of development, proponents of the abolition or "liberalization" of abortion laws have in the main taken as their premise that distinctively human life, that is, valued life, does not commence at conception or at some point near it, but instead at some later stage of prenatal development, such as the point of viability, or at birth itself. Opponents of abolition or "liberalization" have argued from quite different premises. On balance, when "distinctively human" life begins is a matter of contest not so much between those persons and groups who see an embryo or fetus as a human being and those who do not, although this too is involved, but rather is a matter of contest between conflicting views regarding the importance of mere existence in relation to a high quality or excellence of existence.[14] In other words, proponents of abolition or "liberalization" have tended to stress the quality of life after birth rather than the mere existence of life, while their opponents have argued for the transcendence of any life, born or unborn, over the health or happiness of an older or more powerful life. Thus abortion, involving as it does the destruction of, biologically and genetically speaking, a form of human life, raises a basic issue of public interest concerning the value of the human embryo or fetus.

[18] In Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), the Supreme Court struck down a state statute forbidding the use of contraceptives because the law was found to operate unjustifiably upon one aspect of the intimate relation of husband and wife. From this is largely drawn by

13. The concepts of "essential welfare" and of the "healthy society" mentioned here are taken from Banfield, The Unheavenly City, 10–11 (1968).

14. *See generally* Drinan, The Morality of Abortion Laws, in Symposium—Abortion Law Reform, 14 Catholic Lawyer 180 (1968); Jakobovits, Jewish Views on Abortion, in Abortion and the Law 142 (Smith ed. 1967).

Dr. Rosen the argument that a fundamental right of women to choose whether to bear children, after as well as before conception has occurred, must be recognized. In *Griswold*, however, the Court was not required to sit as a super-legislature or rove at large in light of personal and private notions to conclude that choice in the matter of contraceptives was part of the rights associated with home, family, and marriage, which rights were supported by precedent, history, and common understanding.[15] The decision thus operates within a narrow sphere, *see* Kauper, Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case, 64 Mich.L.Rev. 235 (1965); its principles, while tending to expand themselves to the limit of their logic, Cardozo, The Nature of the Judicial Process 51 (1921), must be contained by the historical frame of reference of their purpose. Walz v. Tax Commission of City of New York, 397 U.S. 664, 678–679, 90 S.Ct. 1409, 1416, 25 L.Ed.2d 697 (1970). In our opinion, whether the problem of abortion is a private one of personal or family morality requires first a resolution of the issue of public concern, that is, whether embryonic and fetal organisms should be afforded an opportunity to survive in at least some basic respects on a basis of equality with human beings generally.

[19, 20] Dr. Rosen has strenuously urged before this Court the social undesirability of the Louisiana abortion laws. We may not, however, while professing to act in the service of humane ends, confound private notions with constitutional imperatives. Even where the social undesirability of a law is not disputed, and this is by no means such a case,[16] invalidation of that law by a court debilitates popular democratic government. American Fed. of Labor v. American Sash & Door Co., 335 U.S. 538, 553, 69 S.Ct. 258, 265, 93 L.Ed. 222 (1949) (Frankfurter, J., concurring). We do not share the views of the Courts in Babbitz v. McCann, E.D.Wis., 1970, 310 F.Supp. 293, and Roe v. Wade, N.D.Tex., 1970, 314 F.Supp. 1217, regarding the criteria to be used in testing the constitutionality of abortion legislation. In *Babbitz*, for example, the Court, holding that the State of Wisconsin had not

15. For example, the Court had previously held that the liberty entitled to protection under the Fourteenth Amendment includes the right "to marry, establish a home and bring up children," Meyer v. State of Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923), and the "liberty of parents and guardians to direct the upbringing and education of children under their control." Pierce v. Society of the Sisters of the Holy Names, etc., 268 U.S. 510, 534–535, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925). In Skinner v. State of Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942), the Court struck down an Oklahoma statute providing for the compulsory sterilization of "habitual criminals" on the ground that the statute invidiously discriminated between persons who had committed intrinsically the same quality of offense by sterilizing the one and not the other. To emphasize its view that "strict scrutiny of the classification which a State makes in a sterilization law is essential," the Court noted that it dealt "with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. * * *" 316 U.S. at 541, 62 S.Ct. at 1113. Finally, in Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944), the Court stated:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. Pierce v. Society of Sisters, supra. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter."

16. Considerations of geopolitics, economy, tinkering with natural ecology, genocide, and sociology have been advanced in arguments against the broadening of circumstances under which abortion is permissible. *See generally, e. g.*, Callahan, Abortion: Law, Choice and Morality (1970).

shown a compelling public necessity for invading a woman's "right to refuse to carry an embryo during the early months of pregnancy," concluded: " * * * [T]he mother's interests are superior to that of an unquickened embryo whether the embryo is mere protoplasm, as the plaintiff contends, or a human being, as the Wisconsin statute declares." 310 F.Supp. at 301. This conclusion, we believe, is not mandated by the Constitution.

[21, 22] A reading of current and historical writings on the abortion problem convinces us that *Babbitz* and *Roe* were decided upon theories of life and being which a large part of this country does not entertain.[17] "[T]he word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." Lochner v. New York, 198 U.S. 45, 76, 25 S.Ct. 539, 547, 49 L. Ed. 937 (1905) (Holmes, J., dissenting). We are not persuaded that the Louisiana abortion laws infringe any fundamental principle as understood by the traditions of our people. As an ethical, moral, or religious matter, a woman's refusal to carry an embryo or fetus to term, both historically and today, has been condemned as wrong by a substantial, if not a dominant, body of opinion, except in very limited circumstances.[18] Common science of our people that it must be

17. The attitudes of a society are reflected, at least to some extent, by the statutes it enacts. In 1965, the abortion legislation of the several States might have been roughly classified as those that, in form, prohibited all abortions and those that permitted abortions under carefully limited circumstances. George, Abortion Laws: Proposals and Movements for Reform, in Abortion and the Law 1 (Smith ed. 1967). A review of state legislation today suggests that attitudes toward abortion are in a state of transition, and discussion of the abortion problem is certainly no longer taboo. *See* Clark, Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola U.L.A.L.Rev. 1 (1969).

18. Views from the ranks of organized religion reflect that abortion has been considered morally wrong, except in very limited circumstances. The circumstances that justify abortion vary from religion to religion and denomination to denomination, and it appears that, on balance, attitudes toward abortion are in a state of transition. The official Roman Catholic position is well known. One Roman Catholic commentator has stated that "* * * Catholic moral theology and philosophy have retained, more than the teaching of most other religious denominations, the traditional, and until recently, unchallenged view that abortion is the taking of the life of an unborn but, nevertheless, a real human being." Drinan, The Inviolability of the Right To Be Born, in Abortion and the Law 107–108 (Smith ed. 1967). The Lutheran Church apparently opposes abortion for any reason, while the Presbyterian Church, at least until recently, has favored abortion only to save the mother's life. Reliance is placed upon the individual conscience by the Unitarian and Episcopal Churches, and the Southern Baptist Church has not taken an official position. Rosen, Abortion in America 154–161 (2d ed. 1967). The Orthodox Jewish position will permit abortion if necessary to save the mother's life, and even a remote risk of life invokes "all the life-saving concessions of Jewish law, provided the fear of such a risk is genuine and confirmed by the most competent medical opinions." Jakobovits, Jewish Views on Abortion, in Abortion and the Law 124, 143 (Smith ed. 1967). For example, the "Jewish concern for the mother is so great that a gravid woman sentenced to death must not be subjected to the ordeal of suspense to await the delivery of her child." *Id.* at 142–143. In contrast, the common law has long known the writ *de ventre inspiciendo* authorizing matrons or "discreet women" to inspect the body of a woman to determine if she is pregnant. This writ was issued, for example, to determine before a hanging whether a convicted female was pregnant. If a child was found to be "alive in the womb," that is, "quick," execution was stayed generally until the child was born or by the course of nature it proved that the woman was not pregnant at all. 4 Blackstone, Commentaries Comm. 1, 395 (4th ed. 1771). Conservative and Reform Jews apparently regard abortion far

convictions and attitudes are subject to change, of course, and the valuation of embryonic and fetal life urged by Dr. Rosen may prove ultimately to be supported by common understanding, but we do not find that his valuation is so supported today.

[23, 24] Section 37:1285(6) of the Louisiana Revised Statutes, we conclude, does not offend the due-process clause of the Fourteenth Amendment. We do not recognize the asserted right of a woman to choose to destroy the embryo or fetus she carries as being so rooted in the traditions and collective conranked as "fundamental." The valuation of embryonic and fetal organisms made by the State of Louisiana is supported by scientific fact. Because we further find that section 37:1285(6) is necessary to the accomplishment of a permissible state policy, we must decline plaintiff's invitation to void this law.[19]

Judgment will be entered in favor of defendant, dismissing plaintiff's suit.

Before AINSWORTH, Circuit Judge, and BOYLE and CASSIBRY, District Judges.

CASSIBRY, District Judge (dissenting):*

"* * * One of the basic values of [the right to] privacy is birth control, as evidenced by the *Griswold* decision. Griswold's act was to prevent forma-

more liberally than do Orthodox Jews. Hall, Commentary, in Abortion and the Law 224, 232 (Smith ed. 1967).

The mere assertion, of course, that the action of the State finds justification in the controversial realm of morals "cannot justify alone any and every restriction it imposes. See Alberts v. State of California, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498. * * *

"Yet the very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as the laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis. * * *"

Poe v. Ullman, 367 U.S. 497, 545-546, 81 S.Ct. 1752, 1778, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting); *cf.* Walz v. Tax Commission of City of New York, 397 U.S. 664, 677-678, 90 S.Ct. 1409, 1415-1416, 25 L.Ed.2d 697 (1970).

19. As Mr. Justice Clark has said,

"It is for the legislature to determine the proper balance, *i. e.*, that point between prevention of conception and viability of fetus which would give the State the compelling subordinating interest so that it may regulate or prohibit abortion without violating the individual's constitutionally protected rights."

Clark, Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola U. L.A.L.Rev. 1, 11 (1969). Whether the State of Louisiana, as defendant suggests, has a constitutional duty under the Fourteenth Amendment to protect embryonic or fetal life from destruction by induced abortion is a question we do not consider in the disposition of this case, and we intimate no opinion on its merits.

We have carefully considered Dr. Rosen's contention that section 37:1285(6) denies to him, as well as certain classes of pregnant women, and poor pregnant women generally, equal protection of the laws, which is guaranteed by the Fourteenth Amendment. In particular, we have considered the argument that an affluent woman, whether by legal or illegal means, has a better opportunity than a poor one to obtain an abortion at little risk to her life or health. We are, however, unwilling to equate the types of inequality suggested by Dr. Rosen with a denial of a protected right under the Fourteenth Amendment. Therefore, we reject plaintiff's equal protection argument.

* I concur in those portions of the Court's opinion which hold that we should not abstain and that the abortion laws are not unconstitutionally vague.

tion of the fetus. This, the court found, was constitutionally protected. If an individual may prevent conception, why can he not nullify that conception when prevention has failed?" Mr. Justice Clark, Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola Law Review of L. A. 1, 8 (1969)

Because, answer the majority of this Court, a "human life" comes into existence at conception, and the State's interest in protecting that life overrides the fundamental human rights of the mother to the control of her own body and to choose whether to bear a child. But in my view the history and operation of the Louisiana abortion law belie the majority's construction of a purpose to protect human life. If the purpose is to protect life, this law is "the very mirror image"[1] of what one would suppose such a law to be. The law rather seems to be an effort to enforce certain views of private morality against those not sharing those views, see note 25, *supra*. Far from protecting human life it tends in practice to destroy it. And not the least of the evils of this law is that it operates as an invidious discrimination against the poor.

I

Fundamental Nature of the Mother's Rights

In Part I of this opinion I pass over the interests of the fetus, and, for purposes of analysis, focus solely on the impact of the abortion law on the *mother*. In this Part I set up an artificial assumption, that the fetus is no more than a collection of living cells, a part of the mother's own body that, when separated, dies. In the next two Parts of the opinion I consider the exact nature of the State's interest in the fetus.

In a series of cases, culminating in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1964), the Supreme Court of the United States has established an area of fundamental human liberty in matters relating to marriage, the family and children. This development is summarized by Mr. Justice White in his concurring opinion in *Griswold* (at 502, 85 S.Ct. at 1691): "It would be unduly repetitious, and belaboring the obvious, to expand on the impact of this [Connecticut anticontraceptive law] on the liberty guaranteed by the Fourteenth Amendment against arbitrary and capricious denials or on the nature of this liberty. Suffice it to say that this is not the first time this Court has had occasion to articulate that the liberty entitled to protection under the Fourteenth Amendment includes the right 'to marry, establish a home and bring up children,' Meyer v. State of Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 and 'the liberty * * * to direct the upbringing and education of children,' Pierce v. Society of Sisters, 268 U.S. 510, 534–535, 45 S. Ct. 571, 573, 69 L.Ed. 1070, and that these are among 'the basic civil liberties of man.' Skinner v. State of Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 [compulsory sterilization of habitual criminals]. These decisions affirm *that there is a 'realm of family life which the State cannot enter without substantial justification.* Prince v. Com. of Massachusetts [321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645]' * * *." (emphasis added).

Griswold reaffirmed and extended these principles. In the most sweeping terms the Court struck down a criminal law which infringed on the rights of Connecticut couples to practice contraception. Although Mr. Justice Douglas's opinion for the Court focused upon the right of "marital privacy," there is no question that the right to prevent unwanted birth of children was involved as well.[2] Mr. Justice Goldberg (joined

1. Baird v. Eisenstadt (1 Cir. 1970), 429 F.2d 1398.

2. The United States Court of Appeals for the First Circuit has interpreted *Griswold* as establishing a fundamental right of birth control. *Baird*, note 1, *supra*. In

by Mr. Chief Justice Warren and Mr. Justice Brennan) spoke of "The marital *right to bear children and raise a family*," 381 U.S. at 497, 85 S.Ct. at 1688 and found that the Constitution protected "against * * * *totalitarian limitation of family size*, which is at complete variance with our constitutional concepts." *Id.* (emphasis added); and Mr. Justice White stressed the fact that "The Connecticut anti-contraceptive statute * * * forbids all married persons to use birth control devices *regardless of whether their use is dictated by considerations of family planning, health, or even life itself* * * * [and that the] clear effect of these statutes, as enforced, is to deny disadvantaged citizens * * access to medical assistance and up-to-date information in respect to proper methods of *birth control*." 381 U.S. at 503, 85 S.Ct. at 1691, 1692 (emphasis added)

It is true that the *Griswold* Court did not pass upon the precise question presented here: *Griswold* involved contraception; this case involves abortion. Nevertheless *Griswold* is critically relevant to the present case. For unlike a procedural holding which may be narrowly confined to its particular facts, the *Griswold* decision rested upon the broadest and most sweeping principles of substantive constitutional law. The various opinions may have disagreed as to the methodology by which, or the particular Amendments from which, the right of family privacy is derived. But on one point the seven majority Justices agreed: The "right," be it derived from the First or Fourth, the Ninth or Fourteenth, Amendments, or all of them, was a right "so rooted in the traditions and conscience of our people as to be ranked as fundamental." 381 U.S. at 487, 85 S.Ct. at 1683.

The language of the *Griswold* opinions is strong and unequivocal. Mr. Justice Harlan found that "For reasons stated at length in my dissenting opinion in Poe v. Ullman * * * [the Connecticut] enactment violates basic values 'implicit in the concept of ordered liberty,' Palko v. Connecticut [citation omitted]." 381 U.S. at 500, 85 S.Ct. at 1690. In Mr. Justice White's view "[the] decisions affirm that there is 'a realm of family life which the State cannot enter' without substantial justification [citation omitted]." And Mr. Justice Goldberg, Mr. Chief Justice Warren, and Mr. Justice Brennan considered that "the integrity of that [family] life is fundamental," Griswold v. Connecticut, *supra*, 381 U.S. at 495, 85 S.Ct. at 1687, that it is one of "the requirements of a free society," *Id.* at 493, 85 S.Ct. at 1687 (quoting from Poe v. Ullman, dissenting opinion of Mr. Justice Douglas), and that it "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' * * *." *Id.* at 493, 85 S.Ct. at 1686.

For me, then, the *Griswold* case contains a broad command. It says, to this and other courts: You must protect the

a case involving the application of the Massachusetts anti-contraceptive law to single persons the Court said:

"[W]e consider that [the law] conflicts with fundamental human rights. In the absence of demonstrated harm, we hold that it is beyond the competency of the state. See the various opinions in Griswold v. Connecticut, *ante*, particularly those of Mr Justice Harlan and Mr. Justice White, concurring. See also Richards v. Thurston, 1 Cir., 4/28/70, 424 F.2d 1281." (Aldrich, C. J.).

Several other courts have held that *Griswold's* right of privacy extends to single persons, and, in the "absence of demonstrated harm," to abortion as well as contraception: People v. Belous, 71 Cal.2d 996, 80 Cal.Rptr. 354, 458 P.2d 194 (1969); Babbitz v. McCann, 310 F.Supp. 293 (E.D.Wis., 1970); see particularly State v. Munson (Cir.Ct., Pennington County, S. Dakota, April 6, 1970); Roe v. Wade, 314 F.Supp. 1217 (N.D.Texas, Civ. Nos. 3-3690-B & 3-3091-C, June 17, 1970). See also United States v. Vuitch, 305 F.Supp. 1032 (D.D.C., 1969).

I agree with these courts that *Griswold* establishes a right of birth control, and I see no reason to limit the right to married persons (see note 25, *supra*).

privacy and intimacy of family life, for such relationships lie at the very core of a free society. And laying aside for the moment the interest of the State, I have no doubt that the Louisiana abortion statute falls within this sensitive area.

Indeed in some ways the right to have an abortion is even more compelling than the rights involved in *Griswold*. Contraception involves the first line of defense against an unwanted birth; abortion the last. At the point contraceptives are used birth is only a possibility; there are a number of forces tending to prevent it apart from contraception. When a mother seeks an abortion, however, she has already conceived. Unless a spontaneous abortion or miscarriage occurs, she is faced with the *immediate* reality of carrying and bearing a child against her will. At least two fundamental human rights are thus involved: The mother's autonomy over her own body, and her right to choose whether to bring a child into the world.[3]

It is difficult to overstate the importance of what the mother has at stake. In physical terms alone the thought of making a mother carry and bear a child against her will is not a pleasant one.[4] But the matter cuts much deeper than mere physical pain. Carrying and bearing a child may involve anxiety and trauma and great psychic pain. See Aarons (M.D.), "Therapeutic Abortion and The Psychiatrist," American J. Psychiat. 124:6, December 1967. Infrequently it results in suicide. *Id.* In some cases the child may be born deformed, or the birth may in this or other respects impair the physical and mental health of the mother. Poor families, with little ability to take advantage of means of self-protection that are of easy access to the rich, see, e. g., Griswold v. Connecticut, 381 U.S. 479, 503, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1964) (concurring opinion of Mr. Justice White), often suffer physical, and therefore possibly other kinds of deprivation by the constant birth of children. But perhaps most important, the birth of a child unalterably affects the emotional lives of both mother and child. At its best, it makes possible a relationship of love; at its worst, it creates an unwanted child. When the State seeks to touch the very core of a person's being in such a fashion, and to thrust upon mother and (potential) child such a relationship *by force*, it violates "those 'fundamental principles of liberty and justice which lie at the base of all our civil and political in-

3. The majority argue that the right to abortion cannot be equated with the general right to choose whether or not to bear a child since alternative means are available to prevent conception. This argument is unrealistic. More than a million women found it necessary to have abortions last year (Life Magazine, Feb. 27, 1970). Kinsey found that 22% of the married women interviewed had had one or more abortions by age 45. Abortion in the United States, 50, 54 (Calderon ed. 1958). Between 88 and 95% of the premarital pregnancies in his sample resulted in abortion. Obviously there are great numbers of women who, for one reason or another, are not able to utilise alternative methods. See Griswold v. Connecticut, 381 U.S. 479, 503, 85 S.Ct. 1678, 1692, 14 L.Ed.2d 510 (1964) (concurring opinion of Mr. Justice White).

4. The authority for the idea that the Constitution extends significant protection to a person's sovereignty over his own body extends back as early as 1891, when the Supreme Court stated:

"No right is held more sacred, [n] or is more carefully guarded • • • than the right of every individual to the possession and control of his own person, free from all restraints or interference of others unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right to one's person may be said to be a right of complete immunity: to be let alone.'" Union Pacific Railroad v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 35 L.Ed. 734 (1891).

Of course the right has limits. In Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1904), for example, the Supreme Court upheld a compulsory vaccination law. The lengths to which the Court went, however, to justify a shot in the arm point up the degree to which personal autonomy is entitled to protection.

stitutions * * *.' [citation omitted]." *Griswold, supra*, 381 U.S. at 493, 85 S.Ct. at 1687 (concurring opinion of Mr. Justice Goldberg). As Mr. Justice Brandeis said, dissenting in Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928):

> "The protection guaranteed by the [Fourth and Fifth] amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." [5]

That the State in these circumstances bears a heavy burden of proof to justify the law is beyond doubt.[6] Louisiana urges upon us the protection of human life, a claim which bears examining. Meanwhile, however, both parties have confused the matter by their use of the science of biology.

II

The Relevance of Biology

The biological evidence presented in this case suggests that some sort of human organism exists from the time of conception.[7] The parties, however, would go further and make biology conclusive, for both court and legislature, as to the existence or non-existence of a "human being" at the time of conception. These efforts seem misplaced.

The meaning of the term "human being" is a relative one which depends on the purpose for which the term is being defined. To the scientist a "human being" may be no more than union of sperm and egg; to the poet or to society as a whole the term may connote something else.[8] Science at best marks the

5. This passage is quoted in Mr. Justice Goldberg's concurring opinion in *Griswold, supra* at 550, 85 S.Ct. 1678 and by Mr. Justice Harlan in his dissent in Poe v. Ullman, 367 U.S. 497, 550, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961).

6. See Part III of this opinion.

7. Compare the following excerpt from the cross-examination of Dr. Christopher Tietze, an expert witness in the field of medicine (TR. 14, 2):
"Q. Dr. Tietze, I do not mean to keep quarreling with you, but you keep referring to a human person and under your definition of a human person, you may well be right. I have asked you in my question with regard to a human being, is the embryo a human being in an earlier state of development of the fetus?"
"A. If you will define, if you are referring, apparently to a human being as something begotten by man and potentially to become man, yes, it would be an early stage of a human being. But this is a very special definition and I think an essential one to the discourse between you and me."
* * * * *
"Q. It is also fair to say that this zygote is an organism of the same gene structure of a fully-grown, highly complex adult?"
"A. It has the same, yes * * *."

8. Cross-examination of Dr. Christopher Tietze, TR. 4-5:
"Q. Now, with regard to this zygote which is an early embryo, which is an early fetus, in biological terms, would it be not a fair statement to say that this is a human being?"
"A. I think we are getting ourselves, now, into a philosophical question. I would say as a close approximation to my own reaction to this thing—and that is what we all must do, is face philosophical conceptions—that it is a potential human being and I would not refer to the zygote as an early embryo, I would refer to the zygote as a potential embryo."
* * * * *
"Q. You injected the word philosophical, philosophy, and I ask you from a biological standpoint, isn't this zygote, this embryo, this fetus a human being?"
"A. I think the term human being, with all of its connotations, extends far beyond biology and is a philosophical con-

outermost limits of life; it cannot tell us nearly so well what a human being *is* as it can what a human being definitely *is not*. The Romans, for example, practiced infanticide with indifference.[9] No doubt the science of the Romans regarded the infant as a human being; but can one say the Romans did?

Present practice as well shows the futility of attempting to frame the question in terms of absolutes.[10] In Louisiana, for example, a mother who intentionally destroys her own fetus is guilty of no criminal offense, see, e. g., Simmons v. Victory Indus. Life Ins. Co., 18 La.App. 660, 139 So. 68 (Orleans Ct.App.1932); however, the moment the infant is born, the same act is punishable by the penalty "which the law exacts in all such cases, which penalty is death." State of Louisiana v. Burks, 202 La. 167, 11 So.2d 518, 520 (Sup.Ct.La.1942); La.Rev.Stat. Ann. 14:30 (1950).

The question in this case, then, is not the abstract one of whether a fetus is a "human being," but the more concrete one of the extent to which human value has been assigned to the fetus by *Louisiana*.

We must analyze the precise nature of the State's interest in the fetus to determine whether, a part from the "label" it carries, it is in *substance* the kind of interest which is "compelling" and which "subordinates" the rights of the mother. Griswold v. Connecticut, 381 U.S. 479, 496, 504, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).[11]

cept. If you ask me whether the zygote normally in the course of circumstances, with exceptions, will develop into a human being, obviously the answer is yes. Whether this human being meets all of the other qualifications that we attach to this important term, I submit, is not a question of biology * * *."

* * * * *

"A. * * * To be a human person in any society is something conferred to an individual by his fellow citizens. In some societies, a child was not a human person, in the sense that his parents could do away with him at will * * * I think what we call a human person is an imputed quality, a quality conferred by the society * * *."

Compare the following statement of Mr. Justice Clark:

"To say that life is present at conception is to give recognition to the potential, rather than the actual. The unfertilized egg has life, and if fertilized, it takes on human proportions. But the law deals in reality, not obscurity—the known rather than the unknown. When sperm meets egg life may eventually form, but quite often it does not. The law does not deal in speculation. The phenomenon of life takes time to develop, and until it is actually present, it cannot be destroyed. Its interruption prior to formation would hardly be homicide, and as we have seen, society does not regard it as such. The rites of Baptism are not performed and death certificates are not required when a miscarriage occurs. No prosecutor has ever returned a murder indictment charging the taking of the life of the fetus. This would not be the case if the fetus constituted human life." Loyola of L.A.Rev., vol. 2 (1969).

9. Comment, To Be Or Not To Be: The Constitutional Question of the California Abortion Law, 118 U.Pa.L.Rev. 643, 653, n. 60 (1970) (citing J. Noonan, Contraception, 85–87 (1965).

10. "* * * In the ultimate analysis Catholics do not differ from advocates of easy abortion because Catholics hold that a human life is present in the fetus from the earliest moment of its existence. Catholics differ with their opponents rather over the nature and quality of the reasons which can justify an abortion. Utilizing the traditional principles of moral theology Catholic thought justifies at least the termination of an ecoptic pregnancy and the unintended destruction of a fetus when the removal of a uterus is medically required. Catholics therefore should move away from any line of reasoning or species of rhetoric which suggests that the proponents of abortion are advocating homicide. Catholics should delimit the question to the more precise issue involved, namely, the nature of the reasons which can furnish a moral justification for the termination of the existence of the fetus."
Robert F. Drinan, The Morality of Abortion Laws, Association for the Study of Abortion, Inc., Reprint 1 (1968). (Father Drinan was the Dean of the Boston College Law School, and has just been elected to Congress).

11. Concurring opinions of Mr. Justice Goldberg and Mr. Justice White.

III

The Louisiana Abortion Statute

The opinion of the majority reads very much as though this were a case involving the validity of an ordinary police measure. Every doubt is resolved in favor of the law. Normally, of course, this is as it should be when the serious question of the constitutionality of legislation is raised. But "Surely the right involved in this case * * * 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive from shifting economic arrangements.' Kovacs v. Cooper * * * (opinion of Frankfurter, J.)." Griswold v. Connecticut, 381 U.S. 479, 502, 85 S.Ct. 1678, 1691, 14 L.Ed.2d 510 (1965) (concurring opinion of Mr. Justice White).

"Where there is a significant encroachment upon personal liberty," the presumption of constitutionality is reversed, and "the *State* may prevail only upon *showing* a subordinating interest which is compelling." *Griswold, supra*, at 504, 85 S.Ct. at 1692 (concurring opinion of Mr. Justice White) (emphasis added). I take it then that the State has the burden of proof, see, e. g., Shapiro v. Thompson, 394 U.S. 618, 634–638, 89 S. Ct. 1322, 22 L.Ed.2d 600 (1969);[12] Sherbert v. Verner, 374 U.S. 398, 406–407, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963);[13] Bates v. City of Little Rock, 361 U.S. 516, 525–527, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960);[14] Skinner v. State of Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942),[15] or that, at the very least, the fundamental rights at stake here

> "require particularly careful scrutiny of the State needs asserted to justify their abridgment." Mr. Justice Harlan, dissenting in Poe v. Ullman, 367 U.S. 497, 543, 81 S.Ct. 1752, 1777, 6 L.Ed.2d 989 (1961)

I turn to the statute [La.Rev.Stat.Ann. § 14:87 (Supp.1970)]:

> "87. ABORTION
>
> Abortion is the performance of any of the following acts, with the intent of procuring premature delivery of the embryo or fetus:
>
> (1) Administration of any drug, potion, or any other substance to a female; or
>
> (2) Use of any instrument or any other means whatsoever on a female.
>
> Whoever commits the crime of abortion shall be imprisoned at hard labor for not less than one nor more than ten years." As amended, Acts 1964, No. 167.

12. At pp. 634–637, 89 S.Ct. at pp. 1331–1333 the Court analyzes the State's asserted justifications for the residency requirement for welfare and finds that they are "plainly belied" by the facts (p. 635, 89 S.Ct. p. 1332) and will not "withstand strict scrutiny." (p. 636, 89 S.Ct. p. 1332)

13. "It is basic that no showing merely of a rational relationship to some colorable State interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation' * * *." (p. 406, 83 S.Ct. p. 1795).
At p. 407, 83 S.Ct. at p. 1795 the Court referred to the "asserted state interest" and concluded that "*Nor * * * would the record appear to sustain it.*" (emphasis added)

14. "It cannot be questioned that the governmental purpose upon which the municipalities rely is a fundamental one. No power is more basic to the ultimate purpose and function of a government than is the power to tax. * * * But governmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion in the preamble of the ordinance. When it is shown that state action threatens significantly to impinge upon constitutionally protected freedom it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification." (p. 524, 80 S.Ct. p. 417)

15. "Strict scrutiny [of state sterilization law] is essential * * *."

Defendants urge again and again in their brief, and the majority of this court accept, the proposition that we are here dealing with a statute whose purpose is the protection of "human life." If this is true it is certainly not apparent from the statute itself. Unlike, for example, the Wisconsin statute,[16] which specifically refers to the "life" of an unborn "child," and defines "unborn child" as "a human being from the time of conception until it is born alive," the Louisiana statute makes no reference to "human life;" it refers only to the "embryo or fetus."[17] In Wisconsin the crime of abortion consists of "intentionally *destroy[ing]* the life of an unborn child." (emphasis added) In Louisiana, on the other hand, the crime consists of performing various acts on a "female" for the "*purpose* of procuring *premature delivery*." (emphasis added). Thus in Wisconsin no crime is committed unless the life of the fetus is actually terminated. In Louisiana, "[The abortion statute] does not use the word 'attempt,' but penalizes the felonious administration of any drug, potion, or anything to any woman, for the purpose of procuring abortion or premature delivery, and prescribes *only one penalty*. Hence Section 807 makes no distinction between the attempt and the actual procurement of abortion or premature delivery." State of Louisiana v. Mauvezin, 136 La. 746, 67 So. 816 (1915) (emphasis added). So far as I have been able to determine, abortion is the only crime in Louisiana in which there is no distinction between an attempt and commission of the substantive crime.[18] (Indeed the "attempt" in Louisiana *is* the substantive crime). In past versions of the statute the subject of an abortion was a "pregnant"[19] female; in 1964 the legislature decided that any "female" would do. Finally, it is not even certain whether an intent to terminate fetal life is necessary for a conviction under the Louisiana statute. The 1870 statute, as

16. Wis.Stat. § 940.04:
"(1) Any person, other than the mother, who intentionally *destroys* the *life* of an unborn *child* may be fined not more than $5,000 or imprisoned not more than 3 years or both.
(2) Any person, other than the mother, who does either of the following may be imprisoned not more than 15 years:
(a) intentionally destroys the *life* of an unborn quick child; or * * *
(6) In this section 'unborn child' means a *human being* from the time of conception until it is born alive." (emphasis added)

17. Compare La.Rev.Stat.Ann. § 14:29, entitled "Homicide," which provides in part:
"Homicide is the killing of a *human being* * * *." (emphasis added)
and La.Rev.Stat.Ann. § 14:30, entitled "Murder," which reads in part:
"Murder is the killing of a *human being* * * * [with specific intent to kill] * * * whoever commits the crime of murder shall be punished by death."

18. Compare La.Rev.Stat.Ann. § 14:27, entitled "Attempt," which provides in part:
"Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of or tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; * * *
Whoever attempts to commit any crime shall be punished as follows:
(1) If the offense so attempted is punishable by death or life imprisonment he shall be imprisoned at hard labor for not more than twenty years;
(2) If the offense so attempted is theft or receiving stolen things, he shall be fined not more than two hundred dollars, or imprisoned for not more than one year, or both;
(3) In all other cases he shall be fined or imprisoned, or both, in the same manner as for the offense attempted; but such fine or imprisonment shall not exceed one-half of the largest fine, or one-half of the longest term or imprisonment prescribed for the offense so attempted, or both."

19. The 1942 version of the statute, La.Rev.Stat.Ann. § 14:87, read in pertinent part:
"* * * (1) Administration of any drug [etc.] * * * to a *pregnant* female; or
(2) Use of any instrument [etc] * * * on a *pregnant* female, * * *" (emphasis added)

amended, La.Acts, 1888, No. 24,[20] prohibited certain acts with intent to procure an "abortion" *or "premature delivery"*. (emphasis added). Today the statute does not even use the word "abortion" but simply the broader term "premature delivery."

Thus the Wisconsin statute at least purports to emphasize the life of the fetus; the Louisiana statute focuses more on an intent to interfere with nature irrespective of the fate of the fetus (or indeed of whether there even is a fetus). Along with "prostitution," "crimes against nature," etc. the crime of abortion in Louisiana is an "Offense Affecting Sexual Immorality"[21] rather than an "Offense Against The Person."[22] The provision of the Criminal Code immediately following Abortion, entitled "Distribution of Abortifacients,"[23] provides *one penalty* for distribution of abortifacients *or contraceptives*[24] (Cf. Baird v. Eisenstadt, 1 Cir., 1970, 429 F.2d 1398: "We are led inevitably to the conclusion that * * * it is contraceptives *per se* that are considered immoral * * *.")[25]

20. "Whoever shall feloniously administer, or cause to be administered, any drug, potion, or any other thing, to any woman for the purpose of procuring a *premature delivery*, or whoever shall administer, or cause to be administered, to any woman pregnant with child, any drug, potion, or any other thing, for the purpose of procuring *abortion* or a premature delivery, or whoever by any means whatsoever shall feloniously procure abortion or premature delivery, shall be imprisoned at hard labor for not less than one nor more than ten years." (emphasis added)

21. La.Rev.Stat.Ann. § 14:80–89.

22. La.Rev.Stat.Ann. § 14:29–50.

23. La.Rev.Stat.Ann. § 14:88.

24. "We call your attention to Act 95 of 1920, [the predecessor of the present Abortifacient Statute, note 19 *supra*] which is an Act to prohibit the printing or publishing of an advertisement of any secret drug for the use of females for the procurement of abortion or prevention of conception * * * We are therefore of the opinion that birth control in any form would fall within the criminal statutes now in force in this state."
Op.Atty.Gen. of La. 128, 129 (1932–1934). See also Ops.Atty.Gen. of La. 73 (1934–1936); Comment, 23 La.L.Rev. 773, 775 (1963).
The framers of the 1942 Criminal Code were aware of this interpretation of the law at the time they re-enacted it, see Morrow, The Louisiana Criminal Code of 1942—Opportunities Lost and Challenges Yet Unanswered, 17 Tul.L.Rev. 1, 22 (1942) (Morrow was one of the principal reporters of the Code).

25. H. L. A. Hart has distinguished between "public" and "private" morality in the criminal law. "Public" morality involves actions that are harmful independent of their repercussion on the general moral code. Rape is an example. "Private" morality involves actions that are not harmful to others but offensive to prevailing (or sometimes not so prevailing) moral feelings. Examples are fornication or consenting homosexuality. As Hart puts it, a particular practice violates private morality "if the thought of it makes the man on the Clapham omnibus sick." 62 Listener 162, 163 (July 30, 1959).

In John Stuart Mill's view government has no business enacting *private* morality into the criminal law:

"The only purpose for which power can be rightfully exercised over any member of a civilised community against his will is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant."

On Liberty.

The British government has adopted Mill's position. See Report of the Committee on Homosexual Offenses and Prostitution (Wolfenden Report) 9–10, 20–21, 24, 79–80 (1957). So has the American Model Penal Code, see Tentative Draft No. 4, Comments to Article 207, Sexual Offenses. In the United States, however, courts often affirm—almost always in dictum—the propriety of statutes against fornication, etc. See e. g., Griswold v. Connecticut, 381 U.S. 479, 498–499, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (concurring opinion of Mr. Justice Goldberg). But where fundamental rights are involved, as they are in this case, private morality alone cannot justify their abridgment:

"The mere assertion that the action of the State finds justification in the controversial realm of morals cannot justify alone any and every restriction it im-

Concern for the protection of human life, then, is hardly manifest from the face of the statute.[26] In actual operation the statute fares even worse. Since 1870, when the abortion law was first enacted, there have been no more than four reported decisions of prosecutions.[27] There are only two reported prosecutions subsequent to 1955. All of these prosecutions are against the "criminal" abortionist; as against the *physician* there are no reported decisions of prosecutions.[28]

Perhaps even more revealing, however, is the fact that the *woman* who submits to abortion is guilty of no criminal offense:

> "It is true that a female who voluntarily becomes the subject of an abortion, without justifiable medical reason, is guilty of a detestible and revolting offense against the laws of nature, which is universally condemned, but notwithstanding this, such woman is not guilty of any criminal offense known to the laws of this state." Payne v. Louisiana Ind. Life Ins. Co., 33 So.2d 444 (Orleans Ct. App.1948)

This is true even in the case where the woman intentionally aborts herself. Simmons v. Victory Indus. Life Ins. Co., *supra*. It may be argued that the reason for exempting the mother is to encourage her to testify against the "abortionist." But surely this puts the cart before the horse. Suppose, for example, that A hires B to kill C; would the State

poses." Poe v. Ullman, 367 U.S. 497, 545, 81 S.Ct. 1752, 1778, 6 L.Ed.2d 989 (1961) (dissenting opinion of Mr. Justice Harlan). See also Baird v. Eisenstadt, *supra*.

26. Both parties seek to show the State's interest or lack of it in the fetus by pointing to various succession laws. One statute, for example, says that children in the womb are considered as already born and that an inheritance may "devolve" to them before their birth. La.Civ.Code Ann. Art. 29. See also La.Civ.Code Ann. Art. 954. But the right to inherit does not vest unless or until the child is "born alive," La.Civ.Code Ann. Arts. 956-957, and "children born dead are considered as if they had never been born or conceived." La.Civ.Code Ann. Art. 28.

In my view the succession laws are of doubtful relevancy to the abortion statute; at any rate they are too contradictory to support the argument of either party.

27. State of Louisiana v. Sharp, 248 La. 865, 182 So.2d 517 (1966); State of Louisiana v. Pailet, 246 La. 483, 165 So. 2d 294 (1964); State of Louisiana v. Dore, 227 La. 282, 79 So.2d 309 (1955); State of Louisiana v. Mauvesin, 136 La. 746, 67 So. 816 (1915).

Compare the "Gambling" statute, La. Rev.Stat.Ann. § 14:90, under which there have been at least 50 reported prosecutions. "Sodomy" (Abortion's bedmate in the Code) has even resulted in a greater number of reported prosecutions.

28. The absence of reported cases is not the only evidence of failure to prosecute the physician:

> "The lack of enforcement was noted in 1868, H. Storer & F. Heard, Criminal Abortion 136-147 (1868), and has continued to the present, *see* L. Lader, Abortion 70-73 (1966); Ziff, Recent Abortion Law Reforms (Or Much Ado About Nothing) 60 J.Crim.L.C. & P.S. 3, 8 (1969)." 118 U.Pa.L.Rev. 647, 657, n. 87 (1969).

Speaking of the considerations that Dr. Belous might have weighed in deciding whether or not to perform an abortion in California one writer could blithely conclude "Considering the fact that the possibility of criminal prosecution and loss of practice is rarely realized. * * *" *Id.*

And here in Louisiana Professor C. J. Morrow, to whom defendants refer in their brief as "one of the principal redactors of the Criminal Code," has observed as a fact what the lack of reported prosecutions reflect:

> ***"It is common knowledge that abortions of all types are performed every day, and that there are no criminal prosecutions. This is true because there is obviously common popular acceptance of the practice, in spite of the theoretical disapproval in some quarters. However the tremendously unfortunate aspect of the situation is that under the present state of the law doctors are forced into either open defiance of the positive law in what they deem to be justifiable cases, or into clandestine practice under substandard conditions."*** Morrow, The Louisiana Criminal Code of 1942—Opportunities Lost and Challenges Yet Unanswered, 17 Tul.L.Rev. 1, 22 (1942) (emphasis added).

grant A immunity in exchange for his testimony against B? If abortion is truly regarded as the destruction of human life, the mother is the principal criminal; the "abortionist" is merely her paid executioner. If the State really means to protect the life of the fetus why does it fail to deter the person most directly responsible for taking it? Save for the instigation of the mother the "criminal abortionist" would not exist. Finally, why is the woman who aborts herself immune? Perhaps it will be argued that otherwise she may be afraid to seek medical help if injury results; but this proves only that the health of the mother is considered more important than the preservation of the fetus.[29]

See *conclusion "2", infra.*

The conclusions I draw from the foregoing facts are as follows:

(1) In practice the efforts of the State on behalf of the fetus belie the claim of a compelling state interest. Abortion actually occurs on a massive scale in the United States—estimates run between one and three million per year. Yet there is no significant attempt at deterrence. "Lamented" by some, "decried" by others, the fact remains that the phenomenon of abortion is ignored by most. The fetus in Louisiana is shielded neither from mother nor physician by the criminal law; rather the mother is shielded (rather imperfectly) from the quack. Abortion is thus a singular "crime" in our law; it is a crime without a criminal. A poor person who may steal for the most pressing human needs is branded as a "thief" and punished by the criminal law—often severely. This comes as no surprise: Our society holds the institution of private property in high regard; he who tampers with it does so at his peril. A mother, however, may take the life of her fetus at pleasure so far as the criminal law is concerned. In practice, so may a licensed physician. Surely the remarks of Mr. Justice Frankfurter in the Connecticut Birth Control case are relevant here:

> "* * * The undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis. * * * Deeply embedded traditional ways of carrying out state policy * * *—or not carrying it out—are often tougher and truer law than the dead words of the written text." Poe v. Ullman, 367 U.S. 497, 502, 81 S.Ct. 1752, 1755, 6 L.Ed.2d 989 (1961)

(2) The statute is irrational and self-contradictory, a menace to public health without serving any compensating public need. As previously noted prosecution seems to be almost exclusively against the quack and not the physician. Since the crime, *qua fetus*, is equally great when committed by a physician *the enforcement* of the statute manifests little or no concern for the fetus but rather an overriding concern for the protection of the safety and health of the mother. Yet the menace to public health is clearly the product of the statute itself. The statute's primary effect is not to prevent or deter abortion, see "Conclusion (1)," *supra*, but simply to make it unsafe. Can it be said that there is a "reasonable relation between the prohibition * * * and the protection of the public health, education and welfare"? Sperry & Hutchinson Co. v. Director, 307 Mass. 408, 418, 30 N.E.2d 269, 275 (1940), or that the statute "bears a reasonable relation to a proper legislative purpose * * *." Nebbia v. New York, 291 U.S. 502, 537, 54 S.Ct. 505, 516, 78 L.Ed 940 (1934); Meyer v. Nebraska, 262 U.S. 390, 399–400, 43 S.Ct. 625, 67 L.Ed. 1042 (1923)?

29. Compare the child battering cases. One of the reasons heavy penalties sometimes are not imposed is to encourage the child batterer to seek medical help for the child. Thus low penalties are no indication that the crime is taken lightly but rather that the need to protect the welfare of the child is balanced against the need to punish the child batterer. In the situation where the mother aborts herself, however, if any balance is struck it is struck in favor of the mother, not the child.

(3) The statute inflicts cruel and unusual punishment on the mother and violates equal protection of the law. As pointed out, the State does not attempt to deter abortion by imposition of criminal sanctions directly on the principal actor—the mother. At the same time, however, it makes it illegal for anyone else to perform an abortion. This of course has the effect of raising the price of abortion at all levels of skill. Thus to the extent that the statute deters the mother, it does so only by putting safe abortion beyond her means or by making her risk serious bodily injury at the hands of a relatively low-priced unskilled abortionist.

In Baird v. Eisenstadt, *supra.*, the Court of Appeals for the First Circuit held that it was impermissible for Massachusetts, through its anti-contraceptive law, to pursue a policy of deterring fornication "by making the penalty a personally, and socially, undesired pregnancy." The present case is probably distinguishable from *Baird.* I do not think the legislature *intended*[30] to encourage women to risk their health and lives; but because the statute makes abortion illegal for everyone but the mother it works precisely that result.

This purposeless suffering which the statute brings about is made all the more intolerable by the fact that its victims are primarily the poor:

> "The present law places an unfair discrimination on the poor in that persons with money may obtain safe abortions either by travelling to other jurisdictions, by going to high priced competent though illegal abortionists, or by obtaining legal abortions here based on 'sophisticated indications.'" Report of the Governor's Commission Appointed to Review New York State's Abortion Laws, 17 (Mar.1968)

Deaths and maiming from abortion by nonmedical means such as soaps, chemicals, knitting needles, coathangers, etc., appear to be the basic if not the exclusive property of the non-white poor. Gold,[31] for example, shows that between 1960–62 in New York City abortion accounted for 55.5%, 49.4% and 25.2% respectively of the Puerto Rican, nonwhite and white puerperal death rates. Gold does not report figures for injury short of death, but one can imagine the toll they must take in the ghetto.

30. But see defendant's brief: "Plaintiff also argues that the statute prohibiting abortions forces women to take 'coat hangers and knitting needles' * * * and that this could be corrected by repealing or holding the statute unconstitutional. It is argued that forcing women to go to unskilled abortionists is more of a danger to their health. This is a specious argument. *It is neither necessary nor proper for society to remove obstacles that are in the way of the criminal in order to make it easier to commit the crime.*" (emphasis added)

31. Gold, Erhardt, Jacobziner & Nelson, Therapeutic Abortions in New York City: A Twenty Year Review, 55 Am.J.Pub. Health 964 (1965); see also Note, Abortion and the Law: A Proposal for Reform in Louisiana, 43 Tul.L.Rev. 834, 836–837 (1969):

> "Because the demand for abortion cannot be met within the existing legal framework, illegal means are increasingly employed. For an affluent woman, able to pay a fee of $300 to $600, skilled physicians willing to work outside the law are available. [Citing Time, vol. 90, Oct. 13, 1967 at 33] Indeed in Miami alone abortionists collected $20,000,000 for their services in 1967 * * * [citing Time, *supra*].
>
> Since hospital abortions are generally unavailable to precisely those persons who are unable to afford the expensive and illegal private abortions the less affluent are forced to resort to the unskilled. [citing L. Lader, *Abortion* (1967)] Obviously the greater proportion of the more than 1,000 deaths annually due to abortions [citing Time, *supra*] occur among these expectant mothers. However, the annual death toll is only a small part of the social cost of such a system. To the death toll must be added thousands of women crippled by infection, thousands whose sexual organs are damaged so that they are unable to achieve normal sexual satisfaction, and thousands rendered irreversibly barren [citing Time, *supra*]. These, then, are the results of the prevailing American solution to the problems posed by abortion."

If the penalty is built-into the statute, so is the discrimination. *Cf.* Griswold v. Connecticut, 381 U.S. 479, 503, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965);[32] Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942).[33] See also note 31, *supra*. By making abortion legal for the mother, but illegal for anyone else, the statute's *sole* effect on the mother is to raise the price of abortion. Abortion becomes less available to the degree to which one is not able to afford the "tax." For some the higher price is not an obstacle; for others it is either prohibitive, or, to the extent to which forces them to go to the less skilled practitioners (or to abort themselves), highly dangerous. If criminal sanctions were applied to well-off and poor women alike (not just in theory but in practice), as well as to the "abortionist," the increased price of abortion would be an *additional* (as well as unavoidable) deterrent, *but not the only one*. But the Louisiana statute does not deter rich and poor alike by equal application of the criminal law; it simply makes safe abortion less available to the poor than it would otherwise be. The person with means remains perfectly free to procure a high-priced safe abortion without fear of criminal sanction. This discrimination is therefore far more than an unequal side-effect of an otherwise equal law. The law itself is unequal. It is a *direct* discrimination against the poor, a gross violation of this country's "pledge of the protection of equal laws." Yick Wo v. Hopkins, 118 U.S. 356, 369, 68 S.Ct. 1064, 1070, 30 L.Ed. 220 (1886). Moreover, since the discrimination affects the most fundamental human rights —either by denying abortion to the poor altogether or by subjecting them unequally to risks of life and limb—"*strict* scrutiny * * * is essential, lest *unwittingly, or otherwise* invidious discriminations are made against groups or types of individuals in violation of the constitutional guarantee of just and equal laws." Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (compulsory sterilization law) (emphasis added). See also note 32, *supra*. Many women lose the use of their sexual organs as a result of the abortion laws, see note 31, *supra*, just as did the habitual criminals in *Skinner*. I would hold the statute invalid on the ground of equal protection alone.

(4) The abortion statute neither has a clear purpose to protect fetal life, nor is there good reason to believe it significantly does so in fact. (except, perhaps, where the poor are concerned). See "Conclusions (1) and (3)," *supra*, text at notes 26–29, *supra*, Abortion and the Law 23 (Smith ed. 1967); *Cf.* Griswold v. Connecticut, *supra*, 381 U.S. at 498, 85 S.Ct. at 1689.[34]

These, then, are the weighty State "interests" for which the mother must suffer and, in an estimated 8,000 cases last year, die. I must dissent.[35]

32. "And the clear *effect* of these statutes, *as enforced*, is to deny disadvantaged citizens of Connecticut, those without either knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control * * *. In my view, *a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment.* Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 * * * Skinner v. State of Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, [86 L.Ed. 1655] * * *." (emphasis added) (concurring opinion of Justice White)

33. "* * * strict scrutiny * * * is essential, lest *unwittingly or otherwise* invidious discriminations are made against groups or types of individuals in violation of the constitutional guarantee of just and equal laws. * * *" (emphasis added).

34. "[The State] says that preventing the use of birth-control devices by married persons helps prevent the indulgence by some in such extra-marital relations. The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth control devices * * *." (concurring opinion of Justice Goldberg).

35. "But, as might be expected, we are not presented simply with this moral judg-

I attach as an appendix portions of the excellent opinion of Judge Clarence P. Cooper, which is otherwise not reported.

APPENDIX

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH DAKOTA, WITHIN AND FOR PENNINGTON COUNTY

STATE OF SOUTH DAKOTA, Plaintiff,
vs.
H. BENJAMIN MUNSON, Defendant

MEMORANDUM DECISION

April 6, 1970

CLARENCE P. COOPER, Circuit Judge:

"* * * most of the abortion laws were passed in the so called 'Victorian' era, a time when moral and religious fervor against anything regarded as sinful, resulted in many laws governing morals and personal conduct. The South Dakota statute dates back to 1877. Most of these laws governing personal or private conduct, like the 'blue laws' have either been repealed or have not been enforced. The laws prohibiting abortion represented a change from the common law which permitted abortion in the initial stages of pregnancy, before quickening of the fetus. * * *

"According to reliable estimates, more than a million American women had abortions last year. Of these about 350,000 needed hospital care when they attempted to abort themselves, and more than 8000 of these self-help cases died. (Life Magazine, Feb. 27, 1970) Enforcement of the abortion laws has been chiefly against quacks and charlatans who have botched the job, and the woman lived to complain. Where death ensues, the prosecution has been for homicide. It is a rare case when a licensed physician has been prosecuted. In no instances has the woman been prosecuted, although the abortion laws are directed equally against the woman seeking an abortion.

"With such massive disregard for the abortion law, reflecting a radical change in public attitude, it is in order to determine whether the exercise of the police power in prohibiting abortion is 'sanctioned by usage, held by prevailing morality to be necessary to public welfare, or endangers the vital interests of society', criteria which over the years have been used to measure the right of the State to regulate personal and private conduct. * * *"

ment to be passed on as an abstract proposition. The secular state is not the examiner of consciences: it must operate in the realm of behavior of overt actions, and where it does so operate, not only the underlying, moral purpose of its operations, but also the *choice of means* becomes relevant to any Constitutional judgment on what is done. The moral presupposition on which appellants ask us to pass judgment could form the basis of a variety of legal rules and administrative choices, each presenting a different issue for adjudication." Mr. Justice Harlan, dissenting, Poe v. Ullman, 367 U.S. 497, 547, 81 S.Ct. 1752, 1779, 6 L.Ed.2d 989 (1961).

Item No. 28

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS

STATE OF MISSOURI

SAMUEL U. RODGERS, M.D.; DAVID ROTHMAN, M.D.; DAVID HALL, M.D.; DAN L. BERGER, M.D.; RAYMOND B. BRAGG; ALVAN D. RUBIN; ROBERT H. CRAFT; GWYNDOLYN HARVEY; SUSAN HALVERSTADT; and SALLY STEINBACH, Plaintiffs, vs. JOHN C. DANFORTH, Attorney General of the State of Missouri; and GENE McNARY, Prosecuting Attorney of St. Louis County, Missouri, Defendants, and INFANT DOE; and M. H. BACKER, JR., M.D., Guardian Ad Litem, Defendant Intervenors.	Cause No. 315512 Equity Division

ORDER AND DECREE

Plaintiffs' Motion for Summary Judgment sustained.

I The Court finds and declares:

Section 559.100 of Missouri Revised Statutes unconstitutionally vague and indefinite, on its face and as applied; the statute as applied and interpreted does not give sufficient warning or guidance to plaintiffs, to Judges and to juries in answer to the question when may a pregnancy be terminated or interrupted - "unless the same be necessary to preserve her life".

A statute which is stated in terms so vague that men of ordinary intelligence must guess at its meaning and differ as to its application, violates "Due Process of Law".

II Section 559.100, Missouri Revised Statutes, is in deprivation of rights protected by the First, Fourth, Fifth, Ninth and Fourteenth Amendments of the United States Constitution, specifically:

(a) The right to give and to receive medical advice and treatment.

(b) The right to privacy.

(c) The right to choose whether and when to bear and rear children.

III Missouri Revised Statutes, Section 559.100, denies to plaintiffs the equal protection of the laws.

III Patients and physicians are treated differently, depending upon the local composition of the enforcing authorities and the interpretation of the phrase "unless the same is necessary to preserve her life", i.e., a pregnancy resulting from rape, incest, deformity, or one which may endanger the mental or physical health of the mother.

There is no overriding or compelling State interest to justify the differences.

The statute deprives women of their rights to determine, with their physicians, whether or not to carry a pregnancy to term.

IV Section 559.100 of the Missouri Revised Statutes is in conflict with the "Due Process of Law" under the Fourteenth Amendment of the United States Constitution in that it does not provide an official method by which a physician, patient, or hospital Theraputic Abortion Committee can obtain a timely or adequate review of a decision on the legality of an abortion.

V The moral, religious, and philosophical aspects of the law of abortion are not possible of solution or agreement. Those whose moral, religious, or philosophical convictions do not allow or provide for abortion under any circumstances may follow the dictates of their own beliefs and conscience; and those whose philosophical, moral, or religious beliefs provide otherwise may do so without fear of criminal prosecution - there being no overriding or compelling public or State interest. A different solution in my judgment would impose the will or one moral, religious and philosophical conclusion upon another in violation of the First Amendment of the United States Constitution.

WHEREFORE, the Court sustains plaintiffs' Motion for Summary Judgment.

June 7, 1971

/s/ Herbert Lasky
Herbert Lasky, Judge
Division 4

Item No. 29

IN THE MUNICIPAL COURT OF THE CENTRAL ORANGE COUNTY JUDICIAL DISTRICT

COUNTY OF ORANGE, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff vs. Dr. John Shriver Gwynne Deborah T. Dwyer Defendants	CASE 173309 OPINION June 16, 1970

Defendants, one of them a licensed practicing medical doctor, have been charged with two counts of violation of Section 274 of the Penal Code, by intentionally procuring miscarriages not in compliance with Chapter 11 of Division 20 of the Health and Safety Code.

Defendants and both of them have demurred to the complaint on the grounds that the complaint fails to state a cause of action or crime, in that Section 274 of the Penal Code and Sections 25950 and following sections of the Health and Safety Code are in violation of the Constitution of the United States and of California.

For purposes of the demurrer, the court presumes the charges in the complaint to be true.

There have as yet been no appellate decisions with respect to these sections, so the court must take up one by one the general objections raised in defendants' briefs.

To satisfy the First Amendment establishment clause, the Constitution requires a secular legislative purpose and a primary effect that neither advances nor inhibits religion. ***Everson v Board of Education; McGowan v Maryland.***

The stated purpose of the combination of sections in question is a medical one, purely secular. In construing legislation in California, one may look to the title, etc. Here the primary sections are placed in the Health & Safety Code and are entitled "Therapeutic" and

POOR COPY

the primary effect is upon the health of the mother, which neither advances nor inhibits her religious faith.

The Court would have handled this issue out of hand except for the fact that the greater part of argument was had in this area.

I think it appropriate, here, to say a word regarding the blatant attack made by the defense upon the Supreme Court.

A casual reading of the ***Belous*** case would satisfy even the most prejudiced man that both the opinion of Justice Peters and the dissents of J. Burke and J. Sullivan are directed entirely to the legal questions involved, particularly vagueness, and I for one can find not one scintilla of evidence to substantiate the claim of defense counsel.

I consequently believe that defense argument shows a bigotry unworthy of a court of law.

It is urged that there is no such thing as a "Right of Privacy" in a woman either under the Ninth Amendment or the Fourteenth Amendment, with regard to the bearing of children, etc.

Whatever the merits of this contention, the California Supreme Court has said,

> "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'Right of Privacy' or 'liberty' in matters related to marriage, family, and sex." ***People v Belous***

This court is bound by that statement of law.

Therefore, to regulate in this area the State must have a compelling or overriding interest in the regulation of the subject which is within its police powers.

It has been urged in other states and cases that the State has such an interest in an unborn fetus. None has been found in California prior to viability. (***Keeler v Superior Court*** and ***People v Belous)*** The recent Supreme Court opinion in the ***Keeler*** case may even cast doubt on the interest after viability.

However, we are not here concerned with such an interest, if any there is, because the Legislature has clearly framed the interest upon which it relies; (to-wit: the health of the mother.) The Legislature showed no interest in the unborn fetus prior to twenty weeks by permitting abortion in cases of rape and incest, etc. As Judge Mast stated in the *Robb* case: "If life were present at conception, abortions would not be permitted in cases of rape or incest any more than it would be permitted to terminate the life of a one-year old whose life had come as the result of rape or incest."

Regarding, then, the health of the mother as the only interest of the State involved in these statutes; the statement in *People v Belous* that "abortions are 'the most common single cause of maternal deaths in California,'" and "abortions early in pregnancy and properly performed present minimal danger to the woman;" along with the explanatory material cited therein, gives the State a sufficient and compelling interest in the regulation of abortion to allow the Legislature to proscribe that abortion only be done by a physician, in an accredited hospital, prior to twenty weeks and after consultation or approval of a number of staff doctors. These regulations appear to the court to be reasonable in view of the compelling interest of the State in the life and health of its women residents. To say otherwise would be to merely substitute the court's opinion for that of the Legislature and I cannot do that.

Health & Safety Code Section 25951 and subsections a and b satisfies Constitutional requirements and are valid regulations.

Sub-section c, however, prohibits abortion unless certain conditions are found to exist. Sub-section c(2) attempts to distinguish pregnancy resulting from rape and incest from other pregnancy and in doing so violates the equal protection clause of the Fourteenth Amendment.

"A Statute makes an improper and unlawful discrimination if it confers particular privileges upon a class arbitrarily selected from a larger number of persons, all of whom stand in the same relation to the privilege granted and between whom and persons not so favored, no reasonable distinction or substantial difference can be found justifying the inclusion of one and the exclusion of the others." *Franchise Motor Freight Association v Seavey.*

Classes excluded from the statute include those whose potential offspring are likely to bear grave disabilities, either mental or physical, as a result of the condition of the mother early in the pregnancy, and which are at least as compelling when viewed from the standpoint of the health and welfare of the mother as those following rape or incest. Such discrimination is improper and cannot stand. Likewise, Section 25952, which sets forth procedures to follow in cases of rape and incest, is rendered unnecessary.

I disagree with Judge Mast with regard to his application of the Fifth Amendment right against self-incrimination to Section 25952, in view of the immunities granted therein; however, a decision in that area is not necessary in view of the basic ruling hereinbefore stated.

We come, then, to the most basic question presented. Sub-section c(1) of Section 25951 limits abortion to those cases which "gravely impair the physical or mental health of the mother" or at least where there is a "substantial risk" thereof.

The Court here must balance the risks between the State interest in health and the Right of Life and Liberty in the Fourteenth Amendment.

A hospital abortion performed under clinical condition during the first semester of pregnancy is a safe and simple procedure. In fact, it is now actually safer for a woman to have a hospital abortion than to bear a child. A woman has a compelling interest in her own health and indeed in her life, as well as does the State.

This statute goes beyond protecting women from unsafe procedures and unlicensed practitioners and into the area of impermissible overbreadth.

Under police power, the state can regulate abortion, as the Court has earlier stated; however, it may not deny to a woman the basic right reserved to her under the Fourteenth Amendment to decide whether she should carry or reject an embryo which has not yet reached the twentieth week. Sub-section c(1) of Section 25951 of the Health & Safety Code suffers from fatal overbreadth.

The Court believes that Section 25951 of the Health & Safety Code, Sub-sections a and b are severable from Sub-section c and may stand alone along with Section 25953

The Court, therefore, sustains the demurrer and grants the People ten days leave to amend their complaints to set forth sufficient particularities so as to give notice to defendants regarding against what they must defend themselves.

/s/ William W. Thomson
Judge

Dated: June 16, 1970

BLEED THR

IN THE MUNICIPAL COURT OF THE CENTRAL ORANGE COUNTY JUDICIAL DISTRICT

COUNTY OF ORANGE, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA)		
Plaintiff)	CASE 149005 CASE 159061	
v.)		
ROBERT CUMMING ROBB,)	OPINION OF THE COURT	
Defendant)		

The defendant, Robert Cumming Robb, a medical doctor licensed to practice medicine in the State of California, stands before the Court charged with felonies in four counts. The People of the State of California charge in Count I of Complaint 149005, filed September 4, 1969, that Dr. Robb violated on the twenty-sixth day of November, 1968, Section 274 of the Penal Code of the State of California in that in Orange County, California, he wilfully, unlawfully and feloniously provided, supplied and administered to Susan Klambara and procured said Susan Klambara to take medicine, drugs and substances, and use and employ an instrument and other means with intent thereby to procure a miscarriage of Susan Klambara, which was not in compliance with the Therapeutic Abortion Act, Chapter 11 of Division 20 of the Health and Safety Code of the State of California.

The People charge in Count II of said complaint a violation of the same statute on the twelfth day of August, 1969, in relation to the intentional miscarriage of Teri Ann Alesandro.

The People charge in Count I of Complaint 159061, filed December 22, 1969, violation of the same statute on the thirtieth day of October, 1969, in relation to the intentional miscarriage of Linda P. Muschetto; and in Count II of said complaint the violation of the same statute on the twenty-ninth day of November, 1969, in relation to the intentional miscarriage of Darice Lombard.

By these two complaints, which have been consolidated, the People charge Dr. Robb with four counts of abortion in violation of what is commonly referred to as the "Therapeutic Abortion Act of 1967."

UGH POOR COPY COPY PRINTED CLOSE TO EDGE

The defendant, Dr. Robb, has demurred to the complaint and seeks to have the complaint dismissed on the grounds that the complaint fails to state a crime in that Penal Code Section 274 (The Therapeutic Abortion Act of 1967) is in violation of the Constitution of the United States.

In considering this demurrer we must, and we do, assume that the charges alleged in the complaints are true.

The "Therapeutic Abortion Act of 1967," Section 274 of the Penal Code states:

> Every person who provides, supplies or administers to any woman, or procures any woman to take any medicine, drug or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, except as provided in the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code, is punishable by imprisonment in the state prison not less than two nor more than five years."

Chapter 11 of the Health and Safety Code stated in general that a licensed doctor may perform an abortion if:

First, the operation takes place in a hospital which is accredited by the Joint Commission on Accreditation of Hospitals:

Second, the abortion is approved in advance by a committee of the medical staff of the hospital, which committee is established and maintained in accordance with standards promulgated by the Joint Commission on Accreditation of Hospitals; and

Third, the Committee of the Medical Staff finds that either there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother, or the pregnancy resulted from rape or incest.

Mental health is defined as mental illness to the extent that the woman is dangerous to herself or to the person or property of others or is in need of supervision or restraint.

Further, the Act provides that upon the receipt of an application for an abortion on grounds that the pregnancy resulted from rape or incest, the Committee

shall immediately notify the district attorney of the county in which the alleged rape or incest occurred, and transmit to said district attorney the affidavit of the applicant attesting to the facts establishing the rape or incest.

This is a case of first impression. There has not been any trial or appellate court in the State of California which has considered the constitutionality of the "Therapeutic Abortion Act of 1967." Nor has there been any prior consideration in any of the American jurisdictions of any law similar to the present California law.

The court is mindful of the cases of People of the State of California v. Leon Phillip Belous, 71 A.C. 996, and United States of America v. Milan Vuitch, United States District Court for the District of Columbia Nos. 1043-68 and 1044-68. These two cases considered the law prior to 1967 in California, and a similar law in the District of Columbia.

People v. Belous held that the term "necessary to preserve" (the life of the woman) used in the law as it existed prior to 1967 was not sufficiently certain to satisfy the due process requirements of fundamental constitutional rights. The Court pointed out that no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes, and that all are entitled to be informed as to what the State commands and forbids.

The Court further states that a woman has a right to life and to choose whether to bear children. The woman's right to life is involved because childbirth involves risks of death.

The right of the woman to choose whether to bear children follows from the United States and California Supreme Courts' acknowledgment of a right of privacy or liberty in matters related to marriage, family and sex.

The Court points out that the critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state.

The case of United States v. Vuitch considers a statute in which the phrase "as necessary for the preservation of the mother's life or health." The Court adopts the opinion of People v. Belous so far

POOR COPY

as the same language is considered and in addition holds the word "health" is uncertain.

Thus we see that both People v. Belous and United States v. Vuitch were decided upon the narrow grounds of ambiguity and uncertainty of the language of the statute. As such they have sidestepped and avoided the primary constitutional issues leading to the ultimate question of whether a legislature may in 1970 enact any law prohibiting the performance of an abortion by a medical doctor. The Court believes that this Court, as well as other courts, in view of the thousands and perhaps millions of lives profoundly affected by such laws, can no longer avoid, but must now face this ultimate question, as well as the specific questions relating to this particular statute. The Court will do so now.

The Act provides, among others, that a woman may obtain an abortion if her pregnancy resulted from incest. Incest is a crime punishable by imprisonment in the State Penitentiary for from one to fifty years (Penal Code Section 285). In order to qualify for an abortion under this section of the Act, a woman must admit that she has committed incest to her physician. In addition, pursuant to the statute, she must sign an affidavit that she has in fact committed incest, and naming the date the act occurred and the man with whom the act occurred. Further, the form in general use, pursuant to the Act, calls for "a true description of the events, complete with time, date and location."

The information submitted is required to be submitted to the District Attorney's Office. Of what possible use can this information be put to except for prosecution? Clearly none.

This Court will not hear the People claim that although it appears to be incriminatory on its face it in fact is not because they do not prosecute women for this offense. To do so would force the courts to declare the incest statute unconstitutional in that although apparently constitutional on its face, the practice of enforcement would be a clear violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution inasmuch as an arbitrary classification is made in practice; that is, men are treated differently than women. Both the man and the woman involved in an incestuous relationship must be treated equally.

The Court concludes, therefore, that this section violates the privilege against self-incrimination and is in violation of the Fifth Amendment of the United States Constitution.

In order for the defendant to assert as a defense this ground of unconstitutionality, must it be shown that the alleged victims in these cases became pregnant as a result of incestuous relationships? Clearly not. To require the defendant to inquire at all would be to require the violation of the Fifth Amendment protection. Thus the entire statute must fall.

Even though it is not the defendant's Fifth Amendment privilege which is being violated, he is clearly a proper person to assert the privilege in this case, in accordance with numerous recent decisions of the United States and California Supreme Courts.

The next question is whether the authority delegated by the Legislature to the Joint Commission of Accreditation of Hospitals and to the Committee of the Medical Staff of individual hospitals is a proper delegation of legislative authority. In order to be proper, definite and certain guidelines must be set forth so that the person exercising the authority knows exactly what the legislature intended, and so that the courts can review the exercise of authority.

In this statute there are virtually no established standards to limit the authority. What words of the statute there are which it might be argued set standards are so vague as to be completely meaningless. (This will be discussed further in considering the problem of vagueness.)

Improper delegation of legislative authority in the case of this statute leads to a far greater fault in the statute: The violation of the Equal Protection Clause of the Fourteenth Amendment.

The cases are now clear that in considering the Equal Protection Clause we look to the practice and effect of the statute not the mere face of the statute. What is the practice and effect here? It is that there is a distinct disparity of treatment and operation of the law in different geographic areas of the state.

This can only be the result of improper delegation of legislative authority. We see that in an area which accounts for 16 per cent of the live births, 50 per cent of the abortions are performed, whereas in an area of the state which accounts for 50 per cent of the live births, 23 per cent of the abortions are performed. Such unequal treatment cannot be tolerated.

The Court finds also that there is a pronounced disparity of treatment between the rich and the poor, which is an improper, arbitrary classification, clearly violative of the Equal Protection Clause. The percentage of rejected applicants is far greater in "charity" or indigent hospitals than it is in private hospitals. The rich can "purchase," by consultation fees, letters from the necessary psychiatrists to support their applications -- the poor cannot. The result is that the rich can arrange for abortions under the present law almost at will. The poor cannot.

The Constitution of the United States does not, and the People of the United States will no longer countenance nor permit the unequal treatment of individuals based on their economic positions. All persons, regardless of their financial standing, must be treated equally, and any law not so treating them cannot stand. The time is past when this community - The United States - can or will tolerate arbitrary discrimination or unequal application of the laws.

The next issue I wish to consider is whether the statute is in any way vague or uncertain. A criminal statute must be definite and certain enough to apprise the public as to what acts are prohibited. Failing this, the statute is in violation of the Due Process Clause of the Fourteenth Amendment. For the most part, the statute is definite and certain. However, that part which refers to mental illness "to the extent that the woman is dangerous to herself or to the person or property of others or is in need of supervision or restraint," is completely without meaning and offers no guide whatsoever by which a person can determine what is permitted and what is prohibited. Does supervision mean in an institution, by a psychiatrist, at home? What does dangerous to herself mean? What does restraint mean? They have no meaning certain enough to apprise a person what conduct is prohibited. In addition the Court notes that these words are in the disjunctive, which compounds the vagueness.

This brings us to the primary underlying problem. Does a woman have a constitutional right to make a free choice whether or not to bear children, i.e., whether or not to have an abortion? The Constitution of the United States is strong and lasting because it was written, intentionally, in such a way as to guarantee certain basic freedoms yet to be able to expand and develop to meet changing times, attitudes and approaches. The framers of the Constitution recognized that a constitution stiff and unbending could not long endure. They, therefore, framed, and Thomas Jefferson most clearly pointed out, a Constitution which would be able to develop to protect societies of which they could not dream. We are, therefore, faced with an area which might have been proper for legislation at the inception of the laws regulating abortions in 1850, but is no longer permissible in 1970, People v. Belous, supra.

Griswold v. Connecticut, 38 U.S. 479, states quite correctly that the People of the United States have certain non-enumerated fundamental rights. That among these are a right of privacy and a right to conduct interpersonal relationships between individuals in such a manner as the individuals choose.

This Court rules, that unless the State has a compelling state interest which permits it to interfere in this area, that the total freedom of choice as to whether or not to bear children, including the unrestricted right to have an abortion, is such a fundamental right, see also People v. Belous, supra.

At the inception of the old abortion law in 1850, the State had a compelling state interest in the preservation of the health of women involved. Abortion operations were dangerous with a high incidence of infection and death resulting. Due to the advance of medical science, this is no longer true. An abortion, properly done, is one of the safest operations with virtually no incidence of fatality. There is less danger to a woman from an abortion than from carrying the pregnancy to birth. Thus this state interest is no longer present.

It has been suggested that there is a state interest in preserving the morals of the state and controlling promiscuity. Besides the obvious fact that laws such as this have no effect whatsoever on sexual attitudes of the community, the Griswold case makes it clear that private sexual relations are beyond the purview of the state. The state has no compelling interest in controlling promiscuity.

The state no longer has, if it ever had, a compelling interest in increasing the population of the state. We need not consider this argument further, as the decision is abundantly clear.

Item No. 31

IN THE MUNICIPAL COURT FOR THE SAN LEANDRO-HAYWARD
JUDICIAL DISTRICT, COUNTY OF ALAMEDA
STATE OF CALIFORNIA
BEFORE THE HONORABLE T.L. FOLEY

The People of the State of California,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Decision on Demurrer
	)	
Robert W. Barksdale,	)	
	)	
Defendant	)	
	)	

- - -

In the Barksdale matter, in view of the fact that either side might take an appeal, regardless of which way the Judge might rule, I think that the decision should be read into the record.

The defense Counsel on behalf of Dr. Barksdale filed a very thorough brief of 38 pages and went into the constitutional questions very thoroughly. He did a masterful job on the law of this case.

I was very disappointed that yesterday afternoon the District Attorney's office didn't even file a brief but handed me a copy of the brief that the Attorney General filed in People of the State of California versus Leon Phillip Belous, which doesn't pertain at all to the problem before the Court. The Belous case happened prior to the Amendments of the 1967 Abortion Act. There are many things in the Belous case that applies to the present case, but there was no brief filed on behalf of the District Attorney. Regardless of that, the Court is of the same opinion stated in the decision of Paul G. Mast, Presiding Judge of the Orange County Municipal Court, on January 9, 1970. I would like to write my own written opinion; however, in view of the time emergency in the matter of not getting the brief until yesterday afternoon I was unable to do it, but I want this in the record.

The defendant, Robert W. Barksdale, is charged with a violation of The Therapeutic Abortion Act of 1967. He has demurred to the Complaint and seeks to have the Complaint dismissed on the grounds the Complaint

POOR COPY

fails to state a crime in that Penal Code Section 274 (The Therapeutic Abortion Act of 1967) is in violation of the Constitution of the United States.

In considering this demurrer I must, and I do, assume that the charges alleged in the Complaint are true.

The "Therapeutic Abortion Act of 1967" Section 274 of the Penal Code states:

> Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, except as provided in the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code, is punishable by imprisonment in the state prison not less than two nor more than five years.

Chapter 11 of the Health and Safety Code stated in general that a licensed doctor may perform an abortion if:

First, the operation takes place in a hospital which is accredited by the Joint Commission on Accreditation of Hospitals;

Second, the abortion is approved in advance by a committee of the medical staff of the hospital, which committee is established and maintained in accordance with standards promulgated by the Joint Commission on Accreditation of Hospitals; and

Third, the Committee of the Medical Staff finds that either there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother, or the pregnancy resulted from rape or incest.

Mental health is defined as mental illness to the extent that the woman is dangerous to herself or to the person or property of others or is in need of supervision or restraint.

Further, the Act provides that upon the receipt of an application for an abortion on grounds that the pregnancy resulted from rape or incest, the Committee shall immediately notify the district attorney of the

county in which the alleged rape or incest occurred, and transmit to said district attorney the affidavit of the applicant attesting to the facts establishing the rape or incest.

This is a case of first impression. There has not been any trial or appellate court in the State of California which has considered the constitutionality of the "Therapeutic Abortion Act of 1967." Nor has there been any prior consideration in any of the American jurisdictions of any law similar to the present California law.

The court is mindful of the cases of People of the State of California vs. Leon Phillip Belous, 71 A.C. 996, and United States of America vs. Milan Vuitch, United States District Court for the District of Columbia Nos. 1043-68 and 1044-68. These two cases considered the law prior to 1967 in California, and a similar law in the District of Columbia.

People vs. Belous held that the term "necessary to preserve" (the life of the woman) used in the law as it existed prior to 1967 was not sufficiently certain to satisfy the due process requirements of fundamental constitutional rights. The Court pointed out that no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes, and that all are entitled to be informed as to what the State commands and forbids.

The Court further states that a woman has a right to life and to choose whether to bear children. The woman's right to live is involved because childbirth involves risks of death.

The right of the woman to choose whether to bear children follows from the United States and California Supreme Court acknowledgment of a right of privacy or liberty in matters related to marriage, family and sex.

The Court points out that the critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the State.

The case of United States vs. Vuitch considers a statute in which the phrase "as necessary for the preservation of the mother's life or health." The Court adopts the opinion of People vs. Belous so far as the same language is considered and in addition holds the word "health" is uncertain.

Thus we see that both People vs. Belous and United States vs. Vuitch were decided upon the narrow grounds of ambiguity and uncertainty of the language of the statute. As such they have sidestepped and avoided the primary constitutional issues leading to the ultimate question of whether a legislature may in 1970 enact any law prohibiting the performance of an abortion by a medical doctor. The Court believes that this Court, as well as other courts, in view of the thousands and perhaps millions of lives profoundly affected by such laws, can no longer avoid, but must now face this ultimate question, as well as the specific questions relating to this particular statute. The Court will do so now.

The Act provides, among others, that a woman may obtain an abortion if her pregnancy resulted from incest. Incest is a crime punishable by imprisonment in the State Penitentiary for from one to fifty years (Penal Code Section 285). In order to qualify for an abortion under this section of the Act, a woman must admit that she has committed incest to her physician. In addition, pursuant to the statute, she must sign an affidavit that she has in fact committed incest, and naming the date the act occurred and the man with whom the act occurred. Further, the form in general use, pursuant to the Act, calls for a "true description of the events, complete with time, date and location."

The information submitted is required to be submitted to the District Attorney's office. Of what possible use can this information be put to except for prosecution? Clearly none.

This Court will not hear the People claim that although it appears to be incriminatory on its face it in fact is not because they do not prosecute women for this offense. To do so would force the courts to declare the incest statute unconstitutional in that although apparently constitutional on its face, the practice of enforcement would be a clear violation of of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution inasmuch as an arbitrary classification is made in practice; that is, men are treated differently than women. Both the man and the woman involved in an incestuous relationship must be treated equally.

The Court concludes, therefore, that this section violates the privilege against self-incrimination and is in violation of the Fifth Amendment of the United States Constitution.

In order for the defendant to assert as a defense this ground of unconstitutionality must it be shown that the alleged victims in this case became pregnant as a result of incestuous relationships? Clearly not. To require the defendant to inquire at all would be to require the violation of the Fifth Amendment protection. Thus the entire statute must fall.

Even though it is not the defendant's Fifth Amendment privilege which is being violated, he is clearly a proper person to assert the privilege in this case, in accordance with numerous recent decisions of the United States and California Supreme Court.

The next question is whether the authority delegated by the Legislature to the Joint Commission of Accreditation of Hospitals is a proper delegation of legislative authority. In order to be proper, definite and certain guidelines must be set forth so that the person exercising the authority knows exactly what the legislature intended, and so that the courts can review the exercise of authority.

In this statute there are virtually no established standards to limit the authority. What words of the statute there are which it might be argued set standards are so vague as to be completely meaningless.

Improper delegation of legislative authority in the case of this statute leads to a far greater fault in the statute: The violation of the Equal Protection Clause of the Fourteenth Amendment.

The cases are now clear that in considering the Equal Protection Clause we look to the practice and effect of the statute not the mere face of the statute. What is the practice and effect here? It is that there is a distinct disparity of treatment and operation of the law in different geographic areas of the State. This can only be the result of improper delegations of legislative authority. We see that in an area which accounts for 16 per cent of the live births, 50 per cent of the abortions are performed, whereas in an area of the State which accounts for 50 per cent of the live births, 23 per cent of the abortions are performed. Such unequal treatment cannot be tolerated.

The Court finds also that there is a pronounced disparity of treatment between the rich and the poor, which is an improper, arbitrary classification, clearly violative of the Equal Protection Clause. The

POOR COPY

percentage of rejected applicants is far greater in "charity" or indigent hospitals than it is in private hospitals. The rich can "purchase," by consultation fees, letters from the necessary psychiatrists to support their applications -- the poor cannot. The result is that the rich can arrange for abortions under the present law almost at will. The poor cannot.

The Constitution of the United States does not, and the People of the United States will no longer countenance nor permit the unequal treatment of individuals based on their economic positions. All persons, regardless of their financial standing, must be treated equally, and any law not so treating them cannot stand. The time is past when this community -- The United States -- can or will tolerate arbitrary discrimination or unequal application of the laws.

The next issue I wish to consider is whether the statute is in any way vague or uncertain. A criminal statute must be definite and certain enough to apprise the public as to what acts are prohibited. Failing this, the statute is in violation of the Due Process Clause of the Fourteenth Amendment. For the most part, the statute is definite and certain. However, that part which refers to mental illness "to the extent that the woman is dangerous to herself or to the person or property of others or is in need of supervision or restraint," is completely without meaning and offers no guide whatsoever by which a person can determine what is permitted and what is prohibited. Does supervision mean in an institution, by a psychiatrist, at home? What does dangerous to herself mean? What does restraint mean? They have no meaning certain enough to apprise a person what conduct is prohibited. In addition the Court notes that these words are in the disjunctive, which compounds the vagueness.

This brings us to the primary underlying problem. Does a woman have a constitutional right to make a free choice whether or not to bear children, i.e., whether or not to have an abortion? The Constitution of the United States is strong and lasting because it was written, intentionally, in such a way as to guarantee certain basic freedoms yet to be able to expand and develop to meet changing times, attitudes and approaches. The framers of the Constitution recognized that a constitution stiff and unbending could not long endure. They, therefore, framed, and Thomas Jefferson most clearly pointed out, a Constitution which would be able to

develop to protect societies of which they could not dream. We are, therefore, faced with an area which might have been proper for legislation at the inception of the laws regulating abortion in 1850, but is no longer permissible in 1970, People vs. Belous, supra.

Griswold vs. Connecticut, 38 U.S. 479, states quite correctly that the People of the United States have certain non-enumerated fundamental rights. That among these are a right of privacy and a right to conduct interpersonal relationships between individuals in such a manner as the individuals choose.

This Court rules, that unless the State has a compelling state interest which permits it to interfere in this area, that the total freedom of choice as to whether or not to bear children including the unrestricted right to have an abortion, is such a fundamental right, see also People vs. Belous, supra.

At the inception of the old abortion law in 1850 the State had a compelling state interest in the preservation of the health of women involved. Abortion operations were dangerous with a high incidence of infection and death resulting. Due to the advance of medical science, this is no longer true. An abortion, properly done, is one of the safest operations with virtually no incidence of fatality. There is less danger to a woman from an abortion than from carrying the pregnancy to birth. Thus this state interest is no longer present.

It has been suggested that there is a state interest in preserving the morals of the state and controlling promiscuity. Besides the obvious fact that laws such as this have no effect whatsoever on sexual attitudes of the community, the Griswold case makes it clear that private sexual relations are beyond the purview of the state. The state has no compelling interest in controlling promiscuity.

The state no longer has, if it ever had, a compelling interest in increasing the population of the state. We need not consider this argument further, as the decision is abundantly clear.

The primary contention of compelling state interest advanced on this issue is that the law is necessary to preserve the life of the unborn. This argument will not stand the test of logic, however. When is there

life present in the eyes of the law? Certainly not at conception. If there were life present at conception abortions would not be permitted in cases of rape or incest, or the other exceptions any more than it would be permitted to terminate the life of a one-year old whose life had come as the result of rape or incest. We also see no suggestions that intrauterine devices or "morning after" pills, both of which are abortive devices, are illegal.

The case of Keeler vs. Amador County Superior Court, 276 A.C.A. 324, considering the death of a 31- to 36-week fetus states that the killing of a viable fetus -- one capable of life out of the mother's womb -- (which would always occur in the third trimester of a pregnancy) can be prosecuted for murder as the killing of a human being. Before this stage, the fetus is not considered a human being or alive.

In view of these and many other examples of the law treating the embryo different from a human, we cannot permit a legislative theory which decrees that life begins at conception. To do so would be to blandly adopt the philosophy of one of the country's major religions, an act which clearly would be in violation of the First Amendment to the United States Constitution.

Thus the Court can find no compelling interest of the state, and concludes that the right to choose to bear or not to bear children is a fundamental right of the individual woman to be exercised in any manner she chooses and which may not in any way be abridged by law.

The Court concludes that the Complaint fails to state a cause of action against the defendant inasmuch as the statute is violative of the United States Constitution.

The Complaint is ordered dismissed and the defendant discharged.

I might say that I belong to the religion that was just referred to, and I dislike to render this opinion. I must follow the law under my oath as a Judge. I am a Catholic which makes it very, very difficult -- but my oath of office calls for me to follow the law as stated and set out by the Appellate Courts of this State.

Thank You.

MR. MINTZ: Thank you, very much, your Honor.

We are very happy that we find ourselves in the courtroom of a Judge who has the courage that your Honor has displayed today. We are very appreciative.

THE COURT: Thank you, Herman.

DATED: March 24, 1970

/s/ T.L. Foley
Presiding Judge

Item No. 31-A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

FILED
JUL 22 1971
Court of Appeal - First App. Dist.
CLIFFORD C. PORTER, Clerk
BY _____ Deputy

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Appellant,

v.

ROBERT W. BARKSDALE,
Defendant and Respondent.

1 Crim. 9526

(Muni.Ct.No. 332370-C)

Defendant Robert W. Barksdale was charged by a complaint in the Municipal Court of the San Leandro-Hayward Judicial District, with a violation of Penal Code section 274, as amended in 1967, which states:

"Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, except as provided in the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health & Safety Code, is punishable by imprisonment in the state prison not less than two nor more than five years."

The Therapeutic Abortion Act, q.v., was enacted in 1967. It provides that a licensed physician and surgeon is authorized to perform an abortion in "a hospital which is accredited by the Joint Commission on Accreditation of Hospitals" (Health & Saf. Code, § 25951, subd. (a)), if such abortion is approved in advance by a committee of the hospital's medical staff under certain prescribed conditions (§ 25951, subd. (b)), and the committee finds that one or more of the following conditions exist: "(1) There is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother; (2) the pregnancy resulted from rape or incest" (§ 25951, subd. (c)). On the grounds of statutory rape (Pen. Code, § 261, subd. 1) an abortion may be approved only if the girl is under the age of 15 years (§ 25952, subd. (c)). "The committee . . . must, in all instances, consist of not less than two licensed physicians and surgeons, and if the proposed termination of pregnancy will occur after the 13th week of pregnancy, the committee must consist of at least three such licensed physicians and surgeons. . . ." (§ 25953.) The act further provides that an abortion shall not be approved after the 20th week of pregnancy. (§ 25953.)

Prior to any preliminary examination, defendant generally demurred to the complaint, urging that Penal Code section 274, being violative of the Constitution of the United States, failed to state a public offense. The municipal court, stating -- "The court can find no compelling interest of the state, and concludes

that the right to choose to bear or not to bear children is a fundamental right of the individual woman to be exercised in any manner she chooses and which may not in any way be abridged by the law" -- sustained the demurrer and thereafter dismissed the complaint.

The People appealed the judgment of dismissal to the Alameda County Superior Court. (See Pen. Code, § 1466.) That court reversed, but certified "that the transfer of [the] case to the Court of Appeal appears necessary to secure uniformity of decision or to settle important questions of law." (See Cal. Rules of Court, rules 63 and 64.) We thereupon ordered the cause transferred to this court for hearing and decision.

The parties have chosen to concede in their briefs and oral argument, and at least for the purposes of this appeal, (1) that the charged abortion was performed during the first trimester (13 weeks) of the woman's pregnancy, (2) by a "licensed physician and surgeon," (3) but not in "a hospital which is accredited by the Joint Commission on Accreditation of Hospitals," or in any hospital.

Defendant's primary contention is stated in this manner: "California Penal Code section 274, beyond requiring that abortions must be performed by medical doctors under medically competent procedures, may not prohibit a woman from aborting her first trimester embryo or fetus." More specifically it is urged that the right of a woman to abort an early pregnancy is essentially one of the "penumbral" rights created by the First,

Third, Fourth, Fifth and Ninth Amendments, "the right of privacy as described and given effect in Griswold v. Connecticut, 381 U.S. 479, 484-485.

Principal reliance is placed by defendant upon certain dicta of People v. Belous (1969) 71 Cal.2d 954, which considered the constitutionality of Penal Code section 274, as in effect prior to its 1967 amendment. The earlier statute provided: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years." (Emphasis added.)

In Belous the California Supreme Court, divided 4 to 3, concluded that the pre-1967 section 274 was constitutionally invalid, for the reason that its language permitting an abortion only when "necessary to preserve [the woman's] life," was unconstitutionally "vague and uncertain." The court went no further in its actual holding.

We shall first discuss the effect to be given dicta of California's Supreme Court by the lesser courts of the state.

Dicta, of course, consists of things said in an opinion that are not necessary in reaching the decision of the court. (See Childers v. Childers, 74 Cal.App.2d 56, 61-62.) It is held that such "statements of conclusions not necessary to the

decision are not to be regarded as authority. . . ." (Cox v. Tyrone Power Enterprises, 49 Cal.App.2d 383, 397; see also People v. McAllister, 15 Cal.2d 519, 523; Hills v. Superior Court, 207 Cal. 666, 670.)

Nevertheless, it has been pointed out that the real criticism of dicta "goes to those portions of an opinion which assume to determine matters outside the issues and hence [are] not fully discussed and considered. . . ." (Estate of Wever, 12 Cal.App.2d 237, 239.) Where a point, although dictum, is "quite elaborately considered" (Adams v. Seaman, 82 Cal. 636, 639), or given "full consideration" (Lossman v. City of Stockton, 6 Cal.App.2d 324, 330), it will be given respectful consideration by another reviewing court. (See also San Joaquin etc. Irr..Co. v. Stanislaus, 155 Cal. 21, 28; Granger v. Sherriff, 133 Cal. 416, 417; Paley v. Superior Court, 137 Cal.App.2d 450, 460; Donnell v. Linforth, 11 Cal.App.2d 25, 29.) When the dicta is that of our state's Supreme Court this rule must be particularly applicable to its Court of Appeal.

The respect which must be shown such considered comment of the California Supreme Court was elaborated by the United States Supreme Court in Nolan v. Transocean Air Lines, 365 U.S. 293, 295. There the court found "considered [relevant] dictum" in the case of Leeper v. Beltrami, 53 Cal.2d 195. It was said: "Inasmuch as the view expressed therein by the highest court of California may be decisive of an issue critical to petitioners' claims, and inasmuch as the Court of Appeals for the Second

Circuit is charged with mandatory appellate review in the present case, that court should decide what relative weights, as authoritative sources for ascertaining California law, the New York Court of Appeals would accord to the Sears-Haro line (direct holdings of District Courts of Appeal between 1930 and 1938) and to Leeper (a considered, relevant dictum of general scope by the California Supreme Court in 1959). We set aside the judgment of the Court of Appeals and remand to that court for reconsideration of the case in light of the new factor introduced by Leeper v. Beltrami, supra."

The California Supreme Court in People v. Belous, supra, 71 Cal.2d 954, was of course speaking in the context of a law generally denying a woman's right to an abortion. It was said (p. 963): "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex."[1] And speaking of

---

[1] The Belous court's citation of authority to this proposition follows (pp. 963-964):

"(See, e.g., Griswold v. Connecticut, supra, 381 U.S. 479, 485, 486, 500 [14 L.Ed.2d 510, 515, 516, 524, 85 S.Ct. 1678]; Loving v. Virginia (1967) 388 U.S. 1, 12 [18 L.Ed.2d 1010, 1018, 87 S.Ct. 1817] [statute prohibiting interracial marriages, violative of due process clause]; Skinner v. Oklahoma (1942) 316 U.S. 535, 536, 541 [86 L.Ed. 1655, 1657, 1660, 62 S.Ct. 1110] [sterilization laws; marriage and procreation involve a 'basic liberty']; Pierce v. Society of Sisters (1925) 268 U.S. 510, 534-535 [69 L.Ed. 1070, 1077-1078, 45 S.Ct. 571, 39 A.L.R. 468] [prohibition against nonpublic schools; same]; Meyer v. Nebraska (1923) 262 U.S. 390, 399-400 [67 L.Ed. 1042, 1045-1046, 43 S.Ct. 625, 29 A.L.R. 1446]

(continued)

the right of a woman to choose whether to bear children, the court stated (p. 964), "It is not surprising that none of the parties who have filed briefs in this case have disputed the existence of this fundamental right."

The court continued (p. 964): "The critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state . . ., whether the regulation is 'necessary . . . to the accomplishment of a permissible state policy' . . ., and whether legislation impinging on constitutionally protected areas is narrowly drawn and not of 'unlimited and indiscriminate sweep' . . . ."[2]

(Fn. 1 continued)

[prohibition against teaching children German language; same]; Perez v. Sharp, 32 Cal.2d 711, 715 [198 P.2d 17]; see also Custodio v. Bauer, 251 Cal.App.2d 303, 317-318 [59 Cal.Rptr. 463].) That such a right is not enumerated in either the United States or California Constitutions is no impediment to the existence of the right. (See, e.g., Carrington v. Rash (1965) 380 U.S. 89, 96 [13 L.Ed.2d 675,680, 85 S.Ct. 775] [fundamental but nonenumerated right to vote]; Aptheker v. Secretary of State (1964) 378 U.S. 500, 505-506 [12 L.Ed.2d 992, 996-997, 84 S.Ct. 1659], and Kent v. Dulles (1958) 357 U.S. 116, 125 [2 L.Ed.2d 1204, 1209, 78 S.Ct. 113] [right to travel]; Bolling v. Sharpe (1954) 347 U.S. 497, 500 [98 L.Ed. 884, 887, 74 S.Ct. 693] [right to attend federal unsegregated schools]; Otsuka v. Hite, 64 Cal.2d 596, 602 [51 Cal.Rptr. 284, 414 P.2d 412] [right to vote]; cf. Finot v. Pasadena City Board of Education, 250 Cal.App.2d 189, 199 [58 Cal.Rptr. 520].)"

(end fn. 1.)

[2] The text of the above with cited authority follows:

"The critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state (Shapiro v. Thompson (1969) 394 U.S. 618, 634 [22 L.Ed.2d 600, 615, 89 S.Ct. 1322]; Sherbert v. Verner (1963) 374 U.S. 398, 403

(continued)

The Belous court then proceeded to discuss the several suggested "compelling" state interests in the suppression of abortions.

First considered was the unquestioned state interest in the health and well-being of the pregnant woman. It was pointed out (in the course of a scholarly study, see generally pp. 964-965) that "When California's first anti-abortion statute was enacted, any surgical procedure which entered a body cavity was extremely dangerous. Surgeons did not know how to control infection, and mortality was high. [Citation.] In 1867 Joseph Lister first published his findings on antiseptic surgery . . ., but even in 1883 the techniques he developed were condemned . . ., and as late as 1895 were not well understood or properly applied by even leaders of the medical profession. [Citations.] [¶]

(Fn. 2 continued)

[10 L.Ed.2d 965, 969, 83 S.Ct. 1790]), whether the regulation is 'necessary . . . to the accomplishment of a permissible state policy' (McLaughlin v. Florida (1964) 379 U.S. 184, 196 [13 L.Ed. 2d 222, 230, 85 S.Ct. 283]; see also, N.A.A.C.P. v. Button, 371 U.S. 415, 438 [9 L.Ed.2d 405, 421, 83 S.Ct. 328]; Bates v. Little Rock (1960) 361 U.S. 516, 527 [4 L.Ed.2d 480, 488, 80 S.Ct. 412]; Huntley v. Public Utilities Com., 69 Cal.2d 67, 74 [69 Cal.Rptr. 605, 442 P.2d 685]; Vogel v. County of Los Angeles, 68 Cal.2d 18, 21 [64 Cal.Rptr. 409, 434 P.2d 961]; People v. Woody, 61 Cal.2d 716, 718 [40 Cal.Rptr. 69, 394 P.2d 813]), and whether legislation impinging on constitutionally protected areas is narrowly drawn and not of 'unlimited and indiscriminate sweep' (Shelton v. Tucker (1960) 364 U.S. 479, 490 [5 L.Ed.2d 231, 238, 81 S.Ct. 247]; see also, Cantwell v. Connecticut (1940) 310 U.S. 296, 308 [84 L.Ed. 1213, 1220, 60 S.Ct. 900, 128 A.L.R. 1352]; In re Berry, 68 Cal. 2d 137, 151 [65 Cal.Rptr. 273, 436 P.2d 273]; In re Hoffman, 67 Cal. 2d 845, 853-854 [64 Cal.Rptr. 97, 434 P.2d 353]).

(end fn. 2.)

Although development was slow, techniques of antisepsis and asepsis became major general advances in surgery at and after the turn of the century. In due course safe procedures were developed for specific operations. Curettage, used for abortion in the first trimester, became a safe, accepted and routinely employed medical technique, especially after antibiotics were developed in the early 1940's. [Citation.] It is now safer for a woman to have a hospital therapeutic abortion during the first trimester than to bear a child."

Suggesting that the health of the pregnant woman may have been a compelling state interest bolstering the state's early anti-abortion law, the court added (p. 967): "Although we may assume that the law was valid when first enacted, the validity of the law in 1850 does not resolve the issue of whether the law is constitutionally valid today. [Citations.]"

We note the emphasis of Belous that its study indicated that the relative safety of present day medical techniques exists when the therapeutic abortion occurs during the earlier period of the pregnancy. The court strongly implied that a compelling state interest in the health of the woman, justifying a statutory proscription of abortions, does exist at some later stage of the pregnancy.

The court then discussed the dangers of so-called "criminal abortions," i.e., those prohibited by section 274 and usually performed by unlicensed persons. It was said (pp. 965-966):

"Although abortions early in pregnancy, and properly performed present minimal danger to the woman, criminal abortions are 'the most common single cause of maternal deaths in California.' [Citation.] In California, it is estimated that 35,000 to 100,000 such abortions occur each year. [Citation.]

"The incidence of severe infection from criminal abortion is very much greater than the incidence of death. The Los Angeles County Hospital alone, for example, in 1961 admitted over 3,500 patients treated for such abortions. [Citation.] Possibly more significant than the mere incidence of infection caused by criminal abortions is the result of such infection. 'Induced Illegal Abortion . . . is one of the important causes of subsequent infertility and pelvic disease.' [Citations.]

"Amici for appellant, 178 deans of medical schools, including the deans of all California medical schools, chairmen of medical school departments, and professors of medical schools state: 'These recorded facts bring one face-to-face with the hard, shocking -- almost brutal -- reality that our statute designed in 1850 to protect women from serious risks to life and health has in modern times become a scourge.'"

The Belous court also considered the argument that the state has "a compelling interest in the protection of the embryo and fetus." (P. 967.) It appeared to recognize that at some stage of pregnancy the state did acquire such an interest, even to the exclusion of the conflicting right of the woman. (See pp. 967-969.) But the court made it clear that a woman's right

to choose whether to bear children must prevail over such a state right in the pregnancy's early stage.

It was not contended by the People in Belous, and it is not contended here, that any legitimate state interest requires a larger or expanding population, at least as against the right of a woman to choose whether to bear children. Such a contention, if made, would seem to run contrary to reason in the light of scientific knowledge and the world's present day and projected population problems.

It must be said that the text of Belous which we have discussed discloses thorough and thoughtful consideration of the rights of a pregnant woman, vis-a-vis the state, in the matter of abortion legislation. Under the authority we have cited, ante, and as an intermediate appellate court of this state, we feel obliged to respect the dicta of Belous and to accept it as a correct expression of the law.

Several federal district courts have paid similar respect to the discussion of Belous.

Doe v. Scott (1971) 321 F.Supp. 1385, 1388 (N.D. Illinois, E.D.), concerned an attack on the constitutionality of an Illinois statute which prohibited all abortions except those "'performed by a physician . . . in a licensed hospital . . . because necessary for the preservation of the woman's life.'" The issue presented was (p. 1390) "whether the state has a compelling interest in preventing abortions in the early stages of pregnancy . . . ." The majority of a three-judge court, relying heavily on Belous,

ruled (p. 1391): ". . . that during the early stages of pregnancy--at least during the first trimester--the state may not prohibit, restrict or otherwise limit women's access to abortion procedures performed by licensed physicians operating in licensed facilities." The pertinent statute was held unconstitutional insofar as it restricted or prohibited the "performance of abortions during the first trimester of pregnancy by licensed physicians in a licensed hospital or other licensed medical facility."

In Roe v. Wade (1970) 314 F.Supp. 1217 (N.D. Tex.) a Texas anti-abortion law was under constitutional attack. The statute made felonious any abortion not required "for the purpose of saving life of the mother." Belous was interpreted (p. 1222) as according "Freedom to choose in the matter of abortions . . . the status of a 'fundamental' right." The Texas statute was found to infringe upon this fundamental right, the three-judge court stating:

"While the Ninth Amendment right to choose to have an abortion is not unqualified or unfettered, a statute designed to regulate the circumstances of abortions must restrict its scope to compelling state interests. There is unconstitutional overbreadth in the Texas Abortion Laws because the Texas Legislature did not limit the scope of the statutes to such interests. On the contrary, the Texas statutes, in their monolithic interdiction, sweep far beyond any areas of compelling state interest." (P. 1223.)

BLEED

The court recognized a probable legitimate state concern over "abortion of the 'quickened' fetus." (P. 1223.) However, it said: "The difficulty with the Texas Abortion Laws [under consideration] is that, even if they promote these interests, they far outstrip these justifications in their impact by prohibiting all abortions except those performed 'for the purpose of saving the life of the mother.'"

Belous (71 Cal.2d 954) was again relied upon by a three-judge court in Babbitz v. McCann (1970) 310 F.Supp. 293 (E.D. Wisconsin) wherein a Wisconsin abortion statute was declared violative of the United States Constitution. That statute proscribed abortions unless necessary to save the life of the mother, in which case it must be performed by a physician and, unless "an emergency prevents," in a licensed maternity hospital. The court (pp. 301, 302) quoted the following language of Belous: "'The critical issue is not whether such rights exist, but whether the state has a compelling interest in the regulation of a subject which is within the police powers of the state. . . .'" and then continued:

"Similarly, in the case at bar, we must decide whether the state of Wisconsin has a sufficiently compelling interest to justify the broad restriction on a woman's inherently personal right that is contained in § 940.04(1) and (5), Wis. Stats.

"The defendants urge that the state's interest in protecting the embryo is a sufficient basis to sustain the statute. Upon a balancing of the relevant interests, we hold that a woman's

POOR COPY

COPY BOUND CLOSE IN CENTER

right to refuse to carry an embryo during the early months of pregnancy may not be invaded by the state without a more compelling public necessity than is reflected in the statute in question. When measured against the claimed 'rights' of an embryo of four months or less, we hold that the mother's right transcends that of such an embryo."

"[P. 302.] Under its police power, the state can regulate certain aspects of abortion. Thus, it is permissible for the state to require that abortions be conducted by qualified physicians. The police power of the state does not, however, entitle it to deny to a woman the basic right reserved to her under the ninth amendment to decide whether she should carry or reject an embryo which has not yet quickened. The challenged sections of the present Wisconsin statute suffer from an infirmity of fatal overbreadth."

It is to be noted that Doe v. Scott, supra, Roe v. Wade, supra, and Babbitz v. McCann, supra, as well as Belous, place heavy emphasis on the woman's right to an abortion during the early period of the pregnancy. Expressly or impliedly they assert that at some point during pregnancy the woman's right must yield to the state interest in the preservation of the fetus. Roe v. Wade (314 F.Supp. 1217) suggests that this state interest becomes paramount with the "quickened fetus." And as noted, answering the argument that the state has such an interest in the protection of the embryo as to sustain an abortion statute, the court in Babbitz v. McCann stated that the

woman's right transcended that of an embryo of four months or less.

This special consideration of the law for the advanced fetus is well documented historically. Courts and Legislatures, in varying contexts, have traditionally demonstrated greater concern for the "quickened" unborn child.[3] A sampling of such authority follows. In ancient English law the killing of the fetus of a "woman quick with childe" was manslaughter; later common law provided as one of the elements of abortion murder that "the foetus [be] quickened." Without such quickening the crimes did not appear to lie. (See Keeler v. Superior Court, supra, 2 Cal.3d 619, 626.) An 1829 statute of New York provided that: "'The wilful killing of an unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree.'" (Idem. p. 628.) An early Wisconsin statute (Wis. R.S. 1849, ch. 133) made abortion a punishable offense only if performed upon an unborn "quick" child. A present day statute of the same state (Wis., Stats. § 940.04) provides a much greater penalty for aborting an "unborn quick child," than for an abortion on an "unborn child."

---

[3] Webster's New International Dictionary (2d ed.) Unabridged, defines "quickening" as "The first motion of the fetus in the uterus felt by the mother, occurring usually about the middle of the term of pregnancy." In Keeler v. Superior Court, 2 Cal.3d 619, 624, fn. 1, the court concluded: "The average full-term pregnancy is 40 weeks."

And as we have seen, the court in Roe v. Wade, supra, 314 F.Supp. 1217, expressed the state concern over abortion of the "quickened" fetus.

From a consideration of Belous and the other authority we have referred to, we are impelled to conclude that a woman has a constitutional right to terminate her pregnancy, subject only to reasonably imposed state restrictions designed to safeguard the health of the woman, and to protect the advanced fetus.

We now direct our inquiry into the reasonableness of the restrictions imposed by the Therapeutic Abortion Act on the woman's right to an abortion.

The first question is whether the provisions requiring an abortion to be performed by a licensed physician and surgeon in a hospital accredited by the Joint Commission on Accreditation of Hospitals are reasonably calculated to safeguard the woman's health and well-being.

It is obvious that without the surgical training and expertise of a licensed physician and surgeon an abortion would endanger the health and even life of the woman; no contention to the contrary is made. But the defendant strenuously insists that the place of an abortion operation, as with any other surgical procedure, should be determined by the doctor, in consultation with his patient, uncontrolled by law and in accordance with sound and established medical procedure. He contends that the legislative requirement of a hospital unnecessarily and unreasonably abridges the constitutional right for which he here argues.

We advert again to the scholarly dissertation of Belous. There the court concluded that it was "now safer for a woman to have a hospital therapeutic abortion during the first trimester than to bear a child." (Emphasis added.) (71 Cal. 2d at p. 965.) Its studies had indicated that "in California from November 1967 through September 1968, 3,775 therapeutic [hospital] abortions were reported without a maternal death. . . ." (P. 965, fn. 7.) On the other hand, during one year alone over 3,500 women with severe infection resulting from illegal non-hospital abortions were found to have been treated in one Los Angeles hospital. (P. 966.) And such illegal non-hospital abortions were disclosed to be "'the most common single cause of maternal deaths in California.'" (P. 965.)

For obvious reasons women seeking abortions often wish to keep knowledge of this fact from others, particularly their families and friends. Given the choice of hospital or more private surroundings they would more often choose the latter, for a hospital stay with its relative lack of privacy and its attendant records is far more likely to become commonly known. Such consideration would tend to place undue pressure on the doctor to arrange an inadequate medical environment, even when his medical judgment indicates the need of a hospital situs for the operation.

We note that in Doe v. Scott, supra, 321 F.Supp. 1385, 1391, the court found a statutory requirement that a constitutionally permitted abortion be "performed by licensed physicians

operating in licensed facilities" (emphasis added) not to be unreasonably restrictive. And the court in Roe v. Wade, supra, 314 F.Supp. 1217, 1223, found a legitimate state interest "in seeing to it that abortions are performed by competent persons and in adequate surroundings." (Emphasis added.)

We conclude that the licensed "physician and surgeon" and the "hospital" requirements of the Therapeutic Abortion Act are reasonably designed by the Legislature to further the health and welfare of the pregnant woman seeking an abortion.

Pointing to the act's requirement of a hospital accredited by the Joint Commission on Accreditation of Hospitals, defendant insists that in any event this constitutes "overbread and constitutional vulnerability.

We first observe that in California all hospitals must be licensed by the State Department of Public Health. (Health & Saf. Code, § 1400.) The department is required to make and promulgate reasonable rules and regulations "prescribing minimu standards of safety and sanitation [and] of diagnostic, therapeutic and laboratory facilities and equipment . . . ." (Healt & Saf. Code, § 1411.) Hospitals must be periodically inspected by the department (Health & Saf. Code, § 1407), in which author is vested to suspend or revoke a hospital license for, among other things, violation of the prescribed rules and regulations (Health & Saf. Code, § 1412).

We note further that the Joint Commission on Accredita tion of Hospitals is a private body composed of members and

BLEED

organizations of the medical profession. Its purpose is to maintain and supervise professional standards in accordance with its "Standards for Hospital Accreditation." While most of California's hospitals appear to be "accredited," it nevertheless appears that many, even county hospitals, lack such accreditation and are therefore unavailable for the otherwise legitimate purpose of the Therapeutic Abortion Act.

As we have concluded, a woman has a constitutional right to terminate a pregnancy subject to reasonably enacted legislative restrictions supporting legitimate state interests. By its "accredited hospital" provision the Legislature has delegated to a private organization power to determine the hospital standards under which abortions may be performed. It is established law that a Legislature may not delegate its legislative power to a private person or organization. (Carter v. Carter Coal Co., 298 U.S. 238; Schechter Corp. v. United States, 295 U.S. 495; Daigh v. Shaffer, 23 Cal.App.2d 449. See also 16 Am.Jur.2d, Constitutional Law, § 249, p. 499; 16 C.J.S., Constitutional Law, § 137, pp. 566-567; and see the authorities in those works cited.) This rule must apply with even greater force to a legislative delegation of power affecting a constitutionally guaranteed right.

It appears that an abortion is now a relatively simple and safe surgical procedure. (See discussion, People v. Belous, supra, 71 Cal.2d 954, 965-967.) Yet, although any other surgical procedure, no matter how intricate or demanding or

THROUGH POOR COPY CPOY BOUND CLOSE IN CENTER

dangerous, may be performed in a "licensed" hospital, abortions alone must under the act be performed under the higher or different standards of an "accredited hospital."

Further, it is obvious that the "accredited hospital" provision decreases the number of hospitals available for abortion procedures. And the requirement must, in many cases, unnecessarily increase the distance to the hospital and otherwise inconvenience the physician and surgeon and his patient seeking an abortion.

We conclude that the accredited hospital provision imposes an unnecessary and unreasonable restraint upon the constitutionally guaranteed right under discussion.

We also find the act's requirement of approval of an abortion in advance by a committee of the hospital's medical staff to be without reasonable constitutional justification. The obvious principal purpose of this requirement is to assure that a statutory condition permitting an abortion, i.e., danger to the woman's health, or rape, or incest, exists. As we have shown, no compelling state interest can be found in this area. To the extent that the committee might provide additional assurance that the woman's health would not be adversely affected by the operation we also find no compelling state interest. It will reasonably be presumed that the woman's health would be considered and safeguarded by her physician and surgeon.

The act's provision that no abortion be allowed after the twentieth week of pregnancy undoubtedly rests upon legisl

BLEED

consideration for the protection of the quickened fetus, as well as the greater danger to the woman attending the abortion of an advanced pregnancy. This restriction, we believe, is reasonably supported by the compelling state interests we have discussed.

No merit is found in defendant's contention that he and his patient were denied equal protection of the law. (Cf., Babbitz v. McCann, supra, 310 F.Supp. 293, 298.) And we find nothing resembling a bill of attainder in the subject statutes. Other points raised by defendant, because of the conclusions we have reached, have become moot to a determination of his appeal.

It is established law that "'When part of a statute is declared unconstitutional, the remainder will stand if it is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidity of the statute.'" (In re Perez, 65 Cal.2d 224, 231.) "The test of severability is whether the invalid parts of the statute can be severed from the otherwise valid parts without destroying the statutory scheme, or the utility of the remaining provisions. . . ." (Blumenthal v. Board of Medical Examiners, 57 Cal.2d 228, 238.) Applying these rules we conclude that the unconstitutional features of Penal Code section 274 and the Therapeutic Abortion Act which we have pointed out are severable from the remainder of the statutes.

We hold that Penal Code section 274 and the Therapeutic

THROUGH POOR COPY CPOY BOUND CLOSE IN CENTER

Abortion Act are unconstitutional insofar as they purport to deny, or impose restrictions upon, a woman's right to terminate her pregnancy within its first 20 weeks by an abortion which is performed by a licensed physician and surgeon in a licensed hospital of this state.

From all of the foregoing it appears that the municipal court complaint which, among other things, by legal implication charges that the subject abortion was not performed in a hospital, does allege the commission of a public offense by defendant. The sustaining of his demurrer by the municipal court was error.

The judgment of dismissal by the municipal court is reversed.

Elkington, J.

I CONCUR:

Sims, J.

BLEED

I concur and dissent. I concur in the determination that the complaint states a public offense and that, therefore, the judgment of dismissal by the municipal court must be reversed. I do not, however, concur in the majority holding that a woman has the constitutional right to terminate pregnancy by abortion subject only to the conditions that such abortion must take place within the first 20 weeks of pregnancy and that it be performed by a licensed physician and surgeon in a licensed hospital in this state; nor do I concur in the determination that Penal Code section 274 and the Therapeutic Abortion Act (Health & Saf. Code, §§ 25950-25954) are unconstitutional in the respects indicated by the majority.

The effect of the majority opinion is to remove from the Therapeutic Abortion Act, as constitutionally invalid, the requirements that an abortion may be performed only when the pregnancy would gravely impair the physical or mental health of the mother or the pregnancy resulted from rape or incest, and the requirement that an abortion must take place in an accredited hospital with the prior approval of the hospital's therapeutic abortion committee.

It should be noted, initially, that a statute is presumed to be constitutional unless its unconstitutionality clearly and unmistakably appears that all intendments are in favor of its validity, and that mere doubt is not a sufficient reason for a judicial declaration of its invalidity. (Fox etc. Corp. v. City of Bakersfield, 36 Cal.2d 136, 141; Lockheed Aircraft Corp. v.

THROUGH POOR COPY COPY BOUND CLOSE IN CENTER

Superior Court, 28 Cal.2d 481, 484; Jones-Hamilton Co. v. Franchise Tax Bd., 268 Cal.App.2d 343, 349; People v. Aguiar, 257 Cal.App.2d 597, 601.) As observed in United States v. Vuitch, ____ U.S. _____, _____ [28 L.Ed.2d 601, 608], "statutes should be construed whenever possible so as to uphold their constitutionality."

In People v. Belous, 71 Cal.2d 954, on whose dicta the majority opinion relies, the Supreme Court observed that it did not have to reach the issue of the constitutional validity of the Therapeutic Abortion Act because the abortion in that case had been performed prior to the adoption of the act. (At p. 973, fn. 15.) A close reading of the case indicates, however, that the reviewing court deemed that the state has a compelling interest in regulating abortions. Implicit throughout the decision is the concept that abortions may be limited by the state if the statute is sufficiently clear and narrowly drawn. I perceive that although the court had ample opportunity in Belous to strike down abortion laws in general it did not do so. Instead it simply found that Penal Code section 274, as it read when the conduct there under consideration occurred, contained vague and uncertain provisions which jeopardized its operation by placing an unfair and dangerous responsibility upon any medical practitioner who attempted to follow it.[1] (At pp. 972-973.)

---

1 - Section 274 of the Penal Code then read as follows: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the State prison not less than two nor more than five years.

BLEED T

In reaching its conclusion with respect to the validity of the Therapeutic Abortion Act the majority seizes upon the statement in Belous that "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex. [Citations.]" (71 Cal.2d at p. 963.) My colleagues interpret this statement to mean that a woman has a fundamental right to have an abortion subject only to the condition that it be performed in a licensed hospital by a licensed doctor.

None of the cases cited as authority by Belous for the principle embraced in the subject statement, including Griswold v. Connecticut, 381 U.S. 479, stands for the proposition that a woman has an unqualified right to have an abortion or that she has such a right subject to appropriate medical procedures. At most these cases hold that a woman can choose whether or not she wishes to conceive a child. Adverting to Griswold, I perceive that its holding was limited to a declaration that a statute forbidding the use of contraceptives violates the right of marital privacy guaranteed by several fundamental constitutional guarantees specified in the Bill of Rights. (Pp. 484-485.)[2]

---

[2] - Two of the cases cited in Belous deal particularly with the right to have offspring as a right which is basic to the perpetuation of a race. In Skinner v. Oklahoma, 316 U.S. 535, the United States Supreme Court struck down a statute of Oklahoma which provided for the sterilization of persons defined to be "habitual criminals." The court there made this statement: "We are dealing here with legislation which involves one of the basic civil

(Fn. 2 cont'd)

IROUGH POOR COPY CPOY BOUND CLOSE IN CENTER

Contrary to the implications of the majority opinion, Belous lays great stress upon the prospective mother's health and the criteria of good medical practice as valid standards for determining whether an abortion is lawful. (At pp. 965-971.) Recognition is specifically given to the test established in the Therapeutic Abortion Act., i.e. that abortion is permissible during the first 20 weeks of pregnancy if performed by a licensed physician in an accredited hospital and if it is determined "under prescribed procedures" that there is a substantial risk that the continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the pregnancy resulted from rape or incest. (71 Cal.2d at p. 971; emphasis added.)

In Belous there is specific recognition of the necessity that an abortion be performed in a hospital providing an accepted surgical environment. The dangers posed by a non-hospital abortion were noted thusly: "Although abortions early in pregnancy, and properly performed present minimal danger to the woman, criminal abortions [i.e., those obtained other than from a physician in an accepted surgical environment] are 'the most common single cause of maternal deaths in California.' [Citation.]" (At p.

---

2 - (Cont'd) rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." (At p. 541.) In Loving v. Virginia, 388 U.S. 1, the United States Supreme Court declared unconstitutional a Virginia statute which prevented marriages between persons solely on the basis of racial classifications. In that case we find this statement: "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." (At p. 12.) It is clear that these two cases were concerned with procreation rather than the termination of pregnanc

BLEED

965 and fn. 8 at p. 965.)

In Ballard v. Anderson, 4 Cal.3d 873, the Supreme Court, although not specifically called upon to pass on the constitutional validity of the Therapeutic Abortion Act, did, by its analysis and application of the provisions of the act to the facts at hand, give its stamp of approval to the act. Thus, in Ballard, we find the following significant language: "A legal therapeutic abortion under the act may be given only if qualified medical opinion finds (1) a substantial risk that continuancy of the pregnancy will impair the mental or physical health of the prospective mother, or (2) that the pregnancy resulted from rape or incest." (At p. 879; emphasis added.)

In Ballard the question presented was whether the Therapeutic Abortion Committee of a hospital was required to consider the application of a minor for a therapeutic abortion without the consent of her parents. The reviewing court held that such consent was not necessary and that mandamus lies to compel such a committee to exercise its discretion to approve or disapprove a minor's application for abortion "according to the statutory criteria set forth in Health and Safety Code sections 25951-25954." (4 Cal.3d at p. 884.) It is reasonable to assume that the Supreme Court would not have issued the peremptory writ if it had any misgivings that the requirement of prior approval of an abortion by a committee of a hospital's medical staff was an unconstitutional provision or that the court's direction was nothing more than an idle act.

HROUGH POOR COPY CPOY BOUND CLOSE IN CENTER

I apprehend that Belous and Ballard clearly recognize a compelling state interest in protecting the health of a pregnant mother and that the Therapeutic Abortion Act is a salutary method of insuring such protection pursuant to the state's traditional police power to restrict medical procedures to competent medical practitioners operating in sanitary facilities under safe conditions.

It should be noted here that in United States v. Vuitch, supra, ____ U.S. _____, _____ [28 L.Ed.2d 601, 610], a case decided subsequent to Belous, the United States Supreme Court held that a District of Columbia statute,[3] containing language similar to that struck down in Belous, was not constitutionally vague. Significant to the consideration of the instant discussion is the following statement in Vuitch: "The statute does not outlaw all abortions, but only those which are not performed under the direction of a competent, licensed physician, and those not necessary to preserve the mother's life or health." (At p. 608.)

In my opinion the state also has a compelling interest to protect the embryo or fetus as the center of legal rights. There is abundant and respected authority for the proposition that at some time during the period of gestation the embryo or fetus

---

3 - This statute provided: "Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years; . . ."

becomes a human being entitled to the right of life. Among these are those who hold that human life begins at conception upon the thesis that the genes of the ovum and sperm have every characteristic a human being will ever have as soon as they are united. Others are of the opinion that human life begins at a time during the period of gestation when the fetus takes on a truly human appearance.

There is also abundant and respected contrary authority to the effect that the embryo or fetus is not a human being during the period of gestation, and that human life does not begin until the fetus has developed into a being that is able to live outside the uterus. Until then, say those who hold this opinion, the fetus enjoys no rights and such rights as are generally attributed to it reflect only the interest of the parents. (See People v. Belous, supra, 71 Cal.2d 954, 967-968.)

These propositions appear to be of such generalized and universal knowledge that their existence is beyond dispute so as to require that judicial notice be taken of them. (Evid. Code, § 451, subd. (f).) At the very least they are propositions whose proposals are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. As such they are matters which may be judicially noticed. (Evid. Code, § 452, subd. (h).)

In the instant case the trial court in passing upon the sufficiency of the complaint took judicial notice of these conflicting viewpoints since the matters embraced therein came to

POOR COPY

the attention of the court in its consideration of the points and authorities submitted by the parties upon the hearing of the demurrer. (See Evid. Code, §§ 453, 454, 455.) This the trial court was justified in doing since matters which must or may be judicially noticed are a part of the complaint to be read into it together with the matters contained within its four corners. (South Shore Land Co. v. Petersen, 226 Cal.App.2d 725, 742-747; Colvig v. RKO General, Inc., 232 Cal.App.2d 56, 63-64.) As indicated by the trial court in its "Decision on Demurrer" these viewpoints were considered by it. In its decision the trial court adopted as part of its rationale the proposition that life is not present in the embryo at conception and apparently adopted, as a legal proposition, the concept that the fetus is not a human being until it is capable of life out of the mother's womb.

Among the matters called to the attention of the trial court in connection with the aforementioned viewpoints as to when human life begins was evidence adduced at legislative hearings in 1962 to the effect that human life begins at the time of conception. It is inconceivable that the Legislature which enacted the Therapeutic Abortion Act in 1967 did not have before it this proposition as well as the varying and conflicting viewpoints mentioned above.

As a reviewing court, this court is justified in taking judicial notice of each matter properly noticed by the trial court. (See Evid. Code, § 459; Smith v. Hatch, 271 Cal.App.2d 39, 49.) This court is also entitled to consider the facts as they

appear on the face of the Therapeutic Abortion Act, since the construction of a statute and its applicability to a given situation are matters of law, and we are not bound by the trial court's construction. (Estate of Madison, 26 Cal.2d 453, 456; Neal v. State of California, 55 Cal.2d 11, 17; Plum v. City of Healdsburg, 237 Cal.App.2d 308, 313.)

Accordingly, it appears to me that in enacting the subject act the state clearly evinced a genuine interest and concern for the unborn. That such was the legislative intent is demonstrated by the provisions of the act which limit abortions to cases where the continuance of the pregnancy would gravely impair the physical and mental health of the mother and to those cases where the pregnancy results from rape or incest. If the Legislature had no interest in the embryo or fetus it could simply have provided that a woman was entitled to have an abortion subject only to certain approved medical procedures. The act, however, clearly outlaws all abortions except those performed according to the limitations therein delineated--limitations which Belous recognizes to be properly within the police power of the state.

It is logical to deduce from the facts as appear on the face of the enactment that it was the legislative intent to give the rights of the pregnant woman whose physical or mental health was gravely endangered or whose pregnancy resulted from rape or incest precedence over the rights of the unborn only during the first 20 weeks of pregnancy. It is also logical to deduce from

the enactment that it was the legislative intent to outlaw abortions after the 20th week of pregnancy because of the concomitant compelling interest the state has in the health and welfare of the prospective mother and the fetus she is carrying. Belous points out that a hospital therapeutic abortion is a relatively safe procedure in the first trimester of pregnancy (at p. 965), but takes cognizance that "By limiting [in the Therapeutic Abortion Act] the abortion to the first 20 weeks, the Legislature has taken into account the danger to the mother of the later abortion . . . ." (At p. 971.)

In sum, the Therapeutic Abortion Act discloses by its provisions a concern for a pregnant woman's health and the risks of death due to an abortion, a concern that a woman who is the victim of an unwanted pregnancy should not be compelled to give birth to a child so conceived, and a concern for an unborn child's right to life. All of these considerations entered into the legislative process and the resulting legislation was clearly an attempt to reconcile the rights of the prospective mother and those of the embryo or fetus as a human being entitled to life. In the specific instances in which abortions are permitted under the act the Legislature, under its prerogative to determine the wisdom or necessity of the law, has declared that the mother's rights transcend those of the embryo or fetus.

In reaching this conclusion I am not unmindful of the dictum in Belous that "There is nothing to indicate that in adopting the Therapeutic Abortion Act the Legislature was asserting an

BLEED

interest in the embryo." (71 Cal.2d at p. 971.) A reading of Belous discloses, however, that the decision does not completely reject the concept that the embryo or fetus is a center of legal rights but postulates that a pregnant woman's right to life takes precedence over any interest the state may have in the unborn. (At p. 969.)

For the reasons indicated the Therapeutic Abortion Act must be construed so as to uphold its constitutionality. The termination of pregnancy is not an unqualified right beyond regulation by the state, but subject to reasonable limitations consonant with the state's compelling interest in the health and welfare of the prospective mother and the protection of the embryo or fetus. California has imposed valid limitations in its enactment of the act. Since the act is constitutional in its entirety, it is not the province of this court to weigh the desirability of the social policy underlying it or to question its wisdom. These are purely legislative matters.

Molinari, P.J.

HROUGH POOR COPY CPOY BOUND CLOSE IN CENTER

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

JOSEPH PAUL SHIVELY, M.D., Petitioner, vs. THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA, an Administrative Agency, Respondent.	No. 590333 FINDINGS OF FACT AND CONCLUSIONS OF LAW (C.C.P.,Secs. 632; 1109)

The above entitled cause came on regularly for hearing on July 16, 1968. Robert L. Lamb and Charles G. Norris appeared for Petitioner; Thomas Lynch, Attorney General of the State of California, by Gerald Carreras, Deputy Attorney General, appeared for Respondent.

The cause was submitted and heard on the pleadings, documents and records herein; the Record; Transcript of Testimony, Volumes I and II and Exhibits introduced "In the Matter of the Accusation against J. Paul Shively, M.D.," said hearing held on January 22 and 23, 1968. Said testimony and exhibit being duly filed and introduced in evidence. Respondent's Decision and Findings; Points and Authorities; Summaries and Arguments of respective counsel.

The matter was submitted to the Court for decision, and the Court being fully advised in the premises, and having rendered its decision in favor of Petitioner and against Respondent now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. In each instance alleged in Respondent's Accusation, as hereinafter specified, Petitioner J. Paul Shively, M.D. participated in the obtaining or performing of a therapeutic abortion at an accredited hospital with the approval of the hospital's therapeutic abortion committee in a case of proven rubella in the first trimester of the patient's pregnancy.

2. On or about August 6, 1963, Petitioner did not aid and abet a criminal abortion upon the person of Alice F. McIntosh.

3. On or about April 20, 1964, Petitioner did not

aid and abet a criminal abortion upon the person of Diana Martin.

4. On or about April 22, 1964, Petitioner did not attempt to perform a criminal abortion upon the person of Diana Martin.

5. On or about May 18, 1965, Petitioner did not agree and offer to procure a criminal abortion upon the person of Eileen Selig.

6. On or about May 18, 1965, Petitioner did not aid and abet a criminal abortion upon the person of Eileen Selig.

7. On or about May 20, 1965, Petitioner did not attempt to perform a criminal abortion upon the person of Eileen Selig.

8. On or about May 20, 1965, Petitioner did not agree and offer to procure a criminal abortion upon the person of Sharon Signer.

9. On or about May 20, 1965, Petitioner did not aid and abet a criminal abortion upon the person of Sharon Signer.

10. On or about May 22, 1965, Petitioner did not perform a criminal abortion upon the person of Sharon Signer.

11. On or about June 9, 1965, Petitioner did not aid and abet a criminal abortion upon the person of Betty Logwood.

12. On or about May 28, 1964, Petitioner did not aid and abet a criminal abortion upon the person of Thelma Lofink.

13. Petitioner, in good faith, and with a sincere opinion that it was an acceptable standard of medical practice in the City and County of San Francisco to perform therapeutic abortions in accredited hospitals in cases of proven rubella during the first trimester where the approval of a therapeutic abortion committee was first obtained rendered said medical attention to each individual named in the Accusation against him.

14. Petitioner's conduct was influenced by the fact that the Medical Schools of the University of California, the University of California at Los Angeles, Stanford University, and the University of Southern

California, during the period of 1964 and 1965, taught, in the medical curriculum, that it was an acceptable standard of medical practice to perform therapeutic abortions in an accredited hospital in cases of proven rubella during the first trimester, when the approval of a therapeutic abortion committee was first obtained.

15. Petitioner's conduct was further influenced by the fact that a large segment of the licensed and practicing physicians and surgeons in the counties contiguous to San Francisco Bay held the same opinion as did Dr. Shively.

With respect to Petitioner's involvement as found in Causes and Action First, Second, Fourth, Fifth, Seventh, Eighth, Tenth and Eleventh of the Accusation, Petitioner was voluntarily acting, without compensation, as a member of a Therapeutic Abortion Committee as the result of Petitioner's being a staff member of an accredited hospital, in conformity with what was, in good faith, believed to be acceptable medical practice.

16. In each instance, Petitioner followed procedures and practices and complied with existing standards of acceptable medical care recognized and approved by those reasonably skilled in his profession practicing in the same community.

17. Petitioner rendered professional care, in each instance, in an honest, competent and professional manner in the exercise of his best skill and understanding in good faith, with concern for the health, life and welfare of the patient.

18. In each alleged instance, Petitioner intended and believed that the therapeutic abortion was necessary to preserve the life of the mother.

19. In each alleged instance of Petitioner's participation in the performance of a therapeutic abortion with the approval of the appropriate committee in and of an accredited hospital in cases of proven rubella in the first trimester of pregnancy, the operation was necessary to preserve the life of the mother.

20. The permanent and public record of an unjustified conviction of criminal abortion causes serious and ir-

reparable injury to Petitioner's reputation and future as a Board certified obstetrician and gynecologist.

CONCLUSIONS OF LAW

1. The statement in Business and Professions Code §2377 that a criminal abortion constitutes unprofessional conduct, refers to that activity and intent defined as the crime of abortion by Penal Code §274, as the statutes exist in 1963, 1964 and 1965 when the conduct in question occurred.

2. The abortion statute, Penal Code §274, does not mean by the words "unless the same is necessary to preserve her life" that the peril to life be imminent. It is enough that the dangerous condition be potentially present, even though its full development might be delayed to a greater or less extent. Nor was it essential that the doctor should believe that the death of the patient would be otherwise certain in order to justify him in affording present relief.

People v. Ballard, (1959) 167 Cal. App. 2d. 803, 805, 814
People v. Abarbanel (1965) 239 Cal. App. 2d 31, 34

3. The burden of establishing the criminal nature of the abortions in which Petitioner participated rests with the Respondent Board of Medical Examiners and requires a demonstration through evidence that the procedure was not necessary to preserve the life of the mother; an abortion is not necessarily, in and of itself, a criminal act.

People v. Ballard (1959) 167 Cal. App. 2d 803, 805, 814
People v. Abarbanel (1965) 239 Cal. App. 2d 31, 34

4. The criminal intent necessary to be established by Respondent Board of Medical Examiners in order to find that Petitioner was guilty is the intent to commit a criminal abortion; that is, an abortion for the purpose other than to preserve the life of the mother.

People v. Ballard (1959) 167 Cal. App. 2d 803, 805, 814
People v. Abarbanel (1965) 239 Cal. App. 2d 31, 34

5. Petitioner acted in good faith in accordance with the practices and procedures recognized and approved by those reasonably skilled in his profession in the community, then it cannot be said that the operation was not necessary to preserve the life of the patient.

6. Petitioner, exercising his best professional skill and understanding, honestly believes that the operation is necessary for the preservation of the life of the mother, he cannot be found guilty of a criminal abortion.

People v. Ballard (1959) 167 Cal. App. 2d 803, 805, 814

People v. Abarbanel (1965) 239 Cal. App. 2d 31, 34

7. Respondent's power to discipline medical practitioners is not punitive and requires an established instance of professional disservice, ignorance, dishonesty or incompetence justifying action for public protection.

8. Respondent's disciplinary authority over Petitioner as a licensed physician and surgeon justifies the proceedings and includes the power to inquire as to the facts upon which Respondent's jurisdiction depends.

9. Respondent may resolve and determine issues of fact, but can neither restrict the legal consequences thereof nor render a valid order upon an erroneous conclusion of law for to do so would exercise judicial powers reserved to the courts.

Garfield v. Bd. Med. Exam. (1950) 99 Cal. App. 2d 219, 231

Aylward v. Bd. Chiropractic Exam. (1948) 31 Cal. 2d 833, 839

10. Where an administrative decision is not based upon a determination of fact, but upon an erroneous conclusion of law, and is without the Board's authority, the order is void.

Aylward v. Bd. of Chiropractic Exam. (1948) 31 Cal. 2d 833, 839

11. Respondent's decision finds, on the basis of uncontroverted evidence, that Petitioner acted in the honest opinion that the procedures in which he participated conformed with approved medical practice, were followed by many physicians and surgeons in the community, were taught by the major medical schools in this State and were rendered due to his concern for preserving the life of the patient. Respondent's interest and authority over the subject-matter terminated upon finding facts contradicting and excluding unprofessional conduct.

12. Respondent's determination of facts set forth in the Decision rendered in Petitioner's proceeding is based upon uncontroverted evidence and testimony establish-

ing circumstances precluding Petitioner's guilt of a criminal abortion as a matter of law.

13. On the basis of the Findings of Fact Petitioner was not guilty of performing a criminal abortion in that all of the women allegedly aborted were entitled to protection under the provisions of Amendment VIII of the Constitution of the United States, and Article I, Section 6, of the Constitution of the State of California.

14. On the basis of the Findings of Fact, Petitioner was not guilty of performing a criminal abortion in that all of the women allegedly aborted were entitled to protection under the provisions of Amendment XIV of the Constitution of the United States, and Article I, Section 13, Clause 6, of the Constitution of the State of California.

First Natl. Ben. Soc. v. Garrison (D.C.1945) 58 F. Supp. 972, aff'd 155 F.2d 522
Wilson v. City of Los Angeles (1960)
In re Newbern (1960) 53 Cal.2d 786, 792

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: September 24, 1968

/s/ Andrew J. Hyman
Judge of the Superior Court

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT - CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff)
) NO. 69-3429
vs.)
)
SPIRO P. ANAST,)
)
Defendant)

MEMORANDUM OPINION

1. The defendant has been indicted in a three-count indictment charging that he "committed the offense of solicitation to commit abortion in that he did willfully and unlawfully urge, encourage and advise a female..... to have an unlawful abortion committed, in violation of Chapter 38, Secs. 8-1 and 23-1, Illinois Revised Statutes, 1967." (Each of the three counts names a different female person.)

2. Defendant has filed a 2-pronged attack upon the indictment: (1) He moves to dismiss the indictment because the statute above referred to is unconstitutional because "it is vague, inexplicable of definition and impossible to decipher"; and, (2) because even presuming the constitutionality of the statute, the indictment does not charge the offense of "solicitation to commit abortion."

3. The defendant's position on both grounds is sustained by this Court.

THE FAILURE OF THE INDICTMENT TO ALLEGE A CRIME

4. Sec. 8-1 of Chap. 38, Ill. Rev. Stat. 1967, defines solicitation as follows:

> "A person commits solicitation when, with intent that an offense be committed he commands, encourages or requests another to commit that offense."

5. The indictment charged the defendant with encouraging a female to "have an unlawful abortion committed". It is obviously impossible for the female to commit a legal abortion on herself, as the Abortion Statute, Sec. 23-1, plainly imports the commission of an abortion upon a woman by another. And, it is obvious that the indictment does not charge that the defendant encouraged or requested the female to commit the crime of abortion, merely to have "an unlawful abortion committed".

6. The statute is plain and unambiguous: A person is guilty of solicitation when he encourages or requests another *to commit the offense of abortion*. Encouraging a female to have an abortion committed, which is what the indictment charges, is nowhere made an offense by any statute. Where an indictment, information or complaint which does not define those acts allegedly committed by the defendant to be specific and definite, the indictment fails.

7. And in the instant case, where the State alleged its specifics it failed to allege any crime in accordance with any existing statute.

8. Accordingly there can be no solicitation to encourage a female "to have an unlawful abortion committed" and the indictment is void on that ground.

9. Sec. 23-1 of the Criminal Code states as follows:

> "(a) A person commits abortion when he uses any instrument, medicine, drug or other substance whatever, with the intent to procure a miscarriage of any woman. It shall not be necessary in order to commit abortion that such woman be pregnant or, if pregnant, that a miscarriage be in fact accomplished. A person convicted of abortion shall be imprisoned in the penitentiary from one to ten years."
>
> "(b) It shall be an affirmative defense to abortion that the abortion was performed by a physician licensed to practice medicine and surgery in all its branches and in a licensed hospital or other licensed medical facility because necessary for the preservation of the woman's life. 1961, July 28, Laws 1961, p. 1983, Sec. 23-1".

The statute is unconstitutional (1) for vagueness; and (2) for infringing upon a woman's right to control her body.

10. In *Lanzetta v. New Jersey,* 306 U.S. 451, the Supreme Court held that when a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application, such statute violates the first essential of due process of law, (p. 453).

11. A similar statute was held unconstitutional by the Supreme Court of California, *People v. Belous,* 80 Cal. Reptr. 354 (1969). That court held that a statute making a person who performs an abortion punishable unless abortion is necessary to preserve a mother's life was invalid where the term "necessary to preserve" was not susceptible to a construction which was sufficiently certain to satisfy due process requirements.

12. Just as the defendant in *Belous,* who did not commit the abortion but who referred the patient to a non-physician who did, had standing to raise the constitutional question, the instant defendant likewise has standing. *Griswold v. Connecticut,* 381 U.S. 479, 481; *Barrows v. Jackson,* 346 U.S. 249, 257.

13. The court does not find any compelling state interest sufficient to override the infringement on the personal liberty of a woman effected by the statute here being challenged.

"The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgement of a 'right to privacy' or 'liberty' in matters related to marriage, family and sex. *Griswold v. Connecticut,* 381 U.S. 479; *Loving v. Virginia,* 388 U.S. 1, 12; 18 L. Ed. 2d. 1010 (statute prohibiting interracial marriages held violative of the due process clause).

Recently, a three-judge court sitting in the United States District Court, Eastern District of Wisconsin (Milwaukee), headed by Judge Kerner of the Seventh Circuit Court of Appeals, held unconstitutional a somewhat similar statute (Sec. 940.04 Wis. Stats.) as the one at bar. *Babbitz, Plaintiff v. McCann, et al, Defendants,* No. 69-C-548. The three-judge court held "upon a balancing of the relevant interest, we hold that a woman's right to refuse to carry an embryo during the early months of pregnancy may not be invaded by the State without a more compelling public necessity than is reflected in the statute in question. When measured against the claimed 'right' of an embryo of four months or less, we hold that the mother's right transcends that

of such an embryo." And recently also, a District Court in the District of Columbia invalidated an abortion law in slightly different language. *United States v. Vuitch,* 38 L. W. 2275 (Nov. 10, 1969). The court in *Vuitch* observed: "There has been moreover, an increasing indication in decisions of the Supreme Court of the United States that as a secular matter, a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in the early stages of pregnancy." Accordingly, the Illinois Abortion Statute is unconstitutional in the opinion of this Court.

CONCLUSION

16. For the foregoing reasons, this court holds the statute to be unconstitutional and further holds the indictment to be insufficient; and it is hereby dismissed.

Respectfully submitted,

/s/ George E. Dolezal, Judge
Criminal Division
Cook County Circuit Court

GED:mm

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY
PENNSYLVANIA

CRIMINAL

COMMONWEALTH : No. 1968 - 353

VS. :

BARRY GRAHAM PAGE :

O P I N I O N

CAMPBELL, P.J.:

History

On October 21, 1968, the defendant, a motorcycle mechanic who acquired his expertise in the merchant marines, entered a plea of guilty to a charge that he aborted two unmarried pregnant women. He was sentenced to the state penitentiary for a term of two to five years.

The Act of June 24, 1939, P.L. 872, Section 718 (18 P.S. 4718) was the statutory basis for the prosecution. It is a "broad brush" statute prohibiting all abortions without exception within the state of Pennsylvania.

On March 4, 1970, the defendant filed a PCHA petition alleging that the aforesaid abortion statute is unconstitutional in that it violates the constitutions of Pennsylvania and the United States.

The Social Problem

The problem of abortion is a matter of great current concern in the United States. Aside from the moral and religious issues involved, the resulting social implications and effects are great. The Kinsey group have estimated that one out of every five pregnancies in the United States end in abortion. The annual take by non-professional abortionists has been estimated to be over $350,000,000 a year and is thought to be the third largest illegal endeavor in the United States, exceeded only by gambling and

narcotics. (1) It has further been estimated that over 5,000 women die each year from criminal abortions. (2) As a result of the enormous resulting problems, abortion statutes are being subjected to critical review.

State's Compelling Interest

The commonwealth is aided by the presumption in favor of the constitutionality of the statute. Aside from this presumption, courts have traditionally upheld the constitutionality of state legislation if it can establish an overriding legitimate legislative purpose to justify the interference with individual and family privacy. Thus the real question, as stated in ***People v. Belous,*** 80 Cal. Rep. 354; 38 LW 2167 (1969), was not "whether the right exists but whether the state has a compelling interest in the regulation of the subject which is within the police power of the state."

What is the state's compelling interest in the abortion statute? Is it to discourage fornication and other illicit sexual conduct? If so, why does the statute apply to both married and unmarried women?

Is the state's compelling interest the desire to preserve the health and welfare of women? Why, then, does it apply in bold fiat to medical doctors who possess the requisite skill to easily perform a safe abortion during at least the first trimester of pregnancy? There is abundant medical opinion that it is safer for a woman to have a hospital therapeutic abortion than to bear a child.

Is the state's compelling interest the desire to protect the rights of the fetus? The 14th Amendment to the U.S. Constitution requires that the state accord "due process of law" and "equal protection of the laws" to ***any person*** within their respective jurisdiction and that all ***persons born or naturalized*** in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. (emphasis added.) We know of no court which has construed the early development of the fetus as being a person within the meaning of the 14th Amendment and on the contrary believe that it is generally only applicable at birth. The protection of the embryo and fetus does not justify an abortion statute: ***People v. Belous, supra.***

---

(1) D. Lowe, Abortion and the Law, 3-5 (1966)

(2) Bates and Zawadski, Criminal Abortion, 3-4 (1964).

We can readily perceive of a valid compelling interest of the state in the subject of abortion if it were directed, for example, to prevent an unqualified, unlicensed and untrained individual to perform an abortion which medically would jeopardize the health and safety of the woman involved but, in order to accomplish the result in which the state is interested, the statute must be sufficiently narrow in scope to serve the limited purpose involved: *McLaughlin v. Florida*, 379 U.S. 184; 85 S. Ct. 283 (1964); *Shelton v. Tucker*, 364 U.S. 479; 5 L. Ed. 2d 231 (1960).

We flatly hold that the Pennsylvania statute does not meet this standard because of its broad unlimited and indiscriminate application.

Right to Marital and Personal Privacy

We pass now to the question of whether or not the abortion statute violates the woman's fundamental right to personal privacy and, likewise, the fundamental right to marital privacy.

The Supreme Court of the United States has shown a marked concern with regard to legislative interference in the marital relationship, the individual's right to bear children and to be free from unwarranted invasion upon one's right to privacy. The genesis of such a stance may be seen in such cases as *Griswold v. Connecticut*, 381 U.S. 479; 14 L.Ed. 2d 510 (1965)(upholding the right to distribute and use prefertilization contraceptive devices); *Loving v. Virginia*, 388 U.S. 1; 18 L.Ed. 2d 1010 (1967)(holding a statute prohibiting interracial marriage violative of the Due Process Clause); *Skinner v. Oklahoma*, 316 U.S. 535; 86 L.Ed. 1655 (1942)(holding a sterilization law illegal and finding the right to procreation a "basic liberty").

In these and other cases the court has recognized a constitutionally protected right to privacy which is made applicable to the states through the 14th Amendment to the United States Constitution.

We believe the rationale of the case of *Griswold v. Conn., supra*, is applicable and may be extended to abortive action after conception and that the abortion statute interferes with the individual's private right to have or not to have children. Both the Pennsylvania and Connecticut statutes are at odds with current medical practice, both invade the intimate realm of marital privacy, both interfere with a married couple's freedom to control the number and spacing of offspring, and both are in conflict with a solution of one of the world's critical problems, the population explosion.

The United States District Court in *U. S. v. Vuitch*, 38 LW 2275 (1969)(cert. granted) and the Supreme Court of California in *People v. Belous, supra*, have each declared an abortion statute unconstitutional. Although these statutes were factually dissimilar to the statute here in question, the rationale we believe to be applicable in many respects.

The United States District Court for the Eastern District of Wisconsin has declared a state abortion statute unconstitutional as violating a pregnant woman's Ninth Amendment right of privacy: *Babbitz v. McCann*, 38 LW 2498, decided March 5, 1970. In this case a Wisconsin physician was charged with aborting an unquickened fetus.

We are convinced that the Pennsylvania abortion statute clearly impinges on constitutionally protected areas and without a doubt it is so broad, unlimited and indiscriminate that it fails to meet the present day tests for constitutionality.

Conclusion

We sincerely regret that the question of the constitutionality of this statute should reach this court in its present posture. The reprehensible actions of the defendant are in no way approved or condoned by the language contained herein or the court's decision. The only solace one can gather is the fact that this very statute created the undesirable situation involved in this case and that the legislature may hasten to adopt an abortion statute to meet the needs of present day society. Defendant's petition is therefore granted and the defendant ordered discharged.

BY THE COURT:

/s/ R. Paul Campbell

P.J.

Dated: July 23, 1970

AND NOW, to-wit: July 23, 1970, an exception is noted and bill sealed for the Commonwealth.

BY THE COURT:

/s/ R. Paul Campbell

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH DAKOTA, WITHIN AND FOR PENNINGTON COUNTY

STATE OF SOUTH DAKOTA, Plaintiff,

-vs-

H. BENJAMIN MUNSON, Defendant.

MEMORANDUM DECISION

Apr. 6, 1970

The defendant herein, a licensed physician, is charged with abortion. By motion his counsel seeks dismissal of the information on the grounds that the abortion statute, under which he is being prosecuted, is unconstitutional.

According to reliable estimates, more than a million American women had abortions last year. Of these about 350,000 needed hospital care when they attempted to abort themselves, and more than 8,000 of these self-help cases died. ("Life" Magazine, Feb. 27, 1970.) Enforcement of the abortion laws has been chiefly against quacks and charlatans who have botched the job, and the woman lived to complain. Where death ensues, the prosecution has been for homicide. It is a rare case where a licensed physician has been prosecuted. In no instances has the woman been prosecuted, although the abortion laws are directed equally against the woman seeking an abortion.

With such mass disregard for the abortion law, reflecting a radical change in public attitude, it is in order to determine whether the exercise of the police power in prohibiting abortion is "sanctioned by usage, held by prevailing morality to be necessary to public welfare, or endangers the vital interests of society", criteria which over the years have been used to measure the right of the state to regulate personal and private conduct.

There has been a concerted drive in recent years to abolish or liberalize the abortion laws by statute or to challenge the constitutionality of such laws. Where the legislatures have acted some have liberalized the abortion laws and some have repealed them outright. Abortion is legal in most of Europe and in England. Most of the abortion laws were passed in the so-called "Victorian" era, a time when moral and religious fervor against anything regarded as sinful, resulted in many laws governing morals and personal conduct. The South Dakota Statute dates back to 1877. Most of these laws governing personal or private conduct, like the "blue laws" have either been repealed or have not been enforced. The laws prohibiting abortion represented a change from the common law which permitted

abortion in the initial stages of pregnancy, before quickening of the fetus. In the 19th century when the abortion laws originated, all surgery was risky, and the needs of the frontier era was additional manpower. Now abortion is safer than childbirth, and the highly publicized public interest is in population control.

With the abortion laws on the books, only a small proportion of abortions are performed by licensed physicians, because most doctors are not willing to take the risk of prosecution and loss of their license, however small that may be. The rest are performed by people on a descending scale of competence down to the outright quacks and charlatans, or are performed by the woman herself in desperation where she does not have the funds to finance an illegal abortion. Are the interests of society being served by a law which exposed over a million women last year to such risks? Are the interests of society being served by women bearing unwanted children, subjected to the pressures of an emotionally and financially deprived existence? Are the interests of society being served by the population explosion we are now witnessing?

The abortion law has been held unconstitutional in California on the grounds that the words "necessary to preserve her life" in that state's abortion statute were unconstitutionally vague. People vs. Belous, 458 P(2) 194 (Cal. 1969). The District of Columbia law was invalidated on the same grounds where the language of the statute was "necessary for the preservation of the mother's life or health". U.S. vs. Vuitch, 38 Law Weekly 2275 (Nov. 10, 1969). The language of the South Dakota statute forbidding abortion, "unless the same is necessary to preserve her life" likewise presents the same basis for invalidity.

However, in the opinion of this court, the invalidity of the abortion law goes much deeper in that it interferes with private conduct without serving any vital interest of society. Indeed, it is a disservice to society under the conditions that have been outlined above. This court agrees without reservation with the recent opinion handed down by a three judge panel of the U. S. District Court for the Eastern District of Wisconsin, in the case of Babbitz vs. McCann, et al., #69-c-548, a copy of which was furnished to the court and opposing counsel by counsel for defendant.

Dr. Babbitz sought an injunction in federal district court against a prosecution in state court for performing an illegal abortion. The Wisconsin statute, set forth in detail in the opinion, provided a different penalty for abortion before quickening of the fetus than was imposed for abortion of the quickened fetus. Dr. Babbitz was charged with aborting a fetus before quickening. The court held that the statute under which he was charged was unconstitutional under the Ninth Amendment to the U. S. Constitution, the court concluding that "the State of Wisconsin may not by statute deprive a woman of her private decision whether to bear her unquickened

child", thus squarely facing the fundamental issues involved in the abortion laws.

This court adopts the reasoning of the court in the Babbitz case, under Section IV, which should be read in its entirety, since only portions will be quoted herein for emphasis.

Quoted with approval in Babbitz is the following excerpt from an article by former Supreme Court Justice Tom C. Clark in the Loyola University Law Review for April, 1969, in which Justice Clark concluded from a study of Griswold (striking down Connecticut statute forbidding use of contraceptives) and its predecessor cases:

> "The results of these decisions is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution."

Quoting further from the language of the court in Babbitz:

> "The defendants urge that the state's interest in protecting the embryo is a sufficient basis to sustain the statute. Upon a balancing of the relevant interest, we hold that a woman's right to refuse to carry an embryo during the early months of pregnancy may not be invaded by the state without a more compelling public necessity than is reflected in the statute in question. When measured against the claimed "rights" of an embryo of four months or less, we hold that the mother's right transcends that of such an embryo."

The court went on to find no compelling interest of society in the need to protect the mother's life, since abortion is presently less dangerous than childbirth, or in connection with the discouragement of non-marital sexual intercourse. In fact, most abortions are sought by married women and the laws do not purport to distinguish between married and unmarried women.

Accordingly, defendant's motion for dismissal of the information filed herein will be granted on the grounds that the abortion statute is an unconstitutional invasion of individual right, without a compelling interest in the State.

Counsel for the defendant may prepare an order accordingly.

By the Court:

Clarence P. Cooper, Circuit Judge

OPINION - MARCH 30, 1970

This is the case of the PEOPLE OF THE STATE OF MICHIGAN vs. DR. JESSE KETCHUM AND JUDITH KETCHUM. The Defendants are charged with the crime of CONSPIRACY TO PERFORM AN ABORTION, contrary to M.S.A. 28.773 and M.S.A. 28.204.

At the beginning of the preliminary examination, Mr. John Bai ttorney for the Defendants made an oral motion to dismiss the complaint and warrant on the grounds that the Michigan statute on abortion is unconstitutional because it is indefinite and uncertain and vague and therefore is in violation of the due process clause of the Fourteenth Amendment of the United States Constitution.

This Court recognizes that the issues raised in this proceeding have far reaching moral implications, theological implications, and medical implications. However, this Court will address itself solely to the legal issues raised in the motion.

Nei ther the Defendants' attorney nor the prosecuting attorney have cited to this Court any Michigan Supreme Court decision nor any Court of Appeals decision which have previously held this statute constitutional so therefore this Court is not bound by any prior decisions.

Due process of law requires a penal statute to use clear, explicit, and unambiguous terminology so that men of common intelligence may not differ as to its meaning and application. See Connelly vs. General Construction Company 269 U.S. 385 and Lanzetta vs. New Jersey 306 U.S. 468.

It is the applicable terminology of the Michigan abortion statute "unless the same shall have been necessary to preserve the life of such woman" clear, explicit, and unambiguous? The three key words "necessary," "preserve," and "life" taken individually by both judicial interpretation and dictionary definitions create uncertainty as to their individual meaning. The entire phrase in itself is susceptible to a variety of interpretations. This Court concludes that the terminology is not sufficiently clear, and explicit and does not satisfy the due process requirements without infringing on fundamental rights. See People vs. Belous, 80 Calif. Reporter 354, and The United States vs. Vuitch 38 LW 2275.

The Michigan statute provides for the standard of "any person... with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of said woman." The standard allows "any person" to decide who shall be born and who shall not be born. Certainly our country is established and maintained on the principle of the rule of law - a nation of laws and not of men. The standard "any

person" provides no procedural guidelines. Is not the decision as to who shall or shall not be born a decision in which society has an interest and not a decision to be made conclusively by "any person" without any guidelines to protect the basic rights of the parties involved?

Is there an infringement on the basic rights of the parties as protected under the Fourteenth Amendment? The Court believes that the parties involved include the woman, the unborn, and any person who is performing the abortion. The woman certainly has a right to life as opposed to the risks of death in childbirth. The woman has a right to privacy in matters relating to marriage, family and sex. See Griswold vs. Connecticut 381 U.S. 479. The real issue is whether the state has a compelling interest in the regulation of the right to privacy in matters of marriage, family, and sex. Currently accepted standards of medical practice negate the original compelling interest of the state because the need of the state to protect the woman's health when the abortion statute was originally enacted is no longer evident in light of scientific advancements.

The Court believes that the unborn person may be a person under the Constitution, and thereby shall not be deprived of life without due process of law. In Michigan the unborn child has the right to maintain a tort action, to sue for wrongful death of its parents after its birth. The right to property by means of inheritance. The right to a guardian ad litem in certain actions. Does not the unborn child have an absolute right to life - the right to be born? The Michigan statute as written does not provide for the taking of the life of the unborn person with due process of law.

In addition the statute as written infringes on the right of privacy in the physician-patient relationship, and may violate the patient's right to safe and adequate medical advice and treatment.

Thus this Court finds that the Michigan abortion statute as written is vague and indefinite in its terminology and possible applications as to constitute a denial of due process as protected by the Fourteenth Amendment of the United States Constitution and the Michigan Constitution of 1963 Art. a Sec. 17, and that it infringes on the basic rights of privacy of the woman, and the basic right of life of the unborn person, and infringes upon the right to privacy between physician and patient, without a sufficient state interest in abridging the right of privacy and the right of life. This Court declares the Michigan abortion statute unconstitutional as a denial of due process of law as protected by the Fourteenth Amendment of the U.S. Constitution and Art. 1 Sec. 17 of the Michigan Constitution. In view of the foregoing, this Court finds it unnecessary to consider the other arguments raised by defense counsel. The motion to dismiss the complaint and warrant is granted.

/s/ Clarence A. Reid, Jr.
Clarence A. Reid, Jr.
District Judge

Item No. 37

Order of the District Court, Second Judicial District, County of Ramsey, Denying Motion to Dismiss Indictment Against Appellant Jane E. Hodgson, M.D., Entered June 29, 1970

DISTRICT COURT
STATE OF MINNESOTA

COUNTY OF RAMSEY—SECOND JUDICIAL DISTRICT

File No. 23789

STATE OF MINNESOTA,

vs.

DR. JANE ELIZABETH HODGSON.

The defendant is accused by the grand jury of the County of Ramsey in an indictment returned on May 21, 1970, of the crime of abortion, in that she, the defendant, intentionally produced a miscarriage of one, Jane Doe, which said miscarriage was not necessary to preserve the life of the said Jane Doe nor the child with which she was pregnant. The defendant's first appearance in court was on May 26, 1970, at which time she appeared with her Counsel, Stewart R. Perry, and indicated to the Court that her appearance was a special appearance for the purpose of moving the Court for an order dismissing the indictment for the reason and upon the ground that the statute under which the indictment was returned was unconstitutional. The date of June 12, 1970, was then set as the time for hearing, and the requests to file briefs by both the State and the defendant were granted by the Court.

On June 12, 1970, the defendant, together with her Counsel, appeared before the Court to argue the above described motion. The County Attorney was represented by Mr. Paul Lindholm, Assistant Ramsey County Attorney. In the interim, briefs had been submitted by Mr. Perry and by Mr. Stephen C. DeCoster, Assistant Ramsey County Attorney.

Upon all of the files, records, and proceedings had and filed in said matter, briefs and arguments of Counsel, and after due consideration of the same,

IT IS ORDERED:

1. That the motion brought by defendant to dismiss the indictment returned against her in the above entitled matter be and the same hereby is denied.

2. That the request of the defendant to certify the above entitled matter to the Supreme Court of the State of Minnesota as important and doubtful be and the same hereby is denied.

3. That the defendant will appear before the Court on August 5, 1970, prepared to proceed with her arraignment.

(Signature Illegible)
Judge of the District Court

Dated June 29, 1970.

MEMORANDUM

The statute in question, MSA 617.18, was first enacted into law by the Minnesota legislature in the year 1873. As far as can be ascertained, this is the first constitu-

tional challenge of the statute, and the issues presented in this motion have not been decided in this jurisdiction. The Court has taken judicial notice of the materials cited in the briefs, but they are of such common understanding that they need not be elaborated on here in great detail.

The undisputed facts appear to be that Jane Doe, a married woman, of the age of 23 years, was a patient of the defendant, and on April 14, 1970, was diagnosed as being pregnant. From the medical history obtained, it was suspected that Jane Doe had contracted rubella during the first four weeks of her pregnancy, and that Jane Doe had come to the defendant because she suspected that she had rubella during that period of time. She was apprehensive about her condition, particularly her unborn child, because of her knowledge of the dangerous propensities of the disease. The history of rubella given by Jane Doe was confirmed by clinical observations and laboratory tests on two of her children who at that time had the disease, the examination and tests being performed by a pediatrician located in Minneapolis, Minnesota. Upon the tests having been made, together with examinations in connection therewith, the defendant was of the opinion that Jane Doe had rubella during the first four weeks of her pregnancy. Jane Doe and her husband were aware of the danger to the fetus because of the contraction of the disease and requested the defendant to perform an abortion. The defendant believed in her medical judgment that a therapeutic abortion was medically indicated, and she secured consultations from other members of her profession in the community and in other parts of the United States, resulting in the performance of the abortion in a hospital located in Ramsey County, Minnesota, on April 29, 1970. At that time Jane Doe was about 12

weeks pregnant, and the fetus was not viable or "quick." Before proceeding with the operation, the defendant brought a motion in the United States District Court, District of Minnesota, seeking, essentially, the same relief here presented. A three-judge court denied the motion of the defendant and indicated that she seek her relief in the courts of the State of Minnesota. Because of the lack of time, the defendant proceeded with the operation, rather than first seek her relief in the district courts of the State.

The issues presented cover three, general, broad areas. First, whether or not the State has the right to interfere with the private rights of an individual; two, if the State does have such right, it must have an overriding and compelling interest to justify any such interference with the private life of an individual; and, three, if there is an overriding State interest present today that justifies the existence of MSA 617.18, it is incumbent upon the State to establish such interest.

The Court will touch upon the constitutional issues raised by defendant as they pertain to these three general areas.

Defendant contends that the statute infringes upon the personal liberties of the individual concerned, in that it interferes with a woman's right of privacy in determining whether she will or will not, or should or should not, allow to grow within her body embryo which she does not wish to grow, and that in order for the State to interfere, there must be shown a reasonable basis, an overriding justification, a social purpose of such interference. Defendant further contends that at the time of its enactment, in the year 1873, there was an urgent and well-founded health basis for its passage. Any surgical intrusion into the body

was, at that time, highly dangerous. Infection was almost insured, and mortality was high. Defendant argues that today an abortion performed under proper circumstances is a reasonably safe procedure, even safer than normal childbirth. No doubt these considerations were in the mind of our legislators almost a century ago when the law was first enacted. However, the statute has been periodically reconsidered over the years, most recently at the last legislative session. Whatever the dangers of surgery the legislators might have had in mind during the early years of the history of this law, those considerations have seemed [*sic*] to have disappeared during recent years, and the law is still on the books. The reason for its existence is not because of dangers of surgery or performing an abortion, medically speaking. Some considerations for the continued existence of the law are hereinafter discussed.

Defendant places great emphasis on the fact that the State of Minnesota has never considered an embryo or fetus as a "human being." Defendant further contends that the statute in question denies the rights of the Father or the Mother of the aborted foetus to privacy in contravention of the Ninth and Fourteenth Amendments to the United States Constitution. There is authority to the effect that the unborn child, even before it becomes viable, is an entity which the legislature is empowered to protect. In early recorded history, the child in the Mother's womb was considered a part of its Mother. Reference is made to Roman law, see Justinian, Digest 25.4.1.1. But since that early date we have seen the development of scientific methods to such an extent that the ancient law has been reconsidered, and no longer is the fetus considered to be a plant, static in habit, and growing only in size. Through the marvels of closed-circuit x ray and television, scientific observations of

this little human being during his first weeks of existence have been made possible. Studies of mental growth have been made possible, during the first few weeks of the child's existence. Some studies have indicated that even in the limb bud stage, when the embryo is only four weeks old, there is evidence of behavior pattern: the heart beats. In two or more weeks, slow back and forth movements of the arms and legs appear. Before the 12th week of uterine life, the fingers flex in reflex graphs. From the studies of certain child psychologists, it has been disclosed that the process of mental development which characterizes a 10-year old child or the one-year old child also characterizes the embryo who might be only one month old. Hence, it would appear that the time has been reached when society must discard the theory advanced by the old Roman law, that a parent has an absolute dominion over his offspring, or a return to the ancient notion that a fetus is "part" of his Mother. The Minnesota legislature has made no such distinction, nor has it attempted to set out by law at what stage during pregnancy a child may be considered "quick" or "viable" nor has it at anytime determined at what stage during pregnancy the life of a child can or could be taken for any reason or means. Rather, the legislature has decreed that a miscarriage shall not be caused at anytime during pregnancy unless the same is effected as necessary to preserve the life of the Mother or the life of the child. The State has an interest in the continued existence of every life.

Defendant contends that unless the fetus in question is "quick" or viable, the unborn child has no legal rights in the State of Minnesota. The rights of the unborn child are specifically recognized by Minnesota law in its various

fields, such as: intestate succession; testate successions; trusts and uses; workmen's compensation; paternity and support; land registration; and future interests in real property. Various quotations make reference to "unborn child" and "posthumous child," "lives in being," "twenty-one years and nine months," but the law is entirely lacking with respect to definitions of "quick child" or "viable child." The Court recognizes there are rules and regulations promulgated by the State Department of Health pursuant to MSA 144.151 (4) to the effect that destroying a fetus is not considered a fetal death if aborted for any reason less than 20 weeks after conception. See Registration Manual for Birth and Fetal Death, State Board of Health (1965), Section 5, page 14. However, such regulations and publications are not considered decisive case law, nor are they controlling in the instant matter. Turning our attention to the field of tort law, the first time that the Minnesota State Supreme Court was called upon to pass upon the issue of the right of the heirs of an unborn child to recover in a wrongful death action was in 1949. See *Berkenes* vs. *Corniea* (1949) 229 Minn. 365, 38 N.W. (2) 838. It is noted that the Court, in part of its opinion, quoted Blackstone as follows:

> "The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation. Life is the immediate gift of God—a right inherent by nature in every individual; and it begins, in contemplation of law, as soon as an infant is able to stir in the Mother's womb."

The Court further quotes the case of *Bonbrest* vs. *Kotz* (D.C.) 65 Fed. Supp. 138:

"From the viewpoint of the civil law and the law of property, a child en bentra [*sic*] sa mere is not only regarded as a human being, but as much [*sic*] from the moment of conception—which it is in fact."

While it is true that the child in the Berkenes case had reached a viable state, it is noted that the Court made no distinction between a viable or nonviable child, that is, it does not appear that had the child not been viable, recovery would have been denied. There is substantial authority in other jurisdictions which allow recovery for prenatal injuries to nonviable, unborn children. There appears to be no holding or decision to the effect that would allow a shifting of standards in certain cases. There appears to be no reason to allow a distinction to be made, based upon age of the child within the womb. The dean of tort law, Professor Prosser, states at Section 56:

"Certainly the infant may be no less injured, and all logic is in favor of ignoring the stage at which it occurs."

If the State legislature has seen fit to give the right of recovery to an unborn child or his heirs at various stages during pregnancy in the civil field, why should the child be abandoned at certain stages of pregnancy in the criminal field? If the unborn child at age 12 weeks within the womb has vested rights or the right in certain instances to recover, as hereinabove set forth and described, why should any person be deemed competent to judge that the child's twelve-week life may be taken because of the wishes of its Mother or Father, or because it is unwanted, or because of the possibility of its being deformed or handicapped because

of exposure to certain diseases during the early stages of life? Defendant would ask this Court to so legislate, contrary to what has taken place in the halls of our legislature for generations past. For the reasons hereinafter enumerated, this Court does not so choose to do.

Defendant alleges that the statute in question, MSA 617.18, today is based on the concept of "morality and decency" arising from religious laws in violation of the First Amendment to the United States Constitution. Defendant then points out that these individuals who rely on the position of morality and decency overlook the end results where abortion is not allowed. That is to say, they overlook those children who are being born with gross defects, who must live with them day by day, while those who would preach morality and decency are prompted by it only on occasions where their attention is drawn to what someone else is doing. Defendant further points out that these people overlook the institutions in Minnesota filled with mentally retarded people whose life is tragic, and that they overlook the daily pain that the parents and siblings of such children live, day by day. They further overlook the unwanted children in institutions and overlook the children who are periodically in hospitals with the "battered child syndrome." Defendant contends that it is immoral and indecent not to prevent this, and that it is immoral and indecent to force these institutions to exist.

Where the statute involved deals with conduct which the State has valid grounds to prohibit, that is, the taking of the life of an unborn child, the fact that its policies coincide with the views of certain religious groups is without constitutional significance. It is almost inevitable that any position taken by the State through its legislature on the

subject of abortion must correspond with the religious or moral views of some group or groups within the community. In passing such a law, the legislature did not intend that it establish a religion in contravention of the First and Fourteenth Amendments to the United States Constitution. This subject has been the concern of philosophers and theologians since recorded history has begun. The relationship between religion, morality, and law, perhaps, is difficult to clearly define. However, history teaches that they do overlap in the subjects of their concern. An historical study of the works of our legislative bodies will clearly indicate that many men in their respective roles as legislators were committed to the proposition that the ultimate source of law is from the ultimate Lawgiver Himself. Many have clearly indicated that a just law binds one's conscience, and if a law does not bind one in conscience, it should not be law. There are numerous references in the Old Testament as to the source of our law, among which are the Book of Proverbs, Chapter 8, and Exodus, Chapter 24. Five thousand years ago Hammurabi recognized a supernatural source of authority, and the same reference is also made to Solon, the great leader of freedom-loving Greeks. It seems that down through the centuries, men have further recognized the authority for law and would keep those convictions alive in various forms in the halls of their legislatures. Seven hundred years ago Henry Bracton wrote:

> "The king is under God and the law. When the king or dictator or the State is held above God and the law, liberty is never secure, and the rights of man are mere franchises subject to the whims of other men."

In more modern times these same thoughts might have inspired our great leaders, such as Thomas Jefferson, when he wrote:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness."

Society would reach a strange position in its history if the legislatures of the several states were forbidden from making illegal that which is also immoral according to one's religion, or, indeed, all religions, on the grounds of the establishment clause of the First Amendment. Under such restrictions society might then return to a state of chaos, even barbarianism. The Court recognizes the sincere views of the defendant in this field, and the remarks hereinabove set forth are not in criticism or ridicule of those views or beliefs. The Court is also cognizant of the views of the minority in our various communities who have views which coincide with those of the defendant in this area. However, to give effect to those views of the defendant or the minority, the Court again is called upon to legislate, and for the reasons hereinafter set forth, the Court will not undertake such a responsibility. The Court is also not unmindful of the anxiety of the Mother in this case. Having been exposed to German measles, she was apprehensive of the possibility of bearing or giving birth to a deformed or handicapped child. Instead of agreeing to take the child's life because of this possible exposure, might she not have at least better yielded to the argument of a segment of our society who would state:

"Let the child run its normal period of gestation, and upon birth if it is found that the child will be a burden to its parents or society, then provisions may be taken for its destruction."

The very thought of such argument, perhaps, appears abhorrent to responsible members of our community, but wherein lies the difference? At what stage in the course of human existence, or development, can it be decreed that life should be taken because of the potential inability to perform as normal persons are expected? Society is increasingly concerned with those who have been blessed with healthy bodies, and prefer to serve themselves, and blame society, rather than serve society and honor themselves. Society has never forgotten, nor should it ever forget, that men and women with withered limbs and bodies became outstanding citizens, leaders in their communities, but above all, masters of themselves, while other healthy, vigorous, intelligent individuals, warped within the philosophy of excuse, for one reason or another, have become instruments of their own damnation.

Defendant asserts that the statute in question interferes with the right of privacy of women in violation of the Ninth Amendment to the United States Constitution. The Court agrees that legislation of this type might and can interfere with the right of privacy of certain individuals. This is true with many of the laws of today. A simple illustration concerns the matters of traffic regulations involving the use of a motor vehicle upon the highway. Many such rules and regulations or statutes interfere with the manner in which a person might desire to operate a motor vehicle, but in the protection of life and property, legislative safeguards have been provided, many of which interfere daily

with the rights of individuals. The same problem exists with many other types of legislation. For instance, there are still on the books laws against adultery and fornication, and how intoxicants and narcotics shall be used. These laws are considered by a substantial minority to be archaic in design, and no longer serve a useful purpose in a modern and developing society. However, it is clearly noted that our legislature over the years has not yielded to such arguments and philosophies. This Court does not agree that the statute in question relative to abortion is in violation of the Ninth Amendment of the Constitution of the United States.

Defendant asserts that the statute in question interferes with the right of a medical doctor to practice medicine in the highest standards thereof in violation of the Fourteenth Amendment to the United States Constitution. The Court agrees that the right to pursue one's profession is a constitutionally protected right within the concept of "liberty" and "property." However, it is also noted that medical opinion is divided as to the situations under which a therapeutic abortion is medically indicated. If the State cannot constitutionally regulate the exercise of that judgment, legislators and courts alike would be superfluous, supplanted by a wise elite of doctors. In a democratic society, trust cannot be placed with a body of experts to determine issues of life and death, however qualified, well-motivated, and devoted the experts may be.

Defendant further contends that the statute delegates to the physician the duty and risk of deciding whether the abortion is necessary to preserve the life of the Mother or child and thus violates the Fifth and Fourteenth Amendments to the United States Constitution. Defendant points out the difficulty here is that the doctor must decide

whether or not the abortion is necessary to preserve the life of the patient, and she apparently has difficulty interpreting the word "preserve." Defendant alleges that it is incumbent upon her to make the right decision as to whether or not an abortion is necessary to preserve the life and is thus placed in a conflict of interests; that is, caught between the decision to do the abortion and the fear that if something should go wrong, the matter would be brought to the attention of the police. Thereafter, the doctor must then justify her opinion at a trial. Hence, she jeopardizes her practice and runs the risk of prosecution whenever the decision is made to perform an abortion, where there is any question that medical opinion could differ as to whether or not the operation was necessary to preserve the life of the Mother or the child. This Court, upon examination of the statute, is not persuaded that the words are indefinite or vague. In the Court's opinion, the word "necessary" and the expression "to preserve the life of the Mother" are both reasonably comprehensible in their meaning. The United States Supreme Court has ruled that a criminal statute must be definite enough to acquaint those who are subject to it with the conduct which will render them liable to its penalties. See *Lanzetta* vs. *New Jersey,* 306 U.S. 451, 59 S. Ct. 618, 83 L. PB. [*sic*] 888 (1939). And also see *Connolly* [*sic*] vs. *General Construction Company,* 68 [*sic*] U.S. 385, 46 S. Ct. 126, 17 L. PB. [*sic*] 322 (1926). This Court is of the opinion that the statute sets forth with reasonable clarity and sufficient particularity the kind of conduct which will constitute a violation. It is interesting to note that the defendant challenges the words "necessary to preserve her life" as being vague. The Court is not unmindful that the dedicated medical profes-

sion assumes this responsibility without hesitation almost daily in its various practices. It is deeply interesting to note that the statute in question has been law for a period of almost 100 years, and until the present time no one has challenged the provisions of the statute as being indefinite or vague. The Court cannot agree with the defendant that the statute involves a delegation of legislative responsibility. The legislature has simply set a certain standard, and that is, that no abortion shall be carried out unless necessary to preserve the life of the Mother, and then requires that the individual condition his or or her conduct on a respect for the standard as set. It would appear that the requirements laid out are no more burdensome than those which are established by any criminal law. Such a requirement placed upon the individual is, in no sense, a delegation of legislative responsibility.

The State contends that there are valid policy reasons underlying the statute in question; therefore, the doctrine of separation of legislative and judicial functions and the long-settled judicial rule of reticence in substituting the Court's own notions of legislative wisdom for that of a democractically elected legislature dictate that the challenged statute be sustained. The question of the validity of anti-abortion legislation is not the only issue of importance here. The issue of separation of legislative and judicial functions is as well involved. Even though a court may go so far as to opine that a particular statute in question be unwise, silly, or even asinine, if it has been demonstrated that the statute in question is reasonably tailored to the protection of societal interests with respect to which the legislature is entitled to act, then such act should not be torn down by a court who differs in opinion, philosophically or socially. This does not mean that there are

POOR COPY

not policy grounds for a change in abortion laws which were ably stated in defendant's brief and exhibits. What it does mean is that these arguments are more properly addressed to the legislature of this State, and ultimately to its people. This Court is asked to balance the rights of an unborn child against the rights of the Mother, contrary to what the legislature has so consistently stated. Whose rights shall transcend? Who shall balance the relevant interests? This Court is of the opinion that the problem of balancing is more properly the function of the legislature and of the people of the respective states. In the case of Commonwealth vs. Brunell [*sic*], not yet reported, the Court stated:

> "The subject of abortion has become one of the most controversial social and legal issues of our contemporary society. Reasonable arguments have been advanced both in favor of and against abortion. But when a question is fairly debatable, the courts cannot substitute their judgment on it for that of the legislature." Citing *Druzik* vs. *Board of Health of Aberhill,* 324 Mass. 129. "It is only when a legislative determination cannot be supported upon any rational basis of fact that a court can strike it down. If the law on abortion is not as responsive to felt needs as the people believe contemporary life demands, the remedy rests with a democratically elected legislature and not with the court."

Defendant requests the Court that the statute in question be found constitutional but to then certify the matter to the Supreme Court of the State of Minnesota pursuant to MSA 632.10 for a determination of the constitutionality of

the statute prior to trial. This would obviate the necessity of raising the defense that she might have, relative to a verdict of innocence or guilt, and would at the same time give statewide effect to the ruling on constitutionality. If the Court in the local instance should find the statute unconstitutional, that ends the matter, and there would be no statewide effect of that local decision. Defendant also points out to the Court that a conviction, including a plea of guilty, would be most serious and would place her professional standing in jeopardy. She feels that if the matter should go to trial at the local level without a Supreme Court determination as to constitutionality, then her whole plan becomes moot inasmuch as she will be put to the task of defending herself against the charge brought by the grand jury, and if she is successful at the trial on the merits, again, the matter would not have any statewide impact.

In the light of the foregoing observations and conclusions drawn by the Court, it is obvious that the matter cannot be certified to the Supreme Court of the State of Minnesota, as important and doubtful. The Court believes that the issue or matter is important, but in this Court's opinion the constitutionality of the act in question is not in doubt. Under the circumstances, the Court has no alternative but to order that this matter proceed pursuant to the ordinary rules and processes of our criminal procedures.

The Court is not unmindful of the standing of the defendant in her community, her reputation as a citizen and as a dedicated physician and surgeon, and the Court is not unmindful of the serious position that she is in pursuant to the charge brought against her. However, it is she who chose to violate the law, and she certainly must have been cognizant of the consequences that might follow. In the

opinion of some of her professional colleagues as well as many in this community she will be considered as a very courageous and dedicated person in choosing the course of conduct that she did. Conversely, there will be other members of her profession and members of our community who do not and will not agree with her. Unfortunately, this Court cannot be a part of any plan or procedure other than those duly provided by law. No exception can be made in any case, even though a court might be in sympathy with the actions taken by the defendant.

The regular and ordinary criminal procedure processes established by law and within this Court's responsibility, require that the defendant be ordered to appear for her arraignment, which has been set for August 5th, next. Defendant will then have to decide whether to bring the matter on for trial relative to the issue of her innocence or guilt of the crime as charged or to enter a plea of guilty, and rest her future standing in the hope that the Supreme Court of the State will take a contrary view to that expressed herein.

HACKEY, J.

Item No. 38

Commonwealth of Massachusetts

Middlesex, ss. Superior Court
No. 83879

COMMONWEALTH

v.

PIERRE VICTOR BRUNELLE

DECISION ON DEFENDANT'S SUBSTITUTE MOTION TO DISMISS

The defendant has been indicted for an alleged violation of G. L. c. 272, sec. 19, the so-called abortion statute. The indictment charges that he "with intent to procure the miscarriage of Linda A. Phillips, did unlawfully use a certain instrument upon the body of said Linda A. Phillips."

After pleading not guilty, the defendant filed a substitute motion to dismiss the indictment on the ground that the statute he is charged with violating is unconstitutional. At the hearing of this motion, evidence was received from experts in the fields of medicine and psychiatry. The motion sets out ten grounds on which the statute is claimed to be unconstitutional. Some of these grounds will be discussed separately; others will be grouped together.

I.

The Claim that the Statute violates the First Amendment and the Fourteenth Amendment in that it establishes a Religious Position Peculiar to one Religion.

The defendant contends, in substance, that the statute effects an establishment of religion because it enacts into law the doctrine of the Roman Catholic Church on the subject of abortion. Quite properly, the defendant does not contend that the original abortion statute enacted in 1845 (St. 1845, c. 27) was passed as a result of pressure by the Catholic Church or for the purpose of giving a Catholic moral position the force of law. But the defendant does contend that the effect of retaining in force G. L. c. 272, sec. 19 "is to enact into law theological tenets of some organized religions in this most important area of human life." (Defendant's Brief, p. 18). Two answers may be given to this argument.

First, the Massachusetts statute, as construed by the Supreme Judicial Court, is not in accord with the Catholic view on abortion. See Code of Cannon Law, 2350, sec. 1; Tinnelly, Abortion and the Penal Law, 5 Catholic Lawyer 187, 190. Second, there in no factual basis for any claim that the present purpose of the statute is to give legal effect to any particular religious viewpoint or that in its operation the statute does have that effect. It is almost inevitable that any position taken by the state through its legislature on the subject of abortion must correspond with the religious or moral views of some group within the community. The fact that a law coincides with a religious view does not render that law an unconstitutional establishment of religion. For example, the fact that Sunday is a day of particular significance for the dominant Christian sects does not bar the state from achieving the secular goal of requiring the observance of Sunday as a day of rest. *McGowan v. Maryland,* 366 U.S. 420; *Gallagher v. Crown Kosher Super Market,* 366 U.S. 617. If the state decides that it is in the public interest to restrict abortions to situations involving the life or health of pregnant women, it is not forbidden to do so because that view corresponds with the moral views of a majority or of a minority in the community.

The defendant's argument that the abortion statute violates the free exercise clause of the first amendment is without merit for, while the freedom to hold religious beliefs is absolute, the freedom to act upon those beliefs may be limited where there is a substantial state interest. *Braunfeld v. Brown,* 366 U.S. 599. The interest of the state in protecting what it considers to be human life would appear to be at least as substantial as any interest in maintaining Sunday as a day of rest. See *Raleigh Pitkin-Paul Morgan Mem. Hosp. v. Anderson,* 42 N.J. 421, 201A.2d 537, cert. den. 377 U.S. 985 (1964).

II.

The Claim that the Statute Violates the Due Process Clause of the Fourteenth Amendment and the Massachusetts Constitution, Part 2, C. I, Article IV, in that it is Arbitrary, Irrational, and Not Suited to Achieve any Valid Legislative End.

It is quite probable that the original Massachusetts statute on abortion when enacted in 1845 had as its primary purpose the protection of the health of the mother. At that time an abortion was attended by grave risk to the life and health of the pregnant woman. Due to advances in the last century in medical science and techniques,

an abortion today, carried out by a competent physician in an accredited hospital, involves no more risk to the mother than continued pregnancy and childbirth. It is still true, however, that abortions performed by non-medical persons involve serious risks to the life and health of the woman.

The defendant argues that since there is little danger, comparatively speaking, to the health of the mother in the case of an abortion performed by a properly trained physician, there is no valid state interest served by proscribing an abortion by such a physician even though the abortion may not be necessary to preserve the woman's life or health. In other words, it is argued, the state may not validly deprive a pregnant woman of the right to an abortion requested by her when the only ground of such proscription is the moral one of protecting the fetus.

At the outset, it may be doubted whether the defendant has standing to raise the issue of the constitutional right of a woman not to bear children. It does not appear that the defendant is a duly licensed physician. On a motion to dismiss I cannot assume that he is or is not so licensed. It is rather obvious that the state has the power to forbid persons who are unlicensed physicians to perform abortions. The risk to the health of the mother from allowing unlicensed persons to practice medicine would alone be an adequate ground for the state intervening.

Assuming, however, that the defendant does have standing to raise these issues, I shall deal with them on their merits. There can be no doubt that the abortion statute, although broadly construed by the Supreme Judicial Court, does restrict the liberty of action of a pregnant woman who seeks an abortion solely for personal or social or economic reasons. The question is whether this restraint on her liberty is justified by any compelling state interest. The Commonwealth asserts that the state has a justifiable and overriding interest in protecting the embryo or fetus and that the desire of the woman must be subordinated to this public interest. The basic question posed is whether the legislature may validly regulate the extermination of human life at an early state of its development.

The evidence before me clearly establishes that the product of human conception -- whether it be in the stage of zygote, embryo, or fetus -- may properly be classified as human life. It is not potential human life, but actual human life. The zygote contains within itself the genetic package that will control its development during

its life in the womb and in the world. It is uniquely different from any other part of its mother's body. It is a human being in and of itself in the sense that it is an individual entity human in origin, human in its characteristics, and human in its destiny. Whether it is proper to describe this entity as a human person is a matter of disagreement. The law has not, at least as yet, given full recognition as a juristic person to the embryo or fetus. To a limited extent the fetus has been granted rights as a person, contingent on its birth. *Torigian v. Watertown News Co. Inc.*, 352 Mass. 446; *Meyes v. Construction Service, Inc.*, 340 Mass. 633. Cf. *Dietrich v. Northampton*, 138 Mass. 14. It is difficult to accept the view that because the state has not fully recognized the unborn child as a legal person it lacks power to extend any protection to the fetus or embryo. Although there is some authority to this effect (*People v. Belous*, 80 Cal. Rptr. 354, 458 P.2d 194; *United States v. Vuitch*, 305 F. Supp. 1032), it is of questionable weight here in view of the different statutes under consideration in those cases. Protection of life has traditionally been one of the first duties owed by a state to its people. To say that the state has no interest in life prior to birth except as the mother may choose to permit the state to have an interest is to accept a proposition that contradicts the action of every state legislature. In this area of competing values, if the legislature sees fit to make a choice in favor of life, I find nothing in the federal or state constitution that says that such a choice is forbidden.

III.

The Claim that the Statute Infringes the Right of Privacy of a Pregnant Woman Desiring an Abortion.

The defendant contends that G. L. c. 272, sec. 19, not only invalidly restrains the liberty of a pregnant woman to bear or not bear a child, but that it also invades her constitutionally protected right of privacy. It is argued that her right to plan her reproductive life and her family as she sees fit is within a protected zone of privacy under the first, ninth, and fourteenth amendments of the constitution. Again, there is a question of the defendant's right to raise such an issue in the absence, at least, of evidence of his status as a duly licensed physician. But laying aside this objection, I rule that the claim is without substantial merit.

A nebulous concept of right of marital privacy found recognition in *Griswold v. Connecticut*, 381 U.S. 479. In that case the Supreme Court struck down the Connecticut

contraception statute. The defendant argues that, analogously, the abortion statute as applied to married women invades a constitutionally protected right of a married woman to the control of her reproductive faculties. Some support for this view can be found in the two abortion cases previously cited, *People v. Belous*, supra, and *United States v. Vuitch*, supra. However, there is a distinction between the state's attempted regulation of the marital use of contraceptives and the regulation of abortion. The state's interest in the protection of embryonic and fetal life, absent in the *Griswold* situation, is crucial to the abortion issue.

It may be added that it does not appear whether the woman named in this indictment as the subject of the abortion was married or unmarried.

IV.

The Argument that the Statute is Void on its Face because of its Vagueness.

The Statute in full (G. L. c. 272, sec. 19) reads as follows:

"Whoever, with the intent to procure the miscarriage of a woman, unlawfully administers to her, or advises or prescribes for her, or causes any poison, drug, medicine or other noxious thing to be taken by her or, with the like intent, unlawfully uses any insturment or other means whatever, or with like intent, aids or assists therein, shall, if she dies in consequence thereof, be punished by imprisonment in the state prison for not less than five nor more than twenty years; and, if she does not die in consequence thereof, by imprisonment in the state prison for not more than seven years and by a fine of not more than two thousand dollars."

It is an established constitutional principle that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process ..." *Connelly v. Central Construction Co.*, 269 U.S. 385, 391; *Lansetta v. New Jersey*, 306 U.S. 451. The broad language of the Massachusetts statute, if taken literally and without clarifying judicial construction, might well be open to the charge of vagueness. But the statute has been construed by the Supreme Judicial Court and has been given a specific content that provides adequate guidelines to physicians. Decisions of that court have held that a duly licensed physician may lawfully procure the abortion of a patient if he acts in good faith and in an honest be-

lief that it is necessary for the preservation of her life or to prevent serious impairment of her health, mental or physical, and if his judgment corresponds with the general opinion of physicians in the community in which he practices. *Commonwealth v. Wheeler,* 315 Mass. 394; *Commonwealth v. Nason,* 252 Mass. 545; *Commonwealth v. Brunelle,* 341 Mass. 675.

Moreover, the question is not an open one in this Commonwealth. In *Kudish v. Board of Registration,* Mass. Adv. Sh. (1969) 883 it was held that the statute was not void for vagueness. Two courts have recently utilized the void-for-vagueness principle to strike down abortion statutes which contained an exception permitting abortion when necessary to preserve the life of the mother in one case, and when necessary to preserve the life or health of the mother in the other case. *People v. Belous,* supra; *United States v. Vuitch,* supra. But in neither of these cases was the statute so construed as to give decisive weight to the good-faith judgment of the physician.

The statute, as construed by the Supreme Judicial Court, is no more vague than many traditional concepts of the law such as murder, manslaughter, criminal negligence, and the right of self-defense.

V.

The Claim that the Statute Infringes on the Constitutional Right of Free Speech and on the Freedom of Physicians to Practice their Profession.

The defendant contends that the abortion statute violates his constitutional right of free speech in that it makes criminal the mere conveying of information to a person, knowing that the person can utilize the information to procure an abortion. Also, the defendant claims that the statute unduly interferes with the freedom of the physician to practice his profession, according to his best medical knowledge.

The statute as applied to the defendant raises no question of freedom of speech or the rights of physicians to practice their profession. He is not charged with advising or prescribing an abortion. He is charged with unlawfully using an instrument on the body of a woman with intent to procure an abortion. Hypothetically, it is possible to imagine a situation in which a serious question of first-amendment rights may arise in the application of the statute, but this defendant lacks standing to raise it. Moreover, since it does not appear that he is a licensed physician, he is not entitled to come forward as the champion of the medical profession. As to the power of the state to regulate that profession, see *Kudish v. Board of Registration,* supra; *Lawrence v. Board of Registration,* 239 Mass. 424.

Some miscellaneous arguments advanced by the defendant do not require detailed treatment. For example, the defendant contends that the statute is an invidious discrimination against the poor in violation of the Equal Protection Clause of the fourteenth amendment in that the poor cannot afford to hire physicians or psychiatrists who can legally prescribe therapeutic abortion. The stature is nondiscriminatory on its face. To the extent that it may be discriminatory in operation, the cause is economic, not legal. If a remedy is needed, it lies with the medical profession and the legislature, not with the courts.

The defendant also complains that the statute subjects those who violate it to cruel and unusual punishment. This contention is without merit. A legislature is not required to fix or impose any particular penalty for a crime. The penalties set out in the statute cannot be said to be wholly disproportionate to the gravity of the evil which the legislature could deem to result from illegal abortions. In any case, the defendant has neither been convicted or sentenced. It will be time enough to consider the issue if and when it becomes relevant. See *Commonwealth v. Baird*, Mass. Adv. Sh. (1969) 727, 247 N.E. 2d 574; *Commonwealth v. Leis*, Mass. Adv. Sh. (1969) 97, 243 N.E. 2d 898.

CONCLUSION

The subject of abortion has become one of the most controversial social and legal issues of our contemporary society. Reasonable arguments have been advanced both in favor of and against abortion. But when a question is fairly debatable, courts cannot substitute their judgment on it for that of the legislature. *Drusik v. Board of Health of Haverhill*, 324 Mass. 120. It is only when a legislative discrimination cannot be supported upon any rational basis of fact that a court can strike it down. If the law on abortion is not as responsive to felt needs as the people believe contemporary life demands, the remedy rests with a democratically elected legislature and not with the courts.

The defendant's substitute motion to dismiss is denied.

ENTERED:

Cornelius J. Moynihan
Associate Justice

III.

LEGAL COMMENTARY

RELIGION, MORALITY, AND ABORTION: A CONSTITUTIONAL APPRAISAL

*by Mr. Justice Tom C. Clark**

Thought without action is an abortion;
action without thought is folly.[1]

Our society is currently in the midst of a sexual revolution which has cast the problem of abortion into the forefront of religious, medical, and legal thought. In my day at the bar all discussion of abortion was taboo. For more than sixty years the American Medical Association had a negative policy respecting abortion. The A.M.A. often sought the prosecution of any doctor who engaged in the practice of abortion, regardless of the merits of the individual situation. Society's general attitude toward abortion was such that the patient was ostracised and the doctor was disgraced. As in so many other facets of its moral code, however, society was hypocritical in its behavior. Despite the public pronouncements against its practice, abortions increased, especially among married women, and judicial action against the participants decreased in proportion.[2]

Some social commentators argue that Freud prepared the way for the Kinsey Report, which in turn set the stage for the sexual permissiveness that Reinhold Niebuhr called "moral anarchism."[3] This permeating permissiveness engendered a need for more efficient birth control methods, such as "the pill," and precipitated the doom of the old hypocrisy.

The law, lagging behind as usual, began to emerge from its quagmire and rid itself of the archaic restraints on abortion. In 1962 the American Law Institute proposed an affirmative policy declaring that the termination of pregnancy is justified whenever (1) its continuance would gravely impair the physical or mental health of the mother, (2) the child would be born with grave physical or mental defects, or

---

* Associate Justice, Supreme Court of United States (Retired), 1949-67.

1 *The Wisdom of Nehru*, 34 WISDOM 62 (The Wisdom of India ed. 1960).

2 R. THOMLINSON, POPULATION DYNAMICS 198-99 (1965).

3 Niebuhr, *Kinsey and the Moral Problem of Man's Sexual Life*, in AN ANALYSIS OF THE KINSEY REPORTS ON SEXUAL BEHAVIOR IN THE HUMAN MALE AND FEMALE 62 (D. Geddes ed. 1954).

(3) the pregnancy was the result of rape, incest, or other felonious intercourse.[4]

Within five years of this proposal, the A.M.A. reversed its negative policy and adopted the A.L.I. proposal with only a few nuances.[5] During the next two years, five states liberalized their abortion laws and adopted the A.L.I. proposal.[6]

A further liberalization occurred in Great Britain with the adoption of the 1967 Abortion Act, which permits doctors to consider the mother's "actual or forseeable environment" in deciding whether an abortion is necessary.[7] The American College of Obstetricians and Gynecologists (A.C.O.G.) recently advocated enactment of similar legislation in this country.[8] While the permissiveness of the legislation would contradict existing laws in all states, the A.C.O.G. made it clear that it does not counsel disobedience to the law. It merely recommended liberalization and repeal of inconsistent laws. It did not, however, advocate the legalization of abortion for any unwanted pregnancy or as a population control device.

Various religious, medical, psychological, and legal organizations have been striving to reach some level of accord on the issues involved in promulgating a realistic and acceptable policy toward abortion. Emphasis on this topic is the result of many factors, including the chaotic state of thinking that prevails among the professions and the public, and the medical, emotional, and legal consequences which aborticide has on today's society.

The Christian Medical Society's symposium on controlling human reproduction provides a recent illustration of the disagreement that exists among professionals concerning abortion. Distinguished clerics, psychologists, doctors, and lawyers sought to determine what course of action should be followed. They were unable to answer many important questions, such as: Is the control of human reproduction against the will and spirit of God? At what stage of the gestation period does the fetus acquire human status? What are the constitutional limitations upon the State in prohibiting or limiting the control of

[4] MODEL PENAL CODE § 230.3(2) (Proposed Official Draft, 1962).

[5] Committee on Human Reproduction, *AMA Policy on Therapeutic Abortion*, 201 J.A.M.A. 544 (Aug., 1967).

[6] CAL. HEALTH & SAFETY CODE §§ 25950-54 (West Supp. 1967); COLO. REV. STATS. 40-2-50 (Perm. Cumm. Supp. 1968); GA. CODE ANN. § 26-1202 (effective July 1, 1969); LAWS OF MD. ch. 470 (Supp. 1968); N.C. GEN. STAT. § 14-45.1 (Supp. 1967).

[7] Abortion Act 1967, c. 87, at 2033.

[8] *Just How Great Are the Risks of The Pill?*, MEDICAL WORLD NEWS, May 24, 1968, at 23.

reproduction? I ask myself, "Heaven knows; who can tell? Who shall decide when experts disagree?" These and many other questions must be answered if we are to attain our goal of an aborticide policy that is responsive to modern society's needs and desires.[9]

In a recent conference the Association for the Study of Abortion experienced far greater success in agreeing on an aborticide policy. Dr. Robert Hall, President of the Association, said that the conference was designed to "relate what we know about abortion, and to determine what, if any, extent our attitude toward abortion should change with changing times. . . ."[10] The conference reviewed numerous reports dealing with present abortion laws. One of these reports concerned the effect of California's recently liberalized abortion law. It was noted that while the number of therapeutic abortions performed in California hospitals this year will rise from six hundred to about four thousand, there will continue to be some one hundred thousand illegal abortions performed in that state, because doctors are concerned about risking a prison sentence for an incorrect interpretation of ambiguous provisions of the liberalized law.[11] The conference was also informed that psychiatrists and physicians in various states were referring patients to doctors in states which have more liberal abortion laws. This practice renders the availability of legal abortion dependent upon the woman's ability to reach such states.[12] Many doctors admitted privately that they and most of their non-Catholic colleagues perform several illegal abortions each month. Kenneth R. Whittemere reported that his recent interviews revealed that in one small Southern city, women had a choice between "a chiropractor, an antique dealer, a mid-wife, a mechanic and a doctor dissatisfied with his profession to perform the operation."[13]

The Association reached an almost unanimous conclusion that all abortion laws should be abolished and that the right of childbirth should

---

[9] The theological and medical scholars did agree on *A Protestant Affirmation*. It did not undertake to answer any of the questions posed in the text. In substance, the consensus concluded that as to abortion "each case should be considered individually, taking into account the various factors involved and using Christian principles of ethics." It suggested that suitable cases for abortion would fall within the scope of the A.C.O.G. statement, but not including abortion for convenience only or on demand. *See* CHRISTIAN MED. SOC'Y J. (Nov.-Dec., 1968).

[10] Meeting of the Ass'n for the Study of Abortion, Hot Springs, Va., Nov. 18, 1968, reported in N.Y. Times, Nov. 24, 1968, at 77, col. 1.

[11] *Id.*

[12] *Id.*

[13] *Id.*

be left to each woman acting on the advice of her doctor. This would have the effect of removing the issue from the hands of the legislatures and the courts, which are virtually helpless to decide an ethical question as controversial and far-reaching as abortion.[14] Whether or not we agree with the Association's recommendations, it is readily apparent at this point that a uniform scheme concerning abortion is highly desirous.

Throughout history religious belief has wielded a vital influence on society's attitude regarding abortion. The religious issues involved are perhaps the most frequently debated aspects of abortion. At the center of the ecclesiastical debate is the concept of "ensoulment" or "personhood," *i.e.*, the time at which the fetus becomes a human organism. The Reverend Joseph F. Donseel of Fordham University admitted that no one can determine with certainty the exact moment at which "ensoulment" occurs, but we must deal with the moral problems of aborting a fetus even if it has not taken place.[15] Many Roman Catholics believe that the soul is a gift of God given at conception. This leads to the conclusion that aborting a pregnancy at any time amounts to the taking of a human life and is therefore against the will of God. Others, including some Catholics, believe that abortion should be legal until the baby is viable, *i.e.*, able to support itself outside the womb. In balancing the evils, the latter conclude that the evil of destroying the fetus is outweighed by the social evils accompanying forced pregnancy and childbirth.[16]

Most civilizations of antiquity prohibited the practice of abortion. Ancient Judaism prohibited birth control except in times of famine.[17] Assyrian law imposed the death penalty upon any person participating in an abortion, including the procurer.[18] Even pagan writers described abortion as an evil act prohibited by law.[19]

The New Testament is devoid of pronouncements bearing directly on the issue of birth control or abortion. The Old Testament, however, does not condemn abortion as a capital offense since the fetus was not regarded as possessing a soul within the Sixth Commandment

---

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] For studies in this area see L. EPSTEIN, MARRIAGE LAWS IN THE BIBLE AND THE TALMUD (1942); L. EPSTEIN, SEX LAWS AND CUSTOMS IN JUDAISM (1948).

[18] H. SAGGS, THE GREATNESS THAT WAS BABYLON 215 (1962).

[19] PAULY'S REAL-ENCYCLOPÄDIE DER CLASSISCHEN ALTERTUMSWISSENSCHAFT (Wissowa ed. 1962).

proscription.[20] It does declare, however, that conception is a gift of God which can be withdrawn at His will.[21] Many theologians today argue that man must not destroy what God has created and that aborting a pregnancy destroys the gift of human life.[22]

The medical profession is far from agreeing on the time at which the fetus becomes a human life. Some physicians argue that abortion should be permitted with impunity at any time up to the sixth month of pregnancy since prior to that time the fetus is no more than a growing plant.[23] On the other hand, many eminent physicians believe that the fertilized ovum has human life from the time of conception.[24] In support of this argument they refer to the International Code of Medical Ethics, which states that a physician will maintain the utmost respect for human life, from the time of its conception. A third view is that the decision to terminate a pregnancy must be made according to the circumstances of the particular case. Among the factors to be considered are the duration of the pregnancy, the physical and mental health of the mother, and the risk of serious fetal abnormality. This places the burden of decision upon the doctor and renders the selection of the physician a governing factor in securing permission to perform a therapeutic abortion.[25]

Sociologists have found themselves in a similar quandary over the issue. Some of these social philosophers argue that man is not merely a chemical machine and that he possesses a soul from the earliest stages of fetal development. Therefore the fetus cannot be destroyed with impunity. The control of human reproduction, according to this view, should concentrate on the prevention of conception rather than on abortion.[26] Other sociologists believe that there is no conclusive evidence or persuasive argument that the fetus is human.[27] Indeed,

---

[20] *Exodus* 3:21.

[21] *Genesis* 1:28, 4:1, 11:30; *Ruth* 4:13.

[22] Montgomery, *How to Decide the Birth Control Question*, CHRISTIANITY TODAY, March 4, 1966, at 10.

[23] Stern, *The Issue of Legalized Abortion*, 88 CAN. MED. ASS'N J. 899 (1963); J. FLETCHER, MORALS AND MEDICINE 152 (1967); address by E. Bidinton, Symposium of Christian Medical Society, Aug., 1968.

[24] *See generally* PHILOSOPHY AND ETHICS IN MEDICINE (M. Gelfand ed. 1968).

[25] *See Therapeutic Abortion*, 98 CAN. MED. ASS'N J. 512 (1968).

[26] R. ETTINGER, THE PROSPECT OF IMMORALITY 132 (1962). *But see* Hudeeczek, *De Tempore Animatianis Foetus Humanis Secundum Embroyologiam Hodiernam*, in XXIX ANGELICUM 162-81 (1952). *See also Cyronics and Orthodoxy*, XII CHRISTIANITY TODAY 816 (1968).

[27] Address by John Scanzoni, Ph.D., Assoc. Prof. of Sociology, Indiana Univ., Nat'l Convention of Christian Medical Society, Aug., 1968.

it cannot interact with other human beings. Therefore, there is no proof of life in the sense that the law contemplates proof of fact.

The moving spirit of the times also raises moral issues that divide the disciplines within themselves. A group of one hundred psychiatrists were questioned on the morality of abortion.[28] Twenty-four agreed that abortion should be available upon demand at an appropriate stage of pregnancy. Fifty-six, however, would require consideration of all of the medical and social factors involved in each case before deciding whether to terminate the pregnancy. Sixteen of those questioned would abort only when actual or threatened maternal disaster was present. Only four expressed other views. While this indicates a vast departure from the Christian concept, it does reveal residuals of morality affecting the opinions of over two-thirds of the group. In other words, over two-thirds of the group would not abort a pregnancy solely on demand.

Despite the fact that religious belief continues to permeate our attitude toward abortion, most people today agree with Justice Holmes that "moral predilections must not be allowed to influence our minds in settling legal distinctions."[29] This is illustrated by the fact that the present change in attitude toward abortion has developed while the need for abortion has diminished as a technique to save the life or health of the mother or to prevent fetal deformities. Despite the medical developments, the demand for abortions has increased astronomically.[30] This indicates a definite change in social mores, which is undoubtedly the result of increased knowledge and use of abortion. This attitude of permissiveness is replacing the hypocrisy that prevailed in the last generation.

A major contributing factor to this change in attitude has been the growing antagonism toward the double standard which permits those with social status and financial ability to obtain abortions, while those in the lower social and economic classes are denied this opportunity. We are in the midst of a worldwide movement to make "the pill" and abortion available in the slums as well as on Fifth Avenue. The statistics illustrate the disparity between the affluent and the nonaffluent. Three counties surrounding San Francisco are relatively affluent. These counties account for sixteen per cent of the live births and fifty

---

28 Howells, *Legalizing Abortion*, 1 LANCET 728 (1967).

29 O. W. HOLMES, THE COMMON LAW (1881).

30 *The Cost of Life*, 60 PROCEEDINGS OF ROYAL SOC'Y OF MEDICINE 1235 (1962); Cogan, *A Medical Social Worker Looks at the New Abortion Law*, 2 BRITISH MED. J. 235 (1968).

per cent of the abortions in California. The less affluent Los Angeles County with its widespread slum areas accounts for sixty per cent of the live births and twenty-three per cent of the abortions in California.[31] These facts demonstrate quite clearly that the affluent areas account for a number of abortions disproportionate to their population density.

The increasing number of abortions subjects physicians to increased dangers of liability for incorrectly interpreting a statute. It appears that doctors face an uncertain fate when performing an abortion. This uncertainty will continue unless the legislatures or courts provide relief from liability. Very few states, if any, will repeal all abortion laws as the Association for the Study of Abortion has recommended. Some states, however, may liberalize their laws in accordance with the A.L.I. suggestion, but we have already seen that in states such as California this is an inadequate remedy in many respects. If the medical profession is to be accorded complete protection, it will have to come through the judicial system.

The Supreme Court of the United States has gone far—some critics contend too far—in permitting individual action in the areas of the Bill of Rights. It has not, however, dealt directly with the problem under discussion, nor do the decided cases cast much light on its solution. The best that we can do is examine related areas and draw some analogies.

In 1922 the Court held that the right "to marry, establish a home and bring up children" was an essential liberty within the guarantees of the Fourteenth Amendment.[32] In 1925 a public school statute requiring attendance exclusively at state schools was declared unconstitutional on the ground that it unreasonably interfered "with the liberty of parents and guardians to direct the upbringing and education of children under their control."[33] This concept was later extended to include "the private realm of family life which the state cannot enter."[34] And in 1960 the Court declared, in very broad language, that where State action significantly encroached upon personal liberty, its action would be invalid unless the State had a compelling subordinating interest in the particular activity.[35] Finally, in *Griswold v. Connecticut*[36] the Court struck down the state's statute prohibiting the use of con-

31 N.Y. Times, Nov. 24, 1968, at 77, col. 1.
32 Meyer v. Nebraska, 262 U.S. 390 (1923).
33 Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).
34 Prince v. Massachusetts, 321 U.S. 158 (1944).
35 Bates v. Little Rock, 361 U.S. 516, 524 (1960).
36 381 U.S. 479 (1965).

traceptives. The statute was found to operate upon "an intimate relation of husband and wife" which came within the zone of privacy created by several fundamental constitutional guarantees, the penumbras of which gave protection to the sanctity of a man's home and the privacies of his life. The Court determined that the statute was aimed at use rather than regulation and therefore violated the principle that legislation must not be unnecessarily broad. This does not mean that judges are given a free rein to strike down state regulatory statutes. They must look to the collective conscience of our society in determining which rights are fundamental and therefore protected by the Constitution.

The result of these decisions is the evolution of the concept that there is a certain zone of individual privacy which is protected by the Constitution. Unless the State has a compelling subordinating interest that outweighs the individual rights of human beings, it may not interfere with a person's marriage, home, children, and day-to-day living habits. This is one of the most fundamental concepts that the Founding Fathers had in mind when they drafted the Constitution. No one will deny that a State has a valid interest in regulating the well-being of its inhabitants, especially when it is dealing with children, who are more susceptible to undesirable influences. We have also seen that a State may not unreasonably interfere with the intimate relations of its inhabitants. When deciding on the constitutional restraints imposed on a State's interference with individual rights, the vital question becomes one of balancing. It must be determined at what point the State is interfering with individuals and at what point it is exercising valid authority by regulating the well-being of children.

In his concurrence in *Griswold*, my brother Goldberg asked whether a decree requiring all husbands and wives to be sterilized after the birth of ten children would be valid. He answered the question in the negative.[37] But suppose that the husband and wife voluntarily submitted to sterilization. Would it then violate the Constitution? I think not. Does it therefore follow that voluntary destruction of the fetus is also protected from interference by the State? Perhaps—unless life is present so that the State's compelling subordinating interest in the life of one of its people predominates. However, I submit that until the time that life is present, the State could not interfere with the interruption of pregnancy through abortion performed in a hospital or under appropriate clinical conditions. I say this because State interfer-

[37] *Id.* at 482.

ence is permissible only if reasonably necessary to the effectuation of a legitimate and compelling State interest.[38] Prior to the time that life is present in the fetus, what interest does the State have? Procreation is certainly no longer a legitimate or compelling State interest in these days of burgeoning populations. Moreover, abortion falls within that sensitive area of privacy—the marital relation. One of the basic values of this privacy is birth control, as evidenced by the *Griswold* decision. Griswold's act was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent conception, why can he not nullify that conception when prevention has failed?

The common law courts uniformly held that an infant could not be the subject of a homicide until its complete expulsion from the body of the mother and the establishment of an independent existence.[39] The distinction between fetal life and independent life is that the latter has an independent circulatory system.[40] Hence, where the evidence showed that an infant was killed before its birth was complete or was killed by means used to assist in its delivery, it was not deemed a homicide.[41] Therefore, under the common law, abortion could not be murder. These concepts and distinctions have been somewhat eroded in recent years. At present the courts do not agree on the time when life begins. The courts, however, have held an *accoucheur* responsible for prenatal brain damage to an infant in a viable state.[42] In this line of cases, the courts have found that the unborn infant was a separate biological entity and hence a legal one in contemplation of law, indicating a departure from the requirement of an independent existence. From this reasoning the courts may well take the unborn child into their protective custody. Indications of such a trend are illustrated by the abolition of the viability rule in some jurisdictions[43] and the repudiation of the "live birth" doctrine by fourteen states.[44]

To say that life is present at conception is to give recognition to the potential, rather than the actual. The unfertilized egg has life, and if fertilized, it takes on human proportions. But the law deals in reality, not obscurity—the known rather than the unknown. When sperm

[38] *Id.* at 503 (concurring opinion).
[39] Morgan v. State, 148 Tenn. 417, 256 S.W. 433 (1923).
[40] State v. Prude, 76 Miss. 543, 24 So. 871 (1899).
[41] Evans v. State, 48 Tex. Cr. App. 589, 89 S.W. 974 (1905).
[42] Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946).
[43] *See* PROSSER ON TORTS (3d. ed. 1964).
[44] Del Tufo, *Recovery for Prenatal Torts: Actions for Wrongful Death*, 15 RUTGERS L. REV. 61 (1960).

meets egg life may eventually form, but quite often it does not. The law does not deal in speculation. The phenomenon of life takes time to develop, and until it is actually present, it cannot be destroyed. Its interruption prior to formation would hardly be homicide, and as we have seen, society does not regard it as such. The rites of Baptism are not performed and death certificates are not required when a miscarriage occurs.[45] No prosecutor has ever returned a murder indictment charging the taking of the life of a fetus. This would not be the case if the fetus constituted human life.

It has been urged that the courts are the proper forum to determine when life begins. I submit, however, that the professionals are better able to determine when life begins than are the courts. Tort cases might cast some light on the issue,[46] but I would prefer that the courts yield to the expert testimony of doctors. This testimony would vary greatly, but that is nothing new to our judicial system.

This is not a question that will be easily resolved. Few questions that reach the Supreme Court are. As was stated at the Christian Medical Society's Symposium, "professionals . . . do not wish to play God with human lives, whether in being or inchoate with life. But we can inform our judgment . . . by the widest interchange, airing and concensus. Humility is a large part of every professional's code."[47] It must be remembered that many imponderables are a part of Supreme Court adjudications.

Accommodation of conflicting doctrine is more difficult to achieve in the judicial than in the legislative process. Courts cannot reach out to reform our society. A problem comes to the Court in the form of a justiciable issue and is narrowly drawn, rendering the Court's ruling contracted and finespun. Legislatures, on the other hand, have such facilities for investigation as hearings and may address themselves to the necessities of broad social needs and the correction of evils, both probable and existing. As Mr. Justice Cardozo said, "Legislation can eradicate a cancer, right some hoary wrong, correct some definitely established evil, which defies the feebler remedies, the distinctions and the fictions familiar to the judical process."[48]

---

[45] Schwartz, *Abortion and 19th Century Laws*, TRIAL June-July, 1967, at 41.

[46] Kwaterski v. State Farm Mut. Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967); Hatala v. Markiewicz, 26 Conn. Supp. 358, 224 A.2d 406 (1966). *Contra*, Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (1954); Marko v. Philadelphia Transp. Co., 420 Pa. 124, 216 A.2d 502 (1966).

[47] Prof. Thomas Lambert, Jr., Editor-in-Chief, American Trial Lawyers Ass'n, former Prof. of Law, Boston Univ.

[48] B. CARDOZO, GROWTH OF THE LAW 134 (1924).

The courts work on a case-by-case system which deals with the past rather than the future. Society would not have the benefit of the sweeping effect of a statute, nor would the doctor have the protection that he is entitled to receive. The case method would be slow, expensive, and possibly disastrous. It is for the legislature to determine the proper balance, *i.e.*, that point between prevention of conception and viability of the fetus which would give the State the compelling subordinating interest so that it may regulate or prohibit abortion without violating the individual's constitutionally protected rights.

The present climate seems favorable for immediate legislative action. Five states have already led the way.[49] With appropriate action, many more will follow suit in liberalizing their abortion laws. But this process will take less talk and more action. As Nehru once said:

> I am tired of people who merely talk about things. However wise you may be, you can never enter into the spirit of a thing if you only talk about it and do nothing. Even scientists have a tendency to let a wonderful experiment remain an experiment once it has been performed. The next stage somehow does not come. They may well say that the next stage is somebody else's job, but I think if the scientist had a sense of practical application, he would either try to do it himself, or get somebody else to do it. This association of thought with action is, I think, of utmost importance. Thought without action is an abortion; action without thought is folly.[50]

---

[49] Georgia, Maryland, North Carolina, California, and Colorado.

[50] WISDOM, *supra* note 1.

1258

Temple 40

LAW-MEDICINE NOTES

The Right to Health in National and International Law

WILLIAM J. CURRAN, J.D., S.M.Hyg.

THE United States is in the midst of an upheaval of rights. The Supreme Court, which only a few years ago was primarily concerned with the distribution of powers between the federal government and the states, is now a court of civil rights. Throughout the world rising economic expectations are causing peoples to demand more personal and political rights and privileges.

In the World Health Organization, matters of human rights have been a central concern ever since the founding of the agency in 1946. The Preamble to the Constitution of WHO sets forth the basic principle: "The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."

Since 1946, the subject of human rights has received attention in various international meetings and formal protocols, and declarations have recognized certain specific personal rights, the most important being incorporated in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.

As a result of the International Conference on Human Rights in Teheran in 1968, the WHO was asked to make studies of the problems of human rights that could be occasioned by recent scientific discoveries and technologic advances. Action was taken by the WHO General Assembly in 1968 and again in 1970 concerning these matters. A preliminary report was prepared by the Secretary-General that collected the history of the subject in international agreements and surveyed the field broadly.[1] Among the newer areas examined in the report are the right of privacy, protection of human personality, experimentation on human subjects, deterioration of the environment, human-rights aspects of the delivery of health services, mental-health problems and nutrition. Nearly all these areas have been explored in these columns in the last few years.

The problem in WHO discussion of these subjects, of course, lies in the fact that nearly all of them are matters of national law rather than international legal powers. WHO and other international bodies can contribute greatly to the resolution of problems in these areas and can propose new formulations, but national action is nearly always required.

In the United States, recent legal developments have provided both greater general recognition of a right to health and direct legal actions concerning specific subjects. In the general area, one of the

most important pieces of legislation in Congress has been the Comprehensive Health Planning Act, now in full operation all over the nation on a co-operative, partnership basis among all levels of government. In the declaration of purpose of this legislation it is asserted, "The Congress declares that the fulfillment of our national purpose depends on promoting and assuring the highest level of health attainable for every person, in an environment which contributes positively to healthful individual and family living. . . ."[2]

The bills now before Congress proposing national health insurance and those expanding activities in the field of environmental health all speak in forceful tones about the people's right to health. There are also bills to require studies of the effect of technologic advances on health and human personality.

All physicians and all persons active in the health professions should be aware of the national and international legal activities in this field. These issues will be among the most important to come before the WHO, the UN, and our own national Congress this year.

References

1. United Nations General Assembly: Human Rights and Scientific and Technical Developments: Report of the Secretary-General: Addendum. New York, United Nations, November 9, 1970
2. Public Law 89-749. Comprehensive Health Planning Act of 1966. Findings and declaration of purpose

The rapid change which has taken place in the United States in the past few years in abortion laws and practices is reviewed, with special attention to judicial and legislative developments in America and in other countries. Lessons from the experiences of other countries are cited in terms of their relevance for this country.

ABORTION LAW REFORM AND REPEAL: LEGISLATIVE AND JUDICIAL DEVELOPMENTS

Ruth Roemer, J.D.

IN the three years from 1967 to 1970, a revolution has occurred in the abortion laws and practices in the United States. That revolution is still in process. Our once highly restrictive antiabortion laws have been reformed in 13 states and virtually repealed in four states. No other country has a statute which explicitly makes abortion a matter for decision by the woman and her physician. Although other countries permit abortion on request of the woman under certain circumstances, the four American states have pioneered in treating abortion, as a matter of law, like any other medical procedure.

As a result of recent developments, the United States has become a laboratory in which three different types of legal regulation of abortion can be compared and evaluated. We can also profit from the longer experience of other countries with abortion statutes of varying liberality, although account must be taken of differing family planning programs and systems of delivering health services.

Legislative Developments in the United States

Three kinds of modernized abortion laws have been enacted in the United States since 1967: (1) Twelve states have enacted all or part of the Model Penal Code first proposed in 1957 by the American Law Institute (ALI), under which abortion is not a crime when performed by a licensed physician because of substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the woman or that the child would be born with grave physical or mental defect, or in cases of pregnancy resulting from rape or incest.[1] (2) One state, Oregon, has expanded the American Law Institute grounds to include a sociomedical ground proposed originally by the American College of Obstetricians and Gynecologists[2] and patterned after a provision of the British Abortion Act of 1967,[3] i.e., that in determining whether or not there is substantial risk to the woman's physical or mental health, account may be taken of her total environment, actual or reasonably foreseeable.[4] (3) Four states—Alaska,[5] Hawaii,[6] New York[7] and the State of Washington (by referendum in November 1970)—have repealed all criminal penalties for abortion, provided only that the abortion is done early in pregnancy and by a licensed physician (Alaska, Hawaii, and Washington also stipulate that the opera-

tion must take place in a licensed hospital or other approved facility). Thirty-three states, however, still have laws making abortion a crime except when performed to save the life (or, in a few instances, the health) of the woman. None of these states even requires that the abortion be performed by a licensed physician.

The details of the new laws vary in their provisions.* The key developments relate to six general aspects:

1. All 17 states require that the abortion be performed by a licensed physician.

2. All the states with new laws, except Mississippi and New York, require that the abortion be performed in hospitals, with Kansas also permitting another place designated by law.[8] New York City has recently added the requirement that abortions be performed in hospitals or clinics, and not in doctors' offices.

3. All 17 states allow abortion to save the life of the woman, and also in pregnancies resulting from sex crimes.

All these 17 states (except Mississippi, which authorizes abortion only for rape or to save life) allow abortion to preserve the health or the physical or mental health of the woman. The sociomedical standard of the Oregon law mentioned above is a broader standard than the medical standard of the ALI-style laws.

Seven states set age limits on abortions for statutory rape. These limits may be lower than the age of consent. Thus, in California sexual intercourse with an unmarried girl below the age of 18 constitutes statutory rape; but if pregnancy results, it can be terminated only if the girl is below the age of 15.

All 17 states, except California and Mississippi, allow abortion for fetal abnormality.

4. The maximum time limits within which abortions may be performed vary from 16 weeks in Colorado, New Mexico, and Washington to 26 weeks in Maryland. In Oregon the time limit is 150 days; in Alaska and Hawaii, the fetus must be nonviable; and in New York the time limit is 24 weeks.

5. Medical approval by consultants, boards, or hospital therapeutic abortion committees is required in all states (except Mississippi) with ALI-style laws, although the Model Penal Code did not propose such procedures. In Oregon, two physicians must certify the circumstances justifying an abortion; in Alaska, Hawaii, and New York, only one physician is required.

6. New York and the following ALI-style states have no residency requirement: California, Colorado, Kansas, Maryland, Mississippi, and New Mexico. South Carolina, Hawaii, and the State of Washington have a 90-day residency requirement, and Arkansas, Delaware, North Carolina, and Virginia require four months' residency. Oregon requires that the patient be a resident, and Alaska requires 30 days' residency.

Actual practice, of course, may differ from the provisions of the statutes. In some places, doctors will not perform abortions as late as the statute allows. Nonresidents may not be welcomed even though the state has no residency requirement. Consents, consultations, and committee approvals may be required that are not specified in the statutes. It is also possible that residency requirements may not be strictly enforced and procedures may be more simple than those provided in the statute.

On the federal level, a bill introduced in Congress by Senator Packwood to legalize abortion throughout the nation made no progress. A recent policy enunciated for U.S. military hospitals, how-

* The provisions of all the abortion laws in the United States are summarized in a table, "Current Status of Abortion Laws—August 1, 1970," available upon request from the National Center for Family Planning Services, Health Services and Mental Health Administration, U. S. Department of Health, Education, and Welfare, Rockville, Maryland 20852.

ever, permits abortions and sterilizations for military personnel, active or retired, and their families, regardless of state or local laws.[9] In October, 1970, a White House task force on the mentally handicapped recommended that, in the interest of both maternal and child mental health, no woman should be forced to bear an unwanted child.

Judicial Developments in the United States

Legislative developments have been accompanied by an emerging body of court decisions on the constitutionality of antiabortion laws. The picture changes almost from day to day. As of autumn, 1970, five cases were on the U.S. Supreme Court docket, more than 20 cases were before three-judge federal courts; and, excluding the 20 states with federal cases, many of which also had state cases, another 11 states had cases pending in local courts.[10] The following important cases may be noted.

1. In September, 1969, the Supreme Court of California, in the first decision on the constitutionality of any antiabortion statute, invalidated the pre-1967 antiabortion law of California. In a four to three decision in *People* v. *Belous*,[11] the court held the statute unconstitutional on two principal grounds: (1) that the phrase, "necessary to preserve life," was so vague as to be violative of the due process requirements for a criminal law, and (2) that the law was in violation of a woman's fundamental rights to life and to choose whether to bear children. The latter follows from the U.S. Supreme Court's acknowledgment of a right of privacy or liberty in matters related to marriage, family, and sex.[12]

The critical issue defined by the California Supreme Court was whether the state had any legitimate interest in the regulation of abortion which would justify so deep an infringement of the fundamental rights of women. The court held that the state had no such compelling interest. The court said that it would not speak to the constitutionality of the current California Therapeutic Abortion Act, since Dr. Belous was charged under the old law. But one might well infer from the decision that the current law may be declared unconstitutional on similar grounds. The court did express the view, however, that the decision to terminate pregnancy under the 1967 Therapeutic Abortion Act was solely a medical one, and so long as the physician follows the procedural requirements of the act his judgment may not later be challenged by a jury or prosecutor in a criminal case.

2. Following the landmark decision of the California Supreme Court, the first decision of a federal court invalidating an antiabortion statute was handed down. In *U.S.* v. *Vuitch*,[13] the U.S. District Court for the District of Columbia held unconstitutional the District of Columbia statute which made abortion a felony unless performed by a licensed physician for the preservation of the mother's life or health. The court held this phrase so uncertain and ambiguous as to invalidate the statute for want of due process, and it recommended appeal to the U.S. Supreme Court. The opinion of Judge Gerhard A. Gesell in *Vuitch* emphasized, as the *Belous* decision had done, the woman's liberty and right of privacy in matters related to family, marriage, and sex and the necessity for demonstrating affirmatively the interest of the state in infringing on such rights. The opinion pointed out the discriminatory application of the statute with respect to women who are poor. This case is now on appeal to the U.S. Supreme Court, which has raised certain jurisdictional questions concerning the propriety of direct appeal to the Supreme Court without first proceeding to the U.S. Court of Appeals for the District of Columbia.

3. In addition to these two decisions which broke new legal ground, a number of other courts have invalidated pre-

ALI-style antiabortion laws. These cases have arisen in both federal and state courts.

Three-judge panels of federal district courts have held the pre-ALI-style laws of Texas[14] and Wisconsin[15] unconstitutional because of overbreadth. One court also held the statute void for vagueness, and both courts found the statutes an unconstitutional invasion of private rights and not justified by a compelling interest of the state. Contrary is one federal court which, in a two to one decision, upheld the antiabortion statute of Louisiana.[16]

Similar suits have been brought in federal courts involving the Arizona,[17] Illinois,[18] and New Jersey laws.[19] Suits challenging the Kentucky[20] and Minnesota[21] laws were dismissed on jurisdictional grounds, and the New York case was dismissed as moot on repeal of New York's antiabortion statute.[22]

State courts have also struck down pre-ALI-style laws. In Illinois, a judge of the criminal court held the abortion statute unconstitutional on grounds of vagueness and infringement on the woman's right to control her body.[23] In Pennsylvania, a county court judge found that that state's statute impinges on constitutionally protected areas and is so broad, unlimited, and indiscriminate that it fails to meet present-day tests for constitutionality.[24] In South Dakota, a circuit court condemned the statute because it interferes with private conduct without serving any vital interest of society.[25] In Michigan, the statute was found defective as infringing on the right of privacy in the physician-patient relationship and as possibly violative of the patient's right to safe and adequate medical treatment.[26] Contra, however, is the Massachusetts Supreme Judicial Court, which upheld the constitutionality of the state's statute prohibiting "unlawful" abortion against a charge of vagueness in a case sustaining revocation of a medical license.[27] Suits challenging other pre-ALI-style laws are still pending elsewhere.[28]

4. Attempts are currently being made to obtain an adjudication of the constitutionality of reformed ALI-style laws.[29] Thus far, only one reformed ALI-style law has been invalidated by a federal court—Georgia's 1968 abortion law. The U.S. District Court in Atlanta held unconstitutional those parts of the 1968 Georgia law that limited the woman's right to abortion to the three ALI grounds.[30] The basis of the court's decision was violation of the woman's right of privacy. Retained as a proper exercise of state power, however, were the requirements for medical consultation, hospital committee approval, hospital accreditation and exemption provisions, and the residency requirement.

On the state level, the California Therapeutic Abortion Act has been challenged in three cases. Two cases involving Doctors Robb and Gwynne are still pending, but preliminary decisions involving these doctors have held the California statute unconstitutional.[31] In *People* v. *Barksdale*, a municipal court in Alameda County held the current California law unconstitutional as violative of the equal protection clause of the 14th Amendment, as a vague and improper delegation of legislative authority to the Joint Commission on Accreditation of Hospitals, as discriminatory between the rich and the poor, as lacking the certainty required for a criminal statute with respect to the definition of mental illness, and as violative of the fundamental right of the woman to make a free choice whether or not to bear children.[32] In rejecting the argument that the state has a compelling interest in protecting the embryo, Judge T. L. Foley added the following poignant words:

> I might say that I belong to the religion that was just referred to, and I dislike to render this opinion. I must follow the law under my oath as a Judge. I am a Catholic which makes it very, very difficult—but my

oath of office calls for me to follow the law as stated and set out by the Appellate Courts of this State.[33]

The judicial picture is in constant flux as new cases are filed in federal and state courts; as the defense of unconstitutionality is raised in criminal prosecutions of doctors; as issues are raised concerning jurisdiction of courts and standing of plaintiffs to sue; and as decisions come down and appeals are taken.

On at least eight occasions, the United States Supreme Court has declined to review state court decisions that involved restrictive antiabortion laws.[34] One of these cases was the landmark decision of the California Supreme Court in *Belous*. On October 13, 1970, the court dismissed an appeal from the decision of a three-judge federal court holding the Wisconsin antiabortion statute unconstitutional.[35] Action by the court on the merits of abortion cases will be decisive, but it is possible that some of the cases will go off on questions of jurisdiction or on grounds other than the basic constitutional issues.

Although the final outcome cannot be predicted, three eventualities seem fairly certain. First, more and more states will change their laws in accordance with one or another of the three patterns now prevailing in the United States. Second, as in other nations of the world, moderately reformed laws will be amended to expand the grounds and to simplify the procedures; alternatively, antiabortion laws will be repealed. Third, in every state pressure will mount for making abortion available *de facto* as well as *de jure* to women, rich and poor, faced with the despair and desperation occasioned by unwanted pregnancy.

Recent Developments in Other Countries

The abortion laws of the world have been described on a five-stage continuum, ranging from the most permissive to the most restrictive.[36] Recent legislative changes show that more and more countries are liberalizing their laws or the interpretation of their laws all along this continuum.

1. *Abortion on the Insistence of the Woman*—No new jurisdictions have joined this category, except the four states in the United States discussed previously. The tightening of the Bulgarian law in 1968[37] in order to encourage population growth has been eased by a 1970 interpretation that allows abortion virtually on request for unmarried women and women having at least one child.[38] The hope is that this interpretation will reduce the number of illegal abortions. In these cases, the Bulgarian law resembles once again the most liberal laws of the USSR and Hungary. Now that the German Democratic Republic has liberalized its policy on abortion, as mentioned below, the only restrictive abortion statutes remaining in eastern Europe are those of Romania and Albania.

2. *Abortion on Social Grounds*—Two Scandinavian countries, Finland and Denmark, have liberalized their statutes further to include social grounds. The 1970 law in Finland specifies, in addition to medical and humanitarian reasons and the age of the mother (under 17 or over 40 or already the mother of four children), the following social ground:

> . . . when the delivery and care of the child would constitute, by reason of the conditions of existence of the woman and her family, as well as other circumstances, a change for her.[39]

A unique provision, relevant for all countries faced with expanding demand for abortions, requires the Finnish Department of Health to assure a sufficient number of qualified physicians and abortion hospitals and also impartial and uniform conduct from physicians.

The Danish law of 1970 permits abortion without authorization of a committee for reasons of life or health or in cases where the woman is over 38 or has four children under age 18 who

reside with her.[46] Authorization of a committee is required if the abortion is sought for sociomedical reasons, danger of fetal abnormality, or pregnancy resulting from a sex crime.

Sweden has not yet announced changes in its abortion law which have been under consideration for three years. Various alternatives are bruited about; that abortion may be permitted on the free choice of the woman provided she consults fully with an abortion service or, possibly, that the decision-making process may be decentralized in order to reduce the current delay which drives many women to illegal abortion.

3. *Abortion on Sociomedical Grounds*—Singapore has enacted sociomedical grounds for abortion along the lines of the British Abortion Act of 1967 but with approval required by a Termination of Pregnancy Authorisation Board, except when abortion is to preserve life or health.[41] This is the first Asian country, after Japan, to enact a liberalized abortion law.

The state of South Australia has also enacted an abortion lay modeled after the new British law.[42] Similar legislation is under discussion in New South Wales. A poll of general practitioners in Sydney, N.S.W., found that 957 women approached 92 general practitioners with requests for help in obtaining an abortion in a single year.[43] The fact that each general practitioner is confronted with a major dilemma of this kind ten times a year explains the high proportion of general practitioners in Sydney (76%) who favor liberalization of the law.

Since 1965, the German Democratic Republic has liberalized interpretation of its law, so that abortion is now authorized on sociomedical grounds.[44]

Legislation is still pending in India, which in the form proposed would allow abortion on sociomedical grounds and in cases of contraceptive failure.[45]

Experience in England, Wales, and Scotland during the first 18 months of the operation of the 1967 British abortion law reveals a shift from illegal to legal abortion, a shift from the private sector to the National Health Service, a slowing down of the illegitimacy rate (47% of all abortions in the first 18 months were for single women), and a narrowing of regional discrepancies in the operation of the law.[46] With the aid of voluntary pregnancy advisory services, abortion is being made available to women in all geographic areas and income groups.[47] Attitudes of gynecologists are becoming more sympathetic to applicants for abortion, as reflected by "the granting of National Health Service abortions on an increasing scale and by bodies such as the Royal College of Obstetricians and Gynaecologists taking a sincere, if belated, interest in contraception and sterilisation."[48] The most serious problem appears to be the universal need for improving contraceptive services and practices.

4. *Abortion on Medical Grounds*—Canada[49] and Peru[50] have broadened their abortion laws to permit abortion on the grounds of danger to the life or health of the woman.

5. *Abortion Only to Save the Life of the Woman*—This category has lost adherents. It will continue to do so as current law reform activities in many countries, e.g., France, increase in tempo.

Insights from Abroad

As the United States moves into the problems associated with providing medical care under its new abortion laws, several lessons from the experience of other nations seem relevant.

1. A liberal abortion law will transfer a number of illegal abortions to safe, clinical practice; but as long as restrictions in grounds or procedures remain, some illegal abortion will persist.[51] Initial experience under the California Therapeutic Abortion Act confirms this finding.[52] Therefore, experience in the

four states that have removed virtually all restrictions will be extremely important.

2. The earlier in pregnancy that abortion is provided, the less tendency there is to resort to illegal abortion. In eastern Europe, where abortion is generally done early in pregnancy, illegal abortion has been almost eliminated. The reverse is true in Sweden, where administrative procedures delay authorization for legal abortion. The U.S. laws specify time periods within which the abortion must be performed, but, in addition, women should be educated to seek abortions early and procedures should be simplified to achieve this objective.

3. On the basis of experience from eastern Europe, mortality from legal abortion can be anticipated to be low, particularly if performed early in pregnancy.[53] Complications in eastern Europe affect less than 3 per cent of patients.[54] England, as yet, has insufficient data on morbidity. One British authority has suggested that the requirement of a medical report within seven days after the abortion is too short a time to provide accurate information on complications.[55] Accurate records and reporting are essential.

4. As the British experience indicates, the climbing rate of illegitimacy in the United States may be slowed by increased availability of abortion. With nearly 10 per cent of all U.S. births in 1967 illegitimate, the option of abortion will need to be made widely known and accessible if the risks to health and the social disabilities of births to unmarried mothers are to be lessened.[56]

5. Uneven application of the law by reason of varying attitudes on the part of physicians can be anticipated from the experience in England and Norway. California's experience is similar. Continuing education programs for the medical profession and reforms in medical education are urgent.

6. Shortages of medical and auxiliary personnel may impede full implementation of new laws. In England, however, it was found that, if evenly distributed among all gynecologists, the increased number of abortions would not constitute an excessive workload.[57] It has been suggested that in the United States the load might be distributed among a larger group of physicians than those specialized in gynecology, if the social policy expressed by the new laws is to be implemented. Residents and interns on all services might be expected to perform abortions. Nurse-midwives might also be trained and utilized to perform early abortions. Such a decision would require amendment of the licensure laws in the three states that now license nurse-midwives and enactment of such licensure laws in other states.

7. England's experience shows the bottleneck that may result from shortage of facilities. Ambulatory care, as provided in other countries and as now demonstrated in the United States, is a promising solution for early abortions. Moreover, ambulatory treatment reduces the cost of abortions.

8. Evidence from Chile, South Korea, and Taiwan indicates that, in a country with a high or increasing abortion rate, the conditions are favorable for effective family planning programs.[58] A possible hazard is that the easy solution of abortion may generate a lack of responsibility in using contraceptives. Zeal to meet a long-neglected human need should be accompanied by efforts to use abortion as a means of encouraging effective contraception. A number of European statutes prohibit abortion if an abortion has been performed in the preceding six-month period. A more effective deterrent to repeated abortion would consist in aiding every woman who has an abortion to obtain and use effective methods of contraception.

The dynamic legislative and judicial developments in the laws governing abortion in the Untied States have generated

a ground swell of change. The action of the U.S. Supreme Court is crucial to the rate of progress, but, regardless of the outcome of cases pending before the court, the clock can never be turned back. Safe, legal abortion is now recognized as a fundamental right of women, a protection of maternal health and family welfare, and an assurance that every child is a loved and wanted child. Abortion, however, should be only one service in an array of services that should also include effective contraception, education for responsible sexual relationships, and health protection for mothers and children.

ACKNOWLEDGMENTS—For helpful information on recent legal cases, grateful acknowledgment is made to four authorities on abortion law: Roy Lucas, Norma Zarky, Alan Charles, and Zad Leavy. Any errors are, of course, the responsibility of the author.

REFERENCES

1. American Law Institute, Model Penal Code, sec. 230.3(2) (Proposed Official Draft, 1962). On Aug. 4, 1970, the Commissioners on Uniform State Laws issued a Second Tentative Draft of a Uniform Abortion Act, which authorizes abortions within 24 weeks after commencement of the pregnancy without specific grounds or after 24 weeks on the grounds set forth in the code. The 12 statutes incorporating all or part of the Model Penal Code are: Ark. Stat. Ann., secs. 41-301 to 41-310 (Supp. 1969); Cal. Health & Safety Code Ann., secs. 25950-54 (Supp. 1970); Colo. Rev. Stat. Ann., secs. 40-2-50 to 40-2-53 (Supp. 1967); Del. Code Ann., tit. 11, sec. 301 (1953) and Laws 1969; Ga. Code Ann., secs. 26-9920a to 26-9925a (1969); Kan. Stat. Ann., sec. 21-3407 (Supp. 1969) and Laws 1969; Md. Ann. Code, art. 43, secs. 149E to 149G (Supp. 1969); Miss. Code Ann., sec. 2223 (Supp. 1968); N. M. Stat. Ann., secs. 40A-5-1 to 40A-5-3 (Supp. 1969); N. C. Gen. Stat., secs. 14-44 to 14-45.1 (1969 Replacement Vol. 1B); S. C. Code, secs. 16-82 to 86 (1962) and Laws 1970; Va. Code Ann., secs. 18.1-62 to 18.1-62.3 (Supp. 1970). For discussion of these laws, see Lucas, Roy, "Laws of the United States" in *Abortion in a Changing World* (Robert E. Hall, Ed.), vol. I, p. 127, Columbia Univ. Press, 1970.
2. The American College of Obstetricians and Gynecologists has recently liberalized its position further to approve abortion on the decision of the patient and her physican without additional medical consultation. *AMA News*, Sept. 28, 1970.
3. Elizabeth II, Ch. 87 (1967) permitting termination of pregnancy on the opinion of two registered medical practitioners that continuance of the pregnancy would involve risk to the life of the pregnant woman or injury to the physical or mental health of any existing children of her family greater than if the pregnancy were terminated.
4. S.B. 193, amending Ore. Rev. Stat., secs. 465.110, 677.188, and 677.190 and repealing sec. 163.060 (Laws 1969).
5. S.B. No. 527 repealing and re-enacting Alaska Stat., sec. 11.15.060 (Laws 1970).
6. Public Law No. 1 amending Hawaii Rev. Stat., ch. 768 (Laws 1970).
7. N. Y. Penal Law, sec. 125.05(3) (McKinney Supp. 1970-71).
8. Many states require that the hospital be not only licensed but accredited. For discussion of the unreasonableness and probable unconstitutionality of a requirement restricting performance of abortions to hospitals accredited by the Joint Commission on Accreditation of Hospitals, see Brief *Amici Curiae*, Ass'n for the Study of Abortion, Inc., Planned Parenthood Ass'n, et al., in Vuitch v. Maryland, Court of Special Appeals of Maryland, Sept. Term, 1970. No. 32, argued Sept. 28, 1970.
9. International Herald Tribune, p. 3, Aug. 19, 1970.
10. Personal communication from Roy Lucas, President and Associate Counsel, The James Madison Constitutional Law Institute, N. Y., Oct. 22, 1970.
11. 71 Cal. 2d 954, 458 P. 2d 194, 80 Cal. Rptr. 354 (1969), cert. denied, 397 U. S. 915 (1970).
12. Id. at 963, 458 P. 2d at 199.
13. 305 F. Supp. 1032 (D.D.C. 1969), ques. of juris. postponed to merits, 397 U.S. 1061, further juris. questions propounded, 399 U.S. 923 (1970) (No. 84, Oct. 1970 Term). On the practical availability of abortion under D.C. law, see court order requiring the D.C. General Hospital to give abortions to women meeting the standards for admission to the hospital. Doe v. Gen'l Hosp. of D.C., 313 F. Supp. 1170 (D.D.C. 1970), on motions to hold hospital officials in contempt, —— F. 2d ——, No. 24,011 (D.C. Cir. Mar. 20 and May 15, 1970).
14. Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970) (per curiam), appeal docketed,

39 U.S.L.W. 3151 (U.S. Oct. 7, 1970) (No. 808, Oct. 1970 Term).

15. McCann v. Babbitz, 306 F. Supp. 400 (E. D. Wis. 1969) (three-judge court convened), 310 F. Supp. 293 (1970) (per curiam) (on the merits), appeal dismissed, 400 U.S. ——, 39 U.S.L.W. 3132 (Oct. 13, 1970) (per curiam), perm. injunc. issued, —— F. Supp. —— (E.D. Wis. Nov. 18, 1970) (per curiam).
16. Rosen v. La. State Bd. Med. Examiners, 318 F. Supp. 1217 (1970) (Cassibry, J., dissenting).
17. Planned Parenthood Ass'n of Phoenix v. Nelson, Civ. No. 70-334 PHX (D. Ariz. Aug. 24, 1970) (per curiam).
18. Doe v. Scott, —— F. Supp. —— (N.D. Ill. 1971) (Illinois statute held unconstitutional as impermissibly vague and unduly infringing on the woman's right of privacy in restricting abortion during the first trimester of pregnancy.
19. YWCA v. Kugler, Civ. No. 264-70 (D.N.J., filed Mar. 5, 1970).
20. Crossen v. Breckenridge, Civ. No. 2143 (E. D. Ky.), dismissed June 15, 1970 by U. S. Judge Swinford, Lexington (Ky.) Herald, June 16, 1970. On appeal.
21. Doe v. Randall, 314 F. Supp. 32 (D. Minn. 1970), rehearing denied, 314 F. Supp. 36 (D. Minn. July 1, 1970) (per curiam), appeal docketed *sub nom.* Hodgson v. Randall, 39 U.S.L.W. 3115 (Sept. 21, 1970) (No. 728, Oct. 1970 Term).
22. Hall v. Lefkowitz, 305 F. Supp. 1030 (S.D.N.Y. 1969), dismissed as moot, Op. No. 36936 (S.D.N.Y. July 1, 1970) (per curiam).
23. People v. Anast, No. 69-3429 (Ill. Cir. Ct., Cook County, 1970) (Dolezal, J.).
24. Commonwealth v. Page, Centre County Leg. J. at 285 (Pa. Ct. Comm. Pl., Centre County July 23, 1970).
25. State v. Munson (S.D. 7th Jud. Cir., Pennington County Apr. 6, 1970) (Clarence P. Cooper, J.).
26. State v. Ketchum (Mich. Dist. Ct. Mar. 30, 1970) (Reid, J.).
27. Kudish v. Bd. of Registration in Med., 355 Mass. ——, 248 N.E. 2d 264 (1969). Similar decisions have upheld the Iowa and Vermont statutes as not unconstitutionally vague.
28. See, for example, Arnold v. Sendak, No. IP 70-C-217 (S.D. Ind., filed Mar. 29, 1970); Rodgers v. Danforth, Civ. No. 18360-2 (W.D. Mo., filed May 15, 1970); Steinberg v. Brown, No. C-70-289 (N.D. Ohio); Doe v. Rampton, Civ. No. 234-70 (D. Utah, Sept. 14, 1970). (Temporary restraining order against enforcement of Utah statute issued).
29. Corkey v. Edwards, Civ. No. 2665 (W.D.N.C., filed May 12, 1970); Gwynne v. Hicks, Civ. No. 70-1088-CC (C.D. Calif., filed May 18, 1970); Doe v. Dunbar, Civ. No. C-2402 (D. Colo., filed July 2, 1970), juris. granted —— F. Supp. —— (D. Colo. Dec. 22, 1970). (One of the attorneys in the Colorado suit challenging the first ALI-style law enacted is Richard D. Lamm, sponsor of the reformed legislation in the Colorado Legislature.)
30. Doe v. Bolton, —— F. Supp. ——, Civ. No. 13676 (N.D. Ga. July 31, 1970) (per curiam), appeal docketed, 39 U.S.L.W. 3227 (U.S. Nov. 17, 1970) (Nos. 971, 973, Oct. Term 1970).
31. People v. Robb, Nos. 149005 & 159061 (Calif. Mun. Ct., Orange County, Jan. 9, 1970) (Mast, J.); People v. Gwynne, No. 173309 (Calif. Mun. Ct., Orange County, June 16, 1970) (Thomson, J.); People v. Gwynne, No. 176601 (Calif. Mun. Ct., Orange County, Aug. 13, 1970 (Schwab, J.).
32. People v. Barksdale, No. 33237C (Calif. Mun. Ct., Alameda County, Mar. 24, 1970) (Foley, J.).
33. Ibid.
34. The Jurdisdictional Statement filed in the U.S. Supreme Court on Oct. 7, 1970 by Roy Lucas et al. in Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970) (per curiam), No. 808, Oct. 1970 Term cites the following cases at p. 18, n. 30: Muncie v. Missouri, 398 U.S. 938 (June 1, 1970), denying cert. to 448 S.W. 2d 879 (Mo. 1970); California v. Belous, 397 U.S. 915 (Feb. 24, 1970), denying cert. to 71 Cal. 2d 954, 458 P. 2d 194, 80 Cal. Rptr. 354 (1969); Molinaro v. New Jersey, 396 U.S. 365 (Jan. 19, 1970) (per curiam), dismissing appeal from 54 N.J. 246, 254 A. 2d 792 (1969); Knight v. Louisiana Bd. of Medical Examiners, 395 U.S. 933 (June 2, 1969), denying cert. to 252 La. 889, 214 So. 2d 716 (1968) (per curiam); Morin v. Garra, 395 U.S. 935 (June 2, 1969), denying cert. to 53 N.J. 82 (1968) (per curiam); Moretti v. New Jersey, 393 U.S. 952 (Nov. 18, 1968), denying cert. to 52 N.J. 182, 244 A. 2d 499 (1968); Fulton v. Illinois, 390 U.S. 953 (Mar. 4, 1968), denying cert. to 84 Ill. App. 2d 280, 228 N.E. 2d 203 (1967); Carter v. Florida, 376 U.S. 648 (Mar. 30, 1964), dismissing appeal from 150 So. 2d 787 (Fla. 1963).
35. McCann v. Babbitz, 310 F. Supp. 293 (E.D. Wis. 1970), appeal dismissed, 400

U.S. ——, 39 U.S.L.W. 3132 (Oct. 13, 1970) (per curiam), supra note 15.
36. Roemer, R. Abortion Law: The Approaches of Different Nations. A.J.P.H. 57,11:1906 (Nov.), 1967; Roemer, R. "Abortion Laws of the World: Recent Trends and Policy Issues" in *Abortion in a Changing World*, supra note 1 at p. 119.
37. Bulgaria. Law of 16 Feb. 1968, Int. Dig. Health Leg., vol. 19, pp. 589-602, 1968.
38. David, Henry P. *Family Planning and Abortion in the Socialist Countries of Central and Eastern Europe, A Compendium of Observations and Readings*, p. 69, The Population Council, New York, 1970.
39. Finland. Law No. 239 of 24 Mar. 1970 on the interruption of pregnancy, Int. Dig. Health Leg., vol. 21, no. 4, 1970.
40. Denmark. Law of 18 Mar. 1970, Int. Dig. Health Leg., vol. 21, no. 3, 1970.
41. The Abortion Act of Singapore, 1969, Republic of Singapore, passed 29 Dec. 1969 and assented to by the President 31 Dec. 1969, Int. Dig. Health Leg., vol. 21, no. 4, 1970.
42. South Australia. An Act to amend the Criminal Consolidation Act, 1935-1966, No. 109 of 1969, assented to 8 Jan. 1970.
43. Sussman, William, and Adams, Anthony I. General Practitioners' Views on Pregnancy Termination. M. J. Australia, pp. 169-173, July 25, 1970.
44. Supra note 38 at p. 233.
45. India. The Medical Termination of Pregnancy Bill, 1969 (Bill No. XXII of 1969).
46. Diggory, Peter, and Potts, Malcolm. Preliminary Assessment of the 1967 Abortion Act in Practice. Lancet, pp. 287-291, Feb. 7, 1970.
47. Id. at p. 290.
48. Ibid.
49. Stats. of Canada, C. 38, sec. 18 (1968-69).
50. Peru. Decree-Law No. 17505 of 18 Mar. 1969, Ch. 11, sec. 19, Int. Dig. Health Leg., vol. 21, p. 137 at 140, 1970.
51. Potts, D. Malcolm. "Induced Abortion—the Experience of Other Nations" in *Population Control, Implications, Trends, and Prospects*, Proceedings of the Pakistan International Family Planning Conference at Dacca, Jan. 28-Feb. 4, 1969, p. 241, Sweden Pakistan Family Welfare Project, Lahore, West Pakistan, March 1969.
52. See California State Department of Public Health, *A Report to the 1970 Legislature, Third Annual Report on the Implementation of the California Therapeutic Abortion Act*, p. 5, estimating that 81,600 abortions were done on California women in 1968, of which 76,600 were illegal. Even substantially increased numbers of therapeutic abortions—which have occurred since 1968—will not eliminate an illegal abortion problem of this magnitude. The source of the estimated number of illegal abortions was a carefully controlled study in North Carolina. Abernathy, James R.; Greenberg, Bernard G.; and Horvitz, Daniel G. "Estimates of Induced Abortion in Urban North Carolina." Demography, vol. 7, no. 1, p. 19, Feb., 1970.
53. See Tietze, Christopher. "Abortion Laws and Practices in Europe," *Excerpta Medica International Congress*, Series No. 207, April, 1969; and Tietze, Christopher, "Mortality with Contraception and Induced Abortion," *Studies in Family Planning*, vol. 45, p. 6, Sept. 1969.
54. Supra note 38 at p. 253.
55. Supra note 46 at p. 290.
56. On the higher risks of the unmarried mother and her child, see *Health Aspects of Family Planning*, Report of a WHO Scientific Group, World Health Organization Tech. Rep. Series, No. 442, p. 10, Geneva, 1970.
57. Supra note 46 at p. 288.
58. Engstrom, Lars Erik. "Abortion as a Method of Population Control," in *Population Control, Implications, Trends, and Prospects*, supra note 51 at p. 240.

Dr. Roemer is with the University of California Institute of Government and Public Affairs, Los Angeles, Calif. 90024.

This paper was presented before the Maternal and Child Health Section of the American Public Health Association at the Ninety-Eighth Annual Meeting in Houston, Tex., October 27, 1970.

This paper will appear as a chapter in the book, *Abortion and the Unwanted Child*, edited for the California Committee on Therapeutic Abortion by Carl Reiterman, Ph.D., to be published in June, 1971, by Springer Publishing Company (200 Park Ave. South), New York, N. Y. 10003.

IV.

MEDICAL AND SOCIAL SCIENCE STUDIES ON ABORTION PRACTICES

Item No. 42

The "Perfect Contraceptive" Population

The extent and implications of unwanted fertility in the United States are considered.

Larry Bumpass and Charles F. Westoff

Recent discussions of population policy have raised and sharpened the question of unwanted fertility in the United States (*1*). The issue is whether the elimination of unwanted fertility would have a significant effect on our rate of population growth, and the discussion has revolved in part around what might be called the demographic implications of "perfect contraception." We are not suggesting that such a technological development is in sight, or that, if it were, we would not have to be concerned about problems of distribution and use. The "perfect contraceptive" population is simply a model in which couples can avoid having more children than they want and do not have children before they want them. In the broader sense we are visualizing the "complete fertility controlling population" rather than the "perfectly contraceptive population." The achievement of such a state of affairs might well require social policies for the development of more effective contraceptive techniques and more efficient distribution systems as well as the legalization of abortion on request. However, this article is focused on *implications* of the elimination of unwanted fertility rather than on specific policies necessary to realize this goal.

We make no artificial assumptions about fecundity; we assume that the current incidence of subfecundity (less than normal capacity to reproduce) in the United States will continue. Also, we are *not* assuming that every couple will practice contraception or that all couples will begin using contraception at the same stage of their marriage. The system is completely voluntary. The only condition we are imposing is that couples can control their fertility completely in the sense that they can, within the limits of physiological capacity and variability, have the number of children they want, when they want them. If a husband and wife prefer to have chil-

Dr. Bumpass is assistant professor of sociology at the University of Wisconsin, Madison. Dr. Westoff is professor of sociology at Princeton University, Princeton, New Jersey, and executive director of the National Commission on Population Growth and the American Future, Washington, D.C.

Table 1. Percentages of births occurring between 1960 and 1965 reported to have been unwanted, by birth order and race. The values in parentheses are numbers of births.*

Race	All	Birth order					
		1	2	3	4	5	6+
		1) Unwanted by both spouses					
Total	17	4	6	18	25	39	45
White	14	3	5	17	23	36	39
Negro	31	9	17	24	37	51	61
		2) Unwanted by at least one spouse					
Total	22	5	10	24	35	49	55
White	19	4	7	23	32	46	48
Negro	41	15	24	37	51	61	72
		3) Medium estimate, average of categories 1 and 2					
Total	19 (4,264)	5 (1,090)	8 (1,020)	21 (792)	30 (532)	44 (328)	50 (502)
White	17 (3,091)	4 (839)	6 (779)	20 (602)	28 (397)	41 (215)	43 (259)
Negro	36 (1,108)	12 (234)	20 (229)	30 (180)	44 (131)	56 (107)	66 (227)

* The 1965 NFS double-sampled Negroes. Consequently, for measures computed for the total sample, the data for non-Negroes are weighted by a factor of 2. In this and all subsequent tables based on the NFS, the number of cases reported for the total are unweighted and represent the actual number of sample cases on which the statistics are based. Non-whites other than Negroes are included in the total.

dren right away or want a large family, they may use no contraception at all. On the other hand, if they wish to control their fertility (a virtually universal wish in the sense that practically all exposed couples in the United States use contraception sooner or later) (*2*), they shall be able to practice completely effective and completely acceptable contraception continuously. "Completely effective" means that the failure rate is zero; "completely acceptable" means that the use of contraception carries no costs of any kind—economic, social, or psychological—and that its use would be interrupted only for the purpose of conceiving. While such conditions are Utopian, the model provides a useful framework for assessing the implications of current levels of unwanted fertility in the United States for the rate of population growth.

Radically different policy implications flow from (i) the position that achieving a zero or near-zero rate of population growth requires changing the number of children couples want, and (ii) the position that eliminating unwanted births is sufficient. Consequently, it is important that we evaluate the number of unwanted births in the United States on the basis of the most recent detailed data available. Our estimates are based on the 1965 National Fertility Study (NFS), an interview survey of a probability sample of 5600 married women throughout the nation (*3*).

Measurement of Unwanted Fertility

Reliable reports on unwanted births are difficult to obtain, since the admission that a birth was unwanted reflects on the respondent's ability to control fertility and perhaps also on the status of the child. Unwanted fertility was measured in the 1965 NFS on the basis of questions about the circumstances of each pregnancy. Women who reported the use of some contraceptive method preceding a pregnancy were asked, "Under which of these circumstances did this pregnancy occur?" A card listing the following categories was shown to the respondent:

1) While using a method and did not want to become pregnant at that time.
2) While not using a method but did not want to become pregnant at that time.
3) When stopped using a method in order to have a child.

Women who reported circumstances 1 or 2 were then asked, "Before you became pregnant this time, did you want to have a child (or another child) sometime?" and "Did your husband want to have a child (or another child) sometime?"

Women who reported not having practiced contraception prior to pregnancy were asked: "Was the *only* reason you did not use any method then because you wanted to have a baby as soon as possible?" Those who answered "No" were asked the same questions as the other group about whether they had wanted another child sometime.

Since couples are not always in agreement on the desirability of having additional children, alternative definitions of "unwanted" fertility are possible. A minimal definition would require that both spouses had been reported not to have wanted another child before pregnancy occurred. A broader definition would require only that one spouse had been reported not to have wanted an additional child. When husband and wife disagree on this question, some couples will intentionally have another child, others will not. It seems reasonable to assume that the proportion of unwanted births lies somewhere between estimates resulting from these two definitions, and that the average of the two constitutes a best estimate. We use this estimate throughout the text, although the consequences of alternative definitions are reported in several tables for the reader's evaluation.

To what extent are these measures of unwanted fertility reliable and valid? As part of the 1965 NFS, a subsample of the original sample of women was re-interviewed 3 to 5 months later, to assess the reliability of survey data on fertility and family planning. The percentage of births classified as unwanted differs by 0.3 percent in the two interviews. Checks for internal consistency reveal that none of the women who reported that their last child was unwanted replied (to a different question) that they intended to have additional children. In addition, the NFS estimate is consistent with reports of other fertility surveys based on differing measurement techniques (*4*).

An indirect check on the validity of our estimates can be made in terms of contraceptive efficacy. When we consider women who are near the end of the childbearing stage (40 to 44 years of age), the percentage classified as having experienced at least one unwanted birth implies, even when allowance is made for underreporting, an average contraceptive efficacy that is improbably high (*5*). Realistic assumptions about the level of contraceptive efficacy of this population would very likely lead to a figure for the proportion who had experienced at least one unwanted birth that is higher than the estimate obtained by the measures used here (*6*). This is independent evidence that there is considerable rationalization in the report of unwanted births and that our estimates of unwanted fertility are not likely to be too high.

Incidence and Characteristics of Unwanted Fertility

In order to focus on the most recent picture for which data are available, we have limited the analysis in this section to births which occurred between the beginning of 1960 and the time of interview, the autumn of 1965.

It is evident from the data of Table 1 that unwanted births comprised a sub-

stantial proportion of total births during these years. Our estimates indicate that one-fifth of all births and more than one-third of Negro births between 1960 and 1965 were unwanted. As one would expect, the proportion of unwanted births increases rapidly with birth order. Almost one-third of all fourth-order births and one-half of all sixth- or higher-order births were unwanted; for Negroes the corresponding proportions are nearly one-half and two-thirds. This high level of unwanted births among Negroes indicates the magnitude of the burden of unwanted dependents that is borne by this population, but the problems of unwanted births are substantial among whites as well.

The incidence of unwanted births is negatively related to both education and income (Tables 2 and 3). In general, the proportion of unwanted births is approximately twice as high among wives with less than a high school education as among wives who have attended college. By income, the proportion of births reported as unwanted varies little for families whose 1964 income was over $5000, but it is more than twice as high for families with incomes of less than $3000 as for those with incomes of over $10,000. This differential is particularly marked among Negroes.

We have approximated the Social Security Administration's definition of poverty (*7*), and the results are presented in Table 4. Since family size is one component of that definition, many couples would not have been classified as poor were it not for their having had unwanted children. Consequently, the results indicate the coincidence of poverty and unwanted births rather than a propensity of the "poor" to have unwanted children. Among the "poor" in 1965, unwanted births constituted almost two-fifths of all births and three-fifths of all sixth- and higher-order births; among the "non-poor" one out of every seven births was unwanted among whites and one out of every five among Negroes (*8*).

Estimates for All Women

The foregoing analysis is based on a sample of married women living with their husbands in 1965; consequently, births to women not living with their husbands and most illegitimate births are not represented (*9*). In the absence of reliable data on the subject, our procedures are based on the assumption that the incidence and birth-order distribution of unwanted births are the same for such births as for births reported by wives now living with their husbands. This undoubtedly is a bias in the direction of underestimating the extent of unwanted fertility.

We prepared our estimates separately by race and birth order and then summed them to obtain the total. We estimate that in the period 1960 to 1965 there were 4.7 million births that would have been prevented by "perfect contraception." These births represent one-fifth of all births during the period. Approximately 2 million of these unwanted births occurred among the poor and the near-poor, and half of these among the Negro poor and near-poor (Table 5).

Timing Failures

While the level of unwanted births is high, the data of Table 6 make it clear that many desired births are tim-

Table 2. Percentages of unwanted births (medium estimate) occurring between 1960 and 1965, by wife's education, by race, and by birth order. The values in parentheses are numbers of births.*

Wife's education	Total	White	Negro	Birth order for total					
				1	2	3	4	5	6+
Less than 12 years	26 (1,842)	21 (1,153)	42 (653)	5 (341)	11 (380)	26 (339)	31 (249)	42 (188)	54 (335)
12 years	16 (1,742)	14 (1,361)	28 (358)	4 (525)	6 (437)	20 (232)	32 (207)	48 (102)	44 (139)
College	13 (688)	11 (577)	25 (95)	4 (223)	8 (202)	16 (121)	22 (76)	42 (38)	45 (28)

*See footnote to Table 1.

Table 3. Percentages of unwanted births (medium estimate) occurring between 1960 and 1965, by 1964 family income, birth order, and race. The values in parentheses are numbers of births.*

Income (dollars)	Total	White	Negro	Birth order for total				
				1	2	3	4	5+
Less than 3,000	34 (436)	27 (178)	42 (244)	10 (95)	14 (79)	38 (62)	42 (48)	57 (152)
3,000-4,999	24 (1,032)	18 (562)	39 (446)	7 (282)	12 (224)	23 (170)	30 (122)	56 (234)
5,000-6,999	16 (1,289)	14 (977)	30 (298)	3 (358)	6 (335)	22 (248)	30 (144)	44 (204)
7,000-9,999	16 (867)	16 (772)	28 (84)	4 (214)	4 (226)	20 (174)	29 (121)	42 (132)
10,000 and over	15 (561)	15 (541)	16 (19)	3 (123)	9 (143)	14 (120)	26 (88)	34 (87)

*See footnote to Table 1.

Table 4. Percentages of unwanted births (medium estimate) occurring between 1960 and 1965, by poverty status, race, and birth order. The values in parentheses are numbers of births.*

Poverty status	Total	White	Negro	Birth order for total					
				1	2	3	4	5	6+
Poor and near-poor	32	25	46	7	14	28	34	46	56
Poor	37 (861)	31 (346)	47 (494)	9 (135)	16 (179)	30 (213)	35 (186)	47 (178)	61 (337)
Near-poor	23 (424)	16 (253)	40 (170)	5 (137)	10 (151)	22 (130)	32 (77)	43 (63)	42 (120)
Non-poor	15 (2,979)	15 (2,492)	22 (444)	4 (1,674)	6 (1,481)	20 (1,061)	28 (670)	42 (308)	42 (320)

*See footnote to Table 1.

Table 5. Estimated numbers (in thousands) of unwanted births in the United States between 1960 and 1965,* by birth order, race, and poverty status.

Race	All birth orders	Poor and near-poor	Non-poor	Birth order for total					
				1	2	3	4	5	6+
			1) *Unwanted by both spouses*						
Total	4,050	1,738	2,312	261	369	831	742	669	1,178
White	2,828	838	1,990	176	236	677	576	499	664
Negro	1,103	836	267	82	116	126	151	157	471
			2) *Unwanted by at least one spouse*						
Total	5,321	2,214	3,107	376	553	1,102	1,031	841	1,418
White	3,736	1,062	2,674	234	375	879	800	632	816
Negro	1,432	1,067	365	132	163	193	206	186	552
			3) *Medium estimate, average of categories 1 and 2*						
Total	4,685	1,976	2,709	319	461	966	886	755	1,298
White	3,282	950	2,332	205	306	778	688	566	740
Negro	1,267	951	316	107	139	159	178	172	512

* Proportions of unwanted births in the NFS sample are applied to vital statistics data for the United States (see Appendix for technical details). In the absence of official data on births by poverty status, we have estimated the number of unwanted births to the poor and near-poor on the basis of the distribution by poverty status of unwanted births in the NFS sample.

ing failures. A birth was classified as a timing failure when it was reported as wanted but not the result of the deliberate interruption of contraception.

Of wanted births occurring between 1960 and 1965, two-fifths would have occurred later if their timing had been controlled. The short-run demographic effects of the prevention of timing failures depend upon the length of time considered and the assumed time required for the transition to perfect contraception (contraception enabling every couple to avoid failures in regulating family size and in timing births). For example, if perfect contraception had been universally employed at the beginning of 1960, perhaps 7 percent of the wanted births that occurred between 1960 and 1965 would have been delayed until after 1965. This estimate is based on the assumption that the average length of a successfully planned interval is 1 year longer than that of an interval in which timing was not controlled. If births are delayed, total fertility for each cohort (women born in the same year) being kept constant, there is a dip in births while the change occurs and no subsequent "makeup" of the lost births until the mean age of childbearing falls. When the transition is complete, a certain number of births will have been deferred to subsequent years, and this number will remain fixed so long as the new spacing pattern persists.

After the transitory dip is over, the number of births may be affected by increased spacing (total fertility for each cohort being kept constant) because fertility is centered on a lower portion of the stable age distribution. This effect is negligible in a low-mortality population reproducing at a rate near replacement.

There is, however, one possible indirect consequence of such timing changes that has potential long-run significance. It has been suggested that the longer a birth is delayed, the less likely a woman is to have that birth or a subsequent birth (*10*). The longer a couple puts off having a "wanted" child, the more opportunity the wife has to acquire role patterns at variance with early child-care responsibility. At some point that birth, or a desired subsequent birth, may no longer seem so desirable. In addition, the delay of a desired birth increases the possibility that the birth will be prevented by subfecundity. In any event, the major demographic effect of the universal use of contraception would be the prevention of unwanted births. In the next section we will discuss the long-run implications of this effect.

Table 6. Percentages of wanted births classified as timing failures,* by birth order and race. The values in parentheses are numbers of births.†

Race	All birth orders	Birth order					
		1	2	3	4	5	6+
Total	43 (3,217)	38 (1,020)	42 (906)	50 (587)	50 (335)	44 (162)	47 (207)
White	42 (2,513)	36 (805)	40 (722)	48 (466)	48 (269)	42 (116)	46 (135)
Negro	56 (657)	50 (199)	61 (174)	59 (114)	62 (64)	57 (42)	50 (64)

* A birth was classified as a timing failure when reported as wanted but not the result of deliberate interruption of contraception. † See footnote to Table 1.

Long-Run Implications for U.S. Growth Rate

Since nearly 20 percent of all recent births were unwanted, the elimination of unwanted births could substantially reduce our future growth rate. However, the size of this reduction would depend upon the number of children that women now entering the childbearing years will ultimately want to have.

Viewed from a cohort perspective, for women who were near the end of their childbearing years in 1965 (ages 35 to 44), the elimination of births reported to have been unwanted would have reduced their fertility from 3.0 to 2.5 births per woman. Since an eventual zero rate of population growth would require cohort fertility of about 2.25 births per woman, the elimination of unwanted births would not have been sufficient to establish exact replacement for this cohort, but it would have resulted in considerable progress toward that objective. The proportion of unwanted births (16 percent) reported by this cohort—the figure used to calculate the above estimate of 2.5 births—is lower than the proportion reported for all women in the period 1960–1965, probably due to additional underreporting of unwanted births resulting from the longer period of time that had elapsed since the events in question in the case of the women aged 35 to 44. The demographic effect of eliminating unwanted births is probably greater than we infer because of this underreporting by older women and the probable underreporting of unwanted births in general, and also because the additional children born to these older women before they reach menopause will undoubtedly be mostly unwanted.

The above estimate is based on the experience of married women whose childbearing took place in the high fertility period of the early 1950's. Under circumstances of perfect contraception, women now entering the childbearing years might decide to have larger families than women who have preceded them would have had if they had complete control of fertility, but this does not seem likely. Rapid diffusion of use of the pill has continued since 1965, and one of the consequences of this diffusion may be reduction of the number of "desired" as well as of unwanted children. As women are able increasingly to postpone pregnancy and to enter into nonfamilial roles (particularly employment), many may prefer to have

aller families than they would otherse have chosen. If, in addition, there a trend toward nonfamilial female les, there may be strong pressures ainst any upsurge in the average mily size that would be achieved by merican women with complete fertility ntrol.

In fact there are already indications hat the ultimate family size of the most ecent cohorts may be lower than that f preceding cohorts (*11*). This decline ay be the result of some reduction in nwanted births, in some reduction in he number of children women want to ave, or in some combination of these factors. Predicting the fertility of young women is always precarious, but it eems likely to us that, under the assumption of perfect contraception, the ultimate number of children today's young women would bear would be below the number inferred, under the same assumption, for women who were between the ages of 35 and 44 in 1965. There is some evidence from longitudinal studies that success in the control of fertility results in smaller families than were originally desired (*12*).

However, it is very important that we keep in mind the legacy of past fertility when considering the potential implications, for the U.S. growth rate, of the elimination of unwanted births. Even if exact cohort replacement could be achieved, the population would not immediately cease to grow. The time required for cohort fertility to reach the replacement rate would depend upon the speed with which universal perfect contraception was achieved. After the replacement rate had been attained, it would be some time before the effects of past fertility on the age structure would level off. Frejka has prepared estimates directly relevant to this question (*13*). He demonstrates that if the cohort comprised of women entering their childbearing years between 1965 and 1970 and all subsequent cohorts were to achieve a cohort fertility of exact replacement, the population would continue to grow at least until the year 2035, with a resultant increase in size of 40 to 50 percent.

In summary, the elimination of unwanted births would lead to a reduced growth rate for the United States, barring a marked increase in the average number of children desired. However, even if cohort replacement were achieved (perhaps as a consequence of other developments as well), a zero growth rate for the United States could not be achieved for over 60 years, by which time the population would number over 280 million. The longer it takes to achieve universal perfect contraception, the longer it will take to reduce our growth rate, and the larger, of course, will be the eventual size of our population.

In terms of the implications for a population policy goal of zero growth, our findings do not imply that the task of influencing people to want fewer children should be ignored, especially since this number could shift upward again. However, the elimination of unwanted births would have considerable demographic effect, it would be desirable in human terms, and it would probably be a more readily attainable objective.

Appendix: Comparison with Other Measures

Since the conclusions reached by the use of more conventional measures of "desired" or "ideal" family size (*14*) differ radically from those reached by our procedure of inferring the desired number of children, a word on the differences in the two approaches is necessary. The first is used typically in surveys with married women of all ages within the reproductive span and with varying numbers of children; in this approach the woman is simply asked how many children she would like to have or how many she would consider ideal for herself, or, in some instances, for the average American family. Our approach has been to infer the desired number of children by subtracting the number of unwanted births from the total number of births. The latter procedure results in considerably lower estimates of the number desired. For example, married women aged 35 to 44 in 1965 reported, through the direct approach, a "desired family size" of 3.4 children, as compared with 2.5 children as estimated by our procedure.

In general, the difference is probably attributable to real differences reflected by the two types of measurement. In the direct approach, desired family size relates to the time of the survey and is based on the respondent's fertility history and on her and her husband's adjustment to it. It is not at all inconsistent for a couple that has had a child that had been unwanted to state later, on the basis of a satisfactory (even beneficial) adjustment to the unwanted birth, that the size of their family is what they desire. To infer that this is the number of children such couples would have wanted under the conditions of perfect fertility control would be erroneous. For couples early in their life cycle, the measure of "desired family size" may be highly invalid as a predictor of the number of children they would have if they could control their fertility. The average family size desired by young couples corresponds closely with the eventual average family size for these couples, regardless of the number of unwanted births; this suggests that the number of children young couples desire before the experience of childrearing may be largely a reflection of the observed sizes of the families of other couples of similar social status.

On the other hand, when desired family size is measured by subtracting (for women past the childbearing years) the number of unwanted births from the number of children borne, the time focus is on evaluation of the event at the time of pregnancy. Although the responses may still be influenced by intervening experience, this bias should be much less than the bias when the reference is to the present, or to the future conditioned by the present.

The two types of variables can be measured independently, since about half of the women who reported an unwanted birth also said they would not have preferred to have fewer children than they had. Both measures are useful, but it seems to us that the approach we have defined in this article is the more suited to the task of assessing the demographic implications of perfect contraception.

References and Notes

1. J. Blake, *Science* **164**, 522 (1969); O. Harkavy, F. S. Jaffe, S. Wishik, *ibid.* **165**, 367 (1969).
2. C. F. Westoff and N. B. Ryder, in *Fertility and Family Planning: A World View*, S. J. Behrman, L. Corsa, R. Freedman, Eds. (Univ. of Michigan Press, Ann Arbor, 1969), p. 394.
3. For a description of this sample see N. B. Ryder and C. F. Westoff, *Science* **153**, 1199 (1966). A high level of unwanted fertility in the United States has been reported on the basis of national fertility studies; in this article we draw attention to the implications of the current patterns of unwanted births. For the earlier reports see R. Freedman, P. K. Whelpton, A. A. Campbell, *Family Planning, Sterility and Population Growth* (McGraw-Hill, New York, 1959), pp. 100–153; P. K. Whelpton, A. A. Campbell, J. E. Patterson, *Fertility and Family Planning in the U.S.* (Princeton Univ. Press, Princeton, N.J., 1966), pp. 221–275, 361–370; N. B. Ryder and C. F. Westoff, *Demography* **6**, 435 (1969).
4. N. B. Ryder and C. F. Westoff, *Reproduction in the United States: 1965* (Princeton Univ. Press, Princeton, N.J., in press), chap. 14, table 5.
5. Ryder notes that these levels of unwanted fertility are consistent with a regulatory pro-

cedure that is 99 percent perfect. See N. B. Ryder, "The time series of fertility in the United States," paper presented before the International Union for the Scientific Study of Population, London, 1969.

6. R. G. Potter and J. M. Sakoda, *Demography* 3, 450 (1966).
7. M. Orshansky, *Soc. Secur. Bull.* (March 1968).
8. These estimates of the percentages of unwanted births among poor and non-poor, and the estimates of the gross number of unwanted births in the period 1960 to 1965, discussed in the next section, are of the same order of magnitude as values presented in a preliminary approximation by F. S. Jaffe and A. F. Guttmacher, *Demography* 5, 910 (1968).
9. Our sample design for a new national study in 1970 which calls for a sample of "ever married" women will provide a better basis for making these estimates.
10. R. Freedman, L. C. Coombs, L. Bumpass, *Demography* 2, 267 (1965).
11. N. B. Ryder, in *Fertility and Family Planning: A World View*, S. J. Behrman, L. Corsa, R. Freedman, Eds. (Univ. of Michigan Press, Ann Arbor, 1969), pp. 99–123.
12. C. F. Westoff, E. G. Mishler, E. L. Kelly, *Amer. J. Sociol.* 62, 494 (1957). Additional evidence pointing to the same hypothesis appears in the Princeton Fertility Study (unpublished tabulations).
13. T. Frejka, *Population Stud.* 22, 394 (1968).
14. For discussion of the relationships between these variables see N. B. Ryder and C. F. Westoff, *Population Res.* (March 1969) and A. A. Campbell, *Fam. Planning Perspect.* 1, No. 2, 33 (1969).
15. We thank Ansley J. Coale, Ronald Freedman, Fred Jaffe, Suzanne Keller, and Norman B. Ryder for critical appraisals of the manuscript. We also acknowledge the able computer programming assistance of Andrea Smith.

A picture is presented of the distribution and concentration of the needs and services for family planning in the United States by county. Noteworthy is the concentration of the heaviest program inputs as well as the largest number of women not served in a relatively few urban counties.

GEOGRAPHIC DISTRIBUTION OF NEED FOR FAMILY PLANNING AND SUBSIDIZED SERVICES IN THE UNITED STATES

Raymond C. Lerner, Ph.D.

Introduction

A STUDY, *Need for Subsidized Family Planning Services: United States, Each State and County, 1968,* has recently been released by the Family Planning Office of the Office of Economic Opportunity. This paper will review the purpose and design of the study, and discuss findings which relate to the distribution of women at risk, the number reported served in subsidized programs, and the number unserved, by county, for the United States.

The object of this work was to collect, for each of the 3,072 counties in the U. S., basic data on the need for subsidized family planning services, the services currently available, selected characteristics relevant to need, and resources available for the delivery of services.

The purpose in compiling and collecting such data was, for the first time, to develop a capability for estimating the level of organized family planning services in the U. S. In addition, such information could assist in planning by making it possible to examine where program inputs were going and where they were needed. A file of this nature, it was felt, would also provide baseline data useful for monitoring improvements in the distribution of program efforts over time, and might also serve as a preliminary tool for evaluating the effectiveness of publicly financed family planning programs in reaching program objectives.

For each county in the U. S., selected variables on needs and resources have been compiled from existing sources; however, data on services required field surveys. This paper will deal with only a limited portion of the material on file; the items included in the study for each county are listed in the Appendix.

Methodology

The report, *Need for Subsidized Family Planning Services: United States, Each State and County, 1968,** includes

* Available from the Family Planning Program, Office of Health Affairs, Office of Economic Opportunity, Washington, D. C., or the Center for Family Planning Program Development of Planned Parenthood-World Population, New York, N. Y. 10022.

a full discussion of the methodology and the limitations of data. However, a few important points relevant to the material in this paper will be discussed here.

Population

The basic population denominator and number of women age 15-44 in this work consist of 1966 population estimates for the United States, by county, made by the State and Local Population Estimates Branch, Population Division, U S. Bureau of the Census.*

Need

The total number of women age 15-44 estimated to require subsidized family planning services consist of those who can be classified as medically indigent, fertile, exposed to risk of pregnancy, not currently pregnant or seeking a desired pregnancy. This has been approximated by applying the Dryfoos-Polgar-Varky formula to the census estimates for each county for 1966. The methodology employed by the formula, which was developed at Planned Parenthood, is described in detail in the full report.

Current Services

Because there were no readily available nationwide statistics giving patient figures from which to determine how many women were currently receiving family planning service from organized programs during the period from July 1, 1967, to June 30, 1968, three mail surveys had to be conducted.

We know that health departments, hospitals, and free-standing clinics are the major channels through which subsidized family planning services are delivered, but knowledge of the level of service and the exact locations of service facilities is severely limited. In order to establish a preliminary universe of agencies providing organized family planning services to low-income women, available data from previous reports and surveys were examined for each of these three channels. The field to be surveyed included voluntary and public hospitals, health departments, Planned Parenthood clinics, OEO family planning projects, Neighborhood Health Centers, maternity and infant care projects, and other agencies known to be providing family planning.

It was decided to survey hospitals, Planned Parenthood affiliates, and state health departments—individually and directly—to determine the number of patients served in their programs, and the addresses of their clinics. Responses originating from the same locality were compared for duplications, since combined funding and sponsorship sometimes result in duplicate reporting. When necessary, responses were also edited for conversion from visits to persons served since some agencies do not have record systems which enable them to report unduplicated counts of patients served. While the service figures are probably the best available nationally, they must be regarded as approximations.

No attempt was made to obtain figures on the number of women in the target population served by private physicians at their own expense or through Medicaid. Estimates based on scanty data place this proportion at less than 10 per cent of those in need. Nor could a study of this kind attempt to assess the retention rate of service programs or to evaluate their general quality. Therefore, while the term "number of women served" is employed, it would be more accurate to refer to the "number of patients enrolled" by an organized family planning service. How well or how fully the patients are served is not known, and it is probable that great variation exists from program to program. The study, therefore, could be

* Current Population Reports Series, p-25, Nos. 401, 404, 407 and 409, 1968, describe methodology.

regarded as estimating the extent to which organized programs have been successful in at least enrolling the population in need—a necessary first step toward the systematic evaluation of any program.

Within the defined universe of programs and agencies from which service data were sought, the response rate was excellent, nearly 100 per cent in all categories.

Findings

The data to be presented now are limited to distributions of need and services by county, along with a preliminary assessment of some general characteristics of the counties containing and not containing organized services.

Table 1 provides a summary of the distribution of U. S. counties by the number reporting organized family planning services in fiscal 1968.

In the U. S., it is estimated that, in FY 1968, there were approximately 5.4 million medically indigent women in need of subsidized family planning services. Among the 3,072 U. S. counties, only 1,200 reported organized programs, while, in 1,872 counties, no family planning programs for medically indigent women were identified. One hundred and twenty-two counties reported programs, but were not able to provide figures on the number of women served; they are included among the 1,200 counties with reported programs.

The 1,200 counties reporting organized family planning programs make up 39 per cent of U. S. counties; they also contain approximately 75 per cent of the total U. S. population, and of women aged 15-44, as well as the same proportion of low-income women in need of subsidized family planning services. Almost 800,000 women received subsidized services within these (1,200) counties, which amounts to about 15 per cent of all the women in the U. S. who are estimated to be in need of family planning services (Table 1a). At risk and remaining to be served in the counties with reported programs, were 3.2 million women, or 70 per cent of the total number of women who are unserved in the U. S.

While only 15 per cent of the women in need are being served nationally, there is, of course, great variation from county to county in the current service picture; a few counties were found to provide service to more than 40 per cent of the group at risk, while others reported less than 1 per cent. Among the 1,200 counties reporting services, 20 per cent of those at risk are being served. We still have a long way to go.

The 1,872 counties without reported programs constitute 61 per cent of all U. S. counties but they contain only about 25 per cent of the total U. S. population, about the same proportion of women age 15-44, and 1.4 million or 27 per cent of all low-income U. S. women at risk and in need of family planning. Since no programs are reported, unserved females also equal 1.4 million and unmet need equals 100 per cent.

In summary, about three-fifths of U. S. counties contain one-quarter of those at risk and report no organized programs; conversely, two-fifths of U. S. counties contain three-quarters of those at risk in the entire country and report service to about one-fifth of this group (Table 1). Since the two-fifths of U. S. counties with service contain roughly three-quarters of the U. S. population, it is obvious that these include most of the major urban areas in the country, where need is more highly concentrated. On the other hand, as noted earlier, the 1,872 counties with no organized programs contain only about 1.4 million women at risk, indicating that the need is much less concentrated in these counties.

Table 2 shows the distribution of counties ranked by quartiles of women

Table 1—Distribution of U. S. counties by number reporting organized family planning services for medically indigent women served and unserved: total U. S. population,[a] women age 15-44,[a] estimated number of women in need,[b] number of women served and unserved

	No. of counties	Total population[a] (1966 est.)	Female population[a] Age 15-44	Female population in need[b]	Females reported served	Unserved females
		(000)	(000)	(000)	(000)	(000)
U. S. counties reporting no organized family planning services to indigent women	1,872	48,888[c]	9,577	1,430	—	1,430
Counties reporting organized services to indigent women	1,200[d]	146,811	29,966	3,937	773	3,164
Total	3,072	195,699	39,543	5,367	773	4,594
			Vertical per cent			
No service	60.9	25.0	24.2	26.6	0.0	31.1
With service	39.1	75.0	75.8	73.4	100.0	68.9
Total	100.0	100.0	100.0	100.0	100.0	100.0
			Horizontal per cent			
	(000)					
No service	(N = 48,888)		19.6	2.9	0.0	2.9
With service	(N = 146,811)		20.4	2.7	0.5	2.2
Total	(N = 195,699)		20.2	2.7	0.4	2.3

a. U. S. Bureau of Census, 1966 population estimates.

b. Estimated by applying the Dryfoos-Polgar-Verky formula to female population age 15-44, 1966.

c. Rounding to the nearest thousand was done after computation.

d. One hundred twenty-two counties reporting service but not providing figures on the number of women served have been included; present information is that the number of women served in these counties is not significant.

Table 1a—Number of medically indigent women served and unserved as per cent of U. S. total estimated at risk for subsidized family planning services, fiscal 1968

	No.	%
Served	800	15.4
Unserved	4,600	84.6
Total need	5,400	100.0

served in the 1,200 counties with reported organized programs. The significant finding here is the concentration of service in relatively few counties: 8 counties, or 0.3 per cent of all U. S. counties, account for the first quartile in which about 200,000 women were served (or 25 per cent of reported services). Only 23 more counties, or 0.7 per cent of all U. S. counties, account for the next quartile—200,000 women served. Expressed cumulatively, *31 or only 1 per cent of all U. S. counties account for 50 per cent of all women reported served in subsidized family planning programs throughout the United States.*

Going one step further, the next quartile adds 86 counties. Thus, 117 counties, or 4 per cent of U. S. counties, account for 75 per cent of women reported served; that is, 600,000 out of 800,000 served throughout the U. S. This obviously reflects concentration of program inputs and, as will be shown later in more detail, those service areas include nearly all of the great urban counties where population is concentrated, where needs are most obvious, and where resources for delivery of services are most readily at hand.

Finally, the last quartile of women are served in 961 counties; these are for the most part quite small programs. On an average basis, there are about 200 women per county receiving service in the latter group of counties through all delivery agencies (although in most of these counties only one agency is usually providing services).

Table 3 shows the distribution of quartiles of unmet need: that is, the number of women estimated to be in need of subsidized family planning services but not reported as receiving them, and the number of counties in each quartile. There are approximately 4.6 million women still in need of service.

Table 2—Quartile range of women served in subsidized family planning programs for U. S., fiscal 1968; number and per cent of counties in each quartile

Women served			Counties			
No.	Cum	Cum %	No.	%	Cum	Cum %
(000)	(000)					
200	200	25	8	0.3	8	0.3
200	400	50	23	0.7	31	1.0
200	600	75	86	3.0	117	4.0
200	800	100	961	31.0	1,078	35.0
			122[a]	4.0	1,200	39.1
	None reported		1,872	61.0	3,072	100.0
			3,072	100.0		

a. One hundred twenty-two counties reporting service but not providing figures on the number of women served have been included.

Table 3—Quartile range of women estimated at risk for subsidized family planning services not receiving service for U. S., fiscal 1968, and number and per cent of counties in each quartile

Women unserved			Counties			
No.	Cum	Cum %	No.	%	Cum	Cum %
(000)	(000)					
1,150	1,150	25	69	2	69	2
1,150	2,300	50	244	8	313	10
1,150	3,450	75	626	20	939	31
1,150	4,600	100	2,133	69	3,072	100
			3,072	100		

Here, too, great concentration is evident: relatively few counties in the U. S., 69 in all, account for 25 per cent of the unmet need. The next quartile of unmet need involves 244 additional counties. Thus half of the unmet need of 2.3 million women is found in 313 counties (about 10 per cent of all counties).

It can be noted at this point that most counties with the greatest need figures are also found heading the list of counties with the largest program inputs. For example, if one compares the 50 counties with the greatest need to the first 50, by numbers served, 29 appear on both lists, indicating that there is fair correspondence between location of needs and service efforts. However, the magnitude of the input relative to need is as yet grossly insufficient, inasmuch as several million women remain to be reached and over one million of these are in relatively concentrated target areas in only 69 U. S. counties.

Table 3 shows that the fourth quartile of unmet need is spread over a vast area involving 2,133 counties. While these counties include some metropolitan areas, they are for the most part rural and rural-farm areas with small and dispersed populations and with few health resources, making it difficult and costly to reach the patient.

Table 4 expands on reported services as presented initially in Table 2. In Table 4, as in the earlier table, the number of women served is the controlling variable. The eight counties comprising the first quartile are detailed in Table 4 and vividly illustrate how service inputs have been concentrated in major urban areas. It was to show this that the county, state, and major city identifications were provided. Note that the East appears to be first with three New York City counties, Baltimore, and Washington, D. C. The Midwest is represented by Cook County (Chicago) and Wayne County (Detroit). Finally, in the Far West, we have Los Angeles County.

For proportion of those in need who are served, these areas represent fairly substantial program achievements when compared to the national average: in these eight counties 42 per cent were served—200,000 of 471,000 in need—whereas nationally only 15 per cent were served.

In the second quartile, involving 23 counties, 36 per cent of those at risk were served, in the third quartile 23 per cent, and in the fourth—the least densely populated counties of the U. S.—only 10 per cent. The column labeled "total population" illustrates the increasing dispersion as one moves from high to low

Table 4—U. S. counties by quartiles of women served in subsidized family planning programs; number of women served, estimated need, number unserved, female population age 15-44, total population*

No. of counties	Rank by no. served	County	State	Principal city	No. served (fiscal 1968)	Estimated need	Unserved	Females 15–44 (1966)	Total population (1966)
					(000)	(000)	(000)	(000)	(000)
Detailed listing of 8 counties comprising first quartile, with ranking by number served	1	Cook	Ill.	Chicago	38	82	44	1,029	5,400
	2	L. A.	Calif.	L. A.	33	126	94	1,375	6,814
	3	N. Y.	N. Y.	N. Y. C.	30	49	19	305	1,540
	4	Kings	N. Y.	N. Y. C.	22	64	42	548	2,702
	5	Wayne	Mich.	Detroit	21	59	39	532	2,705
	6	Bronx	N. Y.	N. Y. C.	19	36	17	314	1,543
	7	D. C.	—	Washington	18	21	2	164	806
	8	Baltimore	Md.	Baltimore	18	32	14	303	1,489
8	–	—	—	—	200	471	272	4,572	22,999
23	–	—	—	—	200	550	352	4,600	22,700
86	–	—	—	—	200	860	660	7,735	37,649
1,083[a]	–	—	—	—	200	2,080	1,880	13,059	63,463
1,872	–	—	—	—	No. services reported	1,430	1,430	9,577	48,888
3,072					800	5,367	4,594	39,543	195,699

* Rounding to nearest thousand performed after computation. Total computed in columns or horizontals may not tally due to rounding.

a. One hundred twenty-two reporting service but not providing figures on the number served have been included.

service areas. The first eight counties contain as many people as the next 23. The next 86 counties contain fewer people than the first two groups of 31 counties, and so on. The data make clear that the question of providing family planning services in those areas where population is spread thin has only begun to be examined. Indeed, this is generally true for nearly all health services, not merely family planning.

Table 5 presents data on the population size and the range of the percentage of rural-farm population in the 1,200 counties reporting service figures, arranged again by quartiles of women served. It can be seen from the range of population size that, while in general the counties with least service in the fourth quartile must include many sparsely populated areas, they are not exclusively so. One county in this quartile contains 1.3 million people—suggesting that even in large urban areas the extent of programing for family planning services is severely deficient.

It appears that the first two quartiles, accounting for half of the women served, are comprised exclusively of high-population counties. For example, in quartile two the smallest county by population size is 320,000. Very few of these 31 counties in the first quartiles have any rural-farm population.

The third quartile contains counties that range from relatively small—25,000 population—up to quite large—1.4 million—and show a wide variation in percentage of rural-farm population.

In the fourth quartile, there is a tremendous range, both of population size —from less than 1,000 to 1.3 million— and of rurality—from zero to 59.5 per cent (an inordinately high proportion to be classified as rural-farm). These 1,083 counties are a great mixture of county types, including some highly urban areas which are in fact part of great metropolitan centers (i.e., Boston, Massachusetts; Passaic, New Jersey; Suffolk County, New York) as well as some of the most rural parts of the United States.

It is obviously not always possible to categorize counties as urban or rural-farm areas. The usual problems of classification plague the researcher on this as on so many other dimensions. For, within a single county, there may be extensive urban as well as rural-farm areas. The socioeconomic ecology of a region does not usually oblige us by observing county jurisdictional lines. This factor often results in the mixture of characteristics demonstrated in the tables. Table 6 provides an overview of the number of women unserved with respect to the rural-farm characteristics. All U. S. counties have been ranked from low to high according to per cent rural-farm, and then distributed by quarters by the number of women needing subsidized family planning service. In addition, the number of counties for each quarter with no reported programs are shown.

The 121 least rural counties contain a

Table 5—Quartile range of women served in subsidized family planning programs for U. S., fiscal 1968; for each quartile: the number of counties, range of population size, and range of per cent rural-farm population

Women served	No. of[a] counties	Range of[b] population size	% rural-farm[c]
(000)		(000)	
200	8	800–6,800	All less than 1
200	23	320–2,000	0.0– 2.4
200	86	25–1,400	0.0–17.5
200	1,083[a]	<1–1,300	0.0–59.5
800	1,200		

a. One hundred twenty-two counties reporting service but not providing figures on the number of women served have been included.

b. Bureau of Census estimate for 1966.

c. 1960 Census.

Table 6—All U. S. counties ranked by per cent rural-farm population and distributed by quarters of women unserved (fiscal 1968), range of per cent rural-farm poputation per quarter, number and per cent of counties, and number and per cent of counties with no program

Range % rural-farm population[a]	No. of women unserved	No. of U. S. counties	% of U. S. counties	Counties with no subsidized programs		
				No.	%	
	(000)					
0.0– 0.9	1,150	124	4.0	26	21.0	(N=124)
1.0– 5.2	1,150	359	11.7	45	12.5	(N=359)
5.3–17.8	1,150	876	28.5	500	57.1	(N=876)
17.9–86.0	1,150	1,713	55.8	1,301	75.9	(N=1,713)
	4,600	3,072	100.0	1,872	60.9	(N=3,072)

a. 1960 Census.

quarter of the number of women needing service (1.15 million). No county within this group exceeds 0.9 per cent of rural-farm population; and only 26 or one-fifth of these counties report no program. In the next group, all counties show a small proportion of rural-farm population, not less than 1 per cent and not more than 5 per cent. Here also a small number of counties, about one-eighth, report no program.

Group three moves into the middle to upper range with respect to rurality, and this includes 28.5 per cent of all U. S. counties; 500 or 57 per cent of these report no programs. Finally, in group four, we are really in the country. These are predominately rural counties and include over half of all counties in the U. S. Seventy-five per cent of these counties report no program. As rurality increases, programing decreases.

Table 7 illustrates the program potential of 1,872 counties with no reported service. In this table, the distribution of all counties with no service is

Table 7—Number and per cent of U. S. counties with no subsidized family planning services, by range of estimated number of women in need; number and per cent of women unserved

Counties with no service				Range, estimated no. of women needing service	No. unserved	Cum	%	Cum %
No.	Cum	%	Cum %					
					(000)	(000)		
123	123	6.6	6.6	2,000–10,000	382	382	26.7	26.7
315	438	16.9	23.5	1,000– 1,999	428	810	29.0	55.7
558	996	29.7	53.2	500– 999	395	1,195	27.8	83.5
876	1,872	46.8	100.0	000– 499	235	1,430	16.5	100.0
1,872		100.0			1,430		100.0	

controlled by the range of estimated number of women in need. The total number of women in need is also presented for each group of counties.

Line two in the table shows that a total of 438, or 24 per cent of counties with no program, contain 1,000 or more women at risk; cumulatively, these counties contain a total of 819,000, or 56 per cent, of all those unserved in counties without programs. They should be regarded as areas with high program potential since they contain 1,000 or more women at risk.

The figure of 1,000 or more women per county at risk and in need is a useful measure of the service potential in these areas, since it is estimated that this number of patients is sufficient to provide minimum economy of scale in the operation of a clinic program.

The remaining two groups, totaling three-quarters of all U. S. counties without programs, are the more sparsely populated ones and account for 44 per cent of women at risk in unserved areas.

Summary

This paper has presented in broad terms the distribution and concentration of needs and services in the United States by county.

Of particular note is the concentration in relatively few urban counties of both the heaviest program inputs as well as the greatest number of women unserved. Equally important, a program potential exists in 438 counties with no service provided and more than 1,000 women at risk.

The data also point up the virtual nonexistence of *organized* programs in sparsely populated and rural-farm areas of the United States. In qualitative human terms, the need for family planning programs here is undoubtedly just as great as in metropolitan communities.

Dr. Lerner is Assistant Professor, Department of Community Health, Albert Einstein College of Medicine, Bronx, N. Y.

This paper was presented before a Joint Session of the Center for Population Research and the Epidemiology Section of the American Public Health Association at the Ninety-Seventh Annual Meeting in Philadelphia, Pa., November 13, 1969.

This work was performed at the center for Family Planning Program Development, the Technical Assistance Division of Planned Parenthood-World Population, N. Y. C., pursuant to a contract with the Office of Economic Opportunity, Washington, D. C., Contract No. B 89-4588. During the course of this work the author was director of planning of CFPPD.

APPENDIX

What Is in the File—for Each County in the United States.

a. *Needs and Services*

Total population of U. S., 1966; women in the childbearing years, i.e., 15-44; number of women medically indigent needing subsidized family planning services; number receiving family planning services through subsidized clinic programs; number in need not receiving services, or unmet need; number of home-based migrant workers; number of American Indians under the jurisdiction of the Indian Health Service of DHEW.

Under needs we have also selected health and demographic indexes which provide greater insight into the characteristics of each county: infant mortality rate; number of infant deaths in excess of 17.8 per 1,000 for the five years 1961-1965; fertility rate per 1,000; live birth order as a per cent of all births; out-of-wedlock births per 1,000 live births (not reported for 16 states); births of 2,500 grams or less as a per cent of live births.

Each county is classified by whether it is within a Standard Metropolitan Statistical Area or State Economic Area (for New England) or a nonmetropolitan county according to total population of SMSA, SEA or county.

b. *Resources*

Physicians—Number of nonfederal physicians in patient care with offices in the county; ratio of M.D.'s per 100,000 population; num-

ber of general practitioners; ratio per 100,000 population; number of obstetrician-gynecologists and ratio per 100,000 population.

Hospitals—For all short-term, general-care, nonprofit hospitals reporting births, operated by private agencies, nonfederal governmental agencies, but including the Public Health Service and Indian Health Service hospitals: number in each county; total births reported for all hospitals in the county; number reporting family planning services.

Other Resources — Counties with medical schools; community action agencies; OEO-funded Family Planning Projects; OEO-funded Neighborhood Health Centers; counties with Model City Programs; Children's Bureau Maternal and Infant Care Projects; Public Health Service Neighborhood Service Projects; counties where the health department provides family planning services; and finally, counties where Planned Parenthood affiliates provide family planning services.

To what extent can greater accessibility to abortion services affect poverty and its problems? This analysis addresses itself to such questions and develops proposals for identifying the socioeconomic impact of liberalized abortion laws and accessible services.

SOCIOECONOMIC OUTCOMES OF RESTRICTED ACCESS TO ABORTION

Charlotte Muller, Ph.D., F.A.P.H.A.

THE recent changes in the legality of abortion in the United States through repeal, reform and court action, and the various court cases and legislative movements in the current news, have changed the nature of the problem of access to a large degree. Once chiefly a matter of leveling legal barriers, the access problem now relates to financing, referral, organization of appropriate facilities for care, and patient factors influencing utilization in different social and age groups. The implications of restricted access to care, the subject of the present paper, apply, for different reasons, to post-repeal states (Alaska, Hawaii, New York and Washington), to reform ("health and life"*) states such as California, and to states with old-style laws, which still constitute the majority.

The small market for legal abortions in states with old-style laws has been restricted in access to a certain number of women of means who are able to procure private medical and psychiatric care[8] in hospitals amenities. Meanwhile, their less affluent sisters have rarely been able to receive medically equivalent care in the wards of public hospitals and as service patients in voluntary hospitals. These facts have been well-documented by Hall for hospitals in New York City, New York State, and the United States in reports showing ward/private differences in the ratio of abortions to deliveries, and similar differences between public and other hospitals.[5,6]

The far larger market for illegal abortions (and now, for out-of-state legal abortions) has also been class-structured in that it was the non-poor candidate who could afford jet travel to a service area or the attentions of a qualified physician, although without hospital protections or amenities, in an illegal abortion. The poor candidate was more likely to end up in the hands of the non-medical practitioner or to substitute crude attempts at self-induced abortion through chemical and physical means.

Imperfection in the market inheres in uneven access to knowledge of sources of supply as well as in uneven access to suppliers for economic, social class, and geographical reasons. The result of market imperfections including legal constraints on entry is a lessening of consumer welfare, and in particular, a restriction on the option of couples to choose a fertility level consistent with their total set of preferences for leisure, material goods, the company of children,

* With account taken of present and future environment in determining the risk to health in Oregon's law.

and the educational package they consider normal for each produced child.[2]

Unlike some other health services, the improved accessibility of abortion (which for the poor is a matter of present concern) is evidently a service whose utilization greatly rises in the event of legal accessibility. This is shown by the experience of countries which have passed laws broadening the grounds for abortion to include health as well as life of the mother and admitting socioeconomic considerations. It is also shown in states like California and Colorado which have liberalized the law.[1] A more advanced law in Great Britain was followed by a shift in performance of abortions from private auspices to National Health Service financing, as well as an over-all rise.[16] With wider legal access, the seeking of inferior substitutes, including attempts at self-induced abortion, will doubtless decline, with direct improvement in the maternal death rate among black and Puerto Rican women.[4] It is not clear that all latent demand would be satisfied: some women are held back by the lack of privacy of official procedures, and review committees as in states where "health and life" are accepted grounds; some physicians would continue to refuse to perform the operations; and, some women would deny the reality of the pregnancy until late in its course as they now do. The price of the service would still be a factor in utilization, although it is not easy to say just how elastic the demand is where the legal barrier exists.

Barriers to legal abortion affect the ratio of unwanted children born. Low-income couples express the same family-size goals as higher income couples,[7a] but are less successful, on the whole, in the use of contraception. The leverage power of abortion in adapting actual to desired family size is thus of relatively greater importance for low-income groups.

However, it is necessary to have a limited expectation of the extent to which, based on the foregoing, reduction in unwanted births will solve poverty problems. So long as poor couples desire 3 or 4 children—or more—available means of birth prevention would not necessarily be used to control family size and per capita income would remain low. And, independent of family size among the poor, the reduction of poverty requires a variety of specific programs to deal with low job skills, deficient labor market organization, family health needs, and income maintenance problems, to cite a few items on the national agenda.

The negative effect of unwanted births on family economic and social welfare is felt by way of defects in the timing of the first birth, defects in spacing the interval between children, which affects family capacity to accept the new child, and defects in terminating family formation. Although the reduction of welfare is really the joint result of limitations of the present arrangements for birth control (deficient access, failure to utilize and imperfections in method) and of restricted access to abortion, it is nevertheless possible to avert negative outcomes by better availability of abortion alone, and this is especially true, for the reason cited above, for low-income groups.

One of the important situations relates to the separation of the teen-age male from the educational process.

Alvin Schorr has beautifully presented the mechanism and the evidence linking the family cycle and economic life. Early marriage is generally forced marriage, the result of premature pregnancy. The young father leaves school and cannot return. His bargaining power in the job market is poor and his first job choices are in low-opportunity situations as a result of immediate necessity, lack of information, and low skill. He may also fail to find work. The marriage of the young is less stable, statistically

speaking, than that of a later age, but the probability of a large family is also associated with early age of marriage. Whether the family is separated or united, the burden of support prevents the young adult from experimenting with various types of work. And the family fails to accumulate capital for any decisive improvement in circumstances such as additional training.

Statistical support for this model includes:

1. The high per cent of premarital pregnancy in school-age marriage (one-third of all school age marriages, 87% where both spouses were high school students).

2. The larger family size for both white and black mothers who marry at 18 compared with 2 or 3 years later (white, 3.7 compared with 2.8 children; black, 4.3 compared with 4.0 children). This comparison also reveals the limited success of black families at birth control, with age of marriage having less effect on family size than among whites.

3. The occupational distribution of teen-age males compared with older workers.[15]

In 1966 there were 1.2 million young males aged 16 to 21 who were school dropouts and members of the labor force. Sixty-one per cent of them worked as operatives and non-farm laborers.[21a] (This number rose to 1.6 million in 1969.)[21b]

The crucial outcome in terms of the economic history of the teen-age male is the reduced lifetime earnings of a man who has not completed high school, and again the greater earnings of the college graduate compared to the high school graduate.* Differences also show up in a cross-section. Let us compare just two educational levels within white and black groups. Money income figures for 1968 by years of school completed show 5.9 million white family heads who are college graduates with median income of $13,589, and 7.1 million who started but did not finish high school with median income of $8,525. In non-white families, where the head finished college, the family income was $12,472 (267,000 families); where he started but did not finish high school (1.0 million families), the median income was only $5,766.[21c]

The ratios implicit in the above income figures would be altered with changes in the relative supply of males at the different educational levels, and are also influenced by the structure of demand for workers at different levels. But the return on human capital added by educational processing is real, and it is estimated that four-fifths of high school dropouts are intellectually capable of additional education.[20]

Another problem for economic improvement in the family concerns job-seeking by the mature woman with children. The crucial statistic is that median family income (1968) is 30 per cent higher for families with a male head when the wife is in the paid labor force than when she is not.[21d] The presence of children under six is a deterrent to labor force participation.[22] It is true that an untrained woman may not add greatly to family resources by her employment. What this implies, perhaps, is that training programs are needed to capitalize on the economic opportunity presented to the family by the mother's freedom from pregnancy. It also calls attention to the compulsory school-leaving for girls consequent on pregnancy in many communities, a factor which adds to the effect on long-run family earning potential described above for teen-age males. Girls who started their families in their teens, in their maturity make up a portion of the group

* Data for 1968 estimate lifetime incomes for males 25 years and over by years of schooling: 1-3 years of high school, $294,000; 4 years of high school, $350,000; 4 or more years of college, $586,000. (*Statistical Abstract of the United States*, 1970, p. 111.)

of untrained women. Finally, for married women, mothers of young children, who must work out of financial necessity—18 per cent of those who took jobs in 1963 did so for this reason[24]—unsatisfactory arrangements for child care represent a family price that is paid for their labor force participation and a possible source of fluctuating availability for work. To a considerable degree this is also true for middle-class women who wish to work for personal satisfaction and extra income.

Like the married woman returning to the labor market, the young widow is available for employment to an extent dictated by the age of her youngest child and the number of her children. Half of widowed mothers with 3 or more children did not work at all in 1962, compared with 28 per cent with only one child, and the former group tended to work part-time, if at all. Since part-time employment is in lower-paying occupations, earning power was doubly affected. Furthermore, employment and earnings after termination of child care benefits under Social Security are found to be greatly affected by work experience in the preceding 5 years. Hence, the economic potential of young widows is greatly influenced by size and spacing of families.[29]

A third economic problem exacerbated by uncontrolled family size is present poverty. According to Mollie Orshansky,

> "The family with 5 or more children was still (in 1966) 3½ times as likely to be poor as the family raising only one or two, and . . . almost half the poor children were in families with 5 or more children."[12a]

She further points out that large family size (4 or more children) was found in an increasing number of poor families where the head was a fully employed worker (37% in 1965).[12b] How poor is poor? The median income of a poor family with male head in 1966 was $3,308 for a 4-child family, $3,590 for a 5-child family, and $3,410 for a family of 6 or more children.[12c]

About one-fourth of poor families, and about one-fifth of near-poor families, had 4 or more children[12d]—or 2,214,000 out of 15,240,000 families in the poor and near-poor categories.

The family income figures for the large poor family are equivalent to per capita income of $552, $513, and $430 (or less) respectively. In sharp contrast the lowest budget standard for a 4-person urban family, as priced by the Bureau of Labor Statistics in 1967, was $5,915 or $1,479 per capita.[23]

The immediate consequence of spreading fixed family resources over more persons is fewer goods and services per capita. Transfer payments received by about one-fourth of the poor (assistance, Social Security payments, veterans' pensions, and other devices to transfer current national income between persons by the tax-spending mechanism) are already counted in current income. Even with public assistance the large poor family could not hope to consume at anywhere near the lowest budget standard of the BLS.

Children who lack a welcoming and nurturing parental home can be counted along a continuum of extrusion from the family of origin. The continuum includes adoption, foster home placement, court action for neglect and dependency and less severe but indifferent or otherwise unsatisfactory parental role performance within the family of origin. To count numbers involved is to become cognizant of the numbers of children affected by various degrees and causes of being unwanted during childhood, although one cannot infer that the child was unwanted during the pregnancy. The program costs involved, as in foster or institutional care, must be reduced by the amount of the maintenance component, which would be incurred (although not necessarily at the same level), regardless of where a child is

raised. However, program costs would be higher if services such as schooling for pregnant girls were more adequate.

One measure of children with a problem related to their birth is out-of-wedlock births. The number in 1967 was 318,072, with the figure expected to reach 403,000 by 1980 without any increase in rate. (The rate was 21 births per 1,000 unmarried women ages 15–44 in 1967.) Forty-seven per cent of these births are to girls under 20 years of age.[11] Illegitimate births were 9.7 per cent of total live births in 1966.[21e] Occasionally, out-of-wedlock births are not unwanted, and some are followed by marriage.[14] If this indicates that the figure overstates the problem, it should be remembered that many births in married women are undesired as well as unplanned. One even finds children placed for adoption with both parents living and together. Both in this group and in children retained in the family origin are children born after pregnancy has been followed by marriage.

Another aggregate cited is the number of children given for adoption. This group numbered 158,000 in 1967, or 82.3 per 10,000 children under 5,[21f] but only two-thirds of these were out-of-wedlock births.[18] Extra-legal but permanent adoptions add to these figures.

Many children are not adoptable because of defect or retention of parental rights by incompetent parents or for reasons of racial or religious prejudice. Yet adoptions certainly provide a minimum estimate for the occurrence of preventable births.

The unwanted child is not necessarily indicated by birth order. A wealthy family can provide for a fourth or fifth child materially, and with personal care. A poor family, or one where the mother has a health impairment, may not be able to welcome a third child. Nevertheless birth order, especially in conjunction with income level, is a useful measure of the problem of preventable births. Orshanky's figures yield a count of at least 2.2 million fourth children in birth order among the poor and near-poor, 1.3 million fifth children, and .7 million sixth children.[12e] These figures may be compared with average family size preferences of 2.9 children for non-whites and 3.3 for whites.

It may be pointed out here that in a study of cases of severe parental neglect, the average family size was 8 people. The neglectful family was cited as having inadequate diet, irregular meals and poor food preparation; lack of cleanliness, absence of routine; and neglect of medical problems. Apathy was the predominant attitude. There was a lack of internal and external means for building a positive life-style. The children were often having trouble in school.[30]

The possibility of identifying unwanted children by comparing family-size goals with family size achieved depends on the time at which desired family size is ascertained, since people adapt their announced goals in the event of pregnancy (and a portion of them even succeed in adapting their attitudes and behavior).[3] Conversely, a child originally desired may become unwanted because of the likelihood of deformity, the death or disability of a parent, income change—or the breakup of the marriage. (This change in status of the child has a bearing on the question of abortion only insofar as the change occurs soon after conception.)

If correct, this comparison is a powerful measure. It reveals between 750,000 and 1,000,000 excess births a year between 1960 and 1965. These figures are based on a re-analysis of 1965 national survey data by Charles F. Westoff. The lower estimate is based on births unwanted by both parents, and the higher, on births unwanted by at least one parent. If one uses the higher estimate, 445,000 births among the poor and near-poor are classed as excess, or 42 per cent of all their births, compared with

17 per cent among the non-poor. The incidence of unwanted births increases rapidly with birth order. The estimates cited are minimal in that births retrospectively rationalized by the parents, and births representing timing failures, are omitted.[32]

Children born and living their early years under psychological rejection by mothers, social abandonment by fathers, poverty and other disadvantaged conditions, are exposed to risk of impaired development which, regardless of all other consequences, is economically important as a cause of inferior earning power at maturity. In the several aspects of this problem to be discussed, it is suggested that it is chiefly impaired educational chances which threaten future economic potential. Let us look first at mental retardation.

Seeking of prenatal care late in pregnancy, and inadequate nutrition, are typical or frequent in unwanted pregnancies. At least for high-risk mothers, late care and nutritive lacks are a factor in complications and prematurity, which in turn are found to be related to impaired learning potential. Pasamanick has pointed out that very young mothers and older women had a higher risk of producing mentally defective children, and increasing birth order also increased the risk.[13a] It has also been noted that the extra medical risks of pregnancy among the very young are complicated by the unmarried status and poverty of the adolescent girl typically involved.[17]

Although the status of being unwanted does not predict a certain incidence of mental retardation, in the sense of being either a necessary or a sufficient cause, it is pertinent that of the many births among the poor, who are exposed to the hazards which may lead to mental retardation, a large per cent appear to be unwanted.

Since mental retardation is a multicaused phenomenon in which the nurture, educational stimulation and social opportunities of the child affect outcome, it is surmised that a mild handicap (the more typical case) is continually reinforced in the large, poor, culturally isolated family.

Furthermore, once adolescence is reached, access to higher education and to jobs with responsibility for large assets is dependent on being in the upper track of learners. The chance to increase earning power either by adding to human capital or by associating with expensive cooperating factors of production is impaired by mild mental retardation.

General mental health of the infant is said to be affected by the same considerations of the prenatal environment as applied to development of learning capacity. Pasamanick mentions 5 clinical entities in children significantly associated with complications of pregnancy and prematurity: cerebral palsy, epilepsy, mental deficiency, behavior disorders and reading disabilities.[13b] "Cases" differ from controls not in operative procedures or in long and difficult labor, but in long toxemias and bleeding —i.e., in medical rather than obstetrical features. Summing up, Pasamanick states:

> "There exists a continuum of reproductive insult, at least partially socio-economically determined, resulting in a continuum of reproductive casualty extending from death through varying degrees of neuropsychiatric disability."[13c]

Acceptance by and interaction with parents continues to be an influential factor in the course of mental health throughout childhood.[10,27]

In a study of cases of children requiring agency foster care in New York City, 10 per cent of initial placements were due to severe neglect or abuse and 33 per cent to family problems including rejection milder than the preceding category.[9] An annual figure of 154,000, 2.1 per 1,000 children, for juvenile court

cases of dependency or neglect, in jurisdictions covering two-thirds of the population under 18, is said to be an understatement of the incidence of this problem.[19a]

Impaired mental health interferes with the formal educational process (for example, when there is a behavior problem in the classroom) and with socialization of the child so that he can perform in the labor market at the maximum level for his capacities. At the extreme, delinquency and punishment or other social response removes him from the conventional developmental sequence. It is noted that delinquents often come from broken homes or have many brothers and sisters. A correlation is also noted between adolescent misbehavior and the absence of the father or limited opportunity to identify with him.[28a] (We note about 700,000 children in juvenile delinquency cases in 1967, or 2.3 per cent of those between 10 and 17 years, and an upward trend in rate.)[19b]

Educational growth of the child is recognized to be handicapped in the large family where income and parental time are inadequate. (Income is a substitute for time as when the mother reads to the four-year-old while a sitter walks the baby, or when the four-year-old is sent to a private nursery school while the mother tends the baby.) This problem is broader than the case of actual retardation or diagnosed mental illness in a child.[28b]

Finally, the large poor family is less likely to secure medical attention for its children.[26] The number of school days lost because of illness is greater than for higher income groups.[25] Nutritional defects add to time of recovery after infection and are related to days of school missed. Continuous school attendance has significance for development of human capital.

Summary

It is difficult to assign a weight to the importance of births in excess of desired family size, or births ill-timed in terms of family welfare, in the creation of social problems of neglect, delinquency, psychological and social incapacity to care for children, and the like. Nor is it easy to isolate the effects of this factor on the set of job vs. education choices made by the young father, the difficulties faced by the mature woman in planning re-entry to the labor market, and the experience of being a youthful consumer at the poverty-level of income. Equally, the underdevelopment of human capital by reason of mental retardation, physical and psychiatric health problems, and educational undernourishment defies exact division among specific causes. However well research methods for dealing with multi-caused phenomena succeed in elucidating these relationships in the future, there is in any event food for thought in the present. Ability to control family-size, including the right to abortion, must essentially seek approval on its merits. Personal freedom, equal access to care, and medical protection of the poor are all involved. Yet the discussion cannot help being influenced by observed associations between unplanned births and poverty, untimely marriage, and creation of stress on parental capacities of the more vulnerable for whatever reason.

Future Research

The design of relevant research concerning access to, and financing of, abortion services calls for flexibility because of the fluid situation which now exists with respect to law and policy. If realistic, such research can be useful in guiding policy choices.

1. *Financial needs of patient groups* can be identified by studying total service costs under different marital, social, racial and medical-clinical situations of the patient. Women who have had illegal abortions appear to be more willing than it was previously assumed to reveal information bearing on incidence, preva-

lence, and attendant circumstances.[31] Legality should improve the information flow. This may make it possible to develop estimates for direct costs for medical care and associated travel, and for the indirect costs of lost work-time and child-care replacement, both on a per case basis, and for aggregates. The present cost of surgery, hospital days, and pregnancy tests, determined by familiar methods of medical care research, can serve as a guide to the program expenditures that would be necessary to assure economic access for the low-income woman as state laws yield to the reform movement.

2. Systematic observation of the medical and behavioral *effects of non-hospital service programs*, and of the use of manpower and facility space resources which they entail, could be carried out as such programs are mounted. Such study will aid in developing and revising standards for a non-hospital service.

3. Understanding of one and two is essential for the design of an adequate prepayment benefit: this task needs to be supported by *continuing surveillance of present coverage and gaps*. Insurance entitlements for maternity in the private sector vary widely by employment group and carrier.[33] Nevertheless, a knowledge of current practice as to waiting periods, in-hospital care requirements, payment schedule limits, and family contract conditions is needed for policy purposes. Public sector entitlements have their own sources of geographical and program variation within military dependents, welfare and OEO medical care programs.

1. Finally, *manpower needs* are crucial in view of previous unmet demand. The assessment of additional training required to prepare practicing physicians and medical students to participate in the provision of abortion service is one task, and the appraisal of the attitude of professionals focuses on an element as important as numbers with requisite preparation. The possible role of paraprofessionals in a related theme for health manpower research. This is especially interesting, because in creation of a service able to handle a mass demand, traditional guild issues may be somewhat subdued.

States which have liberalized their abortion laws constitute a natural laboratory for the trial of new approaches in regard to financing, organization, manpower, and referral. Although little advantage has yet been taken of this fact, evaluation of early experience should be encouraged to aid in the development of appropriate social mechanisms for service.

REFERENCES

1. Frank J. Ayd, Jr., "Liberal Abortion Laws," America, February 1, 1969, p. 131; E. W. Overstreet, "Logistic Problems of Legal Abortion," AJPH, 61:3, March, 1971, p. 496.
2. Richard A. Easterlin, "Towards a Socio-economic Theory of Fertility: Survey of Recent Research on Economic Factors in American Fertility," in Fertility and Family Planning, edited by S. J. Behrman, Leslie Corsa, Jr., Ronald Freedman, Ann Arbor, 1969, pp. 134-135.
3. "Economic Status, Unemployment, and Family Growth," Social Security Bulletin, May, 1966, p. 39.
4. Edwin M. Gold *et al.*, "Therapeutic Abortion in New York City: a 20-Year Review," American Journal of Public Health, July, 1965.
5. Robert E. Hall, "Present Abortion Practices in Hospitals of New York State," New York Medicine, vol. XXIII, No. 4, pp. 124-126, March, 1967.
6. Robert E. Hall, "Therapeutic Abortion, Sterilization, and Conception," American Journal of Obstetrics and Gynecology, vol. 91, No. 4, pp. 518-532, February 15, 1965.
7. Frederick S. Jaffe and Alan F. Guttmacher, "Family Planning Programs in the United States," Reprinted from Demography, vol. 5, No. 2, 1968, a, p. 1 (citing Freedman, Whelpton and Bogue Studies), b, pp. 3, 9.
8. See JAMA, January 16, 1967, vol. 199 No. 3, Editorial, "Abortion and the Law" on use of psychiatric grounds for therapeutic abortion.
9. Shirley Jenkins and Mignon Sauber, Paths to Child Placement, New York City Department of Welfare and The Community

Council of Greater New York, 1966, pp. 9, 24.
19. Robert M. Mulford, "Emotional Neglect of Children: A Challenge to Protective Services," Child Welfare, October, 1958, p. 20.
11. National Council on Illegitimacy, "Comments on Recent Trends in Illegitimacy in the U. S.", June 13, 1969.
12. Mollie Orshansky, "The Shape of Poverty in 1966," Social Security Bulletin, March, 1968, a. p. 9, b. p. 11, c. p. 20, d. p. 7, e. Table 4.
13. Benjamin Pasamanick, "Epidemiological Investigations of Some Prenatal Factors in the Production of Neuropsychiatric Disorders," in Health and the Community, Alfred H. Katz and Jean S. Felton, Editors, New York, 1965, a. p. 201, b. p. 203, c. p. 211.
14. Mignon Sauber and Elaine Rubenstein, Experiences of the Unwed Mother as a Parent, Community Council of Greater New York, 1965, pp. 152–153.
15. Alvin L. Schorr, "The Family Cycle and Income Development," Social Security Bulletin, February, 1966.
16. Christopher Tietze, "Legal Abortion in Industrialized Countries," presented in Pakistan, January 28–February 4, 1969, p. 15.
17. U. S. Children's Bureau, Childbearing in and Before the Years of Adolescence, reprinted 1967, pp. 3, 10.
18. U. S. Children's Bureau, Statistical Series 92, Supplement to Child Welfare Statistics—1967, Adoptions in 1967 (1968), pp. 1, 11.
19. U. S. Children's Bureau, Statistical Series 93, Juvenile Court Statistics 1967 (1969), pp. 1, 6, a. pp. 1, 6, b. p. 1.
20. U. S. Children's Bureau Publication No. 460, The Nation's Youth, A Chart Book, 1968, Chart 28, text.
21. U. S. Department of Commerce, Statistical Abstract of the United States, a. (1968) p. 111, b. (1970) p. 113, c. (1970) p. 325, d. (1970)ap. 324, e. (1970) p. 50, f. (1968) p. 10.
22. U. S. Department of Commerce, United States Census of Population 1960 Labor Reserve, PC (2) 6C, 1966, Table 11.
23. U. S. Department of Labor, 3 Standards of Living for an Urban Family of Four Persons, Spring, 1967, Bulletin No. 1570-5, 1969 p. 6.
24. U. S. Department of Labor, Special Labor Force Report No. 59, Why Women Start and Stop Working: A Study in Mobility, September, 1965 (from Monthly Labor Review, Reprint No. 2476), p. 1078.
25. U. S. National Center for Health Statistics, Series 10 No. 47, Disability Days United States—July 1965–June 1966, October, 1968), p. 7.
26. U. S. National Center for Health Statistics, Series 10 No. 49, Volume of Physician Visits United States—July 1966–June 1967, (November, 1968), p. 6.
27. U.S., NIMH, National Clearinghouse for Mental Health Information, Mental Health Program Reports No. 1, February 1967, pp. 255–65, "Studying the Infant-Mother Relationship for Clues to the Causes of Aberrant Development," Nahman H. Greenberg, M.D.
28. U.S., NIMH, The Mental Health of Urban America, PHS Pub. No. 1906, April, 1969, a. pp. 17, 32, b. p. 12.
29. U. S. Social Security Administration, Research and Statistics Note No. 15—1969, Some Facts About the Employment of Widowed Mothers, August 20, 1969.
30. L. R. Young, "An Interim Report on an Experimental Program of Protective Service," Child Welfare, July, 1966, pp. 371–377.
31. Nancy Howell Lee, Acquaintance Networks in the Social Structure of Abortion, Harvard University, 1967.
32. Charles F. Westoff, "The Extent of Unwanted Fertility in the U.S.," presented at Planned Parenthood-World Federation, October 28, 1969.
33. C. Muller, "Health Insurance for Abortion Costs: A Survey," *Family Planning Perspective*, 2:1, October, 1970.

Dr. Muller is a Professor at the Center for Social Research, City University of New York, 33 West 42nd Street, New York, N.Y. 10036

This paper was revised from a paper prepared for the Workshop on Abortion, Obtained and Denied: Research Approaches to Outcomes. It was sponsored by National Institute of Child Health and Development and the National Institute of Mental Health.

This paper was submitted for publication in July, 1970.

Item No. 45

One Hundred and Twenty Children Born After Application for Therapeutic Abortion Refused

Hans Forssman and Inga Thuwe

INTRODUCTION

The aim of the present study was to determine the mental health, social adjustment and educational level of children born after their mothers had applied for legal abortion on psychiatric grounds, and been refused. For this purpose we compared a series of children born of these pregnancies with an equally large control series, following all the subjects up to their 21st birthday.

Therapeutic abortion was first officially legalized in Sweden in 1939 and during the years of relevance to this study it was permissible on the following grounds (which are still valid):

When, because of disease, physical defect or weakness in the woman, the birth of the child would endanger her life or health.

When the pregnancy is the result of a felony, such as rape or incest, or intercourse with a girl under 15, or of the woman being made to submit to intercourse against her will because of being dependent on the man, or when it is any other way the result of gross violation of the woman's freedom of action.

Acta Psychiatrica Scandinavica, 42: 71-88, 1966

When the expected child might inherit a mental disease, mental deficiency, or a severe physical disease or deformity, either from its mother or father.

On July 1, 1946, the law was broadened to include the following indication:

When, in view of the woman's living conditions or other circumstances, it can be assumed that the birth and care of the expected child will seriously undermine her mental or physical health.

This indication came too late for the mothers of the present subjects. It has led to much debate in Sweden, but the psychiatrists at our hospitals seem to have based their recommendations for or against abortion on essentially the same grounds before 1946 as they did afterwards.

Much has been written about abortion during recent years. Among Swedish studies are: *Lindberg's* (1948) What does the woman do when the psychiatrist says no to her application for abortion?; the social worker *Karin Malmfors'* (1951) follow-up study of 200 women who had applied for abortion; *Ekblad's* follow-up study (1955) of 479 women granted an abortion on psychiatric indications; *Arén & Åmark's* (1957) study of the outcome in 244 cases of authorized but unperformed abortions; *Arén's* (1958) study of 100 newly delivered mothers who had a former pregnancy prematurely terminated on legal grounds; *Kerstin Höök's* (1963) follow-up study of 249 women refused a legal abortion. *Schlaug* (1952) studied the male partner in 488 cases of application for abortion. *Ekblad's* and *Hook's* publications also contained data on the men concerned.

Thus several studies have been made of the mothers and fathers involved in cases of abortion. But little has been written about the third member of the trio involved—the unwanted child. *Arén & Åmark* (1957) related that 12 out of 162 children born to women who had gone through with their pregnancy were sent to a foster home for permanent care or adoption. *Malmfors* (1951) related that 7 out of 85 children born after an application for abortion had been refused were left for adoption. These authors said nothing more about the fate of these children, and *Arén & Åmark* did not check their information in the official registers. Furthermore, both these studies were made between 3 and 5 years after the children were born, when they were too young to permit any conclusion about their mental health or social adjustment. *Höök* (1963) followed a number of features in 204 children in her series

until they were 8 1/2 years old, on the average, the ages ranging from 7 to 11 1/2; 15 were left for adoption; the rest of her data about the children cannot be compared with any of the figures from the present study. This seems to be all that is written in Sweden about the fate of these unwanted children.

The Danish author *F. B. Nielsen* (1960), reported that, of 92 children born after application for abortion had been refused, 2 were stillborn, 82 healthy and 8 abnormal in some respect. But his children, too, were too young to permit any conclusion on their mental health and social adjustment.

It is beyond the scope of this investigation to go into the lengthy debate that has been going on about the legislation governing premature termination of pregnancy. Extensive reviews of this are given in the publications of *Ekblad* (1955) and *Höök* (1963).

The problem of abortion was given particular attention in the December 12, 1964, issue of the Lancet, which contained articles by *Tredgold* and by *Uhrus* and a leading article on the subject. The leading article concurred with the demand made at a meeting of U.S.A. specialists in 1955 for "more research into the background, motivation, mechanisms and results" of therapeutic termination of pregnancy.

As therapeutic abortion was not regularized by law in Sweden until January of 1939, it has hardly been possible until now to determine the long-term social and psychiatric consequences for the children born after application for abortion has been refused. In 1960 we published the preliminary results of this study in Swedish.

Material

Unwanted Children

The subjects studied came from Göteborg, Sweden's second largest city, with a population of about 280,000 at the time in question—1939-1942. During these years, the city had only one large general hospital, the Sahlgren Hospital. In October of 1938, a psychiatric department was opened at the hospital, and among its other activities, this department served as a counselling center for mothers seeking legal abortion. During the years of relevance to the present study, it was the only center of this kind in Göteborg. The few cases

taken in hand by private practitioners during this period are not included in our series.

Thus, the material for this investigation originates from all the cases of women living in Göteborg who applied for a therapeutic abortion to the Psychiatric Department of the Sahlgren Hospital during the years 1939 to 1941, inclusive, and were refused. These included both the women coming only to the outpatient service and the ones hospitalized for observation. We took 1941 as the last year so that we could follow the children born of these pregnancies until the age of 21.

During the years 1939 to 1941, altogether 197 women living in Göteborg had 199 applications for legal abortion refused, 2 women having been refused for two pregnancies. These do not include any woman who changed her mind and took back her application. In 188 of the 199, the psychiatrist at the department decided against abortion, in 10 cases, which had been referred to the Medical Board, the Board refused to authorize the abortion, and in one case, also referred to the Medical Board, the Board authorized the abortion but the obstetrician refused to do the operation because the pregnancy had proceeded too far.

Three of the 197 women could not be traced. One was a refugee who lived only a short time in Sweden. It is impossible to explain why the other 2 could not be traced; they may have given a false name or only a temporary address. This left 194 women and 196 refused applications.

Sixty-eight of these 196 pregnancies ended in abortion, spontaneous or provoked. Sixty-eight out of 196 is a large percentage—34.7 percent—and undoubtedly many of them were illegal. Since the drop-out rate is indicative to some extent of the kind of subjects chosen for study—the narrower the indications for legal abortion, the greater the number of illegal abortions—it is interesting to compare this figure with those from other Nordic countries on the frequency of interrupted pregnancy after legal permission for abortion had been refused. There is not much point in comparing our figures with those of other than these countries because the conditions differ too much.

Lindberg (1948) found that only 50 (14.5 percent) did not give birth at the expected time out of all 344 women refused an authorized abortion after being admitted as inpatients to the Psychiatric Department of the Sahlgren Hospital between 1940 and 1946. *Hultgren*

(1959) found that 14.4 percent of 4,274 women whose petitions for abortion had been turned down by the Medical Board during 1954 to 1956 did not go through with their pregnancy; 224 of the 4,274 were from Göteborg, and 35 of these 224 (15.6 percent) did not go through with their pregnancy.

Thus the percentage of prematurely terminated pregnancies, spontaneous or provoked, was smaller in these two Swedish series than in ours. It is true that all *Lindberg's* women had been under observation as inpatients, as against only 49 of our 199. One probably does not get such a good psychotherapeutic grip on patients only coming to an outpatient service as one does when they are hospitalized. On the other hand, only 83 of 136 Danish women refused legal abortion after observation at the Psychiatric Department at Frederiksberg's Hospital went through with their pregnancies, the drop-out rate in this series thus amounting to 39 percent (*Delcomyn,* 1952).

A more probable explanation for the difference is this. *Lindberg's* series comes from 1940-1946, *Hultgren's* from 1954-1956, and ours from 1939-1941. In 1939 the number of legally authorized abortions in Sweden amounted to 439, in 1946 it rose to 2,378 and in 1951 it reached a peak of 6,328; it then fell slightly, amounting to about 5,000 in 1952-1954, 4,562 in 1955, and 3,851 in 1956. Another way of following the trend is to compare the number of legal abortions with the number of livebirths during the same period. During 1939 to 1942, 0.5 pregnancies were terminated by legal abortion for every hundred livebirths. In 1946 the proportion rose to 1.8, and in 1951 to 5.7. In 1952 and 1954 it was 4.8, in 1955 it was 4.3, and in 1956 it was 3.6.

In short, many more authorized abortions were done after than during the years of relevance to our investigation. Because it was harder to get permission for therapeutic abortion in 1939-1941 than later it is reasonable to assume that more illegal abortions were performed in our series than in later series. *Delcomyn* (1952), comparing the Danish figures for 1945-1949 with those for 1950 and the first half of 1951, found that there were relatively more authorized abortions in the second period, and also that a larger percentage of the women refused a legal abortion went through with their pregnancy the second period. She gave no figures for her observation.

Thus 128 of the pregnancies in our series (representing 126 women) proceeded to term. The result was 134 children, including 6 pairs of twins. Four of the 134 were stillborn, and 8 died within a

year, one before it was 2 and one before it was 3. Excluding these 14 cases of early death left 120 children. The present study is based on these 120 all of whom reached the age of 21. They include 4 pairs of twins and 2 twins whose partners had died. Table 1 shows the 120 divided by year of birth and sex.

TABLE 1. *The 120 children born after their mother's application for legal abortion was refused, by year of birth and sex*

Year of birth	Boys	Girls	Total
1939	9	6	15
1940	32	13	45
1941	17	22	39
1942	8	13	21
Total	66	54	120

Control Children

All but 1 of the 120 unwanted children were registered in Goteborg when they were born. We chose control subjects for these 119 as follows: When the infant was born in one of the city's maternity hospitals, we took the next same-sexed child born in the same hospital for its control subject. For the 17 born elsewhere, we took the first same-sexed child registered in the city hospitals on the same day. When the control subject died before the age of 21, we replaced it with the first same-sexed child born after it in the same hospital. For control subjects for twins, we took the next pair of twins, same-sexed or bi-sexed as the case was, born in the same hospital. For the 2 children of twin birth, one of whose partners was stillborn and one died within 3 months, we chose control subjects as if the original children were singletons.

For the control subject of the child born outside Göteborg we took the next child of the same sex registered in the book of the same parish.

Sources of Data Analyzed*

From the civil and parish registry offices we found out: whether the would-not-be mother had had her child after her application was turned down; the addresses of the unwanted children and their control subjects from birth until they reached the age of 21; the marital status of the children and whether they in turn had had any children. One control subject lived in another country for six months when she was 18; apart from this we were able to follow every subject from the time they were born until they were 21.

From the child welfare boards (see p. 132) in the various districts in which the subjects had lived, we learned whether they had any of the subject's names in their files and, if so, why.

At the child-guidance clinics and youth psychiatry centers in the districts where the subjects lived or had lived we asked whether they had been consulted for mental deviation or illness in any of the subjects. We did the same at all the mental hospitals and psychiatric departments in general hospitals, and at all the psychiatric outpatient services in the districts where the subjects had lived after the age of 15. We also wrote to all the rural and urban psychiatric consulting bureaus run independently of the psychiatric departments in the general hospitals. We were not able to cover all the private practitioners who might have been consulted and we therefore disregarded anything we happened to hear from one of them having been consulted.

Sweden has a central penal register for the whole country, where every act of the authorities restricting the liberty of an individual is recorded, whether it be sentence to an adult or juvenile prison or internment in some other kind of an institution; also every instance of exemption from legal punishment because of legal irresponsibility, fines above a certain level and fines for crimes for which the alternative is penal servitude. All cases of conditional sentence are also recorded there. After receiving special permission from the government, we went through these files to see whether we could obtain any further evidence of antisocial conduct on the part of the subjects until they reached the age of 21.

*In these analyses we have called a P value of <0.05 probably significant, of <0.01 significant and of <0.001 highly significant

We also inquired at all the official temperance boards and social agencies in the districts where the subjects lived after the age of 16. (Not until 16 are persons registered in their own names in the records of the social agencies.)

We inquired about the subjects' schooling in the various school districts to which they belonged. Whenever they proceeded to secondary schools, we inquired at these schools whether they had gone on from them to other forms of study, and about any examinations they had passed. Thus we have full information on all the examinations the subjects passed prior to university. We then learned whether they had studied at any university before the age of 21 by going through the annual lists of the students enrolled at the various Swedish universities.

The information we got from the schools and the files of the social agencies showed that there was no point in inquiring at the agencies for the education and care of the mentally retarded.

In Sweden military service is obligatory for men, but not for women. We enquired at the Swedish Institute of Military Psychology about the fitness group into which the male subjects had been classed, and, if they had completed their military service, about how they had succeeded with their duties there. As a rule the young men must enroll for military service the year they become 18, but they can put it off up to the age of 21 or more for reasons of health or education. When they did this, we sometimes extended our limit beyond the 21st birthday in this one respect.

Three subjects (1 original and 2 control subjects) were the children of leading citizens in small communities, and we felt that it would be unfair to make inquiries about them in the local agencies in their neighborhood. But we got all the information we needed about them from other sources and there being no difference between them and the other subjects in depth of penetration we have included them with the others in the various analyses.

Differences Between Original and Control Series

Age, Maternal Age and Social Group

The ages of the two series of subjects correspond almost to the day. The greatest difference amounted to 25 days (twin cases).

The unwanted children were born to mothers 30 years old on the average, the control children to mothers of 28, on the average. There is a significant difference here ($0.01 > p > 0.005$).

We also compared the two series for the social group into which they were born, using the norms from the Swedish electoral statistics for the years 1937 to 1940. We did the grouping according to the father's occupation at the time, or if the mother was unmarried according to hers. Children adopted by couples neither of whom was their real parent, were grouped according to the occupation of the adoptive father at the time. But children adopted by men their mothers married after they were born were grouped according to their mothers' occupation when they were born. The result of this comparison is seen from table 2, which also shows how the inhabitants of Göteborg were distributed by social group in 1940.

More of the control than unwanted children were born into group II, and the reverse held for group III. Combining groups I and II gave 25 for the unwanted children and 36 for the control children, against 95 and 84 for group III. Thus the two series did not differ significantly in this respect ($p \simeq 0.10$), though no consideration was given to social group when choosing the control subjects.

Seventy-seven pairs, each consisting of one subject from either series, belonged to the same social group, 43 did not.

TABLE 2. *The unwanted and control children, by original social group*

	Number		Percentage		
Social group	Unwanted children	Control children	Unwanted children	Control children	Whole of Göteborg in 1940
I	3	4	2.5	3.3	6.5
II	22	32	18.3	26.7	31.4
III	95	84	79.2	70.0	62.1
Total	120	120	100.0	100.0	100.0

Results of Comparing Family and Social Environment of Unwanted and Control Children

Insecure Childhood

We considered that the following circumstances in the history of the subjects pointed to an insecure childhood background:

1. Complaints to a child welfare board about the way the subjects were being treated at home.

Every local authority district in Sweden is required to set up a child welfare board whose duty is to see that all children in its district are properly cared for. Up until 1960 the boards were required to interfere whenever children under 16 were being exposed to physical or mental harm through cruelty or neglect at home, or in danger of becoming delinquent because of their parents' depravity, negligence, or inability to bring up their children.

2. The child taken into custody by a child welfare board for protective care.

If consulting with, advising or warning the parents had no effect, or if the board decided that it would be a waste of time to try to persuade the parents to mend their ways, the board had the right to take the child away from its parents for protective custody.

3. Placement in a foster home.
4. Placement in a children's home.
5. Childhood in broken home, i.e. loss of a parent through divorce or death before the child was 15, or birth out of wedlock not followed by legitimization.

Table 3 shows how many subjects in either series were brought up under each of these circumstances. As seen there, 32 (26.7 percent) of the unwanted children were born out of wedlock, against only 9 (7.5 percent) of the control children. The difference is highly significant ($p < 0.001$). Eighty-six pairs (one member from each series) agreed in regard to legitimacy; 34 did not. The parents legitimized 5 of the 32 unwanted children born out of wedlock by getting married 2 to 24 months after they were born, and the parents of 5 of the 9 illegitimately born control children did the same 2 to 33 months later. Eight of the unwanted children were adopted by others than their

real parents (7 of these were illegitimate). None of the control subjects were adopted.

According to the criteria laid down, 72 (60 percent) of the unwanted children had an insecure childhood, as against only 34 (28.3 percent) of the control children. If one disregards the stays in children's homes, many of which were for only a short while, the figures change to 65 (54.2 percent) against 26 (21.7 percent), and the difference remains highly significant ($p < 0.001$).

In short, it is obvious that the children born after an application for abortion had been refused ran a greater risk of insecurity in childhood than did their control subjects.

TABLE 3. *Comparison between unwanted and control children for circumstances in history pointing to insecurity in childhood (The same child may occur in several categories)*

Circumstances pointing to insecure childhood	Unwanted children		Control children	
Report to children's aid bureaus about unsatisfactory conditions at home	17		6	
Child removed from home by authorities	2		0	
Placement in foster home	19		4	
Placement in children's home	30		10	
Parents divorced before child was 15	23	60	13	22
Parent(s) died before child was 15	10		5	
Born out of wedlock and never legitimized	27		4	
Born out of wedlock and legitimized	5		5	

Disposition to Move to Other Local Authority Districts

There being more delinquency in cities than in other regions we determined how many of either series had stayed the whole time in Göteborg. Another reason for doing so was that we had unusually good possibilities of getting complete information about these subjects since our place of work is in Göteborg. We also checked whether they differed in tendency to move from place to place.

Seventy-seven (62.2 percent) of the unwanted children stayed in Göteborg until they were 21, and 85 (70.8 percent) of the control subjects. Twenty-one (17.5 percent) of the unwanted children had lived in three or more local authority districts, and 19 (15.8 percent) of the control subjects. Thus the two series agreed well, both for permanency of residence in Göteborg, and for tendency to move from one district to another. There were 55 pairs in which both the original and control subject had lived the whole time in Göteborg.

Results of Comparing Personal Data in Original and Control Series

Psychiatric Consultation and Hospitalization

Thirty-four of the unwanted children (28.3 percent) had gone to a psychiatric clinic of some kind or received psychiatric care in a hospital. The corresponding figure for the control subjects was 18, or 15 percent. The difference is probably significant ($0.025 > p > 0.01$).

Twenty-nine of the unwanted children had been under the care of a child psychiatrist, 28 only as an outpatient, and one as an inpatient as well. Six had visited a center for adult psychiatry; 3 of these had been hospitalized, one in a psychiatric department at a general hospital, one at a mental hospital, and one at both. One of the latter belonged to the 29 who had gone to an outpatient department for child and youth psychiatry.

Fifteen of the control subjects had visited a center for child psychiatry, all of them only for outpatient treatment. Four had been patients at a center for adult psychiatry, 2 as an outpatient, one at a mental hospital, and one at both a mental department in a general hospital and a mental hospital. One of these 4 belonged to the 15 who had gone to a center for child psychiatry.

The question arises: Was it because the mothers of the unwanted subjects had been in contact with psychiatrists before the children were

born that so many of these children were registered at centers for child psychiatry? It may be that, having once consulted a psychiatrist, these mothers found it easier to do so again, whereas the mothers of the control subjects, who had seldom if ever consulted a psychiatrist about themselves, did not go to a psychiatrist for their children unless something was seriously wrong. Likewise, the mothers who had consulted a psychiatrist about abortion might be more apt than others to seek psychiatric advice for other personal troubles afterwards, and if they then complained about their children being nervous, the child might very likely be sent to a psychiatrist while the perhaps equally nervous children of other mothers might not.

In 1959 we determined how many of the mothers up to that year had consulted a psychiatrist for matters not directly concerned with the abortion, but only among the mothers of the 57 pairs in which both partners had lived in Göteborg all the time up to then. Twenty-seven of the 57 would-not-be mothers had gone to one of the municipal psychiatric outpatient departments for complaints not directly concerned with the abortion, and 10 of their children had done so. The corresponding figures for the control series were 9 and 0. It is apparent from this that it was not because the would-not-be mothers had consulted a psychiatrist about abortion that these children went more often than the others to a child psychiatrist. When all the subjects reached the age of 21, the number of pairs living the whole time in Göteborg dropped to 55, but we did not consider it worth while to do the analysis again for this sake.

Delinquency and Crime

Our figures for acts of delinquent nature reported to the child welfare boards do not cover drunken misconduct; this will be taken up in the next section.

Twenty-two (18.3 percent) of the unwanted subjects, 19 boys and 3 girls, were registered with the child welfare boards for delinquency, against 10 (8.3 percent) of the control subjects, 9 boys and one girl. The difference is probably significant ($p < 0.05$).

The boards had made investigations in 12 of the first 22 subjects and in 4 of the second to determine whether formal charges brought against them should be dropped. This happened 19 times in the

original series, 8 times in the control series. Three of the first series and one of the second were removed from their homes and placed in protective custody elsewhere, in accordance with the law then in force, according to which correctional measures must be undertaken when children under 18 show severe forms of maladjustment. One of these 3 unwanted children, as well as the control subject, was sent to a reformatory.

The penal register contained the names of 10 of the unwanted children (8.3 percent) and of 3 control subjects (2.5 percent). The difference is not significant ($0.10 > p > 0.05$). Nine of the first 10 were male, one was female. The control subjects were all male.

Drunken Misconduct

The records of the official temperance boards contained the names of 19 of the unwanted children (15.8 percent) and 13 control subjects (10.8 percent) for drunken misconduct. The difference is not significant ($0.50 > p > 0.30$). Two of the first 19 subjects were women. The 13 control subjects were all men.

Public Assistance

Seventeen of the unwanted children (14.2 percent) had received some form of public assistance between the ages of 16 and 21, and 3 of the control subjects (2.5 percent). The difference is significant ($0.005 > p > 0.001$).

Only one subject, a boy in the control series, received a disablement pension from the government; he was an idiot and permanently institutionalized.

Educational Subnormality

Under this heading we included all the uneducable subjects, the ones taught in special schools for the mentally retarded, those whose last year at school was spent in a special class. In the last group we also included a few subjects whose educational subnormality was well documented, but who were taught in ordinary classes because there was no form of special training available for them.

The large cities have a graduated series of special classes in the ordinary schools called remedial reading classes, observation classes,

extra classes and health classes, but we paid no attention to the kind of special class the subjects pupil attended, mostly because it depended on where they lived what kind of class they could choose from.

According to these criteria, 13 of the unwanted children (10.8 percent) were educationally subnormal, as against 6 of the control subjects (5.0 percent). This difference is not significant ($p = 0.10$).

There was one case of well documented mental retardation both in the original and in the control series.

Theoretical Studies Beyond the Obligatory

On drawing a line between the subjects who had done more advanced theoretical study than that required by the school law, and those who had not, we found that only 17 (14.2 percent) of the unwanted had had some form of higher education, as against 40 (33.3 percent) of the control subjects. The difference is highly significant ($p < 0.001$).

Eight unwanted and 12 control children had taken university entrance examinations. Five unwanted children and 11 control children had studied at a university. Neither of these differences is significant.

As mentioned (table 2), more of the control than original subjects came from social group II and the reverse was true for social group III. As a child's education depends a great deal on the social standing of its parents, we also compared the schooling in the two series after excluding the subjects left over when the two kinds of subjects were paired according to social group. This left 77 subjects in each series. Ten of these 77 (13.0 percent) unwanted children had had some form of higher education, against 21 of the 77 control children (27.3 percent). The difference is probably significant ($p < 0.05$).

One can also study the effect of social standing on the education by taking one social group at a time; for this we had to combine groups I and II, as there were too few cases in group I. Five of the 95 unwanted children (5.3 percent) coming from group III had had higher education, against 17 of the 84 control subjects (20.2 percent) coming from the same social group. The difference is significant ($p < 0.01$). The figures for group I + II were 11 out of 25 (44.0 percent)

against 28 out of 36 (77.8 percent). Here the difference is probably significant ($p < 0.05$).

Continuing with these calculations, chi square amounts to 7.93 for social group III and to 5.89 for I and II combined. The sum, 13.82, with 2 degrees of freedom gives a p of <0.001, showing a highly significant difference for the three social groups combined.

Thus it was not differences in proportion of different social groups that caused the difference in schooling between the unwanted and control children.

Military Service

Ten of the 66 males in the original series (15.2 percent) were judged unfit for military service, either at the time of enrollment or after they had started, as opposed to 4 (6.7 percent) of the control subjects. This is not a significant difference ($0.20 > p > 0.10$). According to our information, 4 of the 10 first males were exempted for mental reasons; our information in this respect may not be complete, however. Two of the control subjects were exempted on these grounds.

When a Swedish recruit enrolls, he is classified into one of four groups according to his fitness for military service, from group 1 for a completely satisfactory condition down to group 4 who are assigned to fatigue duty. Apart from exemption from service, our two series were distributed very much alike by fitness for military service.

Marital Status and Parenthood

As we only followed our subjects up to the age of 21, we cannot say much about how they compare with regard to marriage and parenthood. Some differences did emerge, however.

Twenty of the unwanted children (17 women, 3 men) married before the age of 21, and 14 of the control subjects (9 women, 5 men). The difference is not significant here, either for the sexes combined or for one of them.

Two of the female subjects from the original series had also divorced before the age of 21; none of the control women had done so, and no man from either series.

We restricted our analysis of parenthood to the women, as there was no hope of getting reliable figures for the men in this respect.

Fourteen out of 54 women from the original series had had 19 children before they were 21, 4 out of wedlock, and 7 of the 54 female control subjects had had 9 children, 3 out of wedlock.

It is impossible to draw any conclusions from these figures. It will be noted, however, that the control series (which had more education on the whole) contained fewer cases of early marriage and of young mothers. This tallies with the observation that the age of marriage and parenthood rise with the degree of education.

Freedom From Defect in All Respects Studied

Sometimes the same subject will occur in more than one of the groups studied here. Thus a subject registered with the authorities for abuse of alcohol will often be found in the files of the centers for child psychiatry as well; a man who has been in a mental hospital will sometimes be exempted from military service; an uneducable subject will be registered as receiving public assistance, as being educated in a special class, and so on. It is interesting, therefore, to compare the two series for the number of subjects showing no defect in any of the respects studies, i.e., registration for antisocial behavior in the books of the child welfare boards or penal register; official registration for drunken misconduct; education in a special class or school, or uneducability; public assistance or government pension; visits to psychiatric inpatient or outpatient departments during childhood or adulthood. Fifty-eight (48.3 percent) of the unwanted children showed none of these defects against 82 (68.3 percent) of the control subjects. The difference is significant ($0.005 > p > 0.001$).

Taking social group III separately from I and II combined showed the following: Forty of the 95 unwanted children (42.1 percent) coming from group III showed no defect, against 54 of the 84 control subjects (64.3 percent) from the same group. The difference is significant ($0.005 > p > 0.001$). The corresponding figures for group I and II combined were 19 out of 25 (76.0 percent) against 28 out of 36 (77.8 percent). Here the difference is not significant.

The same analysis of the 77 pairs concordant for social group gave 34 unwanted cases (44.2 percent) showing no defect, against 54 control (70.1 percent). The difference is significant ($0.005 > p > 0.001$).

Similar analysis of the 55 pairs living in Göteborg the whole time gave 20 (36.4 percent) showing no defect against 38 (69.1 percent). The difference is highly significant ($p < 0.001$).

As children from broken homes are more apt than others to be antisocial and mentally disturbed, we compared the two series for the number of cases showing none of the aforementioned defects among the subjects who had lived with both their real parents until they were 15. Thirty-three out of the 60 such subjects from the original series (55.0 percent) showed none of these defects, and 68 out of the 98 control subjects of this category (69.4 percent). The difference is not significant ($0.10 > p > 0.05$).

Discussion

Table 4 gives a survey of the ways in which the children born after their mother had been refused a legal abortion differed from the control series of same-aged subjects chosen at random. As seen there, the unwanted children were worse off in every respect, the only exception being due to the one case of a government pension which came from the control series. The differences were often significant, and when they were not, they pointed in the same direction (except for the case just mentioned)—to a worse lot for the unwanted children.

When one looks for a reason for the differences, one is struck mostly by the greater frequency of factors tending to disrupt the stability of the home in the case of the unwanted children, such as birth out of wedlock, and death or divorce of their parents while they were still young. In other words, not as many unwanted children were brought up by both their real parents as were control subjects. Probably as a corollary of this, more of them were brought up by foster parents of in children's homes. But the latter may also have been a consequence of the greater number of complaints to the children's welfare boards about the way in which they were being treated at home.

The difference that turned up most consistently in various forms of analysis was the difference in amount of education. Whatever categories of subjects were studied—different social ranks or different subgroups of the same social rank—the unwanted children got a significantly smaller amount of education than the control subjects.

The reason the unwanted children had had so much contact with psychiatrists was probably not—as we showed—that their mothers

TABLE 4. *Survey of important differences between the unwanted and control children*

	Unwanted children			Control children			
	No. in resp. series	Feature present		No. in resp. series	Feature present		Level of sign. of differ.
		No.	%		No.	%	
Psychiatric consultation and hospitalization	120	34	28.3	120	18	15.0	*
Registration for delinquency at children's aid bureaus	120	22	18.3	120	10	8.3	*
Registration for crime in Penal Register	120	10	8.3	120	3	2.5	–
Registration for drunken misconduct	120	19	15.8	120	13	10.8	
Public assistance between age of 16 and 21	120	17	14.2	120	3	2.5	**
Subnormal educability or uneducability	120	13	10.8	120	6	5.0	–
Theoretical studies beyond the obligatory:							
Whole series	120	17	14.2	120	40	33.3	***
Subjects in pairs congruent for social group	77	10	13.0	77	21	27.3	*
Subjects from social group III	95	5	5.3	84	17	20.2	**
Subjects from social groups I + II	25	11	44.0	36	28	77.8	*
Exemption from military service	66	10	15.2	66	4	6.7	–
Freedom from inferiority in above respects:							
Whole series	120	58	48.3	120	82	68.3	**
Social group III	95	40	42.1	84	54	64.3	**
Social groups I + II	25	19	76.0	36	28	77.8	–

Subjects in pairs consistent for social group	77	34	44.2	77	54	70.1	**
Subjects living all their life in Göteborg	55	20	36.4	55	38	69.1	***
Subjects brought up by both their real parents	60	33	55.0	98	68	69.4	

found it easier to consult a psychiatrist about their child because they had once before consulted a psychiatrist about themselves. It was probably because these mothers were more vulnerable mentally than the others, and passed on this failing to their children, either through genes or through the effect it had on the home environment, or both.

The investigation has shown that children born after their mothers have been refused permission for legal abortion are born into a worse situation than other children. From this one may assume that the children who are not born because their mothers get authorization for abortion would have had to face still greater disadvantages, socially and mentally. Thus, the very fact that a woman seeks an authorized abortion, no matter how trivial her grounds may appear to some, means that the expected child will run a larger risk than its peers of an inferior standing in life. In our opinion, the present investigation shows that the provisions for therapeutic abortion in the law should not only aim to prevent the private tragedy; they should also aim to improve mental hygiene in a wider sense. Thus the legislation should also consider the social handicaps awaiting the unwanted child, not only, as it does now, the genetic risk in the narrow sense of the terms.

Summary

The authors examined 120 children born after their mothers had applied for therapeutic abortion on psychiatric grounds and been refused, comparing them with an appropriate control series of the same size. All the subjects studied lived and were followed up until the age of 21. Data were assembled from civil and ecclesiastical registry offices, social agencies, school authorities, military authorities and all the psychiatric inpatient and outpatient departments everywhere the

subjects had lived. It was ascertained how many of each series had been registered for mental ill-health, antisocial and criminal actions, drunken misconduct, and different forms of public assistance; for the men it was ascertained how they had got on during their military service; likewise the marital status, number of children, and school ability and educational level was determined.

A study of the social features revealed that many more of the unwanted than control children had not had the advantage of a secure family life during childhood. They were also registered more often in psychiatric services, and a few more of them than control subjects received psychiatric care. They were more often registered for antisocial and criminal behavior, and slightly more often for drunken misconduct, and they got public assistance more often than the control subjects. A few more of them were educationally subnormal and far fewer had pursued theoretical studies over and above what is obligatory. They were more often exempted from military service. More of the females married early and had children early than in the control series. The differences between the two series in these respects were often statistically significant, and when they were not significant they always pointed in the same direction—to the unwanted children being born into a worse situation than the control children. Table 4 gives figures for most of the features just mentioned.

The authors conclude that the very fact a woman applies for legal abortion means that the prospective child runs a risk of having to surmount greater social and mental handicaps than its peers, even when the grounds for the application are so slight that it is refused. In their opinion, the legislation of therapeutic termination of pregnancy should also consider the social risks to which the expected child will be exposed.

REFERENCES

Arén, P. (1958): Undersökning av 100 nyblivna mödrar med legal abort i anamnesen (One hundred newly delivered mothers with a history of legal abortion). *Svenska Läk.-Tidn. 55*, 505-522.

Arén, P., & C. Åmark (1957): Prognosen vid beviljad men icke utförd legal abort (Outcome in cases of authorized but not performed therapeutic abortion). *Svenska Läk.-Tidn. 54*, 3709-3784.

Delcomyn, K. (1952): Efterundersøgelse af Kvinder, der har fået Afslag på Anmodning om Abortus provocatus (Follow-up study of women whose application for therapeutic abortion was refused). *Nord. Med. 48*, 980.

Ekblad, M. (1955): Induced abortion on psychiatric grounds. *Acta psychiat. scand.*, supp. 99.

Forssman, H. & I. Thuwe (1960): En socialpsykiatrisk efterundersökning av 120 barn födda efter avslag på abortframställning (Mental health and social adjustment of 120 children born after application for therapeutic abortion refused). *Nord. psykiat. T. 14*, 265-279.

Hultgren, G. (1959): Avslag på ansökan om legal abort (Application for legal abortion refused). *Nord. Med. 62*, 1182-1185.

Hook, K. (1963): Refused abortion. A follow-up study of 249 women whose applications were refused by the National Board of Health in Sweden. *Acta psychiat. scand.*, supp. 168.

Lancet (1964): Termination of pregnancy on psychiatric grounds. Leading article in II, Dec. 12.

Lindberg, B. F. (1948): Vad gör den abortsökande kvinnan när psykiatern sagt nej? (What does the woman do when the psychiatrist says no to her application for abortion?). *Svenska Läk.-Tidn. 45*, 1381-1391.

Malmfors, K. (1951): Den abortsökande kvinnans problem (Problems of the woman seeking abortion). *Svenska Läk.-Tidn 48*, 2445-2468.

Nielsen, F. B. (1960): Afgørelser i et Modrehjelpssamråd og en Efterundersøgelse (Decisions by a maternity assistance board and a follow-up study). *Ugeskr. Laeg. 120*, 330-335.

Schlaug, R. (1952): Om de abortsökande kvinnornas män (The male partners of women applying for therapeutic abortion). *Svenska Läk.-Tidn. 49*, 849-862.

Svensk författningssamling (Swedish Statue Code) (1938): Lag om avbrytande av havandeskap (Legislation on abortion). No. 318. Stockholm.

Sveriges officiella statistik (Official Swedish statistics) (1941): Riksdagsmannavalen åren 1937-1940 (Government election statistics for 1937-1941). Stockholm.

Sveriges officiella statistik (Official Swedish statistics) (1959): Allmän hälso- och sjukvård 1957 (Public health and care of the sick in 1957). Stockholm.

Text till lag om samhällets barnavård och ungdomsskydd (Proposed wording for the legislation governing official supervision of child welfare and protection of youth) (1950): Svenska socialvårdsförbundet (Swedish Social Welfare Association), Stockholm.

Tredgold, R. F. (1964): Psychiatric indications for termination of pregnancy. *Lancet*, 12 Dec., *7372*, 1251-1254.

Uhrus, K. (1964): Some aspects of the Swedish law governing termination of pregnancy. *Lancet*, 12 Dec. *7372*, 1292-1293.

The public health aspects of abortion have still not received the attention they deserve. After reviewing various facets of the problem with specific reference to hospitals in the United States, the author proposes emphasis on abortion law reform, promotion of sex education, and pursuit of an active contraceptive program.

ABORTION IN AMERICAN HOSPITALS

Robert E. Hall, M.D.

THE practice of abortion in American hospitals is inequitable, inconsistent, and largely illegal. The basic reason for this is that this aspect of twentieth-century medicine is governed by nineteenth-century laws.

With minor exceptions the laws in all 50 states permit abortion only "if necessary to preserve the life of the mother." Yet, as medicine has progressed, it has become apparent that considerations other than the preservation of maternal life are involved in the practice of abortion.

Only 25 years ago the risk to the maternal life of women with heart disease, diabetes, and tuberculosis was sufficient to warrant interruption of their pregnancies in compliance with the law. Most abortions then were done for such reasons. Now increased medical knowledge has enabled us to carry many of these women safely through pregnancy; but, at the same time, other medical discoveries have revealed to us equally valid reasons for therapeutic abortion, which do not necessarily entail danger to maternal life.

Need for Abortion Law Reform

Chief among these new-found indications are psychiatric disease and maternal rubella. The ominous implications of both of these conditions were not known when the abortion laws were written. Since the laws have not yet been changed in conformity with these advances in medical science, doctors today are forced to break the law in order to practice modern medicine. And since fully half of the hospital abortions today are performed for psychiatric disease and maternal rubella, it is readily apparent that the law is being broken fairly often.

In the United States, where abortion laws are strict, the ratio of therapeutic abortions to live births is 1:500 and the ratio of illegal abortions to hospital abortions is 100:1. In Denmark, where the abortion law is liberal, the ratio of therapeutic abortions to live births is 1:20 and the ratio of illegal abortions to hospital abortions is 4:1. In Japan, where abortion has been legalized, there are as many abortions as live births. These figures are based, of course, on educated estimates only, but they do serve to illustrate (a) that hospital abortions are exceptionally rare in this country and (b) that the demand for abortion is met illegally when it cannot be satisfied through legal channels. The one million criminal abortions thought to be performed in this country every year

comprise a public health problem of pandemic proportions.

Needless to say, there are no statistics available to document the psycho-socio-medical sequelae of these million criminal abortions, but they are obviously extensive and they are suffered almost exclusively by those who cannot afford the skilled abortionist's fee. Infected abortion cases abound in our charity wards, not in our private pavilions. To a degree, the medical profession is responsible for this dichotomy through its inequitable distribution of therapeutic abortions among ward and private patients.

Rate of Therapeutic Abortions

National surveys bear testimony to the fact that hospital abortions are performed four times as often on the private services as on the ward services.[3,4] In New York City, between 1960 and 1962 the ratio of therapeutic abortions to live births in the proprietary hospitals was 1:250; on the private services of the voluntary hospitals, 1:400; on the ward services of the same voluntary hospitals, 1:1,400; and in the municipal hospitals, 1:10,000. The same inequity pertains to ethnic origin. The rate of therapeutic abortions per live births among white women in New York is 1 per 330, among nonwhites 1 per 2,000, and among Puerto Ricans 1 per 10,000. Approximately half of the puerperal deaths among New York's Negroes and Puerto Ricans are due to criminal abortions, as opposed to only a quarter of the puerperal deaths among white women.[2] Thus surely is a problem in preventive medicine which public health measures could help to solve.

Over all, criminal abortion as a cause of maternal mortality is on the upswing. Concurrently, the relative and absolute incidence of hospital abortion is decreasing. Whereas about 20 years ago there was one therapeutic abortion per 150 live births, now there is one per 500.[5] Aside from the lessened need for abortions on purely medical grounds, the principal reason for this decline has been the establishment of therapeutic abortion boards. These boards have become increasingly prevalent in the past 15 years, partly due to the mistaken belief that they are required by the Joint Commission on Accreditation of Hospitals. At present, about half of our teaching hospitals have such boards.

In theory these boards serve to police the abortion practices of staff physicians, to prevent them from yielding to the pressure of undeserving patients, and to protect them from possible litigation. In fact these boards serve as medical tribunals which are frequently called upon to render moral judgments. Through the detachment typical of committees in general, this judgment is likely to be more academic than humane. After the establishment of such a board at Sloane Hospital, for example, the therapeutic abortion rate declined by one-third.[6]

Abortions for Rubella

It took many years to convince these boards that they should approve abortions for rubella. The ravages of rubella in pregnancy include a fetal death rate of 16 per cent, a prematurity rate of 16 per cent, a deformity rate of 17 per cent, and a 30 per cent incidence of congenital deafness.[12,6] Most of these dangers have been known to the medical profession for 25 years, but at first no abortions were done for this reason because it was argued that such abortions are, after all, illegal. The first rubella abortions were done under psychiatric guise upon the wives of insistent physicians. And now, as the knowledge of rubella deformities has become widespread, the general public has become equally insistent and obstetricians have been forced to comply with their demands in open defiance of the law. Dur-

ing the 1964 epidemic 329 such abortions were done in New York City alone.[3] Although most American hospitals now permit abortions for rubella, some do not. This inconsistency sometimes proves tragic to the individual rubella victim, for even the more liberal abortion committees usually refuse to approve the abortion of a woman who has had her previous obstetrical care at another hospital. As an illustration of the farcical extent of this situation, nine San Francisco obstetricians have been ordered to appear before the State Medical Board on the charge of unprofessional conduct for having performed therapeutic abortions for rubella, whereas at the same time in New York City a hospital is being sued for refusing to perform an abortion on a woman with documented first-trimester rubella which resulted in the birth of a deformed infant.

Abortions for Psychiatric Disease

A different set of inequities is associated with the psychiatric aspects of abortion. In order to comply with the law, abortions for psychiatric disease can be done only if there is a risk of suicide, yet suicide is known to be rare among pregnant women. In New York City, for example, where the suicide rate among women in the reproductive age range is 5.5 per 100,000, the rate among pregnant women in 1963 was 0.5 per 100,000.[7] For this reason, some hospitals refuse to sanction any abortions on psychiatric grounds.[12] In most hospitals, however, the psychiatrists are willing to exaggerate the risk of suicide in order to protect the overall well-being of their patients. As a consequence, about 40 per cent of today's hospital abortions are done for psychiatric conditions.[1,4,8,10,11] Needless to say, it is the private patient who most often profits from this rationale. At Sloane Hospital in the 1950's there was one abortion for psychiatric reasons per 1,119 deliveries on the ward service and one per 101 deliveries on the private service.[5]

Abortion policies vary not only from hospital to hospital but also from service to service within the same hospital. They also vary widely from doctor to doctor on the same service of the same hospital. In one of the large teaching hospitals in the East, for example, the individual abortion-to-delivery ratio of its staff members ranges from 1:110 to 1:11.

The victim of all this confusion is, of course, the American female. Even if she has a legitimate reason for therapeutic abortion she must find Doctor N in hospital Y with policy Z in order to have it done. If she makes the slightest deviation from this route she must seek a criminal abortion or raise an unwanted child. And it is the unwanted child of today who becomes the battered child of tomorrow.

A growing number of prestigious individuals and organizations have recently come to recognize the enormity of this problem and to recommend the abortion law reform necessary as a first step in its solution. Among these groups are the American Law Institute, the New York Civil Liberties Union, the New York Academy of Medicine, the California Medical Association, the American Association of Planned Parenthood Physicians, and the Unitarian Universalist Church. All of these groups have given public support to proposals at least as liberal as that recommended by the American Law Institute in its Model Penal Code, which provides that abortion should be permitted when the mother's mental or physical health is endangered, when there is a significant risk of fetal deformity, and in cases of rape and incest. Bills embodying these proposals have been introduced before the Legislatures of California and New York. Although considerably less liberal than the laws in Scandinavia, Japan, the

Communist world, and the law soon to be enacted in England, these bills represent an enlightened effort to update archaic legislation.

Suggestions for APHA

The public health aspects of abortion have, in my opinion, been too long overlooked. One million cases of cholera every year would create a public health scandal, or even a million cases of rickets. But one million criminal abortions every year are embarrassingly ignored. There are three important approaches to this problem which the American Public Health Association would do well to consider: (1) The promotion of sex education in our schools. In granting that our children are participating in a sexual revolution, are we not remiss in failing to provide them with intelligent guidelines? (2) The pursuit of an active contraceptive program. In recognizing that birth control is an important public health measure, are we not remiss in failing to provide it as a public health service? (3) The sponsorship of abortion law reform. In conceding that the practice of abortion in American hospitals is inequitable, inconsistent, and largely illegal and that this situation is largely due to the impossibility of practicing twentieth-century medicine under nineteenth-century law, are we not remiss in failing as individuals and as organizations to stand up and be counted?

REFERENCES

1. Boyles, S. H.; Prescott, R. W.; and Meyer, J. H. Therapeutic Abortion. Obst. & Gynec. 19:223-227 (Feb.), 1962.
2. Gold, E. M.; Erhardt, C. L.; Jacobziner, H.; and Nelson, F. G. Therapeutic Abortions in New York City: A 20-Year Review. A.J.P.H. 55:964-972 (July), 1965.
3. Gold, E. M. Personal communication.
4. Gottesfeld, A. B. Therapeutic Abortion in a Large General Hospital. Supp. Clin. North America (Apr.), 1957, pp. 439-450.
5. Hall, R. E. Therapeutic Abortion, Sterilization, and Contraception. Am. J. Obst. & Gynec. 91:619-632 (Feb.), 1965.
6. Jaffeux, A. D. M., and Pick, L. Deaths Following Criminal Abortion. Lancet 2:1203-1206 (Dec.), 1959.
7. McLain, C. W. Jr. Abortion in the United States. Calderone, M. S. (ed.). New York: Paul B. Hoeber, 1958, p. 146.
8. Mastroianni, L. Jr., and Klein, M. Changing Attitudes Toward Therapeutic Abortion. J.A.M.A. (in press).
9. Rosen, A. S. Abortion Laws and Their Victims. Trans-action 2:2-32 (Sept./Oct.), 1965.
10. Russell, K. P., and Myers, J. C. Maternal Medical Indications for Therapeutic Abortion. Clin. Obst. & Gynec. 7:10-33 (Mar.), 1964.
11. Schumann, O. Therapeutic Abortion. Obst. & Gynec. 11:339-345 (Mar.), 1958.
12. Thompson, W. N. Jr. Therapeutic Abortion: Responsibility of the Obstetrician. Obst. & Gynec. 2: 470-475 (Nov.), 1953.
13. Warkany, J., and Kalter, H. Congenital Malformations. New England J. Med. 265:993-1001 (Nov.), 1961.
14. Westoff, C. F., and Ryder, N. B. Personal communication.

Dr. Hall is associate clinical professor of obstetrics and gynecology, Columbia University College of Physicians and Surgeons, New York, N. Y. 10032.

This paper was presented before a Joint Session of the Epidemiology and Maternal and Child Health Sections of the American Public Health Association at the Ninety-Fourth Annual Meeting in San Francisco, Calif., October 31, 1966.

[This page intentionally left blank]

Therapeutic abortion, sterilization, and contraception

ROBERT E. HALL, M.D.
New York, New York

IN AN EFFORT to assess the current birth control practices in the United States, the experience of the Sloane Hospital for Women has been analyzed for the years 1951 through 1960 and a survey of 65 major American hospitals has been made. The data thus obtained will be presented in three separate parts: Therapeutic Abortion, Sterilization, and Contraception.

I. Therapeutic abortion

On Sept. 1, 1955, a Therapeutic Abortion Board was formed at Sloane Hospital. Prior to this date the mechanism for obtaining permission to perform an abortion, although it entailed approval of the Chief of Service, was considerably less formal. Since this date abortion applications have been reviewed by a three-member board composed of a senior obstetrician, internist, and psychiatrist. Because of this abrupt change in policy, the abortion cases for this study were selected from the time period between Sept. 1, 1950, and August 31, 1960.

Incidence. During these study years, the ratio of therapeutic abortions to deliveries was as follows:

	Ward	*Private*	*Total*
1950 through 1955	1:141	1:37	1:69
1956 through 1960	1:429	1:111	1:225
1950 through 1960	1:224	1:55	1:110

As can be seen from these figures the incidence of abortions following establishment of the Board has been almost precisely one third of that during the previous 5 years, and abortions were performed four times more frequently on the private service than on the ward service.

Case material. Of the 118 ward patients in this series, 69 were Caucasian, 47 were Negro, and 2 were Oriental. The Caucasian: Negro ratio of 1.5:1 is almost identical to the 1.4:1 ratio on the entire ward obstetrical service. Of the 248 private patients, 247 were Caucasian, none was Negro, and one was Oriental.

In the entire series, 15 patients were under the age of 20, 61 were between 20 and 24, 92 between 25 and 29, 84 between 30 and 34, 73 between 35 and 39, and 41 were more than 39 years old.

One hundred and ninety-nine patients were Protestant, 80 were Jewish, and 69 were Catholic. Twenty-two per cent of the white patients were Catholic.

Two hundred and seventy-six of the patients were married: 90 or 25 per cent were not.

Three hundred and nine or 84 per cent of the patients were less than 13 weeks pregnant, 51 were between 13 and 16 weeks, and 6 were between 17 and 20 weeks.

Type of surgery. The various surgical methods by which these abortions were performed are listed in Table I.

Indications. The indications for the abortions are presented in Table II.

Sterilizations. Sterilization procedures which were carried out in conjunction with

From the Department of Obstetrics and Gynecology, Columbia University, College of Physicians and Surgeons.

therapeutic abortions are enumerated in Table III. Sterilizations were two and one-half times more common on the ward service.

Repeat abortions. The patients in this series who underwent more than one therapeutic abortion are recorded in Table IV. Twelve of these 20 women were sterilized at the time of their last abortion. The indications for the abortions were of a psychiatric nature in only 4 instances. Twelve were private patients and 8 were ward patients.

Legality. In New York State abortion is illegal "unless the same is necessary to preserve the life of the woman or of the child with which she is pregnant." The customary latitude adopted in interpreting this law is exemplified by the contrast between the arbitrarily compiled Groups A and B in Table V.

Experience at other hospitals. Questionnaires were sent to the directors of the obstetrical services of 65 randomly selected major hospitals, requesting the number of ward and private deliveries and therapeutic abortions performed on their services during any recent year or years. Useful information was received from the 60 hospitals listed in Table VI. As indicated by this table, 45 of the hospitals have both ward and private services, ten have ward services only, and five have private services only.

Among the 45 hospitals with both ward and private services, the incidence of therapeutic abortions was higher on the private services in 36; there were no ward or private abortions performed at five other hospitals, which reported 7,869 ward and 1,759 private deliveries; and the incidence of abortions was higher on the ward services of four hospitals which collectively performed only 8 abortions during the years chosen for review. No therapeutic abortions were done on 23 of the 55 ward and 9 of the 50 private services.

There is, of course, some statistical inaccuracy involved in appraising the combined incidence of therapeutic abortions at these various hospitals, for neither the size, the composition, nor the duration of the individual series is constant. It is nevertheless not without significance that the over-all frequency of therapeutic abortions at 60 outstanding American hospitals is 3.6 times higher on their private services than on their ward services. This is consistent with the New York City data presented in Table VII.

Comment.

The ward-private ratio of therapeutic abortions. The incidence of therapeutic abortions is strikingly higher on the private services than on the ward services. This has been observed before.[2-6] How can it be explained?

Part of the explanation lies in the dual tendency of the ward patients to register for antepartum care later in their pregnancies and to be less aware of their need to be aborted. That even this obstacle to ward-private equality can be overcome has been shown at Mount Sinai Hospital in New York, where the abortion rates for the two services between 1952 and 1955 were virtually identical.[7]

Another part of this discrepancy may be attributed to the higher incidence of abortions for psychiatric indications among private patients. Whereas at Sloane Hospital one therapeutic abortion was performed for psychiatric reasons per 1,149 deliveries on the ward service, the comparable ratio for the private service was one per 104. Psychotherapy is known to have been given to 19 of 22 ward patients (86 per cent) and only 69 of 118 private patients (57 per cent) who had abortions for psychiatric reasons. It would appear therefore that private patients

Table I. Type of surgery

	Ward	Private	Total
Curettage only	53 (45%)	175 (71%)	228
Abdominal hysterotomy and bilateral tubal ligation	41	36	77
Abdominal hysterectomy	19	8	27
Abdominal hysterotomy only	3	22	25
Curettage and bilateral tubal ligation	2	7	9

Table II. Indications in detail

	1931 through 1955		
	Ward	Private	Total
Psychiatric			
No specific diagnosis	4	37	41
Neurosis	0	21	21
Psychosis	8	44	52
	12 (10%)	102 (55%)	114
Cardiovascular			
Rheumatic	15	6	21
Hypertensive	12	5	17
Congenital	2	1	3
Other	1	0	1
	30	12	42
Pulmonary			
Tuberculosis	9	11	20
Asthma	0	2	2
Bronchiectasis	2	1	3
Sarcoidosis	1	0	1
Other	0	0	0
	12	14	26
Renal			
Nephritis	1	9	10
Rh incompatibility	0	6	6
Radiotherapy	2	0	2
Hereditary disease	1	2	3
	4	17	21
Oncological			
Breast	0	8	8
Other	2	3	5
	2	11	13
Neurological			
Multiple sclerosis	3	3	6
Brain tumor	1	0	1
Epilepsy	1	2	3
Other	4	2	6
	9	7	16
Renal			
Chronic nephritis	4	0	4
Other	0	3	3
	4	3	7
Other medical			
Arthritis	0	4	4
Lupus erythematosus	2	1	3
Colitis	1	2	3
Purpura	1	1	2
Liver disease	1	0	1
Esophageal varices	0	0	0
Diabetes	1	1	2
Otosclerosis	1	2	3
Previous toxemia	1	2	3
Recent surgery	1	2	3
Alcoholism	0	1	1
Ileitis	0	1	1
Amebic dysentery	0	1	1
Hyperemesis	0	1	1
Fibromyomas of the uterus	0	1	1
Ruptured intervertebral disc	0	1	1
Addison's disease	1	0	1
Dermatitis herpetiformis	1	0	1
Myasthenia gravis	0	0	0
Misdiagnosis	0	0	0
	11	21	32

1956 through 1960			1951 through 1960		
Ward	Private	Total	Ward	Private	Total
1	12	13	5	49	54
2	3	3	2	24	26
8	15	23	16	59	75
11 (33%)	30 (49%)	41	23 (19%)	132 (53%)	115
4	1	5	19	7	26
2	2	4	14	7	21
0	1	1	2	2	4
1	2	3	2	2	4
7	6	13	37	18	55
0	2	2	9	13	22
1	0	1	1	2	3
0	0	0	2	1	3
1	0	1	2	0	2
0	1	1	0	1	1
2	3	5	14	17	31
0	0	0	1	9	10
0	1	1	0	7	7
1	2	3	3	2	5
0	0	0	1	2	3
1	3	4	5	20	25
2	4	6	2	12	14
1	2	3	3	5	8
3	6	9	5	17	22
1	1	2	4	4	8
0	2	2	1	2	3
0	0	0	1	2	3
0	0	0	4	2	6
1	3	4	10	10	20
0	2	2	4	2	6
0	3	3	0	6	6
0	5	5	4	8	12
0	0	0	0	4	4
2	0	2	4	1	5
1	0	1	2	2	4
0	0	0	1	1	2
1	0	1	2	0	2
2	0	2	2	0	2
1	4	5	2	5	7
0	0	0	1	1	2
0	0	0	1	2	3
0	0	0	1	2	3
0	0	0	0	2	2
0	0	0	0	1	1
0	0	0	0	1	1
0	0	0	0	1	1
0	0	0	0	1	1
0	0	0	1	0	1
0	0	0	1	0	1
1	0	1	1	0	1
1	1	2	1	1	2
9	5	14	20	26	46

with unwanted pregnancies are more often referred for primary psychiatric evaluation and/or that psychiatric justification for abortion is more easily obtained for private patients.

But this is far from the complete explanation. As can be seen from Table II, abortions were more common among the private patients at Sloane Hospital for virtually all of the more debatable indications, such as arthritis, inactive tuberculosis, and rubella, and more common among the ward patients for most of the less debatable indications, such as rheumatic heart disease and hypertensive cardiovascular disease. Although comparably detailed information was not solicited from the 60 other hospitals, their participation in this trend is implied by their similar ward-private abortion ratios.

Further evidence of the greater liberality in the private abortion practice lies, of course, in the fact that at Sloane Hospital sterilizations accompanied abortions more than twice as often on the ward service whether the indication was psychiatric or medical.

The legality of therapeutic abortions. Today *the life of the mother* is almost never jeopardized by pregnancy, but *the mental and physical health of the mother and the proper development of the fetus* are not infrequently so jeopardized. Abortion is legally sanctioned by most states only if the former threat exists; yet abortion is medically approved and performed when the latter threats exist. The laws should be clarified to permit the indications for abortion which accepted medical practice has already legitimized.

The American Law Institute unanimously approved of a plan to liberalize our abortion laws 5 years ago. Nothing has been done to transform this proposal into legislation because no group has sought this action. Since it is the obstetricians who violate these laws, it is they, perhaps through their national societies, who should seek their renovation.

II. Sterilization

The sterilizations performed at Sloane Hospital were reviewed for the decade between Jan. 1, 1951, and Dec. 31, 1960. These procedures consisted of bilateral tubal ligations and cesarean hysterectomies. No attempt was made to determine which oophorectomies, salpingectomies, hysterectomies, or radiation castrations were performed for the primary purpose of sterilization, but this practice is uncommon at this hospital.

Incidence. The incidence of bilateral tubal ligations following vaginal deliveries of viable infants was as follows:

	Ward	Private	Total
A. No. of bilateral tubal ligations	464	137	601
B. No. of vaginal deliveries	24,406	12,120	36,526
Ratio of A:B	1:53	1:88	1:61

The incidence of sterilizations in association with cesarean sections was as follows:

	Ward	Private	Total
C. No. of bilateral tubal ligations	309	168	477
D. No. of cesarean hysterectomies	66	80	146

Table III. Sterilizations in association with therapeutic abortions

Indication for the abortion	Ward		Private		Total	
	No.	%	No.	%	No.	%
Psychiatric	7	30	18	14	25	16
Medical	55	58	33	28	88	42
Total	62	33	51	21	113	34

Table IV. Repeat therapeutic abortions during the study years

No. of patients	No. of therapeutic abortions per patient
1	3
7	2
2	2*
8	1*
2	1†

*Plus 1 more at Sloane Hospital or elsewhere prior to Sept. 1, 1950.

†Plus 2 more at Sloane Hospital or elsewhere prior to Sept. 1, 1950.

Table V. Legality of indications

Indication	Ward		Private	
	1951 through 1955	1956 through 1960	1951 through 1955	1956 through 1960
Group A				
Rubella	1	0	9	0
Rh incompatibility	0	0	6	1
Multiple sclerosis	3	1	3	1
Cancer, non-mammary	2	1	3	2
Arthritis	0	0	4	0
Epilepsy	1	0	2	0
Radiotherapy	2	1	0	2
Recent surgery	1	0	2	0
Alcoholism	0	0	2	0
Recurrent pyelitis	0	0	1	0
Asthma	0	0	2	0
Amebic dysentery	0	0	1	0
Brain tumor	1	0	0	2
Dermatitis herpetiformis	0	0	1	0
Liver disease	1	1	0	0
Anomalous children	1	0	0	0
Mental deficiency	1	0	0	0
Purpura	1	0	1	0
Otosclerosis	1	0	1	0
Diabetes	0	0	1	2
Misdiagnoses	0	1	0	1
Congenital cataracts	0	0	1	0
Fibroids	0	0	1	0
Ruptured intervertebral disc	0	0	1	0
Poliomyelitis	0	0	1	0
Previous nephrectomy	0	0	1	0
Totals	16	5	44	11
Group B				
Suicide attempt	0	0	2	0
Advanced tuberculosis	2	0	0	0
Chronic nephritis	4	0	0	1
Ureterosigmoidostomies	0	0	0	1
Severe rheumatic heart disease	3	0	2	1
Severe hypertensive disease	11	2	3	1
Expanding intracranial lesion	1	0	0	0
Intracranial aneurism	0	0	1	0
Severe congenital heart disease	0	1	1	0
Diabetes with renal damage	1	1	0	2
Totals	22	4	9	6

F. No. of cesarean sections	1,947	1,426	3,373
F. No. of nonprimary cesarean sections	866	681	1,547
Ratio of C + D:E	1:5	1:6	1:5
Ratio of C + D:F	1:2.3	1:2.7	1:2.5

The cumulative ratio of all postpartum sterilizations to all viable deliveries (A+C+D:B+E) was 1:31 or 3.2 per cent for the ward service, 1:35 or 2.9 per cent for the private service, and 1:33 or 3.0 per cent for both services.

Table VI. Incidence of ward and private therapeutic abortions at 60 hospitals

Years of report	*Institution*
1960-62	University of Iowa Hospitals
1961-62	Baylor University Medical Center, Dallas
1961-63	New York Hospital—Cornell
1960-61	Grace-New Haven Community Hospital
1960-62	University of California Hospital, San Francisco
1957-61	Johns Hopkins Hospital
1961-62	Pennsylvania Hospital
1959-62	University of Florida Hospital
1958-62	North Carolina Memorial Hospital
1961-62	Palo Alto-Stanford Hospital
6/62-5/63	St. Louis Maternity Hospital
1956-62	Providence Lying-In Hospital
1962	University of Maryland Hospital
1962	Michael Reese Hospital
1957-62	University of Mississippi Medical Center
1960-62	Woman's Hospital, New York City
1962	Albany Medical Center
1961	Medical College of Virginia Hospital
1962	Vanderbilt University Hospital
1/62-6/63	Syracuse Memorial Hospital
1956-61	Harper Hospital, Detroit
1962	Presbyterian Hospital, Denver
1962	Kapiolani Hospital, Honolulu
10/61-9/62	South Carolina Medical College Hospital
1961	Boston Lying-In Hospital
7/57-6/61	Strong Memorial Hospital, Rochester
1951-62	George Washington University Hospital
1951-62	Columbia Hospital for Women, Washington
1961-62	University of Vermont Hospitals
7/62-6/63	University of Virginia Hospital
1960-62	Ohio State University Hospital
1962-63	University of Wisconsin Hospitals
1962	University Hospitals of Cleveland
1953-62	University of Missouri Medical Center
1962	Presbyterian Medical Center, San Francisco
1962	Children's Hospital, San Francisco
1955-62	U. C. L. A. Medical Center, Los Angeles
1962	Hartford Hospital
7/60-6/61	University of Michigan Medical Center
1961-62	Evanston Hospital, Illinois
1960-62	Magee-Woman's Hospital, Pittsburgh
1962	Jackson Memorial Hospital, University of Miami
1958-62	St. Luke's Hospital, San Francisco
1962	West Virginia University Hospital
1962	University of Minnesota Hospital
	Totals
7/61-6/62	University of Illinois Research & Education Hospitals
1962	University of Nebraska Hospital
1957-62	Chicago Lying-In Hospital
1962	Louisville General Hospital
1957-62	Cincinnati General Hospital
1951-62	D. C. General Hospital, Washington
1962	Jefferson Davis Hospital, Houston
1961	Eugene Talmadge Hospital, Augusta
7/52-6/62	University of Colorado Medical Center
1/60-6/63	University of Oregon Medical Center
	Totals
1961-62	Mayo Clinic
1953-62	The California Hospital, Los Angeles
1962	Henry Ford Hospital, Detroit
7/62-6/63	Swedish Hospital, Seattle
1961	St. Luke's Episcopal Hospital, Houston
	Totals
	Grand totals

Ward			Private		
No. of deliveries	*Abortions*	*Abortions: deliveries*	*No. of deliveries*	*Abortions*	*Abortions: deliveries*
4,606	3	1:1,535	1,536	7	1:219
878	1	1:878	14,985	22	1:681
7,314	6	1:1,219	6,973	15	1:465
2,676	5	1:535	7,674	31	1:248
4,852	16	1:303	1,272	15	1:85
11,358	20	1:568	6,046	25	1:242
2,793	4	1:698	3,246	25	1:130
2,388	2	1:1,194	483	6	1:80
4,346	10	1:435	2,125	11	1:193
782	5	1:156	5,172	52	1:99
1,127	1	1:1,127	1,402	2	1:702
7,083	0	0:7,083	45,775	11	1:4,161
2,381	0	0:2,381	538	0	0:538
1,371	1	1:1,371	1,560	10	1:156
8,678	2	1:4,339	736	5	1:147
4,501	5	1:900	2,023	101	1:20
552	0	0:552	1,857	1	1:1,857
4,529	3	1:1,510	1,455	2	1:728
793	0	0:793	393	1	1:393
606	0	0:606	3,800	3	1:1,267
2,595	0	0:2,595	11,051	3	1:3,684
423	0	0:423	1,895	5	1:379
390	1	1:390	4,092	3	1:1,364
2,147	0	0:2,147	208	0	0:208
2,181	8	1:273	3,926	24	1:164
4,765	2	1:2,383	5,824	13	1:448
4,324	1	1:4,324	38,917	178	1:218
1,345	0	0:1,345	3,756	30	1:125
677	1	1:677	3,900	7	1:557
1,535	0	0:1,535	529	0	0:529
7,360	2	1:3,680	3,927	4	1:982
275	2	1:138	207	0	0:207
1,618	8	1:202	2,526	19	1:133
2,388	1	1:2,388	724	0	0:724
241	0	0:241	613	17	1:36
286	0	0:286	1,719	20	1:86
6,634	20	1:332	2,951	36	1:82
621	0	0:621	4,886	18	1:271
1,086	0	0:1,086	373	0	0:373
373	0	0:373	3,944	4	1:986
4,666	2	1:2,333	13,152	15	1:877
3,361	0	0:3,361	1,242	3	1:414
1,773	0	0:1,773	5,383	9	1:598
302	1	1:302	308	0	0:308
720	0	0:720	120	0	0:120
125,700	133	1:945	225,700	733	1:300
2,500	2	1:1,250			
908	0	0:908			
14,332	63	1:227			
2,831	0	0:2,831			
24,417	0	0:24,417			
71,705	5	1:14,341			
6,500	0	0:6,500			
1,041	0	0:1,041			
13,563	24	1:565			
5,429	7	1:776			
143,226	101	1:1,417			
			3,439	5	1:688
			17,911	40	1:488
			1,300	4	1:325
			2,786	3	1:927
			2,969	0	0:2,969
			28,405	52	1:546
268,926	234	1:1,149	253,652	805	1:315

Table VII. Incidence of therapeutic abortions at various types of hospitals in New York City, 1957-1960*

Type of hospital	Ratio of therapeutic abortions to live births
Proprietary	1:204
Voluntary, private service	1:417
Voluntary, ward service	1:1,667
Municipal	1:5,000

Table VIII. Indications for postpartum and postabortal sterilizations

	No. of ward cases	No. of private cases	Total No. of cases
Category 1 (slight medical disease)			
Rh or ABO incompatibility	9	9	18
Emotional disturbance	9	8	17
Varicose veins	2	6	8
Habitual abortions	5	1	6
Moderate hypertension	3	0	3
Sickle cell trait	2	0	2
Recurrent toxemia	2	0	2
Recurrent hyperemesis	1	0	1
Recurrent delivery complications	1	0	1
Liver disease	1	0	1
Syphilis	1	0	1
Neurodermatitis	1	0	1
Tuberculosis, husband	1	0	1
Cataracts	0	1	1
Arrested tuberculosis	0	1	1
Category 2 (serious medical disease)			
Heart disease	22	5	27
Severe hypertension	26	1	27
Rh sensitization	12	7	19
Diabetes	8	2	10
Renal disease	8	2	10
Psychosis	9	0	9
Active tuberculosis	7	0	7
Thrombophlebitis	3	4	7
Familial diseases	3	3	6
Epilepsy	3	2	5
Sickle cell anemia	3	0	3
Intracranial aneurism	2	0	2
Addison's disease	2	0	2
Multiple sclerosis	2	0	2
Asthma	2	0	2
Miscellaneous	14	1	15
Category 3 (parity in excess of 4)	302	36	338
Category 4 (no medical disease; parity less than 5)	7	54	61

In addition to the postpartum sterilizations there were the following:

	Ward	Private	Total
G. Bilateral tubal ligations following spontaneous abortions	9	6	15
H. Bilateral tubal ligations at laparotomy for ectopic pregnancies	2	0	2
I. Bilateral tubal ligations with therapeutic abortions	62	51	113
J. Interval tubal ligations	59	39	98

The yearly incidence of sterilizations between 1951 and 1960 remained remarkably constant for all of the above categories except for the interval sterilizations on the ward service, 66 per cent of which were performed during the last three years of the study period.

Since the subjects of postpartum and interval sterilizations are slightly different, they will be discussed separately.

Puerperal sterilizations.

Case material. The following data pertain to the patients in Categories A and G above. The cases of sterilization associated with cesarean sections were not analyzed in detail.

Two hundred and forty-two of the ward patients were Negro, one was Oriental, and 230 were Caucasian. This Caucasian:Negro ratio of 0.95:1 is considerably lower than the 1.4:1 ratio for the entire ward obstetrical service. Of the private patients, three were Negro and 140 Caucasian.

Excluding the Negroes and Puerto Ricans, 69 per cent of the 163 remaining ward patients and 25 per cent of the remaining 138 private patients were Catholic.

The average age of the ward patients was 32.2 years; of the private patients, 33.7. Thirty-one per cent of the ward patients were under the age of 30, as opposed to 14 per cent of the private patients.

*Indications.** For the purpose of analytic simplification, the indications for postpartum

*Generally speaking, postpartum sterilization is permissible at Sloane Hospital for medical indications, repeat cesarean sections, and parity in excess of four.[5]

and postabortal sterilizations were grouped into the four categories shown in Table VIII. The relative frequency of these various categories is outlined in Table IX. Fifty-four per cent of the private cases and 6 per cent of the ward cases fell into Category 1 (slight medical disease) or Category 4 (no medical disease, parity less than 5). Moreover, the parity of the private patients in Categories 1 and 4 was three or less in 49 per cent (25 patients were para iii, 13 were para ii, one was para i), whereas the parity of the ward patients was three (never less) in only 13 per cent (6 patients).

Parity. The average parity of the ward patients was 6.1, and of the private patients 3.8.

Experience at other hospitals. Of the 65 hospitals in the survey, useful information about postpartum sterilizations was received from the 53 listed in Table X. Since it was unclear from some of the replies whether sterilizations at the time of cesarean sections and abortions were included among the data submitted, it is probably reasonable to assume that the actual incidence of postpartum sterilization is slightly higher than that shown by this table. Although the range from one sterilization per eleven deliveries to one per 467 deliveries on the ward services and from 1:10 to 1:483 on the private services is wide, the over-all minimum average incidence of 2.5 per cent (10,075 sterilizations among 409,374 deliveries, including the Sloane Hospital figures) is probably fairly accurate.

The ward and private rates in this series (including the Sloane Hospital figures) were 2.4 per cent and 2.2 per cent respectively. A similar survey by Starr and Kolasky[9] of 5,673 puerperal sterilizations among 177,433 live births revealed a ward rate of 3.0 per cent and a private rate of 3.3 per cent. These sets of incidence figures are generally in keeping with those reported elsewhere.[10-14]

Comment.

1. The ward-private ratio of puerperal sterilizations. The fact that the ward and private sterilization rates are virtually identical is deceptive, for it suggests the incorrect conclusion that ward and private patients are sterilized in accordance with similar standards. That a double standard does actually pertain to the practice of sterilization as well as abortion is indicated in part by the fact that the average parity of the ward and private patients sterilized at Sloane Hospital was 6.1 and 3.8, respectively, and the medical indications for these sterilizations were debatable in 54 per cent of the private cases and only 6 per cent of the ward cases. There is no reason to believe that similar disparities do not prevail at other hospitals.

2. *The legality of sterilizations.* There are two states (Virginia and North Carolina) which have recently enacted laws permitting sterilization for any reason considered sufficient by two physicians and specifically protecting these doctors from legal redress. These laws are not ideal. In the first place they require a thirty-day waiting period between patient permission and medical action, thus rendering postpartum sterilization practically impossible for the late antepartum registrant. Secondly, they require hospitalization of the patient, thus complicating the simple office procedure of vasectomy. Thirdly, and perhaps worst of all, the very existence of these laws in two states has led many of the physicians in the other 48 states to fear that they should be similarly protected in order to perform a sterilizing procedure.

What is the need for such laws? There is no legal precedent to support the physician's fear that freely requested and medically sanc-

Table IX. Frequency of indications for postpartum and postabortal sterilizations

	Ward	Private	Total
Category 1			
Parity of 4 or less	23	23	46
Parity of 5 or more*	15	3	18
Category 2			
Parity of 4 or less	76	23	99
Parity of 5 or more*	50	4	54
Category 3*	302	36	338
Category 4	7 (1.5%)	54 (38%)	61

*Total with parity of 5 or more was 410; 367 (78 per cent) were ward and 43 (30 per cent) were private patients.

Table X. Incidence of ward and private postpartum sterilizations in 53 hospitals

Years of report	Institution	Ward			Private		
		No. of deliveries	No. of sterilizations	Sterilizations: deliveries	No. of deliveries	No. of sterilizations	Sterilizations: deliveries
1961-62	Baylor University Medical Center, Dallas	878	11	1:80	14,985	719	1:21
1960-61	Grace-New Haven Community Hospital	2,676	57	1:47	7,674	135	1:56
1960-62	University of California Hospital, San Francisco	4,852	177	1:27	1,272	31	1:36
1957-61	Johns Hopkins Hospital	11,358	538	1:21	6,046	72	1:84
1961-62	Pennsylvania Hospital	2,793	71	1:39	3,246	121	1:27
1959-62	University of Florida Hospital	2,388	44	1:22	482	1	1:483
1958-62	North Carolina Memorial Hospital	4,346	43	1:101	2,125	16	1:133
1961-62	Palo Alto-Stanford Hospital	782	29	1:27	5,172	130	1:40
6/62-5/63	Washington University Hospital, St. Louis	1,127	30	1:38	1,402	39	1:36
1956-62	Providence Lying-In Hospital	7,083	91	1:78	45,775	316	1:145
1962	University of Maryland Hospital	2,381	39	1:61	538	42	1:13
1962	Michael Reese Hospital	1,371	50	1:37	1,560	31	1:50
1960-62	Woman's Hospital-St. Luke's	4,501	182	1:25	2,023	74	1:27
1962	Albany Medical Center	552	4	1:138	1,857	10	1:186
1961	Medical College of Virginia Hospital	4,529	403	1:11	1,455	80	1:18
1962	Vanderbilt University Hospital	793	71	1:11	393	39	1:10
1/62-6/63	Syracuse Memorial Hospital	606	0	0:606	3,800	24	1:158
1956-61	Harper Hospital, Detroit	2,595	97	1:27	11,051	264	1:42
1962	Presbyterian Hospital, Denver	423	14	1:30	1,895	127	1:15
1962	Kapiolani Hospital, Honolulu	390	22	1:16	4,092	236	1:17
10/61-9/62	South Carolina Medical College Hospital	2,147	51	1:42	208	8	1:26
1961	Boston Lying-In Hospital	2,181	47	1:46	3,926	105	1:37
7/57-6/61	Strong Memorial Hospital, Rochester	4,765	46	1:104	5,824	72	1:64
1961-62	University of Vermont Hospitals	677	39	1:17	3,900	83	1:47
7/62-6/63	University of Virginia Hospital	1,535	85	1:18	529	10	1:53
1962-63	University of Wisconsin Hospitals	275	5	1:55	207	3	1:69
1962	University Hospitals of Cleveland	1,618	28	1:58	2,526	104	1:24
1962	Presbyterian Medical Center, San Francisco	241	8	1:30	613	16	1:38
1962	Children's Hospital, San Francisco	286	9	1:32	1,719	30	1:57
1955-62	U. C. L. A. Medical Center, Los Angeles	6,634	82	1:81	2,951	40	1:74
1962	Hartford Hospital	621	8	1:78	4,886	83	1:59
7/60-6/61	University of Michigan Medical Center	1,086	11	1:99	373	3	1:126

Table X. Cont'd

Years of report	Institution	Ward			Private		
		No. of deliveries	No. of sterilizations	Sterilizations: deliveries	No. of deliveries	No. of sterilizations	Sterilizations: deliveries
1960-62	Ohio State University Hospital	7,360	294	1:25	3,927	240	1:16
1961-62	Evanston Hospital	373	19	1:20	3,944	163	1:24
1960-62	Magee-Woman's Hospital, Pittsburgh	4,666	10	1:467	13,152	226	1:58
1962	Jackson Memorial Hospital, Miami	3,361	12	1:280	1,242	15	1:83
1958-62	St. Luke's Hospital, San Francisco	1,773	19	1:93	5,383	77	1:70
1962	West Virginia University Hospital	302	15	1:20	308	7	1:44
1962	University of Minnesota Hospital	720	15	1:48	120	1	1:120
	Totals	96,967	2,776	1:35 (2.9%)	172,582	3,793	1:45 (2.2%)
7/61-6/62	University of Illinois Research & Education Hospitals	2,500	41	1:61			
1962	University of Nebraska Hospital	908	29	1:31			
1957-62	Chicago Lying-In Hospital	14,332	617	1:64			
1962	Louisville General Hospital	2,831	55	1:51			
1957-62	Cincinnati General Hospital	24,417	235	1:104			
1962	Jefferson Davis Hospital, Houston	6,500	262	1:25			
1961	Eugene Talmadge Hospital, Augusta	1,041	19	1:55			
7/52-6/62	University of Colorado Medical Center	13,563	225	1:60			
1/60-6/63	University of Oregon Medical Center	3,429	224	1:24			
	Totals	71,521	1,707	1:42 (2.4%)			
1961-62	Mayo Clinic				3,439	26	1:132
1958-62	The California Hospital, Los Angeles				17,914	294	1:448
7/62-6/63	Swedish Hospital, Seattle				2,786	113	1:25
1961	St. Luke's Episcopal Hospital, Houston				2,969	111	1:27
1962	Henry Ford Hospital, Detroit				1,300	31	1:42
	Totals				28,405	575	1:49 (2.0%)
	Grand totals	168,488	4,483	1:38 (2.6%)	200,987	4,368	1:46 (2.2%)

tioned sterilization procedures are forensically indefensible. As a matter of fact, in the only sterilization case ever tried on medical grounds in a United States' court it was held that [even] vasectomy does not constitute mayhem."[19]

Once again, since this is primarily an obstetrical issue, it should be resolved by obstetricians. With or without the formality of legislation, some representative body of obstetricians should establish an acceptable code of sterilization ethics.

Interval sterilizations.

Incidence. At Sloane Hospital during the years of 1951 through 1960 there were 59 interval sterilizations on the ward service

and 39 on the private service. One such procedure was performed for every 448 ward deliveries and for every 351 private deliveries. This ratio is of course less meaningful for this particular type of operation, but it is the only parameter available by which the frequency of this practice can be measured.

Case material. Forty-five of the 59 ward patients were Caucasian, 13 were Negro, and one was Oriental. All of the 39 private patients in this group were Caucasian.

Excluding the Negroes and Puerto Ricans, 75 per cent of the 24 remaining ward patients and 21 per cent of the 39 private patients were Catholic.

Fifty-three (90 per cent) of the ward patients lived in New York City; the remaining 6 lived elsewhere in New York State. Twelve (31 per cent) of the private patients lived in New York City, 11 elsewhere in New York State, and 16 in some other state.

The average age of the ward patients was 33.2 and of the private patients 34.0 years.

The average parity of the ward patients was 4.3, of the private patients 3.0.

Type of surgery. All of the sterilizations in this group were accomplished by bilateral tubal ligation. The approach to the tubes (whether abdominal or vaginal) and the nature of coincidental surgery (abdominal or vaginal), if any, are given in Table XI.

Indications. The various indications for which these sterilizations were done is shown in Table XII and the relative frequency of these five categories in Table XIII. Forty-nine per cent of the private cases and 8 per cent of the ward cases fell into Category 1 (slight medical disease) or Category 4 (no medical disease, parity less than 5).

Experience at other hospitals. Accurate data on the practice of interval sterilizations are difficult to obtain. The survey of 65 hospitals yielded the following: 34 hospitals reported 647 ward interval sterilizations and

Table XI. Surgical approach for interval sterilizations

Approach to sterilization	*Approach to coincidental surgery, if any*	*Ward*	*Private*	*Total*
Abdominal	None	11	16	27
Abdominal	Abdominal	1	10	11
Abdominal	Vaginal	11	6	17
Vaginal	None	15	0	15
Vaginal	Vaginal	21	7	28

Table XII. Indications for interval sterilizations

	No. of ward cases	*No. of private cases*	*Total No. of cases*
Category 1 (slight medical disease)			
Arrested tuberculosis	2	0	2
Varicose veins	0	2	2
Recurrent pyelonephritis	0	1	1
Muscular dystrophy, husband	0	1	1
Cerebral spasm with last pregnancy	0	1	1
Recent spinal fusion	1	1	2
Previous postpartum depression	0	1	1
Cervical amputation for leukorrhea	0	1	1
Neurosis	0	1	1
Habitual abortions	0	1	1
Moderate hypertension	1	0	1
Pachyonychia congenita	1	0	1
Mental depression	1	0	1
Category 2 (serious medical disease)			
Asthma	3	0	3
Heart disease	1	0	1
Psychosis	1	0	1
Ruptured intervertebral disc	1	0	1
Rheumatoid arthritis	1	0	1
Hereditary C. N. S. lesion	1	0	1
Postconcussion syndrome	0	1	1
Postpartum psychosis	0	1	1
Active tuberculosis	0	1	1
Category 3 (parity in excess of 4)	12	3	15
Category 4 (no medical disease, parity less than 5)	1	11	12
Category 5 (coincidental colporrhaphy)	32	12	44

XIII. Frequency of indications for interval sterilizations

	No. of ward cases	No. of private cases	No. of cases
Category 1			
Parity of 4 or less	4	8	12
Parity of 5 or more*	2	2	4
Category 2			
Parity of 4 or less	4	3	7
Parity of 5 or more*	4	0	4
Category 3*	12	3	15
Category 4	1	11	12
Category 5			
Parity of 4 or less	23	11	34
Parity of 5 or more*	9	1	10

*Total number with parity of 5 or more was 33; 27 (46 per cent) were ward and 6 (15 per cent) were private patients.

Table XIV. Frequency of contraceptive advice given to the ward patients of 55 hospitals

	No. of hospitals
Unknown	18
None	13
Less than 26 per cent	9
26 to 50 per cent	10
51 to 75 per cent	2
More than 75 per cent	3

102,849 ward deliveries, a ratio of 1:159; and 27 hospitals reported 595 private interval sterilizations and 126,674 private deliveries, a ratio of 1:213.

Comment. It is generally believed that tubal ligations should be performed almost exclusively in the puerperium. Hence, only 7 per cent of the sterilizations in the Sloane Hospital series were done on an interval basis, 35 per cent of these were done in conjunction with a colporrhaphy, and 21 per cent were done within 6 months of delivery. This belief needs reappraisal. Why should a patient be denied sterilization just because her youngest child is 2 years instead of 2 days old?

III. Contraception

Precise information with regard to the number of Sloane Hospital private and ward patients who have obtained contraceptive advice is unavailable. One approximate fact is known: about 275 new ward patients were seen in the contraceptive clinic every year between 1951 and 1960 and, hence, about 2,750 during the decade. Since there were 29,286 ward deliveries during these years, approximately 9.4 per cent of the ward patients received contraceptive advice. On the other hand, a poll of the attending physicians reveals that contraceptive advice was made available to all of the private patients who wanted it.

Experience at other hospitals. Precise data on the availability of contraceptive advice were also impossible to obtain from the 65 hospitals surveyed. The approximate calculations submitted from the ward services of 55 hospitals are shown in Table XIV. Of the 37 hospitals which estimated the incidence of giving contraceptive advice to their ward patients, 13 reported no contraceptive service, 19 reported an estimate of less than 50 per cent, and five an estimate of more than 50 per cent. Yet it must be safe to assume that contraceptive advice was available to virtually all of the private patients who wanted it.

Comment. The American College of Obstetricians and Gynecologists has already officially approved the principle of providing contraception to all who desire it. It now devolves upon the obstetricians of this country to convert this principle into fact.

Conclusion

The institution and implementation of birth control measures are primarily medical matters. The obstetrician's obligation to provide abortion, sterilization, and contraception is inadequately and inequitably met at the moment. The obstetricians of America must individually and collectively review these vital issues in an effort to establish a more uniformly humane birth control ethic.

REFERENCES

1. Gold, E. M.: Personal communication.
2. Tietze, C.: Am. J. Obst. & Gynec. 60: 146, 1950.
3. Gebhard, P. H., Pomeroy, W. B., Martin, C. E., and Christenson, C. V.: Pregnancy, Birth, and Abortion, New York, 1958, Harper & Bros. and Paul B. Hoeber, Inc., p. 196.
4. Kleegman, S. J.: *In* Rosen, H., editor: Therapeutic Abortion, New York, 1954, Julian Press, Inc., p. 254.
5. Erhardt, C.: *In* Calderone, M. S., editor: Abortion in the United States, New York, 1958, Paul B. Hoeber, Inc., p. 77.
6. Mandy, A. J.: *In* Rosen, H., editor: Therapeutic Abortion, New York, 1954, Julian Press, Inc., p. 284.
7. Guttmacher, A. F.: Surg. Clin. North America 37: 459, 1957.
8. D'Esopo, D. A.: Bull. Sloane Hosp. for Women 7: 134, 1961.
9. Starr, S. H., and Kosasky, H. J.: Am. J. Obst. & Gynec. 88: 944, 1964.
10. August R. V.: Obst. & Gynec. 5: 715, 1955.
11. Savel, L. E., and Perlmutter, I. K.: Am. J. Obst. & Gynec. 80: 1192, 1960.
12. Lull, C. B., and Mitchell, R. M.: Am. J. Obst. & Gynec. 59: 1118, 1950.
13. Barnes, A. C., and Zuspan, F. P.: Am. J. Obst. & Gynec. 75: 65, 1958.
14. Prystowsky, H., and Eastman, N. J.: J. A. M. A. 158: 463, 1955.
15. Christensen versus Thornby, 255, N. W. 620 (Minnesota 1934).

622 West 168th Street
New York, New York 10032

Therapeutic abortion follow-up study

ALAN J. MARGOLIS, M.D.
LESLIE A. DAVISON, PH. D.
KARL H. HANSON, M.D.
SALLY A. LOOS, M.S.W.
CYNTHIA M. MIKKELSEN, M.S.W.
San Francisco, California

A heterogeneous group of pregnant women petitioned for abortion because of possible impairment of mental and/or physical health; 43 of 50 were followed for 3 to 6 months. Ambivalence and guilt appeared more substantially in young women under 18 years of age. Three to 6 months afterward, 29 patients expressed a positive reaction toward abortion, 10 reported no significant change in their life situations and 4 responded negatively. Of the 41 patients remaining fertile, 4 had purposely become pregnant again; 8 others were apparently without consistent contraception. It was concluded that preabortion counseling should outline the necessary steps for Committee consideration, give reassurance as to physical safety, and help the patient understand her motives and goals. Postabortion follow-up should emphasize a clear contraceptive program.

INDUCED ABORTION has become a major method of birth control in many parts of the world. Throughout the United States in the past 3 years, there have been significant modifications of a number of restrictive state abortion laws. Sloane's[1] recent review summarizes the current medical and social dilemma over this problem and concludes that psychiatric labels often mask humanitarian reasons for abortions.

After the 1967 abortion law revision in California, there was a rapid evolution in this field. With the ensuing increase in legal abortions, it became possible to study prospectively a heterogeneous group of women who desired abortions for a variety of reasons. This is a preliminary report on the follow-up of such a study group.

From the Departments of Obstetrics and Gynecology, Psychiatry, and Social Work, University of California–San Francisco.

Presented at the Thirty-seventh Annual Meeting of the Pacific Coast Obstetrical and Gynecological Society, Kauai, Hawaii, November 9-14, 1970.

Patients and procedures

From November 1, 1967, to June 30, 1968, 55 women applied to the staff of the Obstetrical Service of the University of California–San Francisco for termination of pregnancy because of its possible significant impairment of their mental or physical health. The screening procedures used in this study included: (1) a self-administered questionnaire* at the time of initial application for abortion, which provided demographic data and pertinent information; (2) a Minnesota Multiphasic Personality Inventory (MMPI) profile prior to abortion and again 3 to 6 months later (this test was omitted when cultural or linguistic factors obviated its use); (3) a psychiatric evaluation of the degree of psychiatric illness and/or possible effects of pregnancy on the patient's mental health; (4) a semistructured interview* by a social worker (adapted from Simon and associates[2]) 3 to 6 months after the abortion to

*Available on request to Dr. Davison, Adult Psychiatric Clinic, University of California–San Francisco, San Francisco, California 94122.

Table I. Therapeutic abortion committee results (November, 1967, to June, 1968)

Total No. of patients considered	55
Abortion refused	4
3 aborted elsewhere	
1 delivered twins at term, had tubal ligation	
Abortion granted	51
6 medical indications	
44 psychiatric indications	
1 refused and went to term	
Follow-up	
Complete	43
Incomplete	7

assess the postabortal responses and psychosocial situation.

The abortion techniques included dilatation and curettage in early weeks of pregnancy (in 2 women), aspiration (in 29), hypertonic injection (in 9), and hysterotomy (in 1). At the patients' own request, tubal ligation was also done in 4 who had aspiration abortion, in one with hypertonic injection, and in one with hysterotomy; 3 also had hysterectomies.

Results

The Therapeutic Abortion Committee (Table I) accepted 51 of the 55 women who applied, one of whom subsequently elected to carry her pregnancy to term. Three were rejected on the basis of insufficient evidence to substantiate impairment of mental health and obtained abortions elsewhere. A fourth patient, who was rejected because abortion seemed psychiatrically contraindicated, was delivered of twins at term and had a tubal ligation.

Information accrued (Table II) from the self-administered questionnaire showed a wide age range—from 13 to 44 years, with 46 per cent of patients falling between 21 and 26 years. Thirty-six were in the first trimester at the time of abortion, despite the 10 to 14 day preabortion procedures. The psychiatric evaluations at the time of approval included 15 with a situational reaction, 14 with neurosis, 10 with character disorders, 6 who had a major psychotic illness

Table II. Demographic data on 51 patients

Age (years)	
13-14	3
15-19	6
20-24	19
25-29	8
30-34	7
35-39	2
40 and over	6
Marital status	
Never married	23
Married or common-law relationship	21
Separated, divorced, or widowed	7
Race	
Caucasian	41
Negro	7
Filipino	2
Oriental	1
Education	
Below high school graduate	11
High school graduate	14
Some college	26
Income (self or family)	
$10,000 or more	8
5,000-10,000	13
3,000 - 5,000	12
3,000 or less, and welfare	13
Unknown	5
Patient status	
Private	15
Staff	36
Prior pregnancies	
None	19
Term or premature delivery	25
Spontaneous abortion only	1
Induced abortion	6
Present pregnancy (weeks' gestation)	
6-9	6
10-13	30
14-20	15
Contraception	
None or irregular	21
Rhythm, douche	4
Withdrawal, Foam	7
Condom, diaphragm	6
Intrauterine device	3
Oral contraceptive	9
Unknown	1
Prior sociopsychiatric assistance	
None	24
Individual psychotherapy	21
Hospital or day care	4
Group therapy	1
Social work interviews	1

Table III. Pregnancies following therapeutic abortion

Age	Marital status	Prior pregnancies	Indications for abortion	Months to conception following abortions	Comments
26	Common-law relationship	2 Illegal abortions	Mental health	5 months	Conceived intentionally in same relationship that prompted therapeutic abortion; now felt more secure and continued pregnancy.
26	Married	2 Term deliveries 1 Spontaneous abortion	Recurrent sarcoma	2 months	Regretful that abortion and chemotherapy did not influence extensive sarcoma; continued pregnancy.
22	Common-law relationship	1 Term delivery 2 Illegal abortions	Mental health	6 months	Therapeutic abortion for pregnancy by undetermined father; currently pregnant by man whom she has married; continued pregnancy.
16	Single	None	Mental health	2 months	Felt forced to abortion by family; conceived again and continued pregnancy.

concurrent with the pregnancy or in the immediate past, and 6 who had no obvious psychiatric problems.

Four to 6 months after abortion, the follow-up interview on 43 patients indicated that 22 had positive psychological changes, demonstrated by growth experience, increased empathy, increased sense of freedom, and greater sense of femininity. Seven reported other positive changes, such as less fear of pregnancy assured by sterilization or knowledge of better birth control methods, and improved marital or family relations. Four had negative reactions, such as guilt or fear of men, and 10 indicated no change in attitude.

The patients' principal fears of abortion were concerned with the possibility of injury as a result of the abortion technique (in 21 women), its effect on mental or physical health (in 6), retaliation by others or by one's own conscience (in 5), feelings about destroying living tissue (in 3), and Committee rejection (for 2). In the postabortion follow-up, 36 expressed negative reactions centered around the ignorance of the procedural technicalities (in 12), the time required for processing (in 13), and some apparently embarrassing personal encounters during the experience (in 11). The 25 positive responses indicated good supportive help from various staff members. The principal suggestion by the patients was a request for more available public information and less complex application requirements.

Of the 41 aborted women who were not sterilized, 4 became pregnant again (Table III). In each case the pregnancy was consciously sought for a variety of reasons. In 2, the abortion was a regretful experience, while in the other 2 the abortion seemed to have allowed more stable life situations to become manifest. In addition to the 16 year old, who was pregnant again, a 13 year old and a 14 year old also regretted their preabortion decisions; all three felt very guilty and believed they had injured a living being.

The mean preabortion MMPI showed abnormal elevations on the scales depicting depression, psychopathic deviation, and schizophrenia. A study of 36 paired pre- and post-abortion profiles showed that 15 of the 27 initially abnormal tests became essentially normal after abortion. This was a significant change ($P < 0.002$) by a test for correlated proportions.

In response to several questions designed to detect mixtures of feelings, 17 of those responding reported some guilt, and 20 had some ambivalence. Nevertheless, in a direct query as to whether they would repeat the abortion under similar circumstances,

Table IV. Recent therapeutic abortion follow-up studies within the United States

Source of data	Years of study	Sample size studied	Total group aborted	Age (mean or range)
Peck and Marcus,[3] Mt. Sinai Hospital, New York	1963 to 1965	50	85	20-40
Simon and associates,[2] Jewish Hospital of St. Louis	1955 to 1964	46	65	Not stated
Patt and colleagues,[4] Michael Reese Hospital, Chicago	1964 to 1968	35	48	23
Levene and Rigney,[5] San Francisco	1968	56	70	21
This study	1968	43	50	13-44

37 said they would, 6 were unsure, and 2 would have refused.

In contrast to the generally poor pre-abortion contraceptive practices, 25 patients were taking oral birth control pills 3 to 6 months after abortion. Two patients were satisfied with IUD's, and one patient used a diaphragm, and one used a condom. Six patients refused birth control advice, and 6 patients did not return for a postabortal doctor visit.

After therapeutic abortion, 3 patients initiated psychotherapy, and 11 continued psychiatric care, while 6 had short-term, problem-directed interviews with a psychiatrist or social worker. Twenty-three women had no sociopsychiatric follow-up observation beyond the tests made to complete this study.

Comment

Our data corroborate 4 recent studies of therapeutic abortion patients in the United States (Table IV), which show that terminations of pregnancy do not tend to aggravate mental illness and are often helpful to the life situation adjustment of these patients. The legal, social, and medical sanction for interruption of pregnancy results in minimizing untoward guilt and depressive reactions, leaving the great majority of women with a sense of rightness of their pregnancy terminations, now culturally approved.

Of particular concern to us, however, are the pregnant girls under 18. Although our study group was small, we encountered a great deal of ambivalence and guilt. As a result, we feel that especially careful evaluation and counseling should be provided for them and their families. The alternative of a teen-ager carrying a pregnancy to term presents great difficulties for the teen-ager and her child, and the delicate balancing of risks often requires the most expert collaborative effort of physician, psychiatrist, and social worker.

A large number of patients used oral contraceptives regularly after abortion; however, 8 women were apparently without satisfactory birth control advice 3 to 6 months afterward. Although they were not pregnant, they constitute a significant group of potential repeaters. It is mandatory that a therapeutic abortion unit place a high priority on understanding the patient's attitude toward birth control and help her to choose a method which she will use regularly.

The things that concerned our patients most about abortion were ignorance of what to expect in the preliminary screening process and fear of the physical danger of the

Marital status	Socioeconomic status	Indication for abortion	General impression of outcome
Mostly married	Caucasian Jewish private patients	25 Psych. 25 Nonpsych.	"The psychiatric status of 92 per cent . . . improved or unchanged. . . ." "Ninety-eight per cent . . . would . . . with hindsight . . . again elect abortion in perference to continuing pregnancy in question."
Not stated	Well-educated Caucasian Protestant or Jewish patients	16 Psych. 30 Nonpsych.	"Little new psychiatric illness . . . that could be related to abortion."
23 Unmarried 12 Married	31 Private patients 4 Staff service	35 Psych.	". . . with rare exceptions, abortion was genuinely therapeutic."
59 Unmarried 11 Married	70 Private patients	70 Psych.	"Properly done induced abortion does not in itself result in significantly noxious emotional sequelae."
22 Unmarried 21 Married 7 Separated	15 Private patients 36 Staff service	44 Psych. 6 Nonpsych.	29 patients expressed positive reaction after abortion; 10 reported no significant change; 4 responded negatively.

surgical procedure. Both of these areas should be emphasized in the preabortion counseling, as well as the fact that few requests for therapeutic termination are denied. Concerns over time schedule or anonynity can quickly be dispelled. The conflicting feelings arising from conscience or fear of family repercussions can be pinpointed for more intensive follow-up.

As a result of our study, we have tried to shorten the time between patient application, Committee decision, and abortion, as well as to minimize cost and provide efficient, effective care by come-and-go abortion procedures in the first trimester. At present, the time interval from first contact to abortion ranges from 36 hours to 2 weeks.

Since California law and others modeled on American Law Institute recommendations do not specify that a psychiatrist must attest to the degree of mental health impairment of the patient, we have encouraged the patient's physician to make that assessment. If a psychological problem is unresolved, or if the patient is grossly disturbed, a psychiatric consultation is obviously important. However, an interested and concerned obstetrician can usually make the necessary observations to permit a final judgment by the Committee. Currently, a formal psychiatric consultation is presented to the Committee in 10 per cent of the staff cases and in 20 per cent of the private cases.

For many women, therapeutic abortion will become an increasingly frequent alternate to a stressful pregnancy. An estimated 60,000 abortions will have been done in California during 1970. Such a procedure must continue to be carefully scrutinized so that it will be associated with minimal hazards and maximum efficiency and effectiveness.

REFERENCES

1. Sloane, R. B.: New Eng. J. Med. 280: 1206, 1969.
2. Simon, N. M., Senturia, A. G., and Rothman, D.: Amer. J. Psychiat. 124: 59, 1967.
3. Peck, A., and Marcus, H.: J. Nerv. Ment. Dis. 143: 417, 1966.
4. Patt, S. L., Rappaport, R. G., and Barglow, P.: Arch. Gen. Psychiat. 20: 408, 1969.
5. Levene, H., and Rigney, F.: J. Nerv. Ment. Dis. 151: 51, 1970.

Discussion

Dr. JOHN C. MCDONNOTT, San Mateo, California. Dr. Margolis, along with many others, recognizes that abortion is not a simple matter and that problems other than morbidity and deaths are involved. He has attempted a prospective study for which he should be commended but to believe that observations over the 6 month postabortal period are of much importance is to give them more weight than they deserve. While anecdotal discussion is derogated by our scientific colleagues, my thoughts go back to the time I started private practice in 1936. During the great depression, abortions were as popular as they are today. At that time, most abortions were done by experts, since staying out of San Quentin was a strong incentive. They were also done early, a factor favoring a good outcome. As the depression receded, the number of infertility patients was high. Careful study disclosed a history of induced abortion in many. Among these persons, the feeling of guilt was great, and they were difficult to handle. Fortunately in most cases the blocked tubes opened up 6 to 8 years post abortion, and pregnancies ensued to the point where the problem was one of the opposite sort.

As chairman of the abortion committee from the time the California abortion law was changed to the present time, I have been forced to learn about a whole group of persons whose values differ from mine in almost all respects. These values do not stem from tradition but seem to represent those in the nonthinkers who dominate the news media. Samples of this thinking are: "If you feel like doing something, do it. Don't take a chance on injuring your psyche by any sexual repression. If anyone warns you of dangers in your course of action, ignore him because he represents the "straight" generation. Don't use birth control pills, they're dangerous. Do have an abortion, it's simple, quick, and safe." I could go on with samples of cliches promoted by news media—unfortunately supported by enthusiasts in our profession who think any means should be used to promote their goals. Persons with these attitudes by and large form the group requesting abortions at our hospital. Now, the question arises, should we go along with these misconceptions so that the patient will regard the abortion as an exciting episode in her young life and become an authoritative dispenser of misinformation to her friends.

The complete lack of correct information appears to me to be the biggest problem to be solved relative to abortions. This we attempt to correct among our abortion applicants. Each case is considered individually. Trained social workers spend much time trying to work out problems bearing on the patient's decision. All community resources are brought to her attention. Pressure from the husband, boy friend, or parent is determined and discussed, and, in some instances with extensive discussion, other solutions than abortion are selected. The true facts with regard to abortion dangers and sequelae are presented, so that a truly knowledgeable decision can be made. After abortion, we have "rap" sessions where an effort is made to present to the patient the effect of life style on health, both mental and physical.

Without scientific knowledge to tell us the real end result of abortions, we reason the extensive individual effort will help to diminish the adverse results. The current efforts to streamline the process and make only formal compliance with legal requirements brings me to the observation made by my social worker, that ultimate efficiency will have as its result the barren goal of nothingness.

Dr. EUGENE C. SANDBERG, Palo Alto, California. It is interesting to note the similarity in figures emanating from different areas. The recurrence rate of undesired pregnancies in Dr. Margolis' series was ten per cent. Two years ago, Dr. Von der Ahe[1] mentioned in a report to this Society that the recurrence rate for illegitimate (and presumably undesired) pregnancies was nine per cent among the patients at 4 Los Angeles facilities for unwed pregnant women. At Stanford University Hospital during the past three years, we have also noticed that five to ten per cent of patients requesting therapeutic abortions have had prior undesired pregnancies.

Similarity in figures is also noticeable regarding subsequent utilization of contraception. Two years ago Tyler and associates[2] studied a group of women who had been admitted to Grady Memorial Hospital in Atlanta with or for an induced abortion. Upon dismissal, only seventy-five per cent accepted contraception. In Dr. Margolis' group, the figure was essentially the same. This seems to be a very low rate of acceptance of contraception for a group of women who have just procured an abortion.

Last, I think it would be foolhardy for anyone to believe that pregnancy will be prevented on a long-term basis, even in the group accepting contraception. It is well known that the two-year dropout rate is approximately fifty per cent for

essentially each of the contraceptive methods. Additionally, in Tyler's study, twenty-two per cent of the patients admitted with or for an induced abortion had previously attended the Grady Memorial Hospital Family Planning Clinic. Obviously, something didn't take. And their experience is not unique.

REFERENCES

1. Von der Ahe, C. D.: AMER. J. OBSTET. GYNEC. 104: 279, 1969.
2. Tyler, C. W., Asher, J. D., and Freeman, M. G.: Induced Abortion and Family Planning, Presented at the Workshop on "Abortion, Obtained and Denied: Approaches to Outcomes," Bethesda, December 15, 1969, National Institute of Child Health and Human Development and National Institute of Mental Health. In press.

DR. J. OPPIE MCCALL, Portland, Oregon. Opponents and proponents of therapeutic abortion seem to take an exquisite delight out of presentations such as Dr. Margolis has given us. We seem to take delight on whichever side of the fence we are on as to some prospective analysis of the individual after the fact. Did she think it was a good idea? We have here, of course, an extremely small number of patients but even with a large number of patients we have an extremely varied group to try to analyze, anywhere from the 12 year old to the 45 year old, married and unmarried, etc. I find it difficult to even achieve any semblance of order out of trying to see how this patient regarded her abortion after it was done. However, let me fall into the same trap of wanting to compare how she feels before and after and ask Dr. Margolis a question which all these studies so far have failed to bring out. That is, regardless of age, marital status, etc., have the psychiatrist and the psychologist interpreted what the effect was of the early-trimester abortion as opposed to the mid-trimester abortion. My own observation is that I fear the girl with a second-trimester abortion is going to have a much more violent reaction to her abortion.

DR. MARGOLIS (Closing). I appreciate Dr. McDermott's observations based on his long practice of our specialty. Some of our abortion patients have patterns of sexual behavior which some might consider promiscuous; however, our incidence of positive preabortion gonorrhea cultures is one per cent whereas it is 3 to 4 per cent in our antenatal group.

With regard to Dr. McCall's observation, I agree that a second-trimester abortion is technically significantly different from first-trimester abortion. I think also that a candidate for abortion in the second trimester is a different patient than a candidate for abortion in the first trimester. Knowledge of abortion may not have been easily available to her, or more important she might have a marked degree of ambivalence that would aggravate any reaction to abortion.

VIEWS AND REVIEWS

PSYCHOLOGIC AND EMOTIONAL CONSEQUENCES OF ELECTIVE ABORTION

A Review

GEORGE S. WALTER, MD, MPH, FACOG

Should we consider abortion as temerity or therapy? Tradition impugns to the aborted woman a burden of guilt and social stigma. However, scrutiny of available literature suggests that there is really no documentation for significant psychiatric sequelae. The review suggests certain inadequacies of reported studies and underscores the need for carefully controlled, long-term, prospective observation of the woman seeking abortion, and of her family.

Unto the woman He said:
I will greatly multiply thy sorrow and thy conception;
In sorrow thou shalt bring forth children,
And thy desire shall be to thy husband,
And he shall rule over thee.

Genesis 3:16

THE DAUGHTERS OF EVE, long laboring under the burden of this terrible curse, are beginning to stir. Who, but they, can rightly divine the moment when their full creative powers should bloom? A voice is heard!

But, it was not always so. The ancient Assyrians decreed that she be impaled upon a stake and not dignified by burial should she exercise her own judgment. The fanfare that was Greece and Rome winked at, yea welcomed, both abortion and infanticide, and yet allowed the ascetic Pythagoreans to, once again, deprive each woman of her birthright. The debate has continued through the centuries, with the cudgel of church and civil law on the one side, and necessity on the other,[80,121,128] while in between, male philosophers tendentiously argue at what metaphysical point of time life begins after the chance collision of an aggressive motile cell with the wall of one that is less so.[4,82]

But woman has been adamant in her self-determination, and by whatever means fell to her knowledge or power, has attempted to control her fertility. The vacillating pendulum of public practice has swung toward a more liberal approach to induced abortion in recent years, till we have more abortions than births in Hungary,[37,102] and 1 out of every 8 Japanese doctors may be an abortionist.[117] And yet, we hear that in certain groups in the United States, 94% of

Maternal and Child Health Consultant, Navajo Indian Health Area, Indian Health Service, HSMHA, Fort Defiance, Arizona.

This article was written by George S. Walter, MD, in his private capacity. No official support or endorsement by the Indian Health Service or the US Public Health Service is intended or should be inferred.

Submitted for publication Feb 16, 1970.

The illustration at the top of the page is "Two Doctors in Discussion," from *Treatise Against All Pestilence and Tainted Air* by Alonso Espina, published in 1518 in Valladolid, Spain (The Bettmann Archive).

Reprinted from Vol. 36, No. 3, September 1970

OBSTETRICS & GYNECOLOGY

Published by the MEDICAL DEPARTMENT

HARPER AND ROW

Copyright © 1970 by

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS

Printed in the U.S.A.

pregnancies are unwanted!"[48] Confusion is no more rampant anywhere than in the professional arena, where we hear such cries as, "There are no nonmedical indications for abortion!" and "Teach chastity!"[40] The New Jersey Supreme Court has ruled that, "The unborn child would almost certainly choose life with defects as against no life at all."[37] Even such a prominent and usually progressive authority as Mary Calderone clouds the issue by saying, "Aside from the fact that abortion is the taking of a life, I am also mindful of what was brought out by our psychiatrists—that in almost every case, abortion, whether legal or illegal, is a traumatic experience that may have severe consequences later on."[39]

But, is this necessarily so? The purpose of this discussion will be to examine the woman who is faced with a pregnancy, to see upon what she bases her reaction to it, to consider with her the possible alternatives, and then to see what psychoemotional phenomena have been demonstrated by experience with women who have exercised their right not to bear a child.

A WOMAN LOOKS AT MOTHERHOOD

A woman will function appropriately and effectively as a mother if:

She achieves, besides language mastery, a level of abstract thought sufficient to see herself apart from others;

She esteems this concept of herself and finds it reliable;

Her actual self usually approximates this well-regarded image of herself;

She perceives the struggle out of which her identity evolved; and

She genuinely wants to be a mother.[109] She is expected to go through the progression of accepting her pregnancy (after an 85% initial rejection in primagravidas), developing an affiliative response to the fetus, and then assigning a reality-based identity to the newborn.[25] Fortunate indeed, are the majority of women who blissfully accomplish this metamorphosis from woman to mother.

If she is significantly maladapted in any one of these areas, then she may be one of the 3 to 13 women, per 1000 live births, who develops a significant puerperal psychologic illness.[13,20,69,88,100] The risk to her of recurrent episodes may increase tremendously with subsequent pregnancies.[72-74,119,124,161] So powerful is this emotional condition that illness has even been found in mothers after the adoption of children.[108] Indeed, her progression to emotional motherhood may be arrested, and the pregnancy will end. It has been postulated that the psyche might play a role in spontaneous abortion,[91,99] and most certainly does in habitual abortion; patients forced into motherhood and femininity by a successful Shirodkar procedure have had acute psychiatric disturbances.[133] This, then, is the powerful and overwhelming set of forces, some conscious, many others unconscious, focusing on the woman who contemplates bearing a child.

THE ALTERNATIVES TO CHILDBEARING

A woman may go ahead and bear her child, either adjusting reasonably well in the process, or rejecting the infant, although more will be said later about the child.[5,68]

She may threaten to procure, or even attempt, an illegal abortion,[47,65,169] particularly if she has been abandoned by her partner, and has hysterical traits.[4] She may actually obtain an illegal abortion, with its inherent dangers.[10,82,99,121] Interestingly enough, relaxation of abortion laws has not always led to a reduction of illegal abortions as was anticipated.[36,71,186]

She may threaten suicide, and in spite of suggestions to the contrary,[4,21-23,65,109,134] pregnant women do commit suicide, both before[16,21,122,158] and after termination of pregnancy.[142-148]

Whatever the patient's motivations or make-up, threats, whether toward abortion

or suicide, should be considered seriously and interpreted as signs of mental insufficiency and an inability to cope. This woman's behavior becomes an unpredictable entity.[4,188] Extensive studies of women who develop puerperal depression show that their personality make-up is such that their strong "mother-compliance" makes them very good patients and hard to recognize as women with great potential for acting-out behavior, either against themselves or the child.[84]

A woman's last alternative, available today only in certain privileged geographic and social circumstances, would be to seek a legal abortion. Let us digress slightly at this point to develop a train of logic which will set the stage for a consideration of the emotional sequelae of legal abortion.

We are told that neurotic women tend to have more pregnancies, abortions (all types), stillbirths, neonatal deaths, and psychiatric illness in their children.[99] We also know that there is a high degree of correlation between the prepregnancy state of mental health and the likelihood of puerperal illness.[4,35,39,41–43,70,94–96,109,113–115,120–127,156,188] Women with an earlier spontaneous abortion show significantly more psychiatric symptoms than others during subsequent pregnancies,[56] and some women have a "postabortion hangover" lasting until the projected term of the aborted pregnancy.[113] Mental illnesses associated with reproductive function account for 2–8% of all female psychiatric admissions,[39,69,109] with significant numbers of deaths,[7] and full recovery in only around 85%.[124]

If one of every five American pregnancies ends in abortion for some reason,[87] and if the incidence of mental insufficiency is higher after legal abortions,[97] and if some cognitive dissonance must be necessary to allow a woman to contemplate willful abortion, would it not be reasonable to expect a significant amount of mental illness after induced abortion?

EXPERIENCES WITH INDUCED ABORTION

There is a growing body of literature, much of it from northwestern Europe, and more recently from investigators in England and America, which discusses the psychiatric sequelae of induced abortion for nonmedical indications.[4,14,21,26,41–43,49,51,56,57,73,77,84,96–97,99–103,108,202,206,110,113–114,120,126–130,136,158] It is beyond the scope of this particular discussion to repeat the details of individual studies.

While there is some variation in their numbers and the quality of sampling and controls, if one removes the overlay of emotional, sentimental, and technical pejoratives, there is an amazingly consistent finding: legal abortion can be performed without fear of severe psychic harm to the woman. The reaction to abortion is determined almost entirely by a woman's previous psychologic set. Her feelings may fall into one of the following categories:

Guilt

Reported incidences varied from none at all to as high as 30%, with none severe. A critical factor in mild, immediate guilt is the actual physical setup of the clinical situation and the attitude of people caring for the patient. As time passed after the abortion, the degree of guilt decreased, until by one year, there was almost no guilt. What little did remain was frequently due to failure of the woman's manipulative effort, and was disguised as self-anger at the inability to structure a relationship or situation. True depression was rare, and suicide was almost absent from the data. The phenomenon of the so-called "atonement pregnancy," to make up for the one aborted, was noted in some studies, but has not been sufficiently investigated. While there was some concern about manifestations of delayed guilt, with possible involutional depression, none of the studies has progressed long enough to evaluate this yet.

Impaired Development of Adult Stages of Personality

This was found only if the woman proved sterile following the abortion, and this incidence was not greater than for normal pregnancy.[149,153,154] If she had a previous personality defect or frank illness, it might actually improve or remain essentially unchanged.

Disturbance of Relationship with the Opposite Sex

A woman might project her own childish or neurotic emotions upon her spouse and appease her own guilt by blaming it on him. This was particularly true if she had been pressured into the abortion by the man. The Kinsey group [49] went beyond mere figures showing patient satisfaction to evaluate a woman's subsequent performance in three areas. They found that 90% of postabortal unmarried women resumed premarital coitus, suggesting little psychic damage. Premarital abortion did not affect adversely the sexual adjustment in marriage as measured by the rate of orgasm during the first year of marital intercourse. And the incidence of marital break-up was actually lower in women who had had a premarital induced abortion. While one might argue with their criteria for measuring ill-effect, it does appear that their subjects' function was not interferred with.

When all the data are considered, we can probably say that legal abortion leaves its mark, just as does every other important event in a person's life. It is an unnatural way of solving conflict involved in an unwanted pregnancy. Women who are psychically vulnerable risk a deterioration in their condition through an unwelcome pregnancy and the extra load this involves, whatever course is adopted. Those who are mentally stable manage the pregnancy better. Those who come to therapeutic abortion are already highly selected in terms of their psychopathology. We must remember, therefore, in considering the rare unfavorable outcome that the pregnancy was a symptom of, rather than the cause of, the emotional disturbance, and that abortion was only a method of treating the symptom. Abortion may have no effect, or it may actually stabilize the underlying process.

Further Considerations of Effects of Abortion

We must think of any woman seeking abortion, even an unmarried one, as occupying a place in a social unit of interrelationships. In considering this unit, the most immediately apparent member is the sexual partner of the woman. A search of the literature reveals that there is really very little written about this important element of her psychologic field. Studies of women with puerperal emotional difficulties suggest that their husbands are frequently repeated images of their own rather weak and colorless fathers, and that the women feel victimized by and martyred to these ineffective men, whom they dominate. There is frequently a basic and covert sexual and procreative conflict which is unresolved as well. It is also known that women seeking abortion may do so at the insistence of partners whose neurotic behavior is being acted out upon their wives. The meaning of these relationships as well as of the induced abortion itself to the male is not clear.

Ekblad[41] reports that among the husbands of 479 women aborted upon psychiatric indications, 32% were neurotic, 14% more were alcoholic or criminal or both and 10% had somatic diseases. Hook reported similar patterns in 20% of partners of women who were refused abortion and 46% of partners of those granted abortion, suggesting once again that the request for abortion may have arisen from a mutual psychoemotional illness. The Kinsey group studies[49] report that following the abortion itself, only 4.2% of the male partners had

psychiatric consequences attributable to the abortion. This scanty data serves only to underline the importance of the man and the absence of any real body of information about his role.

Again, observing the woman as part of a biologic unit, we must ask about the effect of abortion upon children in that unit. Women seeking abortion on psychiatric grounds have been shown to have an immature emotional involvement with previous children.[109] Studies of puerperal illnesses suggest that when a mother has difficulty, it is not only a sick patient, but also a sick relationship between mother and child.[93] We also know that women with previous disturbances are the most likely to have repetitive episodes of disturbance when faced with [illegible] again, and that this disturbance [illegible] either lead a woman to request abortion or result in infanticide as often as once or twice in 500 births.[7,116] If abortion is selected as a solution to the immediate problem of an unwanted pregnancy, older children in the same family may misinterpret the act as a great threat and require psychiatric treatment.[109] From observing a group of 87 children whose mothers had aborted (type not specified), Cain reported two types of reactions: an immediate type, characterized by anxiety attacks, nightmares, increased aggressiveness, stuttering, running away, death phobias, increased separation anxiety, sudden outbursts of fear or hatred of the mother, and even suicide attempts; and a late type ranging from isolated fantasies to pervading, crucial, and disabling illness. He feels that the children's reactions are not predictable, but will be influenced by the degree of their knowledge of the abortion and their parent's attitude toward it and toward them. A very revealing retrospective study by Forssman and Thuwe followed 134 children born to 128 women who were refused abortion. Only 120 survived to 21 years. Seven and one-half percent were abandoned. They compared them to a self-selected control group of wanted children, and found that the "failed abortion" children had more family instability, more antisocial and criminal behavior, more drunken conduct, more military exemptions, less education, and needed more public assistance and psychiatric care. More of the girls in the unwanted group married early and had children early. Hook found in children under 12, born to mothers after abortion was refused them, an incidence of 22% disorders of behavior in the first 4 years of school, compared to 20% in the control group. There has not been adequate study of children, but we can conclude that the very fact that a woman applies for a legal abortion means that the prospective child risks having to surmount greater social and mental handicaps than his peers, even when the grounds for the application are so slight that it is refused. Legislation on therapeutic termination of pregnancy must consider the social risk to which the expected child will be exposed.

CRITICISM OF STUDIES REVIEWED

When the contributions of all authors are read and compared, some rather consistent defects in the body of knowledge and the methods used to obtain it are found.

Sampling methods are not uniform and not always good, so data may not be comparable. For example, psychiatric sequelae may be quite different in a cold, frightening, across-the-tracks type of abortion. Part of the guilt may actually be over money spent. A woman who has an abortion as the result of professional consultation shares the burden of decision. There is a high degree of self-selection in those seeking abortion. In the studies, there is no systematization of data gathering, and inadequate attempts are made to find those who do not return voluntarily. There may be a failure to standardize consideration of the patients by type of abortion—spontaneous, medically indicated, illegal or legal. The differentiation

and relationship between pre- and post-abortal psychopathology are not always clear. The meaning of the aborted pregnancy as well as that of subsequent pregnancies is not always investigated. Many of the studies mix patients who have concomitant sterilization with those were only aborted, and the majority of them have not followed their patients long enough to rule out late sequelae. Some of the evaluations of puerperal psychiatric illnesses do not include abortal histories. Only rarely does a study consider such factors as age, parity and spacing of children as influences on guilt formation. Probably one of the most serious errors is the almost universal projection of figures and results from Scandanavia into expectations from other countries. The difference in sociocultural concepts of abortion may make this a significant sociologic error.

PROFESSIONAL ATTITUDES TOWARD ABORTION

One cannot review this much material without being struck by the fact that one of the largest deterrents to a liberalized abortion policy, in spite of the public clamor, is the health profession itself.[16,21,23–4,29,61,97,115,128,132,150] Abortion is foreign to the attitudes fostered in physicians during their medical training; the gynecologist, the one to do the abortion, has a basic psychologic conflict. A whole generation of professional health workers refuses to let the myth die out that abortion will irreparably harm a woman and somehow place a stigma upon her. Physicians remain adamant. The male physician won't let the woman decide—reminiscent of the moralistic attitude about pain relief in childbirth before Queen Victoria demanded it for herself. The pregnant woman symbolizes proof of male potency, and if the male loosens his rule over women and grants them the right to dispose of that proof when *they* want to, the men then feel terribly threatened lest women can, at will, rob them of their potency and masculinity. This flaunting of traditional subservience may be one of the more powerful and less conscious determinants of our irrational opposition to granting women the right to decide matters in this crucial area of their lives. It may also function in the frequent professional insistence upon sterilization as a "package deal" with abortion. In this way the male physician can maintain control.[97,156]

CONCLUSIONS

Consideration of the emotional stresses of parturition would suggest that induced abortion could be a traumatic and damaging episode in a woman's life. Extensive review of the literature reveals that this has not been true. In fact, for the healthy woman with a happy marriage, abortion is most often truly therapeutic. There is still inadequate evaluation of the meaning of abortion to the woman's sexual partner and her other children. Various previous studies do not cast doubt upon our conclusion about the relative psychiatric safety of abortion, but they do point out the pressing need for baseline studies on the prevalence of psychologic disabilities resulting from other outcomes of pregnancy—the birth of a normal child, a premature child, a retarded or otherwise abnormal child; a neonatal death or late spontaneous abortion; and the consequences of unwanted parenthood for mother, child, family and community. Professional attitudes have been indicted as one of the major deterrents in keeping abortion from its rightful place as a useful tool in helping a couple thoughtfully and carefully plan their family.

Abraham Lincoln advised us well when he said, "The dogmas of the quiet past are inadequate to the stormy present. . . As our case is new, so must we think anew and act anew. . . We must disenthrall ourselves."

Box 76
Fort Defiance, Ariz 86504

References

1. Aarons A: Therapeutic Abortion and the Psychiatrist. Amer J Psychiat 124:743, 1967
2. Addison P: Abortion Act, 1967. Lancet 2: 503, 1968
3. Amark C: Indications For Abortion in States of Psychic Insufficiency. Acta Psychiat Scand 34: Suppl 136:221, 1959
4. Anderson EW: Psychiatric Indications For the Termination of Pregnancy. J Psychosom Res 10:127, 1966
5. Aren P: On Legal Abortion in Sweden. Acta Obstet Gynec Scand 37:Suppl 1, 1958
6. Aren P, Amark C: Prognosis Where Abortion Granted But Not Carried Out. Acta Psychiat Scand 36:203, 1961
7. Arentsen K: Postpartum Psychosis. Danish Med Bull 15:97, 1968
8. Astrachan J: Severe Psychologic Disorders of the Puerperium. Obstet Gynec 25:13, 1965
9. Benson R, Collins H: The Medicolegal Aspects of Psychogenic Abortion. Clin Obstet Gynec 4:265, 1961
10. Bernstein I: Psychiatric Indications for Therapeutic Abortion. Minn Med 50:51, 1967
11. Bolter S: The Psychiatrist's Role in Therapeutic Abortion: The Unwitting Accomplice. Amer J Psychiat 119:312, 1962
12. Boulas SH, Preucel RW, Moore JH: Therapeutic Abortion. Obstet Gynec 19:222, 1962
13. Bratfos O, Haug J: Puerperal Mental Disorders in Manic Depressive Females. Acta Psychiat Scand 42:283, 1966
14. Brekke B: Other Aspects of the Abortion Problem.[18]
15. British Medical Association Committee on Therapeutic Abortion: Indications For Termination of Pregnancy. Brit Med J 1:171, 1968
16. Burke MF: Suicide in pregnancy. Brit Med J 2:49, 1968
17. Cain A, Erickson ME, Fast I, et al: Children's disturbed reactions to their mother's miscarriage. Psychosom Med 26:58, 1964
18. Abortion in the United States. Edited by MS Calderone. New York, Harper & Row, 1968
19. Calderone MS: Illegal abortion as a public health problem. Amer J Public Health 50: 948, 1960
20. Cheney C: Indications for therapeutic abortion. JAMA 103:1914, 1934
21. Clark M, Forstner I, Pond DA, et al: Sequels of unwanted pregnancy. Lancet 2:501, 1968
22. Cogan N: A medical social worker looks at the new abortion law. Brit J Med 2:235, 1968
23. Cohen R: Some maladaptive syndromes of pregnancy and the puerperium. Obstet Gynec 27:562, 1966
24. Cohen S: Abortion for the emotionally disturbed? J Med Ass Georgia 57:489, 1968
25. Corcoran C: Abortion—A catholic view. Illinois Med J 135:700, 1969
26. Cosgrove SA: Lack of Relation Between Therapeutic and Criminal Abortion. Quart Rev Surg Obstet Gynec 16:223, 1959
27. Council of the Royal College of Obstetricians and Gynecologists: Legalized Abortion. Brit Med J 5491:850, 1965
28. Crowley R, Laidlaw R: Psychiatric opinion regarding abortion: Preliminary report of a survey. Amer J Psychiat 124:359, 1967
29. Curran D: Psychiatric indications for the termination of pregnancy. New Zeal Med J 60:467, 1961
30. Daniels R, Lessow H: Severe postpartum reactions. Psychosomatics 5:21, 1964
31. Destounis N: Postpartum psychiatric syndromes. Delaware Med J 38:16, 1966
32. Deutsch H: The Psychology of Women, Motherhood, Vol 2, New York, Grune and Stratton, 1945
33. de Veber LL: Antenatal euthanasia. New Eng J Med 280:1248, 1969
34. Diggory PLC: Some experiences of therapeutic abortion. Lancet 1:873, 1969
35. Douglas G: Some emotional disorders of the puerperium. J Psychosom Res 12:101, 1968
36. Douglas G: Puerperal depression and excessive compliance with the mother. Brit J Med Psychol 36:271, 1963
37. Dunn HP: Therapeutic Abortion in New Zealand. New Zeal Med J 68:233, 1968
38. Eastman N: Induced abortion and contraception. Obstet Gynec Survey 22:3, 1967
39. Ebaugh F, Heuser KD: Psychiatric aspects of therapeutic abortion. Postgrad Med 2: 325, 1947
40. Editorial, New Eng J Med 280:1240, 1969
41. Ekblad M: Induced abortion on psychiatric grounds: A follow-up study of 479 women. Acta Psychiat Scand 31: Suppl 99:1, 1955
42. Ekblad M: Proceedings, International Planned Parenthood Conference, Stockholm, 1953
43. Ekblad M: Psychiatric follow-up study of women after legal abortion. Acta Psychiat Scand (Suppl) 80:162, 1953
44. Enoch MD: Psychiatric sequelae to the termination of pregnancy. Brit Med J 1:563, 1967
45. Field M: The Re-legalization of Abortion in Soviet Russia. New Eng J Med 255:421, 1956
46. Flowers CE: Address at Navajo Obstetrics and Gynecology Seminar, Gallup, New Mexico, 1968
47. Forssman H, Thuwe I: One hundred twenty children born after application for therapeutic abortion refused. Acta Psychiat Scand 42:71, 1966

48. Finnadi I: Surveys in induced and spontaneous abortions in the Copenhagen area. Acta Psychiat Scand 40:Suppl 189:238, 1964
49. Gebhard PH, Pomeroy WB, Martin CE, et al: Pregnancy, Birth, And Abortion. New York, Harper & Row, 1958
50. George BJ: Current abortion laws. Illinois Med J 131:696, 1967
51. Gillis A: Follow-up after abortion. Brit Med J 1:506, 1969
52. Gold E, Erhardt CL, Jacobziner H, et al: Therapeutic abortion in New York: Twenty year review. Amer J Public Health 55:964, 1965
53. Guttmacher A: "Therapeutic Abortion: One Physician's Viewpoint." Quart Rev Surg Obstet Gynec 16:235, 1959
54. Guttmacher A: The Shrinking Non-Psychiatric Indications for Therapeutic Abortion.[12]
55. Hammond H: Therapeutic abortion. Amer J Obstet Gynec 89:349, 1964
56. Harrison CP: On the futility of legalizing abortion. Canad Med Ass J 95:360, 1966
57. Harrison C: Teenage pregnancy—Is abortion the answer? Pediat Clin N Amer 16: 363, 1969
58. Hartman R, et al: A symposium: Medical implications of the current abortion law in Illinois. Illinois Med J 131:666, 1967
59. Hauschild T: The role of the psychiatrist in therapeutic abortion and sterilization. Med Bull US Army Europe 20:322, 1963
60. Hayman A: Some aspects of regression in non-psychotic puerperal breakdown. Brit J Med Psychol 35:135, 1962
61. Heller A, Whittington H: The Colorado story: Denver General Hospital experience with the change in the law on therapeutic abortion. Amer J Psychiat 125:809, 1968
62. Helperin M: The problem of criminal abortion. Quart Rev Surg Obstet Gynec 16:231, 1959
63. Hemphill RE: Incidence and nature of puerperal psychiatric illness. Brit Med J 2: 1232, 1952
64. Henker F: Abortion and sterilization from psychiatric and medico-legal viewpoints. J Arkansas Med Soc 57:368, 1961
65. Hook K: Refused abortion. Acta Psychiat Scand 39:Suppl 168, 1963
66. Ingram I, Treloar HS, Thomas GP, et al: Interruption of pregnancy for psychiatric indications—A suggested method of control. Obstet Gynec 29:251, 1967
67. Jansson B: Mental disorders after abortion. Acta Psychiat Scand 41:87, 1965
68. Jansson B: Psychic insufficiencies associated with childbearing. Acta Psychiat Scand 39:Suppl 172, 1963
69. Javert C: Psychosomatic aspects of habitual abortion. Med Times 90:115, 1962
70. Jacobson L, Kalj L, Nilsson A: Post-partum mental disorders in an unselected sample: Frequency of symptoms and predisposing factors. Brit Med J 1:1640, 1965
71. Jensen M: quoted in Foreign Letters. JAMA 157:1378, 1955
72. Kalj L, Jacobson L, Nilsson A: Postpartum mental disorders in an unselected sample: The influence of parity. J Psychosom Res 10:317, 1967
73. Kalj L, Jacobson L, Nilsson A: Postpartum mental disorders in an unselected sample: The psychiatric history. J Psychosom Res 10:329, 1967
74. Kalj L, et al: Postpartum mental disorder in an unselected sample: The importance of the unplanned pregnancy. J Psychosom Res 10:341, 1967
75. Kalj L, Malmquist A, Nilsson A: Psychiatric aspects of spontaneous abortion: II. The importance of bereavement, attachment, and neurosis in early life. J Psychosom Res 13: 53, 1969
76. Kane F, Ewing J: Therapeutic abortion—Quo vadimus? Psychosomatics 9:202, 1968
77. Kay DWK, Shapira K: Psychiatric sequelae of termination of pregnancy. Brit Med J 1:5535:299, 1967
78. Knar-Colwell JJ: Neuroticism in the early puerperium. Brit J Psychiat 111:1189, 1965
79. Kenin L, Blau N: Mental illness associated with the postpartum state. Clin Obstet Gynec 5:716, 1962
80. Uhrus K: Some aspects of the Swedish law governing termination of pregnancy. Lancet 2:1292, 1964
81. Kestenberg J: Outside and inside, male and female. J Amer Psychoanal Ass 16:457, 1968
82. Knutson A: When does a human life begin? Viewpoints of public health professionals. Amer J Public Health 57:2163, 1967
83. Koeniger P: The physician and abortion law. Alaska Med 10:119, 1968
84. Kolstad P: Therapeutic abortion. Acta Obstet Gynec Scand 36: Suppl 6, 1957
85. Koya Y: A study of induced abortion in Japan and its significance. Milbank Mem Fund Quart 32:282, 1954
86. Kretzchmar RM, Norris AS: Psychiatric implications of therapeutic abortion. Amer J Obstet Gynec 198:568, 1967
87. Kummer J: Post-abortion psychiatric illness—A myth? Amer J Psychiat 119:980, 1963
88. Kummer J: Psychiatric contraindications to pregnancy. Calif Med 79:31, 1953
89. Lader L: Abortion. Indianapolis, Bobbs-Merrill Co, Inc, 1966
90. Laidlaw R: Other aspects of the abortion problem.[18]
91. Leng GA: British abortion law amendment. Singapore Med J 9:59, 1968

92. Lidz T: Other aspects of the abortion problem.[10]
93. Lomas P: Observations on the psychotherapy of puerperal breakdown. Brit J Med Psychol 34:245, 1961
94. Malmfors K: Status of women after legal abortion. Svensk Lakartidn 48:2445, 1951
95. Malmquist A, Kaij L, Nilsson A: Psychiatric aspects of spontaneous abortion: I. A matched control study of women with living children. J Psychosom Res 13:45, 1969
96. Mandelbrote BM, Monro M: Neurotic illness as a factor in reproduction. Acta Psychiat Scand 40:419, 1964
97. Mandy AJ: Reflections of a gynecologist.[123]
98. Mandy T, Scher E, Farkas R, et al: The psychic aspects of sterility and abortion. Southern Med J 44:1054, 1951
99. Mann E: Psychiatric investigation of habitual abortion. Obstet Gynec 7:589, 1956
100. McCoy D: The emotional reaction of women to therapeutic abortion and sterilization. J Obstet Gynaec Brit Comm 75:1054, 1968
101. McGraw R: Legal aspects of termination of pregnancy on psychiatric grounds. New York J Med 54:1605, 1956
102. Mehlan KH: Combatting illegal abortion in the socialist countries of Europe. World Med J 13:84, 1966
103. Melges F: Postpartum psychiatric syndromes. Psychosom Med 30:95, 1968
104. Meyerowitz S, Romano J: Who may not have an abortion? JAMA 209:260, 1969
105. Montagu MF: Introduction.[18]
106. Montgomery T, Lewis A, Hammersly M: Maternal deaths in California 1957–1962. Calif Med 100:412, 1964
107. Moore R: Psychiatric and legal aspects of therapeutic abortion and sterilization. New Zeal Med J 58:772, 1959
108. Muller C: The dangers of abortion. World Med J 13:78, 1966
109. Mumford RS: An interdisciplinary study of four wives who had induced abortions. Amer J Obstet Gynec 87:865, 1963
110. Niswander K, Patterson R: Psychologic reaction to therapeutic abortion. Obstet Gynec 29:702, 1967
111. Norris AS: The tired mother. J Iowa Med Soc 54:478, 1964
112. Nuckols F: Postpartum and postoperative psychiatric emergencies: Related syndromes. Alabama J Med Sci 2:264, 1965
113. Patt S, Rappaport RG, Barglow P: Follow-up of therapeutic abortion. Arch Gen Psychiat (Chicago) 20:408, 1969
114. Peck A: Therapeutic abortion: Patients, doctors, and society. Amer J Psychiat 125:797, 1968
115. Peck A, Marcus H: Psychiatric sequelae of therapeutic interruption of pregnancy. J Nerv Ment Dis 143:417, 1966
116. Pitt B: Atypical depression following childbirth. Brit J Psychiat 114:1325, 1968
117. Ponimerenke WT: Abortion in Japan. Obstet Gynec Survey 10:145, 1935
118. Robb DF: The abortion act of 1967. Practitioner 201:694, 1968
119. Robinson D: Management of combined organic and emotional factors in a post partum psychosis. Minn Med 49:1897, 1966
120. Roger TF: Attitude toward abortion. Amer J Psychiat 125:804, 1968
121. Abortion in America. Edited by H Rosen. Beacon Press, Boston, 1967
122. Therapeutic Abortion. Edited by H Rosen. Julian Press, New York, 1954
123. Rosenberg A, Silver E: Suicide, psychiatrists and therapeutic abortion. Calif Med 102: 407, 1965
124. Royal Medico-Psychological Association. Memorandum on Therapeutic Abortion. Brit J Psychiat 112:1071, 1966
125. Russell KP: Therapeutic abortions in California in 1950. Western J Surg 60:497, 1952
126. Sandosham AA: Legal abortion. Med J Malaya 22:167, 1968
127. Sandosham AA: Our abortion laws. Med J Malaya 22:165, 1968
128. Schwarz RA: Psychiatry and the abortion laws: An overview. Compr Psychiat 9:99, 1968
129. Senay E: Post partum depression: A case review, diagnostic, treatment, and sociomedical aspects. Conn Med 30:645, 1966
130. Shainess N: Abortion: Social, psychiatric, and psychoanalytic perspectives. New York J Med 68:3070, 1968
131. Sim M: Abortion and the psychiatrist. Brit Med J 5358:680, 1963
132. Idem: Abortion and the psychiatrist. Brit Med J 5350:145, 1963
133. Idem: A guide to psychiatry. London, Livingstone, 1968
134. Idem: Psychiatric disorders of pregnancy. J Psychosom Res 12:95, 1968
135. Simon A: Psychiatric indications for therapeutic abortion and sterilization. Clin Obstet Gynec 7:67, 1964
136. Simon N, Senturia A, Rothman D: Psychiatric Illness Following Therapeutic Abortion. Amer J Psychiat 124:59, 1967
137. Simon N, Senturia A: Psychiatric sequelae of abortion. Arch Gen Psychiat (Chicago) 15:378, 1966
138. Sloane RB: The unwanted pregnancy. New Eng J Med 280:1206, 1969
139. Sorrel WE: Abortion: Its psychodynamic effects. Psychosomatics 8:146, 1967
140. Stephenson HA: Therapeutic abortion. Obstet Gynec 4:578, 1954
141. Taylor ES, Droegemueller W, Drose V: The first year of experience in Colorado with the

...new abortion law. Amer J Obstet Gynec 103:694, 1969

142. Tietze, R.: Psychiatric indications for abortion. Minn Med 50:49, 1967

143. Tietze, C: Therapeutic abortion. JAMA 209:229, 1969

144. Tietze C, Lewit S: Abortion. Sci Amer 220: 21, 1969

145. Tietze C: Induced abortion and sterilization as methods of fertility control. J Chronic Dis 18:1161, 1965

146. Tietze C: Legal abortion in Scandinavia. Quart Rev Surg Obstet Gynec 16:227, 1959

147. Tietze, C: Therapeutic abortions in New York City, 1943–1957. Amer J Obstet Gynec 60:146, 1950

148. Tietze: Therapeutic abortion in the United States. Amer J Obstet Gynec 101:784, 1968

149. Tod EDM: Postpartum depression. Lancet 2:1264, 1964

150. Tredgold RF: Psychiatric indications for the termination of pregnancy. Lancet 2:1251, 1964

151. Turner GF, Jr: Postpartum and postoperative psychiatric emergencies: A description of the syndromes. Alabama J Med Sci 2: 251, 1965

152. Vanden Bergh RL, Taylor ES, Dross V: Emotional illness in habitual aborters following entering of the incompetent cervical os. Psychosom Med 28:257, 1966

153. Warner M: Successful pregnancies after spontaneous and induced abortions. Western J Surg 64:504, 1956

154. Wilson T: Why therapeutic abortion? Minn Med 50:55, 1967

155. Westoff C; Moore EC; Ryder NB: The structure of attitudes toward abortion. Milbank Mem Fund Quart 47:11, 1969

156. White R: Induced abortions: A survey of their psychiatric implications, complications, and indications. Texas Rep Biol Med 24: 531, 1966

157. Wiener A, Sicahiltter R: The postpartum psychosis. J Int Coll Surg 36:490, 1961

158. Wilson DC: Psychiatric implications in abortions. Virginia Med Monthly 79:448, 1952

159. Winokur G, Ruangrakool S: Postpartum impact on patients with independently diagnosed affective disorders. JAMA 197:242, 1966

160. Wolff T, Caldwell J: Psychiatric aspects of therapeutic abortion. Florida Med Ass J 52:95, 1965

161. Yalom I, Lunde DT, Moos RH, et al: Postpartum blues syndrome. Arch Gen Psychiat 18:16, 1968

Therapeutic Abortion

Definitions. Therapeutic abortion is the termination of pregnancy before the period of fetal viability for the purpose of saving the life of the mother or safeguarding her health. Because concepts are changing rapidly, the definition of therapeutic abortion lacks precision. The word "health" in particular is variously interpreted. In its broadest sense, as defined by the World Health Organization, it applies not only to physical health but also to mental health and social well-being. Therapeutic abortion, unlike any other surgical operation, is governed by statute or common law in all states, but the wording of the regulations differs widely. In the strictest sense the law in most states does not permit the procedure for reasons such as illegitimacy, poverty, or rape, or on the basis that the infant is likely to be gravely malformed. Despite its apparent simplicity the law remains vague because the definitions of "life," "save," and "preserve" are subject to widely varying interpretation. For example, one English high court has acquitted a physician for performing therapeutic abortion in a case of rape of a young girl (*Rex* v. *Bourne*. For details see Harper). Abortions are commonly performed in cases of rubella, as a result of which the child may be malformed. In a time of rapidly changing laws, concepts, and mores, therapeutic abortion cannot be defined nor can the listing of its indications carry any degree of accuracy or permanence.

Legal Status. Contrary to popular belief today's stringent abortion laws are of fairly recent origin. Before quickening (the term applied to the first definite perception of fetal movement, which occurs between the sixteenth and twentieth weeks of gestation), abortion was either lawful or widely tolerated in both the United States and Great Britain until 1803. In that year, as part of a general overhaul of British criminal law, a basic criminal abortion law was enacted that made abortion before quickening illegal. Canon law, creating the dogma that in no circumstance is abortion justifiable, was established in 1869 by Pope Pius IX (Pilpel and Norwick).

The British law of 1803 became the model for similar laws in the United States, but it was not until 1821 that Connecticut enacted the nation's first abortion law. Throughout the nation abortion became illegal except to save the life of the mother. In a few states, the word "health" was added. Until very recently therapeutic abortion in most states was legally permissible only if it was necessary to save the *life* of the mother. Two states extended the exception to "to prevent serious or permanent bodily injury", and in another two, the exception read "to preserve the life or health of the woman." If the "health of the woman" be construed to include her mental health, still in only two states was therapeutic abortion legally permissible on psychiatric indications or to prevent the birth of a malformed child (as in rubella), which might affect the mother's mental health. Since therapeutic abortion to save the *life* of the woman is rarely necessary, it follows that the great majority of such operations performed in this country went and still go beyond the letter of the law. Nevertheless, experience has shown that if a reputable physician, with the written approval of two other reputable physicians, carries out the operation openly in an accredited hospital, the propriety of the operation is rarely questioned by officers of the law. (For details of the legal status of therapeutic abortion in the United States, consult Harper). Many hospitals have set up abortion committees to decide the permissibility of abortion. Because the intent of these committees is to protect the reputation of the hospital, they have, in general, tended to be restrictive.

There is a growing body of both professional and lay opinion in favor of liberalization of the abortion laws. In 1943, the prestigious New York Academy of Medicine was among the first medical organizations to recognize the need for reform. Since that time the Academy has issued three statements on the subject; the last in 1969 favors repeal of existing abortion laws.

In 1959, the American Law Institute suggested a Model Penal Code governing abortion. This code would authorize therapeutic abortion when a licensed physician believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother, or that the child would be born with grave physical or mental defects, or that the pregnancy resulted from rape by force, or incest. Two physicians must certify in writing their belief in the justifying circumstance.

In 1967 the House of Delegates of the American Medical Association went on record as supporting reform of the abortion laws conforming to the general guidelines set forth in the Model Penal Code. In 1965 the American College of Obstetricians and Gynecologists recommended, in addition to the provision of the Model Penal Code, that social and total economic environment, actual or reasonably foreseeable, be considered as having a bearing on the health of the mother.

Between 1967 and 1969 eleven states amended their abortion laws by extending the indications for therapeutic termination of pregnancy. The new abortion act in Great Britain (1967) is among the most permissive of all recently enacted statutes. It contains two significant clauses in respect to the ascertainment of health of the mother:

1. "Account be taken of the pregnant woman's actual or reasonably foreseeable environment.
2. "Account be taken not only of the effect of pregnancy on the mother but on any existing children of her family."

If liberally construed, the current British abortion law is tantamount to virtually unrestricted abortion.

The report of Governor Rockefeller's special commission to review the New York State Abortion Law was published in March, 1968. The recommendations follow the Model Penal Code, but add two additional indications for abortion as follows:

1. "The pregnancy commenced while the female was unmarried and under 16 years of age, and is still unmarried.
2. "When the female already has four living children."

The principal arguments in favor of a more permissive abortion statute have been summarized by the Governor's special commission as follows:

1. "The deaths, sterility and harmed physical and mental health, resulting from the large number of illegal abortions each year could largely be prevented if such abortions were performed by competent physicians in proper hospital surroundings, within the framework of reasonable legislation.
2. "The wide disparity between the statutory law and actual practice encourages disrespect for the law and places upon the conscientious physician an intolerable conflict between his medical duty to his patients and his duty as a citizen to uphold the law.
3. "The present law places an unfair discrimination on the poor. Persons with money may obtain safe abortions either by traveling to other jurisdictions, by going to high-priced, competent though illegal abortionists, or by obtaining legal abortion here based on 'sophisticated' psychiatric indications."

The divergence between the literal interpretation of the law and current medical practice has led today's physician into an area of grave legal risk. There are indications that the courts may take action when reputable medical practice in accredited hospitals does not conform to strict interpretation of rigid abortion laws.

In 1969 there were two court decisions of major importance in this field. On September 5 the California Supreme Court in the case of *People* v. *Belous* declared the pre-1967 California abortion law unconstitutional on the following grounds:

1. The phrase "necessary to preserve life" is unconstitutionally vague;
2. "The fundamental rights of the woman to choose whether to bear children" is a right of privacy which the statute unconstitutionally abridges;
3. The statute violates the Fourteenth Amendment because of the "delegation of decision making power to a directly involved individual" (i.e., the doctor might be penalized for approving a request for abortion but not for denying a request).

In November, 1969, a decision in the United States District Court for the District of Columbia declared unconstitutional that part of the statute outlawing abortions other than those done "for the preservation of the mother's life or health." The reasoning was similar to, and in part relied upon, that in the *Belous* decision.

The New York law was recently challenged in the Federal Court for the Southern District of New York. The complaint in this case alleged that the abortion law is unconstitutional on grounds similar to those cited in the California case.

Minority reports accompanying many of these reports and resolutions are best summarized by the conclusion to The Minority Report of the Governor's Commission Appointed to Review New York State's Abortion Law, as follows: "Because we consider the proposals of the majority of our Committee to be violative of the fundamental rights of the human child *in utero* and detrimental to our traditional and still viable ideals of the sanctity of human life and the integrity of the family unit, we dissent."

The reform of abortion laws along the guidelines drawn by the American Law Institute has not worked well. Although the number of abortions has increased markedly, the poor still find it difficult to obtain abortions even in situations of obvious merit. Illegal abortions have probably not decreased. The laws are vague and in many instances capriciously interpreted (Monroe; Russell and Jackson; Droegemueller and co-workers; and Overstreet).

Although some states, notably Hawaii, Alaska, Washington, and New York have repealed their abortion laws, in most instances the solution to this complex problem may stem not from legislative reform of existing statutes but from action

of the courts on the constitutionality of abortion laws. (For full discussion of the constitutional questions, see Lucas.)

Indications. The indications for therapeutic abortion are discussed with the diseases that most commonly lead to the operation. A well-documented indication is heart disease in the wake of previous decompensation (p. 783). Another commonly accepted indication is advanced hypertensive vascular disease (p. 738). Still another is carcinoma of the cervix (p. 841).

Currently the two most frequently encountered indications for therapeutic abortion are psychiatric disease and potential abnormalities of the fetus. Among 4,675 therapeutic abortions performed in New York City between 1951 and 1962, inclusive, the major indication for the operation was a mental disorder (Gold and co-workers). Many, however, believe that interruption of pregnancy on psychiatric grounds is often a double-edged sword, which may aggravate rather than ameliorate psychotic tendencies. In the opinion of both Pearce and Martin, when the operation is carried out on mentally unstable women, 25 to 50 per cent are left with remorse and guilt. Even in the case of abortion for nonpsychiatric indications, Gebhard and associates found evidence of prolonged psychiatric trauma in 9 per cent of a sample of American women in whom the operation had been performed therapeutically or criminally. McCoy found that 27 percent of 62 women questioned at least one year after therapeutic abortion expressed varying degrees of regret. Seventy-three per cent of his patients were satisfied, and those for whom pregnancy was socially untenable rarely regretted the operation. Niswander and Patterson found that a similar percentage of their patients regretted the operation. Sim, an English psychiatrist, makes the sweeping statement: "There are no psychiatric grounds for termination of pregnancy." There is little information about the psychologic impact on the patient of refusal of her request for abortion. These women rarely commit suicide even though they may threaten to do so, however, among 249 Swedish women who were denied abortion, Hook found only 23 per cent who had accepted the situation and made a satisfactory adjustment.

Potential abnormality of the fetus as an indication for therapeutic abortion comes up most frequently in connection with maternal rubella. We believe that the operation is justified in selected cases (p. 808). As intrauterine diagnostic technics improve, the problem of serious fetal malformation will present more frequently. Valenti and colleagues have reported a therapeutic abortion performed on the basis of a firm diagnosis of Down's syndrome. Recently Schneck and colleagues have made an intrauterine diagnosis of Tay Sachs enzymatic disease. Other enzymatic disorders can be diagnosed with reasonable accuracy (Ch. 38, p. 1078).

It is impossible to predict what the future acceptable indications for therapeutic abortion will be. It is certain, however, that public opinion will not tolerate much longer the disregard of patients with unwanted pregnancies complicated by serious social problems. The new abortion policy of the American College of Obstetricians and Gynecologists succinctly states the matter as follows:

> Therapeutic abortion may be performed for the following established medical indications:
>
> 1. When continuation of the pregnancy may threaten the life of the woman or seriously impair her health. In determining whether or not there is such risk to health, account may be taken of the patient's total environment, actual or reasonably foreseeable.

2. When pregnancy has resulted from rape or incest: In this case the same medical criteria should be employed in the evaluation of the patient.
3. When continuation of the pregnancy is likely to result in the birth of a child with grave physical deformities or mental retardation.

Incidence. Tietze and Lewit estimate that about 8,000 therapeutic abortions per year were performed in hospitals in the United States from 1963 to 1965 (see also Rowe). This ratio of about 2 abortions per 1,000 live births contrasts with 70 per 1,000 live births in Sweden. In Hungary the number of abortions exceeds the number of live births. As the result of a sharp and continuing decline in traditional medical indications (heart disease, hypertension, pulmonary tuberculosis, and hyperemesis, for example), the number of operations performed on these grounds has fallen dramatically over the past two decades, with the result that interruption of pregnancy on physical indications is becoming rare.

Technic. Vaginal therapeutic abortion may be performed by the traditional dilatation and curettage or by the more recently introduced suction technic. The likelihood of uterine perforation, cervical laceration, hemorrhage, incomplete removal of the placenta, and infection increases sharply after the twelfth week, and perhaps somewhat earlier in primigravidas; for this reason neither dilatation and curettage nor suction curettage should be performed when the duration of pregnancy has exceeded that limit. If interruption of more advanced pregnancy is urgent, abdominal hysterotomy, hysterectomy, or intraamniotic injection of hypertonic saline are preferable.

There are other circumstances in which abdominal hysterotomy or hysterectomy is preferable to the vaginal operation. If, for example, sterilization is to be included in the procedure, combining hysterotomy with tubal ligation in a single operation or performing a hysterectomy is sometimes preferable to the two separate procedures. If the therapeutic abortion is done for medical or serious psychiatric indications, it is often carried out abdominally, because many of these indications for the operation are sound reasons for sterilization also. Still another advantage of abdominal hysterotomy is the greater likelihood of complete evacuation of the uterine contents, particularly if care is exercised in incising the uterine wall, so that the gestational sac may be delivered intact.

Light inhalation anesthesia with or without a muscle relaxant is usually satisfactory for the vaginal operation. The cervix is more easily dilatable if 1 per cent procaine or xylocaine is injected bilaterally into the paracervical tissues. Warming of the dilators is also helpful. To lessen the likelihood of uterine perforation an infusion of 10 units of oxytocin in 500 ml of saline or Ringer's lactate solution is sometimes given slowly during the operation. After the usual preparations for a vaginal operation, the cervix is grasped with a tenaculum and the depth of the uterine cavity is measured by a sound. Care is taken that no instrument be introduced into the uterus beyond that depth. The cervix is very gradually dilated with a series of Hegar dilators (Fig. 1). As shown in Figure 2, the fourth and fifth fingers of the hand introducing the Hegar dilators should rest on the patient's buttock as a further safeguard against uterine perforation. It is our opinion that a sharp curette is more efficacious and that its dangers are not greater than those of the dull instrument in the usual therapeutic abortion. Perforations of the uterus rarely occur on the downstroke of the curette but may occur when any instrument is introduced into the uterus; since the knife edge of a sharp curette is directed downward, it can have no bearing on this hazard. Any curette, however, is a

Fig. 1. Hegar graduated dilators.

Fig. 2. Dilatation of cervix with Hegar dilator. Note that the fourth and fifth fingers rest against the buttock. This maneuver is a most important safety measure because, if the cervix relaxes abruptly, these fingers prevent a sudden and uncontrolled thrust of the dilator, a common cause of perforation of the uterus.

dangerous instrument if injudicious force is applied to it. As shown in Figure 3 the necessary manipulations should be carried out with the thumb and forefingers only.

Suction curettage, introduced by Wu and Wu in China in 1958, has furnished

Fig. 3. Introduction of the curette. Note that the instrument is held merely with the thumb and forefinger; in the upward movement of the curette only the strength of these two fingers should be used. Moreover, just as soon as the curette has entered the cervical canal, the fourth and last fingers rest on the buttock as further protection against uterine perforation. Still another safeguard is the administration of 5 units of oxytocin 15 minutes before the operation and again as the patient is being draped.

a quick, nearly painless and almost completely safe method of performing therapeutic abortions before the twelfth week of gestation. This technic is now the method of choice in the U.S.S.R. (Reid) and in other countries of eastern Europe. It is receiving increasing attention in Great Britain (Kerslake and Casey) and in the United States. The suction curettes are hollow tubes of different diameters, with a moderate-sized opening at or near the tip. A glass trap is interposed between the curette and a vacuum pump. Under paracervical block or light general anesthesia the cervix is dilated sufficiently to allow passage of the curette. Oxytocin is usually administered, and suction up to 760 mm Hg is obtained by covering the bypass at the base of the curette with the thumb. The curette is swept gently around the interior of the uterus until no further products of conception can be seen entering the trap. The entire procedure takes from two to three minutes. It is too soon to predict whether current enthusiasm for this method will be sustained. Perforation of the uterus is not unknown, however.

After the fourteenth week of pregnancy, when the fundus can be palpated through the abdominal wall, abortion may be brought about by the intraamniotic injection of hypertonic saline or 50 per cent glucose solution. The exact mechanism of action is still uncertain. Klopper has shown a rapid fall in estriol excretion after the injection of hypertonic saline. Pregnanediol remains at the same level, however, until the abortion is terminated. Such technics are not new, Boero having produced abortion with an intraamniotic injection of dilute formalin as early as 1935. In 1958, Brosset passed a needle through the abdominal wall into the uterine cavity, withdrew 50 ml of amniotic fluid, and injected an equivalent amount of 50 per cent dextrose in water. In his series, the interval between injection and abortion averaged 38 hours. Since then, articles by numerous authors (Jaffin and associates; Wood and colleagues; Weingold and co-workers; and Goehberg and Reid) have attested the efficacy of this method, using 50 to 200 ml of either 50 per cent dextrose or the even more effective 20 per cent saline. These technics may obviate the necessity for hysterotomy in therapeutic abortion. Although they are far safer than the original technic utilizing formalin, there is danger of infection, especially when dextrose solution is employed. Peel has reported a death from this

procedure, caused by the staphylococcus, and Briggs and MacDonald and colleagues have reported deaths caused by *Clostridium perfringens*.

Inadvertent introduction of hypertonic saline into the maternal circulation carries the likelihood of serious central nervous system and cardiopulmonary reactions. Cameron and Dayan have reported two new deaths as well as five others collected from the literature. All the patients had a high concentration of sodium in the blood and damage to the brain. Six patients showed extreme dehydration. Another reported complication following hypertonic saline is defective hemostasis caused by hypofibrinogenemia and related coagulation defects (Goldstein and also Quilligan). Between 1946 and 1950, more than 70 papers on this technic were published. There were 18 deaths between 1949 and 1952 alone (Wagatsuma). The method is no longer used in Japan. In contrast, both Goodlin and Schiffer report good results in moderately large series. Eastman comments on these studies as follows: "The intramuscular injection of hypertonic saline for the induction of labor, if without substantial hazard, fills a real need in obstetrics; but only time will tell whether precautionary measures against hypernatremia will prevent such catastrophes as here reported."

In 22,179 cases, both gynecologic and obstetric, in which dilatation and curettage were performed for various reasons in two Baltimore hospitals, perforation of the uterus was recognized in 47, or once in about 500 operations, as reported by Badman and Korman. This figure agrees fairly well with that of Kushner and Dill, who report one known perforation in 700 operations. Although it is customary to regard the curette as the main offending instrument, Kushner and Dill point out that in their series of 21 perforations the curette caused less than one third. In the remainder a sponge stick, a sound, or dilators (both Hegar and Goodell) were the perforating instruments in about equal numbers.

The management of perforation of the uterus depends on the clinical events following the accident, particularly with regard to the extent of damage to other pelvic or abdominal viscera. Constant close observation of the patient for signs of peritoneal irritation or abdominal hemorrhage is therefore required. In the Baltimore series cited, abdominal exploration was deemed advisable in about one half the cases. In other series the comparable fraction has been somewhat smaller, averaging perhaps one third or less. In doubtful cases of perforation expectant treatment is the best course.

The morbidity and mortality rates from therapeutic abortion can be documented only from countries with permissive laws. In 23,666 therapeutic abortions performed in Denmark, the mortality rate was 0.7 per 1,000 operations, and serious but nonfatal sequelae ensued in 3.2 per cent (Berthelsen and Østergaard). These sequelae included 98 cases of perforation of the uterus and 122 cases of salpingitis, peritonitis, and septicemia. In addition, 113 cases of nonfatal but serious complications followed 5,320 abdominal hysterotomies, or 2.1 per cent.

The mortality rates appear to be correlated closely with the ease of obtaining abortion and the period in pregnancy when the operation is performed. Thus there is a mortality rate of about 4 per 100,000 abortions in the countries of eastern Europe and Japan, where abortion is not permitted after the third month of pregnancy and is entirely permissive. In contrast, the mortality rate is nearly 70 per 100,000 abortions in Denmark, where abortion may be performed later in pregnancy and is relatively more frequently done for serious medical disease.

Mortality with Contraception and Induced Abortion

THE following paper was written by Christopher Tietze, M.D., Associate Director, Bio-Medical Division, The Population Council. We are pleased to be able to present it here.

AN unwanted pregnancy can be avoided by the use of contraception; an unwanted birth, by induced abortion. Since the ultimate objectives are identical, it is appropriate to compare the two approaches in terms of the risks to the woman's life associated with their use. This can be done by means of a statistical model, based on 100,000 women of reproductive age in fertile unions and exposed to the risk of pregnancy, assuming the following rates of mortality.

1. *Maternal Mortality* from complications of, or associated with, pregnancy, childbirth, and the puerperium, *excluding induced abortion: 20 deaths per 100,000 pregnancies.* This rate corresponds to the current level of maternal mortality in the white population in the United States. Official statistics of maternal mortality in the United States are based only on deaths attributed to complications of pregnancy, childbirth, and the puerperium. Thus defined, the rate of maternal mortality, excluding abortion, was 18 per 100,000 live births in 1964–66.

"Associated" deaths, related to pregnancy and childbirth, but attributed to other causes, e.g., heart disease, are not available for the United States. In England, where such associated deaths are identified and shown separately, they comprise about one-third of the number of deaths attributed to complications of pregnancy, childbirth, and the puerperium. Raising the maternal mortality rate for the U.S. by one-third brings it to 24 per 100,000 live births. Since the number of spontaneous fetal deaths appears to be on the order of one-sixth of all pregnancies and since very few deaths result from spontaneous abortion, an overall risk to life, excluding induced abortion, of 20 per 100,000 pregnancies would seem to be a reasonable approximation.

2. *Mortality* associated with *illegal abortion* induced out of hospital by persons without medical training: *100 deaths per 100,000 abortions.* This is a very rough estimate, and, almost certainly conservative, since it is lower than the maternal mortality rate, excluding abortion, per 100,000 live births for white women in the United States 25 years ago. Fortunately, the precise level of this rate is not relevant to the argument.

3. *Mortality* associated with *legal abortion* performed in hospital, at an early stage of gestation: *3 deaths per 100,000 abortions*, based on current statistics from eastern Europe (73 deaths among 2,567,000 legal abortions in Czechoslovakia, Hungary, and Slovenia, 1957–67).[1]

4. *Mortality* associated with *highly effective contraception: 3 deaths per 100,000 users per year*, based on the studies recently published in Great Britain, on *excess mortality from thromboembolic disease* attributable to the use of *oral contraceptives.* According to the report by Inman and Vessey,[2] the excess mortality from pulmonary embolism, cerebral thrombosis, and coronary thrombosis was 2.2 and 4.5 per 100,000 users for women 20–34 and 35–44 years of age, respectively. A weighted average of these two figures yields an annual excess risk to life of about 3 per 100,000 users.

Line 1 of Table 1 illustrates the reproductive behavior of a group of women neither using contraception nor having recourse to induced abortion.

The interval between two successive conceptions consists of three segments: the period of gestation (G), the anovulatory period following confinement (A), and the average number of ovulatory cycles required for a new conception to occur (O).[3] Of these three segments, the first (G) can be estimated within narrow limits as eight months, allowing for about 15 per cent spontaneous abortions. The anovulatory period (A) is known to vary widely, depending on the extent and average duration of breastfeeding. The present model allows for a range from 4 months without breastfeeding to 14 months with universal and prolonged breastfeeding. The mean value for the third segment (O), also estimated at eight months, may be too high.

The relationship between the number of pregnancies (P and P'), the number of women (W), the time factor (T), and the duration of the three segments of the in-

[1] C. Tietze, "Abortion Laws and Abortion Practices in Europe," *Advances in Planned Parenthood (v.5): Proceedings of the Seventh Annual Meeting of the American Association of Planned Parenthood Physicians, San Francisco, California. 9–10 April 1969.* (In press).

[2] W.H.W. Inman and M.P. Vessey, "Investigation of Deaths from Pulmonary and Cerebral Thrombosis and Embolism in Women of Child-bearing Age," *British Medical Journal*, 2:193–199. 27 April 1968.

[3] R.G. Potter, "Birth Intervals: Structure and Change," *Population Studies*, 17:155–166. November 1963.

TABLE 1. *Illustrative Annual Rates of Pregnancies and of Deaths Associated with Contraception, Pregnancy, and Induced Abortion per 100,000 Women of Reproductive Age in Fertile Unions*

	Pregnancies	Deaths
1. No contraception, no induced abortion	40,000–60,000	8–12
2. No contraception, all pregnancies aborted out of hospital	100,000	100
3. Ditto, aborted in hospital	100,000	3
4. Highly effective contraception	100	3
5. Moderately effective contraception, no induced abortion	11,800–13,000	2.5
6. Ditto, all pregnancies aborted out of hospital	14,300	14.3
7. Ditto, aborted in hospital	14,300	0.4

terval between conceptions (G, A, and O) is defined by the following formula:

$$P = \frac{W \times T}{G + A + O}$$

In our model, T equals 12 months and G, A, and O are also expressed in months. The application of the formula to the estimate described in the preceding paragraph yields the following results:

$$P = \frac{100{,}000 \times 12}{8 + 4 + 8} = \frac{1{,}200{,}000}{20} = 60{,}000$$

$$P' = \frac{100{,}000 \times 12}{8 + 14 + 8} = \frac{1{,}200{,}000}{30} = 40{,}000$$

Thus, without contraception or induced abortion, 100,000 women experience in the course of one year between 40,000 and 60,000 pregnancies, corresponding to average intervals between conceptions ranging from 20 months to 30 months. Given the level of maternal mortality, excluding abortion, assumed for this model, of 20 per 100,000 pregnancies, the 100,000 women would experience between 8 and 12 deaths associated with the reproductive process.

Line 2 assumes no contraception, but all pregnancies are aborted out of hospital. Because gestation and the post-gestational anovulatory period are both substantially shorter than under the assumptions of the preceding line (G = 3 months, A = 1 month), the number of pregnancies rises to 100,000 with 100 deaths:

$$P = \frac{100{,}000 \times 12}{3 + 1 + 8} = \frac{1{,}200{,}000}{12} = 100{,}000$$

In line 3, the same number of abortions is performed legally in hospitals, resulting in 3 deaths instead of 100.

Line 4 assumes a highly effective method of contraception, such as the consistent use of oral anti-ovulants under the combined regimen. The expected number of pregnancies is on the order of 100.[4] Excess deaths from thromboembolic disease equal those resulting from legal abortions in hospitals, shown on the preceding line. Because of the small number of pregnancies, mortality associated with either pregnancy and childbirth or with abortion is insignificant.

A comparison of lines 3 and 4 shows that women regulating their fertility exclusively by means of abortions performed in hospitals are exposed to a risk to life of the same order of magnitude as an equal number of women using oral contraception consistently over the same period of time.

Lines 5, 6, and 7 each assumes a less effective but completely safe type of contraception which extends the average duration of ovulatory exposure required for conception from 8 to 80 months. This level of contraceptive effectiveness was approximately achieved by urban American couples in the 1950's, using the diaphragm or condoms, mainly for child spacing, and not for family limitation.[5]

Line 5 assumes no induced abortions and the number of conceptions is computed as follows:

$$P = \frac{100{,}000 \times 12}{8 + 4 + 80} = \frac{1{,}200{,}000}{92} \cong 13{,}000$$

$$P' = \frac{100{,}000 \times 12}{8 + 14 + 80} = \frac{1{,}200{,}000}{102} \cong 11{,}800$$

The corresponding number of deaths is on the order of 2.5 per 100,000 women per year.

Line 6 assumes that all pregnancies are aborted out of hospital by lay abortionists. The number of pregnancies increases slightly, owing to the shorter gestation and post-gestational anovulatory periods.

$$P = \frac{100{,}000 \times 12}{3 + 1 + 80} = \frac{1{,}200{,}000}{84} \cong 14{,}300$$

The expected number of deaths is 14.3 per 100,000 women per year.

In line 7, the same number of abortions is performed legally in hospitals and the number of deaths drops to 0.4 per 100,000 women or approximately one-seventh of the corresponding values shown in line 3 for no contraception but legal abortion, and in line 4, for oral contraception.

On the basis of this model, the following is my conclusion: In terms of the risk to life, the most rational procedure for regulating fertility is the use of a perfectly safe, although not 100 per cent effective, method of contraception and the termination of pregnancies resulting from contraceptive failure under the best possible circumstances, i.e., in the operating room of a hospital.

While comparable estimates of morbidity, associated with pregnancy and childbirth, abortion out of hospital and in hospital, and oral contraception, are not available, it is not unlikely that the pattern would be similar to that which has been demonstrated in terms of mortality.

[4] C. Tietze, "Oral and Intrauterine Contraception: Effectiveness and Safety," *International Journal of Fertility*, 13 (4):377–384. October–December 1968.

[5] P.C. Sagi, R.G. Potter, C.F. Westoff, "Contraceptive Effectiveness as a Function of Desired Family Size," *Population Studies*, 15:291–296. March 1962.

THE POPULATION COUNCIL

245 Park Avenue, New York, New York 10017

The Population Council is a foundation established in 1952 for scientific training and study in population matters. It endeavors to advance knowledge in the broad field of population by fostering research, training, and technical consultation and assistance in the social and biomedical sciences.

ABORTION LAWS AND ABORTION PRACTICES IN EUROPE

CHRISTOPHER TIETZE*

Legislation regulating abortion in Europe runs the gamut from complete prohibition in Belgium and Ireland to abortion on request in Hungary and the U.S.S.R.[1] In a number of countries, *de facto* practice is more permissive than the indications recognized *de jure*. As shown in Table I, listing all countries with more than one million inhabitants and based in part on a compilation by Hubinont[2], the predominantly Catholic countries of western and southern Europe have the most restrictive legislation. Where artificial termination of pregnancy is not entirely prohibited, it is permitted for the single purpose of saving the woman's life or on narrowly interpreted medical indication, *i.e.*, to avert a serious threat to the woman's health, without consideration of the circumstances under which she has to live. In a few countries, eugenic and/or humanitarian indications are also recognized, at least *de facto*. Generally, therapeutic abortion is done rarely and with reluctance, but this is not universally true and in a few cities, notably in Switzerland, the practices of the medical profession are very liberal.[3, 4]

Northern Europe[5]

The first countries in Europe to take steps toward the liberalization of their abortion laws were Iceland, Sweden, and Denmark, during the 1930's. After World War II, Sweden in 1946 and again in 1963,[6] and Denmark in 1956,[7] further revised their abortion laws. Finland passed a liberal abortion statute in 1950[8] and Norway in 1960.[9] In the latter country, the new law merely codified what had long been accepted medical practice.

The range of acceptable indications is roughly the same in Sweden, Norway, Denmark and Finland. In each instance the law recognizes a medical indication, a eugenic indication, and a humanitarian indication. The scope of the medical indication has been explicitly extended to include considerations of a mixed socio-medical character. The wording of the Danish statute of 1956 will serve as an example. Under this statute, termination of pregnancy is permitted 'if the induction of an abortion is necessary to avert a serious danger to the life or health of the woman. In order to evaluate this danger, an appreciation shall be made of all the circumstances of the case, including the conditions under which the woman will have to live, and consideration shall be given not only to physical or mental illness, but also to any actual or potential state of physical or mental infirmity'.[7]

In regard to the eugenic indication, the older statutes mention only the hereditary transmission of mental disease, mental deficiency, and other severe illness or defect. Sweden's Royal Medical Board, however, has authorized the termination of pregnancy on psychiatric indication in many cases of German measles and in at least one celebrated case of thalidomide use.[10, 11] The 1963 amendment to the Swedish law and the new Danish and Norwegian statutes extend the traditional eugenic indication to cover damage or disease acquired during intra-

* Bio-Medical Division, The Population Council, New York, N.Y.

TABLE I

Abortion laws and abortion practices in Europe, 1969

	Recognized indications	De jure	De facto
I	Absolute prohibition	Belgium*	Ireland
		Ireland	
II	Threat to woman's life	Albania	Albania
		Austria*	Italy
		Italy	Portugal
		Netherlands*	Spain
		Portugal	
		Spain	
III	Medical	France	Austria*
		German Fed. Rep.	France
		Switzerland*	German Fed. Rep.
IV	Medical, eugenic, and/or humanitarian	German Dem. Rep.*	Belgium*
		Greece	Greece
		Rumania* (1)	Netherlands*
V	Medical-social and eugenic	Great Britain	Great Britain
			Switzerland*
VI	Medical-social, eugenic, and humanitarian	Denmark	Denmark
		Finland	Finland
		Norway	German Dem. Rep.*
		Sweden	Norway
			Rumania* (1)
			Sweden
VII	Medical, eugenic, humanitarian, and social	Czechoslovakia	Czechoslovakia
		Poland*	Yugoslavia
		Yugoslavia	
VIII	On request	Bulgaria (2)	Bulgaria
		Hungary	Hungary
		U.S.S.R.	Poland*
			U.S.S.R.

* *De facto* practice more permissive than *de jure* indications.

1. The *de jure* position for women 45 years of age and over and those with four or more children is in Group VIII. Information on the *de facto* position is fragmentary but the reported number of abortions suggests Group VI.

2. For children, women the *de jure* position is Group VII.

uterine life. The humanitarian indication applies to pregnancies resulting from offenses against the penal code, such as forcible and statutory rape, as well as incest.

With minor exceptions, the maximum period of gestation at which abortion is permissible is five months in Sweden, four months in Denmark and Finland, and three months in Norway.

Examination of the administrative machinery implementing the abortion statutes in these four countries of northern Europe reveals important differences. The procedure is most centralized in Sweden, where, until 1965, more than 85 percent of all legal abortions were authorized by the Royal Medical Board in Stockholm, which makes its decision on the basis

of a written report from the physician who has examined the woman seeking abortion. The remaining 15 percent of the terminations were performed on the authority of a certificate signed by two physicians. The latter type of authorization accounted for one-fourth of all cases in 1966 and about one-third in 1967, possibly indicating a greater willingness on the part of Swedish doctors to accept responsibility for the decision.

In Denmark, most legal abortions require the unanimous authorization of a committee of three persons, attached to the local Mothers' Aid, a publicly supported organization, which conducts a thorough medical and social investigation. Twenty such committees have been established throughout the country, including five in Greater Copenhagen, each consisting of a psychiatrist, a gynecologist, and a social worker. Abortion on purely medical indications, where the threat to life and health results from a disease and not from the conditions under which the woman lives, may be performed on the sole authority of the appropriate chief of service. These cases represent about one-tenth of the total number of legal abortions in Denmark.

In Finland and Norway, the administrative machinery is relatively decentralized, with most legal abortions approved by two physicians, one of whom must be a gynecologist or surgeon on the permanent staff of a hospital. In Finland, the other physician is drawn from a roster of medical specialists established by the State Medical Board; in Norway, he is appointed by the county health officer and must be trained in psychiatry or social medicine.

In recent years, commissions of experts to re-evaluate the abortion question have been appointed in Sweden, Denmark, and Finland. The report of the Danish commission was published in early 1969.[18] A majority of its members rejected abortion on request, at least 'for the time being', but recommended four new indications for the interruption of pregnancy: Advanced age ('If the woman has completed her thirty-eighth year prior to the end of the twelfth week of pregnancy'), multiparity ('If the woman has given birth to at least four children who live at home and are under eighteen years of age'), immaturity ('If the woman, because of her youth or immaturity, cannot for the time being take care of the child in a responsible manner'), and social stress ('If pregnancy, childbirth, or care for the child may be assumed to result in severe stress on the woman, which cannot be averted in any other way, so that termination of pregnancy is considered necessary in consideration of the woman, the maintenance of the home, or the care of other children in the family'). H. Hoffmeyer, in a minority report, supported abortion on request for all women. The committee also recommended that the maximum period of gestation at which a pregnancy may be terminated be reduced from sixteen weeks to twelve weeks.

The reports of the Swedish and Finnish commissions are not yet available for analysis. Because it is known that the Swedish commission was given a mandate for a further liberalization of the indications for abortion, its recommendations and the resulting action of the legislature, if any, are expected with keen anticipation.

Legal abortions in Sweden increased from less than 0.1 per 1,000 population in 1939, following the enactment of a liberalized abortion law, to 0.9 per 1,000 in 1951, after which the trend was reversed, and the abortion rate dropped below 0.3 per 1,000 during the seven years 1957–63 (Table II and Figure 1), although the upward trend was resumed in 1961. Five years later the abortion rate surpassed the high point of the early 1950's and in 1967 it reached a peak of about 1.2 abortions per 1,000 population.[19] The course of events in Denmark was roughly parallel to that in Sweden, on a higher level, at least until 1966.[20]

In Sweden about 35 percent of the women undergoing legal abortion in 1964–65 were single, 55 percent were married, and 10 percent were widows or divorcées. About 75 percent had previously given birth, including 10 percent with five or more children.[21] In Denmark the proportions of married women (79 percent), parous women (89 percent), and mothers of five or more children (12 percent) were higher, but there were relatively fewer single women (14 percent) and previously married women (7 percent).[22] These statistics are based, respec-

TABLE II

Legal abortions in Sweden, 1939-67, and Denmark, 1939-66

Year	Number		Rate per 1,000 population	
	Sweden	Denmark	Sweden	Denmark
1939	439	484	.07	.13
1940	506	522	.08	.14
1941	496	519	.08	.13
1942	568	824	.09	.21
1943	703	977	.11	.25
1944	1,088	1,286	.17	.32
1945	1,623	1,577	.24	.39
1946	2,378	1,930	.35	.47
1947	3,534	2,240	.52	.54
1948	4,585	2,543	.67	.61
1949	5,503	3,425	.79	.81
1950	5,889	3,909	.84	.92
1951	6,388	4,743	.90	1.10
1952	5,322	5,031	.75	1.16
1953	4,915	4,795	.69	1.10
1954	5,089	5,140	.71	1.17
1955	4,562	5,381	.63	1.21
1956	3,851	4,522	.53	1.01
1957	3,386	4,023	.46	.90
1958	2,825	3,895	.38	.86
1959	3,071	3,587	.41	.79
1960	2,792	3,918	.37	.86
1961	2,909	4,124	.39	.89
1962	3,205	3,996	.42	.86
1963	3,528	3,971	.46	.85
1964	4,671	4,527	.61	.96
1965	6,208	5,188	.80	1.09
1966	7,254	5,726	.93	1.19
1967	9,600*	NA	1.22	NA

* Preliminary.
NA – Not available.

tively, on abortions approved by the Royal Medical Board in Sweden and the Mothers' Aid organization in Denmark; abortions authorized by two physicians (Sweden) or by the chief of service (Denmark) are excluded.

In Norway, two special surveys established the numbers of abortions performed in hospitals at about 0.6 per 1,000 population in 1949 and 0.9 per 1,000 in 1954.[15] After the law of 1960 had become operative in February, 1964, the abortion rate increased to 1.2 per 1,000 population in 1966.[16]

In Finland, legal abortions rose from about 0.7 per 1,000 population in 1951 to 1.4 per 1,000 in 1960. Over the next five years a decline to 1.0 per 1,000 was recorded.[17] In Iceland, according to unpublished data furnished by the Ministry of Health, legal abortions averaged slightly more than fifty per year during the decade 1954–63 without a discernible trend; this figure corresponds to 0.3 abortions per 1,000 population.

The overwhelming majority of legal abortions in northern Europe are performed on

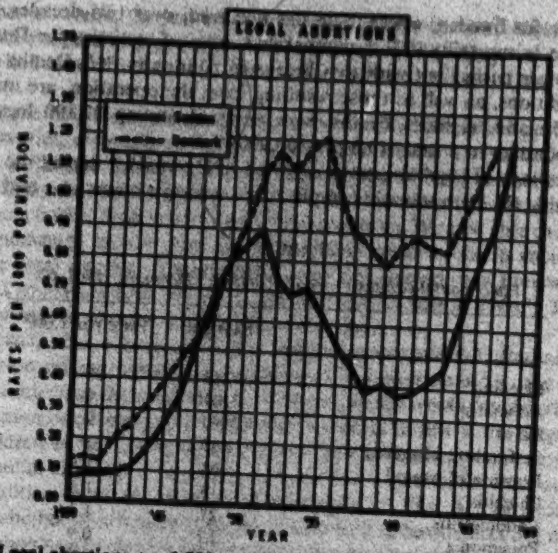


Fig. 1. Legal abortions per 1,000 population: Sweden and Denmark, 1939–67.

medical indication and, most often, on psychiatric grounds. The eugenic and humanitarian indications play very minor roles.

One of the major goals of the liberalization of abortion statutes in northern Europe was to reduce the incidence of illegal abortion. A further objective was to reduce the total number of abortions, legal and illegal combined, by establishing early contact with the pregnant woman and making available to her a broad range of social services. There is no agreement among Scandinavian authors as to what extent the first of these objectives has been achieved, and it is even less likely that the second goal has been realized in any of the countries concerned.[19–21] Whether the abortion laws have actually contributed to what has been referred to as 'abortion mentality' is a much debated question.

A by-product of the liberal laws of northern Europe has been the compilation of nation-wide statistics on mortality associated with legal abortion (Table III). The longest continuous

TABLE III

Mortality with legal abortion: Sweden, 1946–66 and Denmark, 1940–63

Country and period	Legal abortions	Deaths	Rate per 100,000
Sweden			
1946–48	10,500	27	257
1949–53	28,000	27	96
1954–59	22,800	15	66
1960–66	30,600	12	39
Denmark			
1940–50	19,300	38	195
1953–57	23,700	16	68
1961–63	21,700	9	41

series is available for Sweden, where there has occurred, over two decades, a marked and gratifying decline in mortality.[28 31] A comparable series of statistics for Denmark extends over an even longer period but with two breaks in continuity.[28-30] Deaths attributable to pre-existing conditions, as well as those resulting from the operation, are included in these statistics. For Finland, eighteen deaths were reported among 27,100 legal abortions in 1950-57, corresponding to a rate of 66 per 100,000.[28]

Early complications of legal abortions reported in Denmark[32] during the period 1961-65 are shown in Table IV. Late somatic complications among women who had legal abortions

TABLE IV

Early complications of legal abortions: Denmark, 1961-65

	Number	Rate per 1,000
Bleeding*	243	11
Adnexitis**	201	9
Fever	199	9
Perforation of uterus	69	3
Rupture of wound	33	1.5
Phlebitis	33	1.5
Endometritis	27	1.2
Pneumonia	19	0.9
Pulmonary infarction	14	0.6
Injury to cervix	14	0.6
Ileus	12	0.6
Shock	8	0.4
Peritonitis	7	0.3
Sepsis	5	0.2
Other	7	0.3

* Including 91 cases of repeat evacuation presumably because of bleeding.

** Including oophoritis, salpingitis, and parametritis.

have been comprehensively surveyed by Lindahl.[27] Ekblad and others have studied the mental and emotional sequelae among women who had legal abortions,[28, 29] women whose abortion was approved but not carried out,[29] and those whose application was refused,[31] as well as among their children.[29]

United Kingdom

The most recent addition to the roster of countries with extended indications for legal abortion is Great Britain. According to the common law, which is the basis of the British legal system, abortion prior to quickening was not a crime, while abortion after quickening was considered a misdemeanor.[33] In 1803, abortion was made a statutory offense and a felony, although its performance was less severely punished prior to quickening than after quickening.

The Offenses Against the Person Act, enacted in 1861, made 'unlawfully' induced abortion a felony punishable by life imprisonment. The Act did not define 'unlawfully' and made no provision for the therapeutic termination of pregnancy. However, in 1938, in the famous case of *Rex vs. Bourne*, Mr. Justice Macnaughten ruled that abortion need not be unlawful if done in good faith to preserve the mother's life. He further instructed the jury as follows: 'If the doctor is of the opinion . . . that the probable consequences . . . will be to make the woman a

physical and mental wreck, the jury is quite entitled to take the view that the doctor . . . is operating for the purpose of preserving the life of the mother'. Bourne, who had aborted a young girl who had been the victim of a gang-rape attack, was acquitted and a legal precedent was set.[38]

Nevertheless, the official attitude and practice of the British medical profession remained basically conservative, especially in regard to non-private patients. About 1,570 therapeutic abortions were performed in the National Health Service (NHS) hospitals in England and Wales in 1958, rising to 2,830 in 1962 and to 6,380 in 1966. Over the same period, the abortion rate rose from 0.03 to 0.06 to 0.13 per 1,000 population. Women able to pay the customary fee of 100 guineas ($ 290) or more found it notably easier to obtain abortions, especially in London. The total number of therapeutic abortions, including a minimum estimate of those performed in private practice, increased to about 21,000 in 1966.[39] The latter figure corresponds to a rate of about 0.4 per 1,000 population.

In October, 1967, after a long and bitter legislative struggle,[39,40] Parliament enacted a liberalized abortion statute, authorizing abortion if two physicians '. . . are of the opinion, formed in good faith: that the continuance of the pregnancy would involve risk to the life of the pregnant woman or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped'.[39] The Act provides further that 'in determining whether or not there is such risk of injury to health, account may be taken of the pregnant woman's environment both at the time when the child was born and thereafter so far as foreseeable.' Abortions may be performed in NHS hospitals or in facilities approved by the Minister of Health. The latter category includes private nursing homes. Conscientious objectors are specifically excused from participating in abortion procedures. The Act applies to England, Wales, and Scotland, but not to Northern Ireland; it came into force on April 27, 1968, after the appropriate regulations had been issued.[39] Guidelines for physicians in evaluating medical indications have been published by the British Medical Association.[40]

The British Abortion Act of 1967 contains a number of revolutionary innovations. Potentially most important are the words 'greater than if the pregnancy were terminated,' qualifying the 'risk to life or of injury to physical or mental health' of a continuing pregnancy. While this clause was inserted at a late stage of the legislative process, at the request of opponents of liberalization, it has been interpreted as justifying abortion in order to secure a relatively small improvement in the woman's medical condition, since at least the risk to life associated with early abortion under favorable conditions is substantially less than the risk normally associated with pregnancy and childbirth.[41]

Another important passage are the seven words 'or any existing children of her family'. Couched in medical terms, this phrase constitutes a recognition of the fact that not only the mother but her entire family may be adversely affected by the birth of an unwanted child. It should also be noted that the Act does not establish administrative machinery to authorize the termination of pregnancy. Any two physicians can make the determination if they feel that the required conditions are met.

A definitive evaluation of the new British abortion statute will not be possible for some time. During the first year of operation of the Act about 37,700 abortions were reported in England and Wales, including 22,900 in the NHS hospitals and about 15,200 in private practice. It would appear, then, that the number of therapeutic abortions under the NHS has more than tripled, as compared with 1966, while the total for England and Wales has increased to a level of 0.8 legal abortions per 1,000 population. Of the women undergoing abortion, about 48 percent were single, 44 percent were married, and 8 percent widowed, divorced, or separated.[42]

The trend of legal abortions in Britain in the years to come will depend largely on the

attitude of the medical profession. At present, resistance to abortion is often encountered, especially outside of London. One of the major centers of opposition is Birmingham. In one of the city's NHS hospitals, both consultants in obstetrics are Roman Catholics, who do not perform abortions. They are said to refer applicants to another hospital where the chief of the obstetric service has recently boasted that only one abortion was performed on his service in the course of a year. The psychiatrist at the same hospital is Dr. Myre Sim, who feels that 'there are no psychiatric grounds for the termination of pregnancy' and who moved the resolution against abortion reform at the conference of the British Medical Association in 1967.[39] In response to this situation, which makes it impossible for sympathetic general practitioners to refer their patients to local hospitals, a group of physicians and other professional workers have formed the Birmingham Pregnancy Advisory Service, which counsels women on whether they have lawful grounds for abortion, and if they have, tries to help them obtain it. The group hopes to start its own abortion center.[41] Similar groups may be organized in other cities.

Although statutes and practices relating to abortion are much more liberal in northern Europe and in Britain than in the majority of European countries or in the United States, abortion has, in fact, been 'legalized' on limited grounds only. Several of the socialist countries in eastern Europe have adopted far more radical policies.

Eastern Europe[42-58]

In eastern Europe, abortion policy has undergone several major changes since 1920, when interruption of pregnancy at the request of the pregnant woman was legalized in the U.S.S.R. by a joint decree of the Commissariats of Health and Justice. In 1936, another decree restricted legal abortion to a list of specified medical and eugenic indications. In 1955, the policy was once more reversed and the restrictive decree of 1936 repealed by the Presidium of the Supreme Soviet.[59]

Following the example of the U.S.S.R., all the socialist countries of eastern Europe, except East Germany and Albania, adopted similar liberalizing legislation.[60-61] In the words of the preamble to the Soviet decree, the aims of this legislation are 'the limitation of the harm caused to the health of women by abortions carried out outside hospitals', and to 'give women the possibility of deciding themselves the question of motherhood.'

Throughout eastern Europe, official concern with overpopulation or rapid population growth is proscribed by Marxist philosophy. Moreover, several of the countries concerned have very low birth rates, and none has a high birth rate by global standards. At least two countries, Czechoslovakia and Hungary, have long pursued an active population policy by means of family allowances for third and later children.

Within the overall pattern of legal abortion, considerable variation between individual countries is apparent. Abortion at the request of the pregnant woman was legalized in the U.S.S.R., Bulgaria, Hungary, and Rumania. In Poland, the law of 1956 stipulates a 'difficult social situation' as an acceptable reason for the termination of pregnancy. In Czechoslovakia, the law permits abortion for reasons 'which deserve special consideration', among which the Ministry of Health listed in 1957: *(a)* advanced age, *(b)* numerous children, *(c)* loss or disability of husband, *(d)* broken home, *(e)* predominant economic responsibility of the woman for the maintenance of the family or the child, *(f)* difficult circumstances of an unmarried woman resulting from her pregnancy, and *(g)* pregnancy due to rape or other offense. Late in 1961, a new regulation restricted voluntary abortions on the ground of multiparity to women with three or more living children, and also required a threat to the level of living in cases of predominant economic responsibility of the woman.[62] In Yugoslavia, termination of pregnancy may be authorized if the birth of the child would result in a serious personal, familial, or economic situation for the pregnant woman which cannot be averted in any other way.

Commissions for the authorization of abortion, consisting of physicians and representatives of the social services, have been established in Czechoslovakia and Yugoslavia. Medical boards also exist in Hungary, but their function has become purely formal since they must assent if the applicant insists on having her pregnancy terminated. In Poland, abortion is authorized by a certificate from a single physician.

Throughout eastern Europe abortion is prohibited in cases of pregnancy of more than three months' duration, except for medical reasons, and also if the applicant has undergone an induced abortion during the preceding six months. In some countries, such as Czechoslovakia and Hungary, the operation must be performed in an appropriately equipped and staffed hospital, where the typical period of stay is two or three days followed by sick leave if the woman is a wage earner. In Poland and Yugoslavia, however, many legal abortions are done on ambulatory patients. In recent years, suction curettage has been used on an increasing scale throughout eastern Europe because it is technically easier, faster, and less traumatic than the traditional 'D & C'.[54, 57]

The last few years have brought important changes in the abortion laws and practices of some countries in eastern Europe. These changes took place in East Germany, Rumania, and Bulgaria.

The German Democratic Republic did not participate in the general liberalization of abortion laws during the 1950's. After World War II the draconic regulations of the Third Reich were replaced by a series of State laws under which legal abortion could be performed on medical, eugenic, and humanitarian grounds, and to some extent on social or economic grounds also. These statutes were in turn superseded in 1950 by the Law for the Protection of the Mother and the Child, which permits abortion on medical and eugenic indication only. The decision lies with regional commissions which include among their members not only physicians but also representatives of the social services and the quasi-official Union of German Women.[58, 59] In 1965, these commissions were administratively authorized to extend the scope of the medical indication, taking into account the woman's social environment.[60] Since statistics on legal abortions in the German Democratic Republic have not been published since 1962,[61] the effect of this administrative action cannot be evaluated.

The changes in Rumania and Bulgaria were in the opposite direction. In both countries, abortion on request, to be performed without any formalities in any hospital, had been legalized in 1956–57. Rumania abruptly reversed this policy by a decree issued in October, 1966, restricting abortion to women over forty-five years of age and to mothers supporting four or more living children, in addition to the usual medical, eugenic, and humanitarian indications.[62] The medical indication is narrowly defined as a threat to the woman's life. The preamble to the decree of 1966 refers to the 'great prejudice to the birth rate and the rate of natural increase' resulting from the practice of abortion as well as to 'severe consequences to the health of the woman'. It would appear, however, that the primary reason for the repeal of the law of 1957 was concern over the decline in the birth rate, which by 1966 had dropped to 14.3 per 1,000 population, the second lowest in Europe.

In the case of Bulgaria, the change was far less drastic than in Rumania. According to a regulation issued in February, 1968, interruption of pregnancy is prohibited in the case of a woman without a living child, except in the presence of a serious medical or social indication, established by a women's health center.[63]

Women with one or two children must apply to a board which 'shall explain the harmfulness and dangers of abortion, the need to take the pregnancy to full term, the financial support which the family will receive after the birth of the child and, in general, shall make every effort to dissuade every woman who expresses the desire to have her pregnancy interrupted from doing so'. If, nevertheless, the woman persists in asking for the termination of her pregnancy, the board must give its approval. Women over forty-five years of age and those with three or more children do not require the approval of the above-mentioned board.

TABLE V.

Births and abortions in Czechoslovakia, 1953-67, Hungary, 1950-67, and Slovenia, 1955-67:

Year	Number in 1,000's			Rate per 1,000 population		
	Live births	Legal abortions	Other abortions*	Live births	Legal abortions	Other abortions*
1953 Czechoslovakia	271.7	1.5	29.1	21.2	0.1	2.3
1954	266.7	2.8	30.6	20.6	0.2	2.4
1955	269.2	2.7	33.0	20.3	0.2	2.5
1956	262.0	3.1	31.0	19.8	0.2	2.3
1957	252.7	7.3	30.2	18.9	0.5	2.3
1958	235.0	61.4	27.7	17.4	4.6	2.1
1959	217.0	79.1	26.4	16.0	5.8	1.9
1960	217.3	88.3	26.3	15.9	6.5	1.9
1961	218.4	94.3	26.0	15.8	6.8	1.9
1962	217.5	89.8	26.1	15.7	6.5	1.9
1963	236.0	70.5	29.4	16.9	5.0	2.1
1964	241.1	70.7	28.5	17.1	5.0	2.0
1965	231.6	79.6	26.2	16.4	5.6	1.8
1966	222.5	90.3	25.5	15.6	6.3	1.8
1967	217.4	95.1	24.4	15.1	6.6	1.7
1950 Hungary	195.8	1.7	34.3	20.9	0.2	3.7
1951	190.6	1.7	36.1	20.2	0.2	3.8
1952	183.8	1.7	42.0	19.6	0.2	4.4
1953	206.9	2.8	39.9	21.6	0.3	4.2
1954	223.3	16.3	42.0	23.0	1.7	4.3
1955	210.4	35.4	43.1	21.4	3.6	4.4
1956	192.8	82.5	41.1	19.5	8.3	4.2
1957	167.2	123.4	39.5	17.0	12.5	4.0
1958	158.4	145.6	37.4	16.0	14.7	3.8
1959	151.2	152.4	35.3	15.2	15.3	3.5
1960	146.5	162.2	33.8	14.7	16.2	3.4
1961	140.4	170.0	33.7	14.0	17.0	3.4
1962	130.1	163.7	33.9	12.9	16.3	3.4
1963	132.8	173.8	34.1	13.1	17.2	3.4
1964	132.1	184.4	34.3	13.1	18.2	3.4
1965	133.0	180.3	33.7	13.1	17.8	3.3
1966	138.5	186.8	33.6	13.6	18.3	3.3
1967	148.9	187.5	34.9	14.6	18.4	3.4
1955 Slovenia	32.1	0.4	5.0	21.0	0.3	3.3
1956	31.5	0.8	4.6	20.4	0.5	3.0
1957	30.1	2.2	5.6	19.4	1.4	3.6
1958	28.2	4.7	6.0	18.1	3.0	3.8
1959	28.4	6.4	5.2	18.2	4.1	3.3
1960	27.8	8.2	5.5	17.6	5.2	3.5
1961	29.0	9.3	5.6	18.2	5.8	3.5
1962	29.0	9.5	5.6	18.1	5.9	3.5
1963	29.2	9.4	6.1	18.1	5.8	3.8
1964	29.3	9.4	6.0	17.9	5.8	3.7
1965	30.7	9.9	6.1	18.6	6.0	3.7
1966	30.9	9.5	5.4	18.5	5.7	3.2
1967	29.6	10.1	4.3	17.5	6.0	2.6

* Hospital admissions.

This regulation was issued on the basis of a governmental decree for the encouragement of the birth rate. There is no question, therefore, that the interest from abortion on request was motivated primarily by demographic considerations. The birth rate in Bulgaria was 14.9 per 1,000 population in 1966.

The liberalization of abortion laws in the 1950's resulted in spectacular increases in the incidence of legal abortion throughout eastern Europe. The most comprehensive and trustworthy statistics are those for Czechoslovakia, Hungary, and Slovenia, the most developed among the constituent republics of Yugoslavia (Table V). The U.S.S.R. has not published any statistics on abortion. There are reasons to believe, however, that the number is very large and the rate very high.[44]

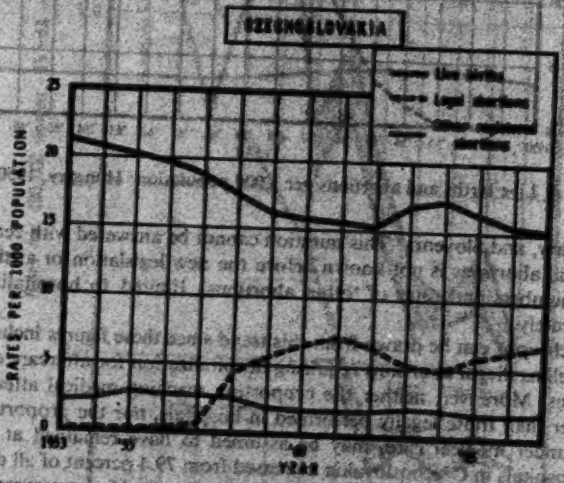


Fig. 2. Live births and abortions per 1,000 population: Czechoslovakia, 1933–67.

In Czechoslovakia (Figure 2), legalization of abortion for non-medical reasons was preceded by almost two years of public discussion. Moderate increases in the abortion rate in 1956 and 1957 reflect the changing attitude of the medical profession.[45] Promulgation of a new and liberalized abortion law in December, 1957, was followed by a steep rise in legal abortions in 1958, which continued at a decelerating pace until 1961, when the rate reached a peak of 6.8 per 1,000 population. The trend was then reversed with a drop to 5.0 per 1,000 in 1963, followed by a renewed upward movement two years later which has continued through 1967.[46, 47]

In Hungary (Figure 3), vigorous efforts to enforce existing laws against criminal abortion in 1952 and 1953 were followed by an increase in births in 1953 and 1954. At about the same time, medical boards for the authorization of therapeutic abortions were established. The growing numbers of legal abortions since 1953 indicate the progressive liberalization of the policies of these boards.[48] After the decree of June 3, 1956, had introduced termination of pregnancy on request, the rate of legal abortions increased rapidly until it reached 18.4 per 1,000 population in 1967, exceeding the birth rate by about one-fourth.[49]

In Slovenia, the rate of legal abortions approaches that found in Czechoslovakia; however, the decline seen in that country during the early 1960's is lacking.[50–52]

What has been the effect of legalization on the frequency of illegal abortions in Czecho-

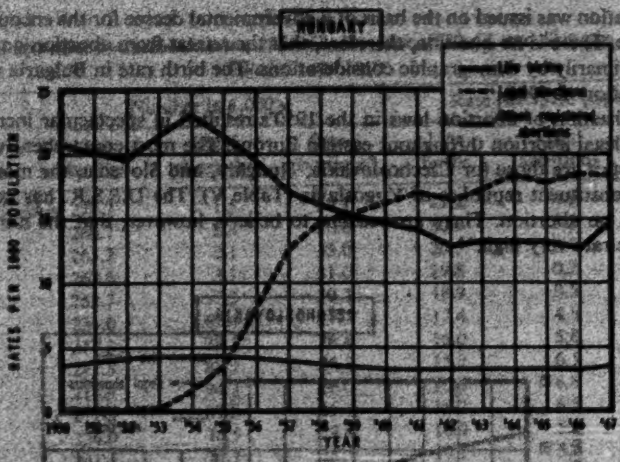


Fig. 3 Live births and abortions per 1,000 population: Hungary, 1930–67.

slovakia, Hungary, and Slovenia? This question cannot be answered with certainty since the number of illegal abortions is not known before the new legislation or at the present time. The reported numbers and rates of 'other abortions', limited to hospitalized cases, have declined moderately.

No firm conclusions can be drawn from this trend since these figures include spontaneous abortions as well as illegal abortions requiring hospitalization for aftercare or the treatment of complications. Moreover, neither the proportion reaching medical attention among all abortions, other than those legally performed in hospitals, nor the proportion hospitalized among those under medical care, may be assumed to have remained at constant levels. Deliveries in hospitals in Czechoslovakia increased from 79.4 percent of all deliveries in 1955 to 98.1 percent in 1966.[15] The corresponding proportions in Hungary were 67.0 percent in 1956 and 96.6 percent in 1965.[16] To what extent this trend toward greater utilization of institutional facilities extends to the treatment of abortion is a matter of conjecture.

Mortality due to abortion, as reported in national cause-of-death statistics, declined rapidly in Czechoslovakia and Hungary after the enactment of liberal abortion statutes in the 1950's; such a change was not seen at that time in countries without new legislation, such as France or England (Figure 4). The declines are even more marked if the deaths associated with the rising numbers of legal abortions are excluded. It should be noted, however, that the level of abortion mortality in Hungary was still significantly higher, in spite of the downward trend, in the early 1960's than in western Europe, while in Czechoslovakia it was only slightly lower than in France or England.

In summary, then, there is little doubt that the number of criminal abortions has declined substantially but that these declines have been masked by increased hospitalization after spontaneous or illegal abortion, resulting in part from restrictions on the private practice of medicine and in part from the fact that women no longer fear prosecution or harassment by the police. Nevertheless, criminal abortion and/or self-abortion have not disappeared, even in Hungary, where abortion has been available on request for more than a decade. There is evidence that this stubborn survival of clandestine abortion is associated with the relative lack of privacy of the official procedure.[17]

'Other abortions' are reported more frequently in Hungary than in Czechoslovakia. According to Hirschler, the high rate reflects the practice of some gynecologists who admit

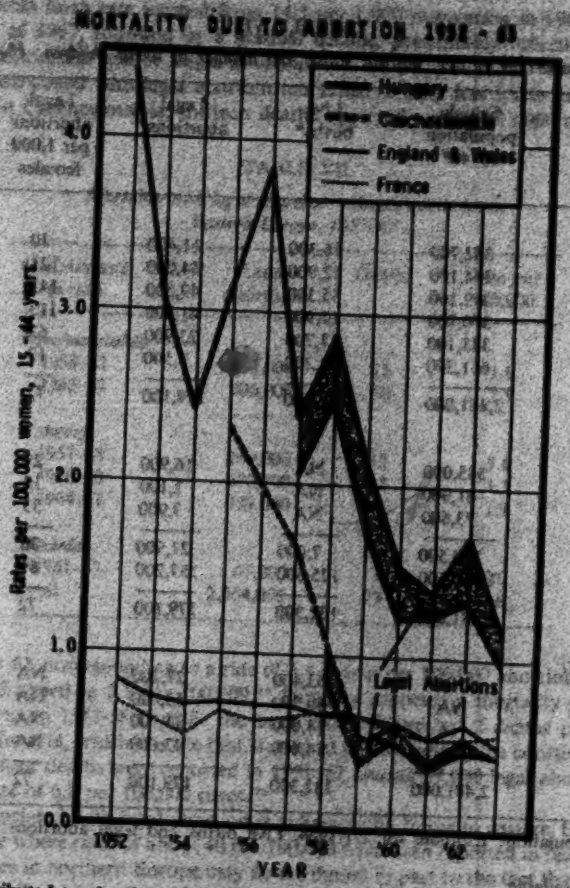


Fig. 4. Deaths attributed to abortion per 100,000 women, 15–44 years of age: Selected countries[a] 1952–63.

women to hospitals under the pretext of incomplete abortion in order to avoid charging the prescribed modest fee for abortion on request or because the women live outside the area from which the hospital may admit for this purpose.[29] There is no ready explanation for the relatively high rate of 'other abortions' in Slovenia.

According to the official statistics for 1965, two out of three women undergoing legal abortion in Czechoslovakia (67 percent) were between twenty and thirty-five years of age, compared with three out of four (74 percent) in Hungary.[30,31] Even higher were the proportions of married women (82 percent in Czechoslovakia, 86 percent in Hungary) and of women who had one or more living children at the time of the abortion (88 percent in Czechoslovakia, 85 percent in Hungary). Table VI shows additional detail on these points for Hungary.

Rumanian statistics are fragmentary. According to reports in the literature, which could not be traced to an official source, 112,000 legal abortions were performed in 1958, the first full year after abortion on request was legalized, and 219,000 in 1959.[32] The corresponding

TABLE VI

Pattern of legal abortion by age, marital status and number of living children: Hungary, 1963–64

Age, marital status, and number of prior living children	Female population 15–49*	Live births*	Legal abortions*	Legal abortions per 1,000 females	Legal abortions per 1,000 live births
Age:					
15–19	382,700	16,300	11,400	30	700
20–24	364,100	52,900	44,000	121	830
25–29	349,100	35,300	49,300	142	1,400
30–34	378,700	17,900	41,800	113	2,300
35–39	383,100	7,700	23,900	62	3,100
40–49	631,300	2,200	8,500	13	3,900
15–49	2,481,000	132,300	179,100	72	1,350
Marital status:					
Single	585,000	NA	16,900	29	NA
Widowed	61,900	NA	1,100	18	NA
Divorced	73,600	NA	3,900	53	NA
Unmarried	720,500	7,000	21,900	30	3,100
Married	1,760,500	125,300	157,200	89	1,250
Total	2,481,000	132,300	179,100	72	1,350
Living children:					
None	NA	63,400	27,200	NA	430
1	NA	40,300	53,600	NA	1,330
2	NA	14,000	35,700	NA	4,000
3 or more	NA	14,600	42,600	NA	2,900
Total	2,481,000	132,300	179,100	72	1,350

* Female population: Estimate for 1/1/1965. Live births and legal abortions: Average of 1963 and 1964.
NA = Not available.

abortion rates were 6.2 and 12.0, respectively, per 1,000 population. For 1965, the Central Committee of the Rumanian Communist Party announced a total of 1,115,000 abortions, 58.6 per 1,000, but it is not clear whether this figure refers to legal abortions only or to all abortions.[9] No data are available for the intervening years, which makes it difficult to evaluate the truly extraordinary figure for 1965 which is four times the number of births.

Following the sudden reversal of policy in late 1966 the number of legal abortions in Rumania dropped precipitously. According to a report of a Danish mission visiting Rumania in late 1967, about 15,000 were performed during the first ten months under the new law.[10] Over the same period, about 104,000 so-called spontaneous abortions were reported. The corresponding rates, computed for a full year, were 2.2 and 6.5, respectively, per 1,000 population. While the abortions reported as spontaneous doubtless include many that were illegally induced, the Rumanian authorities suggested that the high rate may reflect, at least in part, a true increase in incidence, resulting from anatomical damage by repeated induced abortions during the preceding years. It was stated that women admitted to hospitals from November 1966 through March 1967 had experienced, on the average, five prior abortions.

The Rumanian birth rate jumped from 14.3 per 1,000 population in 1966 to 38.4 in the third quarter of 1967, followed by a gradual decline, presumably reflecting increased recourse to contraception and/or illegal abortion.

Mortality associated with legal abortion has fallen to very low levels in eastern Europe (Table VII). In Czechoslovakia, thirteen deaths occurred among 413,000 abortions during

TABLE VII

Mortality with legal abortion: selected countries in Eastern Europe, 1957–67

Country and period	Legal abortions	Deaths	Rate per 100,000
Czechoslovakia			
1958–62	413,000	13	3.1
1963–67	406,000	10	2.5
Hungary			
1957–58	269,000	15	5.6
1960–63	670,000	22	3.3
1964–67	739,000	9	1.2
Slovenia			
1961–67	67,000	4	6.0
Total	2,564,000	73	2.8

the period 1958–62, corresponding to a rate of 3.1 deaths per 100,000 abortions. By 1963–67, mortality had dropped to 2.5 per 100,000.[73] Hungary reported a mortality rate of 5.6 per 100,000 abortions in 1957–58,[62] while the most recent figure is 1.2 deaths per 100,000 for 1964–67.[74] In Slovenia, which has the best statistical service among the constituent republics of Yugoslavia, four deaths were reported in 1961–67 among 67,000 legal abortions, corresponding to a rate of 6.0 per 100,000 cases.[75]

Mortality associated with legal abortion is substantially lower in eastern Europe than in northern Europe where rates of about 40 per 100,000 have been reported in recent years. The higher death rates in northern Europe may be attributed in part to the fact that a substantial proportion of legal abortions is performed after the third month of gestation.[36, 39-41] These late abortions contribute heavily to the total number of deaths; in eastern Europe almost all legal abortions are performed in the first trimester of pregnancy, with the majority in the second month. In addition, many women undergoing legal abortion in northern Europe are ill or at least in poor physical condition, while in eastern Europe the overwhelming majority are in good health.

Statistical information on morbidity associated with legal abortion is less complete than information on mortality, and it is very difficult to achieve comparability between countries and even between investigators in the same country.

One of the early studies from Czechoslovakia reported on 7,331 terminations of pregnancy performed in five hospitals, mainly by dilatation and curettage.[44] The rate of early complications was 34 per 1,000 abortions, including twenty cases of infection, ten cases of bleeding, and four injuries per 1,000 women. At about the same time, three Hungarian authors reported on 23,300 legal abortions in one county, including 13,458 in three large hospitals.[45] In the latter group, 32 per 1,000 women experienced early complications, mainly bleeding and fever, with rates in the three hospitals ranging from 7 to 54. In addition, twenty-one women per

1,000 had to be re-admitted within six weeks of the operation. Serious injury was reported in eleven cases per 1,000.

In recent years, the pattern of early morbidity appears to have improved, although serious problems of statistical comparability remain. Table VIII summarizes Hirschler's countrywide

TABLE VIII

Early complications of legal abortions: Hungary, 1960–67

Type of complication	Rate per 1,000	
	1960–63	1964–67
Perforation of uterus	1.3	1.0
Fever of gynecologic origin	4.8	4.0
Hemorrhage after the abortion	6.3	6.6
Readmission for fever*	5.0	4.3
Readmission for hemorrhage*	11.2	10.0

* Within four weeks after the abortion.

data on early complications in Hungary during the period 1960–67.[35] Černoch, in 1965, reported similar figures for Czechoslovakia, without specifying the coverage: Injuries—0.6 per 1,000 abortions, inflammation—5 per 1,000 abortions, 'more profuse bleeding'—3 per 1,000 abortions.[36]

Information on the sequelae of legal abortion in eastern Europe is scanty. In Hungary, premature birth tends to occur more frequently among women who have had induced abortions than among women who have not had them. This is true regardless of age, parity, employment, and other characteristics of the mother.[36–37] The frequency of prematurity tends to increase with the number of prior induced abortions. However, while prematurity is associated with high infant mortality, legal abortions preceding childbearing have not been numerous enough in Hungary to prevent a drop in infant mortality from 58.8 per 1,000 live births in 1956 to 38.4 per 1,000 in 1966.

In summary, then, abortion laws and abortion practices in Europe run the gamut from the traditional restrictions which prevail mainly in the West and South, through liberalization in the North and in Britain, to complete or almost complete legalization in a number of countries of the East. Whatever direction our own way of dealing with abortion takes, we can draw on the experience of Europe and learn from it.

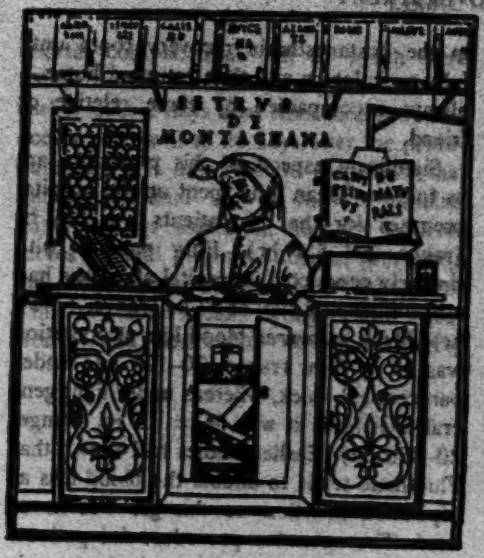
REFERENCES

1. Hess, H., *Die Abtreibung in Europa und den aussereuropäischen Ländern*, Stuttgart, 1967.
2. Hubinont, P. O., 'Abortion in western and southern Europe: a preliminary study,' *Paper presented at the International Conference on Abortion, Hot Springs, Virginia, Nov. 17–20, 1968.*
3. Geser, M., 'Zahlen und Gedanken zur legalen Schwangerschaftsunterbrechung in der Schweiz und im Ausland,' *Schweizerische Medizinische Wochenschrift, 86*: 1006–1010, 8 Sept. 1956.
4. Marr, S., 'Abortion à la Suisse,' *New Statesman*, 7 Apr. 1967.
5. Tietze, C., 'Legal abortion in Scandinavia,' *Quarterly Review of Surgery, Obstetrics and Gynecology, 16*: 227–230, Oct.–Dec. 1959.
6. Sweden: Laws, Statutes, etc., 'Interruption of pregnancy,' *International Digest of Health Legislation, 17*: 152, 1966.
7. Denmark: Laws, Statutes, etc., 'Interruption of pregnancy,' *Ibid., 8*: 377–381, 1957.
8. Finland: Laws, Statutes, etc., 'Interruption of pregnancy,' *Ibid., 2*: 559–561, 1951.
9. Norway: Laws, Statutes, etc., 'Interruption of pregnancy,' *Ibid., 16*: 148–154, 1965.

10. Fletcher, S., 'The issues of two wills,' *The Case for Legalized Abortion Now* (A. F. Guttmacher, ed.), pp. 15–25. Berkeley, 1967.
11. Rapoport, J. L., 'American abortion applicants in Sweden,' *Archives of General Psychiatry, 13*: 24–33, July 1965.
12. Denmark: Justitsministeriet, *Betænkning om Adgang til Svangerskabsafbrydelse*. Copenhagen, 1969.
12a. *Op. cit.*, p. 49.
12b. *Op. cit.*, p. 24.
12c. *Op. cit.*, pp. 182–188.
13. Sweden. Medicinalstyrelsen, *Allmän Hälso-och Sjukvård*. Stockholm, various years.
14. Denmark. Sundhedsstyrelsen, *Medicinalberetning for Kongeriget Danmark*. Copenhagen, various years.
15. Norway: Justisdepartementet, *Innstilling fra Straffelovrådet om Adgangen til å Avbryte Svangerskap*, p. 74. Trondheim, 1956.
16. Finland: Laakintohallitus, *Yleinen terveyden- ja sairaanhoito*. (Suomen Virallinen Tilasto, XI; 67), pp. 154–156. Helsinki, 1966.
17. Aldén, T., 'Om de illegala aborternas antal och geografiska fördelning,' *Abortfrågan* (Sweden: Inrikesdepartementet), pp. 222–234. Stockholm, 1953.
18. Ingelman-Sundberg, A., 'Om de illegala aborternas antal och geografiska fördelning,' *Svenska Läkartidningen, 50*: 2386–2392, 13 Nov. 1953.
19. Quensel, C. E. and Gemell, S., 'Ha de illegala aborterna minskat under de senare åren?,' *Svenska Läkartidningen, 50*: 2784–2792, 24 Dec. 1953.
20. Wahlén, T., 'De illegala aborternas antal: en kommentar till aborthetänkandets bilaga II,' *Svenska Läkartidningen, 51*: 248–250, 29 Jan. 1954.
21. Hoffmeyer, H. and Nørgaard, M., 'Konceptionshyppighed og svangerskabsforløb: undersøgelser og beregninger af den illegale aborthyppighed siden 1940,' *Ugeskrift for Læger, 126*: 355–371, 12 Mar. 1964.
22. Klintskog, E., 'Operationsriskerna vid legal abort,' *Abortfrågan* (Sweden: Inrikesdepartementet), pp. 252–261. Stockholm, 1953.
23. Oram, V., 'Dødsårsag og dødelighed ved legal svangerskabsafbrydelse i årene 1940–50 i Danmark,' *Ugeskrift for Læger, 114*: 482–485, 17 Apr. 1952.
24. Berthelsen, H. G. and Østergaard, E., 'Komplikationer og mortalitet ved legal abortus provocatus baseret på 23,666 anmeldelser til sundhedsstyrelsen i årene 1953 til 1957,' *Ugeskrift for Læger, 120*: 1005–1009, 31 July 1958.
25. Olsen, C. E., Nielsen, H. B. and Østergaard, E., 'Abortus provocatus legalis: en analyse af 21,730 anmeldelser til sundhedsstyrelsen 1961–1965,' *Ugeskrift for Læger, 129*: 1341–1351, 12 Oct. 1967.
26. Oki, M., 'Die Abortsituation in Finnland,' *Internationale Abortsituation, Abertbekämpfung, Antikonzeption* (K-H Mehlan, ed.), pp. 64–69. Leipzig, 1961.
27. Lindahl, J. M., *Somatic Complications following Legal Abortion*, Stockholm, 1959.
28. Ekblad, M., 'Induced abortion on psychiatric grounds: a follow-up study of 479 women,' *Acta Psychiatrica et Neurologica Scandinavica*, suppl. *99*: 1–238, 1955.
29. Jansson, B., 'Mental disorders after abortion,' *Acta Psychiatrica Scandinavica, 41*: 87–110, 1965.
30. Aréen, P. and Åmark, C., 'The prognosis in cases in which legal abortion has been granted but not carried out,' *Acta Psychiatrica et Neurologica Scandinavica, 36*: 203–278, 1961.
31. Hook, K., 'Refused abortion: a follow-up study of 249 women whose applications were refused by the National Board of Health in Sweden,' *Acta Psychiatrica Scandinavica, 39* (suppl. 168): 1–156, 1963.
32. Forssman, H. and Thuwe, I., 'One hundred and twenty children born after application for therapeutic abortion refused: their mental health, social adjustment and educational level up to the age of 21,' *Acta Psychiatrica Scandinavica, 42*: 71–88, 1966.
33. Williams, G., *The Sanctity of Life and the Criminal Law*, p. 152. New York, 1957.
34. Ferris, P., *The Nameless: Abortion in Britain Today*, pp. 42–48. London, 1966.
35. Diggory, P. L. C., 'Some experiences of therapeutic abortion,' *Lancet, 1*: 873–875, 26 Apr. 1969.
36. Abortion Law Reform Association, *Alra Newsletter No. 19*. Late Summer 1967.
37. Hindell, K. and Simms, M., 'How the abortion lobby worked,' *Political Quarterly, 39*: 269–282, July–Sept. 1968.

38. United Kingdom: Laws, Statutes, etc., 'Interruption of pregnancy,' *International Digest of Health Legislation, 19:* 887–889, 1968.
39. United Kingdom: Laws, Statutes, etc., *The Abortion Regulations 1968*, London, 1968.
40. British Medical Association: Committee on Therapeutic Abortion, 'Indications for termination of pregnancy,' *British Medical Journal, 1:* 171–175, 20 Jan. 1968.
41. Abortion Law Reform Association, *A Guide to the Abortion Act 1967*, London, 1968.
42. Peel, J. and Potts, M., 'Demographic aspects of abortion in Britain,' *Paper presented at the Conference of the International Union for the Scientific Study of Population*, London, 3–11 Sept. 1969.
43. Sim, M., 'Abortion and the psychiatrist,' *British Medical Journal, 2:* 145–148, 20 July 1963.
44. Abortion Law Reform Association, *Abs Newsletter*, No. 21, Summer 1968.
45. Mehlan, K-H. (ed.), *Internationale Abortsituation, Aborthekämpfung, Antikonzeption*, Leipzig, 1961.
46. Tietze, C. and Lehfeldt, H., 'Legal abortion in Eastern Europe,' *Journal of the American Medical Association, 175:* 1149–1154, 1 Apr. 1961.
47. Tietze, C., 'The demographic significance of legal abortion in Eastern Europe,' *Demography, 1:* 119–125, 1964.
48. Potts, M., 'Legal abortion in Eastern Europe,' *Eugenics Review, 59:* 232–250, Dec. 1967.
49. Field, M. G., 'The re-legalization of abortion in Soviet Russia,' *New England Journal of Medicine, 255:* 421–427, 30 Aug. 1956.
50. Bulgaria: Laws, Statutes, etc., 'Interruption of pregnancy,' *International Digest of Health Legislation, 8:* 605–607, 1957.
51. Czechoslovakia: Laws, Statutes, etc., 'Interruption of pregnancy,' *ibid., 10:* 283–292, 1959.
52. Hungary: Laws, Statutes, etc., 'Interruption of pregnancy', *ibid., 9:* 536–540, 1958.
53. Poland: Laws, Statutes, etc., 'Interruption of pregnancy,' *ibid., 9:* 319–323, 1958.
54. Yugoslavia: Laws, Statutes, etc., 'Interruption of pregnancy,' *ibid., 12:* 619–622, 1961.
55. Czechoslovakia: Laws, Statutes, etc., 'Interruption of pregnancy,' *ibid., 13:* 491–492, 1962.
56. Vorta, M., 'A critical view of vacuum aspiration: a new method for the termination of pregnancy,' *Obstetrics and Gynecology, 30:* 28–34, July 1967.
57. Kerslake, D. and Carey, D., 'Abortion induced by means of the uterine aspirator,' *ibid., 30:* 35–45, July 1967.
58. Mehlan, K-H., 'Die Abortsituation in der Deutschen Demokratischen Republik,' *Internationale Abortsituation, Aborthekämpfung, Antikonzeption* (K-H. Mehlan, ed.), pp. 52–63, Leipzig, 1961.
59. German Democratic Republic: Laws, Statutes, etc., 'Protection of the mother and the child,' *International Digest of Health Legislation, 4:* 58–61, 1952.
60. Mehlan, K-H., 'Die Abortsituation im Weltmaßstab,' *Arzt und Familienplanung*, pp. 69–99. Berlin, 1968.
61. Mehlan, K-H. and Falkenthal, S., 'Der legale Abort in der Deutschen Demokratischen Republik: Statistik der Jahre 1953–1962,' *Das Deutsche Gesundheitswesen, 20:* 1163–1167, 24 June 1965.
62. Romania: Laws, Statutes, etc., 'Interruption of pregnancy,' *International Digest of Health Legislation, 18:* 822–837, 1967.
63. Bulgaria: Laws, Statutes, etc., 'Interruption of pregnancy,' *ibid., 19:* 589–602, 1968.
64. Mehlan, K-H., 'Combating illegal abortion in the socialist countries of Europe,' *World Medical Journal, 13:* 84–87, May–June 1966.
65. Vorta, M., 'Die Abortsituation in der Tschechoslowakischen Sozialistischen Republik,' *Internationale Abortsituation, Aborthekämpfung, Antikonzeption* (K-H. Mehlan, ed.), pp. 107–113. Leipzig, 1961.
66. Sen, V. and Kučera, M., 'Potraty v Československu v letech 1958–1962,' *Demografie, 5:* 289–307, 1963.
67. Czechoslovakia: Ministerstvo Zdravotnictví, 'Potraty,' *Zdravotnická Statistika ČSSR*, Prague, various years.
68. Hirschler, I., 'Die Abortsituation in der Volksrepublik Ungarn,' *Internationale Abortsituation, Aborthekämpfung, Antikonzeption* (K-H. Mehlan, ed.), pp. 114–122. Leipzig, 1961.
69. Hungary: Központi Statisztikai Hivatal, *Magyarország népmozgalma: demográfiai évkönyv* (Statistical Publications: Demographic Yearbook), Budapest, various years.
69a. *Op. cit.* for 1965, p. 102.

70. Yugoslavia. Slovenia: Zavod za Zdravstveno Varstvo, *Zgodnja Fetalna Smrtnost v SR Sloveniji, 1955–1964*. Ljubljana, 1966.
71. Yugoslavia. Slovenia: Zavod za Zdravstveno Varstvo, *Spior in Njegovo Progresovanje v SRS v Letu 1965*. Ljubljana, 1966.
72. Andolsek, L., Personal communication.
73. Czechoslovakia: Ministerstvo Zdravotnictvi, *ČSSR zdravotnictvi 1968 (1967)*, p. 26. Prague, 1968.
74. Gál, G., Németh, A. and Fazekas, S., 'Ein Beitrag zur Frage der septischen, kriminellen, postabortalen Nierenkomplikation,' *Zeitschrift für Ärztliche Fortbildung, 59*: 592–596, 1 June 1965.
75. Hirschler, I., *Material presented at the International Conference on Abortion, Hot Springs, Virginia, Nov. 17–20, 1968*.
76. Meihlan, K-H., 'Legal abortions in Roumania,' *Journal of Sex Research, 1*: 31–38, Mar. 1965.
77. Romanian Communist Party: Central Committee, 'Analiza starii de sanatate a populatiei si masurile privind perfectionarea organizarii retelei sanitare si imbunatatirea asistentei medicale in Republica Socialista Romania,' *Scintela*, 27 Oct. 1968.
78. Černoch, A., *Material presented at the International Conference on Abortion, Hot Springs, Virginia, Nov. 17–20, 1968*.
79. Novak, F., *ibid.*
80. Sweden: Inrikesdepartementet, *Abortfrågan. Betänkande avgivet av 1950 års abortutredning* (Statens Offentliga Utredningar 1953: 29), p. 221, Stockholm, 1953.
81. Frandsen, E., Mosbech, J. and Mølgaard, B., 'Abortus provocatus i Danmark i 1955 og 1957,' *Ugeskrift for Læger, 121*: 1538–1543, 1 Oct. 1959.
82. Petterson, F., *Epidemiology of Early Pregnancy Wastage*, p. 89, Stockholm, 1968.
83. Hudcovič, A., 'Technika interrupcie,' *Československá Gynekologie, 25*: 650–657, Nov. 1960.
84. Szendi, B., Lakatos, I. and Tóth, Z., '23,300 Schwangerschaftsunterbrechungen im Spiegelbild der Operationsmethode und der Frühkomplikationen,' *Zeitschrift für Ärztliche Fortbildung, 54*: 751–756, 1 July 1960.
85. Černoch, A., 'Experiences in Czechoslovakia with the effects and consequences of legalized artificial termination of pregnancy,' *Paper Presented at United Nations World Population Conference, Belgrade, 30 Aug. to 10 Sept. 1965*.
86. Barsy, G. and Sárkány, J., 'A mûvi vetélések hatása a szülétési mozgalomra és a csecsemöhalandóságra,' *Demográfia, 4*: 427–467, 1963.
87. Miltényi, K., 'A mûvi vetélések hatásainak kérdésehez,' *Demográfia, 7*: 73–87, 1964.



EDITORIAL

LEGAL ABORTION WITHOUT HOSPITALIZATION

ALAN J. MARGOLIS, MD, FACOG and
EDMUND W. OVERSTREET, MD, FACOG

OBSTETRICIANS TODAY are fearfully watching the rising numbers of legal abortions now being performed in various areas of the United States. Rates in some major hospitals have reached 300–500 abortions per 1000 births and continue to increase. In California, since the liberalized (but still moderately restrictive) law took effect in Nov 1967, the rate for the entire state has doubled for each 6-month period. Now it has reached about 60 per 1000 births.

From the Department of Obstetrics and Gynecology, University of California School of Medicine at San Francisco.

Submitted for publication May 22, 1970.

The illustration at the top of the page is from a 15th-century German woodcut. (The Bettmann Archive)

Now that Hawaii, Alaska and New York have repealed all restrictive statutes, those states may be expected rapidly to reach and, doubtlessly, to surpass California's experience. The widespread movement throughout the United States to remove abortion from the ambit of the law and return it to the physician-patient relationship is building enormous impetus and impact. If and when this occurs, the sheer numbers of abortions may well become overwhelming. For example, despite the 15,000-odd legal abortions performed in California in 1969, it is estimated fairly reliably that approximately 76,000 illegal abortions were performed upon California women during that time. Should abortion-on-request simply for the unwanted pregnancy soon become legal, the prospect of 90,000-odd abortions per year would be awesome indeed. Physicians in states in which repeal has already been accomplished are already fearful that the influx of patients from surrounding states may well approximate such a situation. Hence, it is the hope of many that when repeal does come it will be mediated by a major national judicial or legislative decision which will apply to *all* states uniformly, rather than being brought about by spotty, gradual repeal state by state.

Already, however, many hospitals and their staffs are encountering increasing problems in handling the present numbers of abortions. Encroachment on available hospital beds, limited operating room time, overwhelmed admissions personnel, preoccupation of hospital staff time, and the revolt of residents are only a few of the troubles which have developed. Since we may expect these problems to be compounded tremendously as liberalization of abortion proceeds, it is essential for us to plan ahead in organizing our abortion procedures to handle the expected load.

Various solutions to these problems have been proposed. All of them are ameliorative to some degree. It seems likely that for a

Reprinted from Vol. 36, No. 3, September 1970
OBSTETRICS
and
GYNECOLOGY
Published by the Medical Department

period of time, at least, the performance of legal abortions will be reserved to licensed physicians and restricted to hospital premises. Hence, any methodology which spares hospital bed space, operating room time and hospital personnel deserves our serious consideration and our immediate attention in planning for the future.

For these reasons, we wish to draw attention to the experience of this department in the use of outpatient, come-and-go, first-trimester abortion by uterine suction evacuation, and to emphasize the simplicity and the safety of this procedure. Although this method has been used very extensively in Eastern European countries and in Japan, American physicians have been distrustful of it and reluctant to adopt the procedure. Our own preliminary experience in 55 outpatients was presented by one of us (AJM) at the annual meeting of the American Association of Planned Parenthood Physicians in Boston on April 10, 1970, and details of the results will be published elsewhere.* Since these details will not appear, however, for almost a year, and because the matter is so urgently important, we feel that a brief summary of the results should be presented here.

Fifty-five patients with pregnancies of no greater than 12 weeks' menstrual duration had initial work-ups and therapeutic abortion adjudication procedures as outpatients. Each patient presented herself at our regular come-and-go surgery suite approximately one hour before the scheduled procedure, having been prohibited any oral intake since the previous midnight. Aspiration abortion was then performed, either under light general anesthesia or intravenous analgesia plus paracervical block. A standard aspiration apparatus was used together with the Vibrodilator.† The patient was then observed in the postanesthesia recovery room until fully ambulatory and then returned home—always accompanied by some relative or friend.

Significant aspects of this procedure are as follows: Mean time spent on the hospital premises for the 55 patients was 3.4 hr (range, 1.1–5.4 hr). Fifty patients with similarly conducted inhospital abortions had a mean hospital stay of 37 hr (range, 11–54 hr). Mean measured blood loss at operation was 25 ± 6 ml (range, 20–125 ml) under paracervical block, whereas under light general anesthesia it was 66 ± 15 ml (range, 20–350 ml). Earlier studies had shown that Fluothane tends to double the blood loss at aspiration abortion, so this gas was never used. The operative procedure for patients under general anesthesia required approximately 30 min, whereas for those under paracervical block, it increased to about 50 min because of the time required for the analgesia and for the block to "take." Moreover, the time required for the patient with a paracervical block to recover fully from the somewhat heavier analgesia tended to prolong her stay in the recovery room.

Of greatest interest, of course, is a consideration of complications incidental to this methodology. There were none at operation, although, in 3 patients, difficulty in accomplishing cervical dilatation dictated abandonment of the outpatient procedure and admission to hospital for the abortion. It seems advisable not to undertake come-and-go aspiration abortion in patients with very firm, tight cervices.

Eight of the 55 patients were seen later in the emergency room for postabortal complications: postabortal bleeding (5), mild endometritis (2), and subacute salpingitis (1). Of these, 3 were admitted to hospital for 2-day stays. Of 50 patients with inpatient abortions, 7 had comparable postabortal complications and 2 were similarly readmitted to hospital. Of greatest significance is the fact that none of these post-

* Advances in Planned Parenthood (Vol. 6). Edited by AI Sobrero, C McKee. New York, Excerpta Medica Foundation, (in press)

† Berkeley Tuscumbia Co, Berkeley, Calif.

abortal complications—all of which were handled with minimal therapy—developed earlier than 2 days after abortion, and most occurred from 3 to 30 days after the procedure. So, it is important to emphasize that the conventional 12- to 48-hour hospital admission for aspiration abortion patients serves no real purpose either in preventing or discovering postabortal complications. This fact alone speaks strongly for the feasibility and desirability of accomplishing early abortion as a come-and-go outpatient procedure—provided that the circumstances, auspices and skills brought to bear are of the highest quality.

In the light of our own experience, we feel that this methodology for legal abortion should be given extensive trial in the hope of minimizing the logistic problems created by our mounting abortion rates.

University of California Medical Center
San Francisco, Calif 94122

Item No. 54

ON THE HEALTHINESS OF FOUR THOUSAND ABORTIONS IN A FREE STANDING ABORTION SERVICE

Horace Hale Harvey, III, M.D.

Barbara Yarnell Elizabeth Pyle

We would first like to thank the people of New York, their legislators, and the Public Health Board for a law and a policy that allows for improvement and self-correction. This is a great moral step necessary to remove the fear of abortion.

We would next like to thank the National Clergy Consultation Service on Abortion (especially Reverend Howard Moody and Arlene Carmen) and the five hundred clergymen throughout the United States who with their pioneering spirit have led the way in the concept of abortion reform. Planned Parenthood is likewise to be commended for its stand on this issue.

Lastly, we would like to offer a heartfelt thanks to the doctors working with us, the nurse-counselors, and to the entire staff of the Community Sex Information and Education Service. Our efforts and dreams would have come to nothing without your hard work and loyalty.

INTRODUCTION

New York is to be commended for leading the country in the repeal of abortion laws. The new law provides that a physician can perform an abortion under conditions that are healthy and safe on a consenting woman up to the twenty-fourth week of pregnancy. This law will inevitably become the model after which the rest of the country will pattern its laws when the reform becomes nationwide. As the New York law will become the model, so will New York's applications of this law. It is to the betterment of these future ends that we do hereby present this report.

The Community Sex Information and Education Service (hereinafter called CSI) is a not-for-profit incorporation devoted to developing nationwide sex education. In July of this year, the National Office of CSI recognized the need for there to be a quality control on the means whereby women in New York receive abortions. This conclusion was reached based upon the many phone calls that poured into our office and into the office of the Clergy and Lay Advocates for Hospital Abortion Performance complaining of the abusive treatment and the exploitive prices by many of the doctors, the profiteering referral agencies, and the hospitals performing abortions in the metropolitan area.

With the tripartite goal of safety, price control, and psychological health, CSI formed Women's Medical Group to act as a consumer control for women seeking abortions in the first ten weeks of pregnancy. Women's Medical Group is able to monitor the safety of the procedure by setting standards for the equipment and the methods, by supervising the participating doctors and by having a comprehensive follow up program consisting of a Women's Medical Group "hot line" telephone number making available to the women 24 hours a day, a doctor or a Registered nurse to answer any questions relating to the procedure or to their condition following the procedure. With these means, and a medical questionnaire completed and returned by the patient ten days later, Women's Medical Group is able to evaluate the participating doctors, and thereby offer the patients a safe procedure.

Women's Medical Group has been able to control abortion pricing since July 1, for slightly over 4,000 abortions by referring only to doctors who have agreed to charge a reasonable fair price, and who have also agreed to perform 25% of the procedures at no charge at all to welfare and indigent patients. The third goal of CSI, psychological health, is perhaps the factor that makes Women's Medical Group so unusual. To achieve this goal, the Group furnishes counselors who work closely with the doctors performing the abortions. The majority of these counselors are registered nurses who have had abortions themselves, and are therefore naturally sensitive to the complicated feelings and reactions that an abortion evokes in a woman. In addition, these nurses have received special training to enable them to deal with the varied psychological aspects and impacts of abortion.

To the furtherment of these three goals, and to the further help of the women of New York, we offer these statistics on the healthiness of 4,000 abortions performed by a free standing abortion service.

For operational details of Women's Medical Group, please see the attached appendix.

Abortion safety is usually measured by comparing the rates of the following medical complications which are often associated with abortions: death, shock, bleeding, infection, perforation, and incomplete abortion.

A) In four thousand abortions performed since July 1 using a local anesthetic, there have been no deaths and no cases of shock or cardiac arrest. This perfect record should be contrasted with the death rates ranging from two to five per one hundred thousand cases, which have occurred in the European and New York hospitals due to the use of general anesthesia for early abortions. The only abortion death in London last year was due to general anesthesia.

B) The bleeding varied from only a few drops in four to six week pregnancies to an average of about one ounce for cases eight to ten weeks pregnant. One ounce is the amount of blood loss a woman ordinarily has during a normal period. However, in our four thousand cases we also had three women who unexpectedly turned out to be ten to twelve weeks pregnant and who lost about a pint of blood during the abortion. This does not represent a serious blood loss, since one pint of blood is the usual amount of blood given during a blood donation to a blood bank. We also had one patient who was sixteen weeks pregnant and who lost about two pints of blood. No woman required a blood transfusion or intravenous fluids. It is important to note that all four of these women were found unexpectedly to be over ten weeks pregnant, thus we have every reason to believe that no woman who is less than ten weeks pregnant will bleed on an average more than she does with a normal period, and the earlier the abortion the less the blood loss. Independent research (*Obstetrics and Gynecology*, September-1970) has shown that abortions done in hospitals with general anesthesia result in about twice the blood loss of abortions done with local anesthesia. This is probably because general anesthesia prevents uterine contraction which normally would prevent bleeding.

C) Fever and Infection - We had four patients of the one thousand five hundred and sixty who returned our research form, who reported they had fever of 100.4 degrees or more for one day or more. In two of these cases the fever returned to normal in two days, while in two other cases the fever returned to normal in three days. None of these patients with fever required hospitalization.

D) Perforated Uterus - This is the condition resulting when an abortion instrument goes through the uterine muscle wall. We have had nine such cases in four thousand abortions. However, eight of these cases occurred during the first two thousand abortions, whereas only one of these nine cases occurred during the second two thousand cases. This indicates that as the physicians gain experience and become more skilled, they are less likely to perforate a uterus. In fact, the one later perforation was by one of the newer and less experienced physicians (and in a ten and one half week pregnancy).

Thus, we have every reason to believe that uterine perforation can be eliminated as doctors gain skill at doing early abortions. Of the first eight perforations, only three were hospitalized. Two of these hospitalizations were found to be fifteen weeks pregnant. There was only one out of seven perforations in pregnancies less than ten weeks which required hospitalization. Therefore, perforations of such early pregnancies are not as serious a complication as it has been thought to be in the past, since none of these had later complications. All three of our hospitalizations were discharged without complications within three or four days.

E) Incomplete Abortion - We have had one such case wherein the physician suspected in advance that he had not completed the abortion, because he found no pregnancy tissue when he examined the tissue removed from the uterus. (We require that physicians examine all tissues removed from the uterus to make certain that they have removed the entire pregnancy.) In this case, since the patient was only four or five weeks pregnant, the physician could not be sure that he completed the abortion, since in such an early pregnancy there is little or no tissue to be found. Thus, we asked this patient to have another pregnancy test done by us two weeks later. This test proved positive, so the abortion was completed immediately without complications. Let us now compare the complication rates of these 4,000 abortions with those rates of complications in New York hospitals' early abortions. This data is summarized as follows:

Complication	N.Y. Hospitals % Less Than 12 Weeks	WMG Gross % All Cases	WMG Correct % Less Than 12 We
Hemorrhage	.2	.1	.0
Infection	.2	.2	.2
Perforation	.2	.2	.1
Others	.4	.025	.025
	1.0%	.525%	.325%

The third column above is corrected in the sense that in it we have removed all abortion cases of 12 week or more pregnancies, since this was done in the above hospital data. Comparing the above complication rates suggest that Women's Medical Group has had about one-third to one-half the overall complication rate of the New York hospitals. Since the number of these complications is so small in both Women's Medical Group and New York hospitals, the most important fact is that the New York hospitals have had deaths whereas Women's Medical Group has had none. Generally, from this data it can be concluded that early abortions (or abortions less than 12 week pregnancies) are very safe and free from serious medical complications, whether or not they are done in a free standing abortion service such as Women's Medical Group or in a hospital, just as long as no general anesthetic is used. In fact, from the point of view of medical techniques and safety, an early abortion is similar to having a tooth pulled - both usually involve the use of a local anesthetic, both usually involve very little loss of blood, both can easily be done relatively quickly on an ambulatory basis (e.g., during a lunch hour), both have similar "non-fatal" complications and dangers which occur in the range of one per each thousand cases. Thus, in view of the new evidence of the safety of abortion done in free standing abortion services, it would seem hard to justify more medical precautions for an abortion than we require for having a tooth pulled.

CURRENT INVESTIGATION

Aspiration abortion without cervical dilation

SADJA GOLDSMITH, M.D.
ALAN J. MARGOLIS, M.D.
San Francisco, California

Aspiration abortions on 67 conscious patients with pregnancies of 10 weeks' duration or less were performed successfully without cervical dilation and with minimal risk of perforation, with the use of a 6 mm. diameter flexible plastic cannula. Four other women required slight dilation of the cervix to complete the abortion. There was no significant morbidity in any patient. This simple technique should be useful in future large-scale abortion programs in licensed clinics.

WHILE ASPIRATION ABORTION is accepted widely as a safe and effective technique, any modification is important which will make the procedure more simple, more safe, and less time-consuming without sacrificing completeness of uterine evacuation. Also, if performed without anesthesia or only with paracervical block, an anesthesiologist need not be in attendance and the morbidity of general anesthesia is not incurred.

Although it has been customary to use a cannula whose outside diameter in millimeters is equal to the duration of pregnancy in weeks,[1] evacuation can often be effected without dilation.[2] Such a technique shortens the procedure, decreases discomfort in the conscious patient, and decreases risk of cervical injury.

Our study was conducted to test the efficacy of a flexible 6 mm. diameter plastic aspiration cannula* (Fig. 1) developed by Harvey Karman to remove early first-trimester products of conception. This flexible cannula has two openings at its tip which permit bending without blockage if it is applied to the uterine fundus.

From the San Francisco Center for Legal Abortion; Planned Parenthood–World Population, Alameda-San Francisco; and the Department of Obstetrics and Gynecology, University of California.

Procedure

Seventy-two pregnant women whose last menses had occurred 10 weeks or less earlier were selected only on the basis of their willingness to be aborted while awake.

Preliminary procedures† included a medical and psychosocial history, physical examination, routine laboratory studies, Rh-antibody screening, and cervical culture for gonorrhea. The abortions were performed on a come-and-go basis at this medical center in a small surgical room attached to an op-

*Supplied as Vacuaid 7-mm. by Berkeley Bio-Engineering Company, Berkeley, California.

†Approval of patients for abortion was in accord with the revised California statute.

erating suite. Many patients received an oral analgesic one hour before the procedure, while others had no premedication.

A medium Graves speculum was used to expose the cervix, which was then fixed with a tenaculum. A paracervical block was performed by injecting 4 ml. of one per cent lidocaine at each of 4 sites (3, 5, 7, 9 o'clock) 1 cm. deep to the vaginal fornix. The operator cleaned the cervix and vagina with povidone-iodine solution while waiting for the block to become effective. The uterus was sounded to verify its depth and confirm its inclination. The 6 mm. cannula was then passed to the fundus and, while negative pressure (60 to 70 cm. Hg) was applied, it was moved within the uterus to aspirate all parts of the cavity. The duration of aspiration was timed and the procedure was concluded when the uterine walls seemed closely applied to the cannula.

Completeness of evacuation was checked by exploring the uterine cavity with a small curette. When aspiration through the 6 mm. cannula did not produce sufficient tissue, the cervix was dilated to 8 or 9 mm. and a larger aspirator was used to ensure total tissue removal. All specimens were examined to confirm the presence of the products of conception, then sent to the pathology laboratory. Aspirated blood and amniotic fluid were also measured. The patient was discharged within an hour, with an appointment for a 2 week postabortion visit.

During the procedure, each patient was attended by a counselor who explained the procedure and gave encouragement and support.

Results

Of the 72 women (Table I), aspiration abortion was completely successful in 67; 4 required cervical dilation and a larger cannula to empty the uterus. In 1 primigravida the internal os could not be identified by probe or small dilator. The procedure was stopped, and 2 weeks later abortion was performed without difficulty under general anesthesia. Mean aspiration time for the 67 successful cases was 3 minutes (range 1 to 7 minutes), and blood loss averaged 38 ml. (range 10 to 170 ml.).

Fig. 1. The 6 mm. flexible cannula with connecting tubing showing the double opening and a band marking 10 to 12 cm. from the tip.

No patient presented any evidence of a morbid, febrile postabortal course. One patient was observed in the hospital after abortion because products of conception were not positively identified in the pathology laboratory and a diagnosis of ectopic pregnancy was considered but not confirmed. Another patient was seen 7 days postabortion in the emergency ward with the sudden onset of uterine bleeding. She was sent home with a diagnosis of nonsignificant bleeding from the organizing placental site. Five patients telephoned with minor questions which required reassurance only.

Seventy of the 72 women were seen at the 2 week postabortion checkup; the other 2 verified by telephone that they had no problems.

Comment

Abortions performed on healthy women, many of whom are young primigravidas, require meticulous scrutiny and safeguards to minimize early as well as late morbidity and death. There are several obvious advantages in performing early abortions without general anesthesia or cervical dilation. By avoiding general anesthesia, a small but definite risk is eliminated and the procedure is more economical of medical personnel and cost. With-

Table I. Results of early abortion with the use of the 6 mm. flexible cannula

	Total cases	Cases by weeks of gestation from LMP*			
		7	8	9	10
Abortions performed	72	2	15	32	23
Primigravidas (age range 16 to 36)	43	1	7	17	18
Multigravidas (age range 17 to 39)	29	1	8	15	5
Cases requiring larger cannula (8 or 9 mm.)	4	0	0	0	4

*LMP = last menstrual period.

out cervical dilation, the conscious patient experiences primarily the cramps of terminal uterine spasm of short duration as the products of conception are completely removed. For this, the patient is amenable to verbal support and the encouragement of being able to leave the unit promptly and in full possession of her faculties.

Avoidance of cervical dilation eliminates the risk of perforation with a dilator. It may also decrease the incidence of premature delivery in subsequent pregnancies, an abortion sequela discussed by Klinger.[3]

At our institution,[4] the most significant morbidity in a large series of first-trimester induced abortions was related to occasional uterine perforation and possible bowel complications. The ease with which the 6 mm. cannula tip bends without blocking aspiration diminishes this risk of perforation.

Early abortion without cervical dilation appears to be a safe and simple enough procedure to be used on a mass basis for early interruption of unwanted pregnancy. With well-qualified personnel who are careful to accept only pregnancies early in the first trimester, and who perform the aspiration technique skillfully, out-of-hospital abortion in well-equipped, licensed facilities seems feasible.

REFERENCES

1. Kerslake, D., and Casey, D.: Obstet. Gynec. 30: 35, 1967.
2. Papasov, B., Atanasov, A., and Mikhneva, O.: Akush. Ginek. (Sofia) 4: 45, 1965.
3. Klinger, A.: Int. J. Gynaec. Obstet. 8: 680, 1970.
4. Stewart, G.: Personal communication.

ABORTION UNDER PARACERVICAL BLOCK

A. JEFFERSON PENFIELD, M.D., F.A.C.O.G.
Syracuse, New York

Medical Director, Planned Parenthood of Syracuse, Inc., and Assistant Professor, Department of Obstetrics and Gynecology, Upstate Medical Center

The author performed more than 600 first-trimester abortions by dilatation and suction and instrumental curettage under paracervical block as an outpatient procedure. Premedication, systemic narcotics, intravenous fluids, and oxytocic agents were found unnecessary. Pain relief and cervical relaxation were good with lidocaine used alone. The only complications were 2 cases of low-grade fever and uterine tenderness four to five days postoperatively subsiding after twenty-four hours of antibiotic therapy, and 3 patients who later required standard curettage because of retained products after initial suction curettage. Gynecologists can lessen their dependence on inpatient hospital facilities by adopting the technic, which is suitably performed in any well equipped office.

Is abortion a justifiable back-up method of birth control? With the July 1, 1970, enactment of the New York State Abortion Law, the Legislature gave an affirmative answer. Now any woman in New York State can legally contract with a physician to terminate her pregnancy up to the twenty-fourth week. Pressures are mounting in other states for repeal or reform of their abortion laws.

Greater efforts, of course, must be made in the field of birth control. Let us help our patients prevent unwanted pregnancies. When we fail, however, and are asked to terminate these pregnancies, some of us at least must be prepared to perform safe surgical abortions.

The author's experience with more than 600 patients aborted between November, 1969, and April, 1971, has convinced him that pregnancies under twelve weeks duration may be safely and painlessly terminated by dilatation and curettage under paracervical anesthesia. Both standard and suction curettage technics were used. In no instance was hospitalization necessary.

Review of literature

A number of papers have appeared in American and European journals on outpatient dilatation and curettage for diagnostic purposes, for completion of incomplete abortions, and for therapeutic abortions. Israel and Mazer[1] reported in 1938 on their experience with 305 patients on whom they performed office curettage for abnormal bleeding. In every case satisfactory tissue for diagnosis was obtained; and, except for one perforation without adverse consequence and one "mild infection," no significant complications were reported. Credit was given to Howard Kelly, M.D., who advocated this procedure in 1924.

Despite these authoritative reports on the advantage of office curettage, the past thirty years have seen the great majority of these procedures performed in hospital operating rooms under general anesthesia. This routine is appropriate for the very anxious patient who cannot relax sufficiently to be examined properly awake, but hospitalization for curettage is unnecessary for the great majority of patients.

In the past ten years there has been renewed interest in performing dilatation and curettage procedures in the outpatient department or in the well-equipped gynecologist's office. Mengert and Slate in 1960[2] reported on diagnostic dilatation and curettage as an outpatient procedure on 403 patients. Benzalkonium 1:100,000 was used to wash the vagina, and gloves were not used. A self-retaining retractor was employed, and 10 to 20 cc. of 1 per cent aqueous procaine were instilled into each paracervical area. Satisfactory anesthesia was obtained in all cases, and the single complication of significance was a drop of blood pressure to 60/45 in one elderly patient immediately after injection of the anesthetic. The pressure returned to normal promptly with the aid of

P473

pressor drugs. In 1964 Connar and Bepko[3] reported on 605 cases of dilatation and curettage for incomplete abortion under pudendal and paracervical block. Ten cc. of mepivacaine 1 per cent were deposited in each paracervical area at 4:00 and 8:00 o'clock. All patients received premedication, usually sodium pentobarbital and scopolamine. Satisfactory anesthesia was obtained in 604 of 605 patients. There were no major complications.

In 1967 Van Praagh and Povey[4] reported on paracervical block for dilatation and curettage in 176 patients from fifteen to fifty-five years of age, including cases of dysfunctional bleeding, incomplete and septic abortions, postpartum hemorrhage, and therapeutic abortions. There were no recognized complications. Good pain relief was obtained in 168, fair relief in 4, and poor relief in 4. The 8 unsatisfactory effects were thought to be due to poor placement of the anesthetic, for all occurred during the first weeks of the study as the technic was being perfected. In 1969 Jorgensen[5] reported on paracervical block in curettage for diagnostic purposes and for abortion in 373 patients. Using pethidine as premedication, a satisfactory analgesic effect was observed in 90 per cent of the patients. The only serious side-effect noted was transient shock in a seventy-three-year-old patient, whose blood pressure fell from 170/100 to 70/40 immediately after the injection of 18 ml. of leoste-sin-noradrenaline 1 per cent in the paracervical tissues. No change in consciousness occurred. A few minutes after she had received oxygen and dextran, her blood pressure returned to normal.

Thus, out of a total of 1,862 patients reported who had dilatation and curettage under paracervical block, there was not a single serious complication resulting from the procedure. Satisfactory analgesia was obtained in well over 90 per cent of the cases.

In recent years, suction or aspiration curettage has become the method of choice for uterine evacuation, particularly in women more than six weeks following conception. Initial aspiration of uterine contents may be accomplished in less than three minutes, and is usually accompanied by very little bleeding. It is advisable to follow this up, nonetheless, with standard instrumental curettage to clean out adherent fragments or loosened decidua. Extensive experience with this method was reported by three investigators at the April, 1970, meeting of the American Association of Planned Parenthood Physicians.[6-8]

Patients

In the twelve-month period between November 1, 1969, and November 1, 1970, the author personally performed 291 first-trimester abortions, all as outpatient procedures under paracervical block. Of these, 187 were performed in the Planned Parenthood Center, and 104 in the author's private office.

TABLE I. Duration of pregnancy

Number of Weeks	Number of Patients
4	3
5	13
6	24
7	29
8	27
9	29
10	18
11	3
12	1

The following analysis of the first 147 cases is representative of the series as a whole. The average age of patients was twenty-four years, with the oldest patient being forty-six and the youngest fourteen years. Patients' marital status was: single, 84; married, 49; divorced, 8; separated, 4; and widowed, 2.

The duration of pregnancy from assumed date of conception (add two weeks if standard nomenclature used) is shown in Table I.

The estimated blood loss from onset of procedure to one hour postoperative was: 10 to 20 cc., 33 patients; 20 to 50 cc., 70 patients; 50 to 100 cc., 35 patients; and 100 to 200 cc., 9 patients.

Patients presented themselves either on their own initiative or were referred from private physicians, the Clergy Consultation Service, or Planned Parenthood. All patients were examined by the author or by another gynecologist between one day and three weeks before the procedure. Whenever appropriate, the patient's husband, family, or boy friend were consulted to be certain that alternative solutions to these "problem pregnancies" had been explored. If the patient and other involved persons reached a firm decision in favor of pregnancy termination, the procedure was scheduled as soon as convenient.

Procedure

The patient arrived, preferably after a good night's sleep, having had no food or water for at least eight hours. The first 30 patients all received premedication consisting of narcotics, tranquilizers, or sedatives. Many of them, however, experienced the side-effects of nausea, drowsiness, and dizziness. During the next several months the patients received no premedication, and there was no apparent increase in apprehension or discomfort.

With each of the first 50 patients, an intravenous solution of 5 per cent dextrose in water containing 40 units (4 cc.) of oxytocin was run in rapidly during the procedure. None of the remaining patients has received any intravenous fluids or any oxytocic agents, and there has been no increase in uterine blood loss nor any detectable difference in uterine tone.

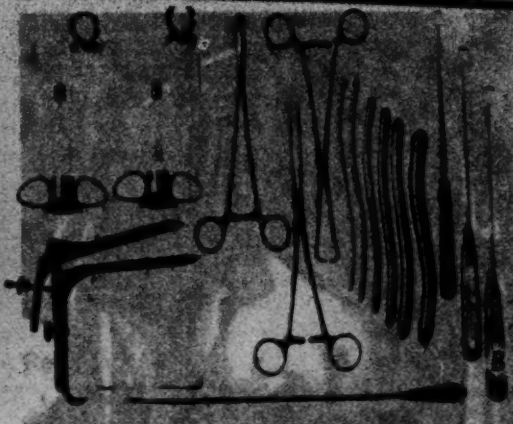


FIGURE 1. (A) Office equipped for abortion under paracervical block. (B) Instruments used in performing dilatation and curettage.

Figure 1 shows the equipment and instruments necessary to the operation.

Preoperatively the patient's pulse and blood pressure were taken. A repeat pelvic examination was done to confirm uterine size and position and to rule out any infection or abnormalities. A large bivalve speculum was then inserted and the vagina and cervix thoroughly cleansed with three separate scrubs of full-strength povidone-iodine solution (Betadine), taking care to rotate the speculum so as to reach every portion of the vagina.

The cervix was then grasped with a single-tooth tenaculum, and gentle traction applied to expose the posterior vault of the vagina. Xylocaine hydrochloride (Lidocaine) 1 per cent with 1:100,000 epinephrine was then injected through a 20-gauge 4-inch hypodermic needle whose point lay about ½ cm. beyond the vaginal mucosa (Fig. 2). Eight cc. were deposited at 4:00 o'clock and 8 cc. at 8:00 o'clock to block the uterovaginal plexus of Frankenhauser, a cluster of ganglia in the uterosacral region just lateral to the internal cervical os. This solution blocks all the sensory nerves from the uterus which run from the uterosacral ligament areas into the pelvic and hypogastric plexuses.

Recently the author has produced more consistent total cervical anesthesia and greater internal os relaxation by injecting 5 cc. each at 4:00 and 8:00 o'clock and 3 cc. each at 2:00 and 10:00 o'clock. The plunger of the syringe was withdrawn slightly before and two to four times during the administration of the lidocaine at each site. No patient received more than 20 cc. of the anesthetic solution.

The patient was allowed to rest for three to five minutes to allow for diffusion of the anesthetic and to detect any adverse reaction to the lidocaine. Surgical masks, sterile gloves, and sterile instruments were used. The operator straightened the cervicouterine angle and gently sounded the uterus, carefully ascertaining the direction of the

FIGURE 2. Anesthetic administered to paracervical area.

cervical canal and the location of the internal os. Hegar dilators were then introduced, beginning with number 2 (2 mm.). Extreme care and gentleness were practiced during the dilatation (Fig. 3). For pregnancies under six weeks, dilatation beyond number 8 Hegar was found to be unnecessary. If over eight weeks, and if the suction curet was to be used, dilatation up to number 13 Hegar (13 mm.) was usually accomplished without difficulty, even

FIGURE 3. (A) Hegar dilator introduced into cervix. (B) Hollow plastic curet inserted.

in the primigravida patient. An advantage of paracervical over general anesthesia is that it does relax the internal os and therefore facilitates dilatation. Most patients found this part of the procedure entirely painless.

Following dilatation of the cervix, uterine evacuation was then accomplished usually by the suction method, utilizing hollow plastic curets of varying diameters, attached by means of rigid plastic tubing to a two-bottle aspiration apparatus, whose motor was capable of producing a negative pressure throughout the system of 25 to 30 inches of mercury.* Following uterine aspiration, sharp instrumental curettage was employed in all patients to clean out remaining fragments of the ovum.

In the majority of instances the site of embryonic implantation was found to be on the posterior or posterolateral wall of the uterus. The uterine corpus invariably contracted down well during the procedure, regardless of whether or not an oxytocic agent was administered. When the operator had gained sufficient experience, the actual time required for curettage was never more than ten minutes. About one half of the patients admitted to some cramps during the completion of the curettage, but in no instance was the pain sufficient to justify the use of narcotics or general anesthesia.

*Emerson's Uterine Aspirator, Emerson Division, Vernitron Medical Products, Carlstadt, New Jersey.

Each patient rested for one hour following the procedure, and then returned home with her escort. She was instructed to rest at home for the remainder of the day, and was able to resume normal activities the next day. Antibiotics were not prescribed. If there were a risk of exposure to pregnancy, birth-control pills were started immediately. However, patients were encouraged to refrain from intercourse until their one-month follow-up visit.

Some of these patients have now been followed as long as eleven months postoperatively. All of those followed more than six weeks resumed normal menstruation, and there have been no repeat unplanned pregnancies in this group. In general, the patients have expressed gratitude and satisfaction concerning the decision to terminate pregnancy and the method used.

Comment

Complications which one might expect from this procedure include: reaction to the local anesthetic, laceration of the cervix, uterine perforation, hemorrhage, and infection.

Three patients who had suction curettage at ten weeks required a standard curettage between one and three weeks later because of retained products. With increasing experience and better technic such a complication should be rare.

Two patients developed low-grade fever and uterine tenderness four to five days postopera-

tively. They were treated with a broad spectrum antibiotic, ampicillin trihydrate (Polycillin), and after twenty-four hours their fever and discomfort disappeared. These 5 are the only patients out of the entire series of 291 who experienced significant complications.

The set-up for outpatient abortion must nonetheless include safeguards for the management of any of the complications listed. The following should be available in case of drug reactions: oxygen; vasopressors, such as levarterenol bitartrate (Levophed bitartrate injection), dosage 4 cc. per 1,000 cc. 5 per cent dextrose in water; and anticonvulsants, such as diazepam (Valium injectable) 10 mg. intravenously. Intravenous fluids should be at hand, and there should be access to blood, particularly packed red cells. Rh negative patients are candidates for Rho (D) immune globulin (Rhogam) administration.

Summary

A review of the world literature has demonstrated that dilatation and curettage under paracervical block is a safe and usually painless procedure.

The author's series of more than 600 first-trimester surgical abortions has also shown the acceptability of this technic when performed in a well equipped outpatient or office facility.

Gynecologists must not only offer better birth control, but also must prepare themselves to meet the requests for abortion. They must learn to lessen their dependence on inpatient hospital facilities, and accept the challenge of outpatient surgical abortion under paracervical block.

600 East Genesee Street
Syracuse, New York 13202

References

1. Israel, S. L., and Meser, C.: The safety and advantage of office curettage, Am. J. Obst. & Gynec. 36: 445 (1938).
2. Mengert, W. F., and Slate, W. G.: Diagnostic dilatation & curettage as an outpatient procedure, *ibid.* 79: 727 (1960).
3. Conner, E. J., and Bepko, F. J.: Communication, *ibid.* 89: 822 (1964).
4. Van Praagh, I. G., and Povey, W. G.: Paracervical block for dilatation and curettage, Obst. & Gynec. 29: 167 (1967).
5. Jorgensen, P. L.: Paracervical block. Use in curettage for diagnostic purposes and for abortion, Acta obst. et gynec. scandinav. 43: 446 (1969).
6. Cushner, I.: The aftermath of liberalizing abortion legislation in Maryland: problems and projections, delivered at American Association of Planned Parenthood Physicians Annual Meeting, Boston, Massachusetts, April 10, 1970.
7. Brenner, P.: The positive and negative aspects of therapeutic abortions—report of 800 cases, *ibid.*
8. Margolis, A. J.: Therapeutic abortion without hospitalization, *ibid.*

SUBJECT INDEX

Page

Motion for Leave to File Brief Amici Curiae in Support of Appellants 1

Brief of Amici Curiae 5

Summary of Argument 5

Argument 8

I.

The Texas Abortion Law Infringes Upon the Right to Marital and Individual Privacy Without a Compelling State Interest 8

A. The Statute Infringes Upon the Right to Privacy 8

1. Marital Privacy 8

2. The Right of Privacy of the Individual Woman 11

B. The Statute Infringes Upon Fundamental Constitutional Rights Without Serving Any Compelling State Interest 14

1. The Statute Serves No Health Interest of the State; on the Contrary, It Has Created a Severe Health Problem 15

2. The State Has No Valid Interest in Indirectly Legislating Morality, and the Statute Does Not Actually Serve Any Moral Purpose 17

3. The State Has No Interest in Increasing Its Population; on the Contrary, Its Interest, if Any, Is in Limiting Population Growth 17

Page

4. The State Has No Interest in Requiring That All Embryos Develop and Be Born 18

(a) The Law Has Never Restricted Abortions for the Purpose of Protecting the Embryo 18

(b) There Is No Legal Recognition of the Fetus as a Person; Live Birth Is Required Before Any Rights Attach 18

(c) The View That "Human Life" Commences With Conception Is a Philosophical Conclusion Not Supported by Scientific Evidence 19

5. Conclusion 20

II.

The Application and Effect of Restrictive Abortion Laws, Such as the Texas Abortion Law, Results in Discrimination Against Poor and Non-White Women in Exercising Their Fundamental Interest in Marital and Individual Privacy, Denying to Them the Equal Protection of the Laws 21

A. Factual Data Demonstrate Discrimination Against the Poor and Non-White 21

B. As a Result of the Disproportionate Unavailability of Hospital Abortions to Them, the Poor and the Non-White Resort to Unsafe Criminal Abortions Which Lead to High Mortality and Morbidity Rates 27

Page

C. Where Abortion Restrictions Have Been Eliminated, the Poor and the Non-White in Fact Receive Abortion Services in a Non-Discriminatory Manner 28

D. The Impact of the Restrictive Abortion Law Effectively Denies Equal Protection to the Poor and Non-White 30

III.

The Delegation of Authority to Physicians to Approve Abortions at Their Peril Results in Discrimination Against Poor and Non-White Women, Denying to Them the Equal Protection of the Laws 33

IV.

The Texas Abortion Law, While Permitting Abortion to Save a Woman's Life, Irrationally Excludes From Its Protection Women Whose Health May Be Seriously Threatened, Who Bear a Deformed Fetus, Who Have Been Victims of Sexual Assault, Who Are Financially, Socially or Emotionally Incapable of Raising a Child and Whose Family Tranquillity and Security Would Be Seriously Disrupted by the Birth of Another Child, Exclusions Which Bear Most Heavily on the Poor and Non-White, and Which Do Not Serve Any Compelling or Reasonable State Interest, Denying to These Women the Equal Protection of the Law 37

Conclusion 42

TABLE OF AUTHORITIES CITED

Cases	Page
Babbitz v. McCann, 310 F. Supp. 293, appeal dis. 400 U.S. 1	13
Baird v. Eisenstadt, 429 F. 2d 1398, prob. juris., 401 U.S. 934	17
Bates v. Little Rock, 361 U.S. 516	14
Brooks Estate, In re, 32 Ill. 2d 361, 205 N.E. 2d 435	14
Dandridge v. Williams, 397 U.S. 471	33
Doe v. Gen. Hosp., 313 F. Supp. 1170, 434 F. 2d 423, 434 F. 2d 427	23
Douglas v. California, 372 U.S. 353	31
Epperson v. Arkansas, 393 U.S. 97	20
Erickson v. Dilgard, 44 Misc. 2d 27, 252 N.Y.S. 2d 705	14
Gardner v. California, 393 U.S. 367	31
Gomillion v. Lightfeet, 364 U.S. 339	31
Griffin v. Illinois, 351 U.S. 12	30, 31, 42
Griswold v. Connecticut, 381 U.S. 479	8, 9, 10, 11, 17, 42
Harper v. Virginia Bd. of Elections, 383 U.S. 663	30, 42
Hobson v. Hensen, 269 F. Supp. 401, aff'd sub. nom., Smuck v. Hobson, 408 F. 2d 175	31
Jackson v. Denno, 378 U.S. 368	36
Jacobson v. Massachusetts, 197 U.S. 11	13
Long v. District Court of Iowa, 385 U.S. 192	31
Loving v. Virginia, 388 U.S. 1	9
Mayberry v. Pennsylvania, 400 U.S. 455	36

Page

Meyer v. Nebraska, 262 U.S. 390 9

Murchison, In re, 349 U.S. 133 36

Olmstead v. United States, 277 U.S. 438 11

Patton v. Mississippi, 332 U.S. 463 31

People v. Belous, 71 Cal. 2d 954, cert. den., 397 U.S. 915 .....12, 16, 18, 19, 28, 35, 38, 39

Pierce v. Society of Sisters, 268 U.S. 510 8

Pres. & Directors of Georgetown College, Inc. v. Jones, 231 F. 2d 1000, cert. den. 377 U.S. 978 .. 14

Railway Express Agency v. New York, 336 U.S. 106 38

Rinaldi v. Yaeger, 384 U.S. 305 31

Shapiro v. Thompson, 394 U.S. 618 .....30, 33, 42

Skinner v. Oklahoma, 316 U.S. 535 8

Smith v. Texas, 311 U.S. 128 31

State v. Murphy, 27 N.J.L. 112 16

Terry v. Ohio, 393 U.S. 1 11

Tumey v. Ohio, 273 U.S. 510 36

United States v. George, 239 F. Supp. 752 14

U.S. v. Vuitch, ... U.S. ...., 91 S. Ct. 1294 34

Williams v. Oklahoma City, 395 U.S. 458 31

Yick Wo v. Hopkins, 118 U.S. 356 30

Regulations

Code of Federal Regulations, Title 21, Sec. 130.45.. 41

Code of Federal Regulations, Title 45, Sec. 220.20 18

Code of Federal Regulations, Title 45, Sec. 220.21 18

Statutes Page

California Penal Code, Secs. 274-276 39

Texas Penal Code, Art. 1191 .....8, 33, 41

Texas Penal Code, Art. 1196 .....21, 33, 38

United States Code, Title 42, Sec. 705(a)(12) .. 18

United States Code, Title 42, Sec. 1396 33

United States Constitution, Fourteenth Amendment 7, 9, 37, 42

Textbooks

American College of Obstetrics & Gynecology, Policy on Abortion, Medical Tribune, Oct. 12, 1970, p. 1 32

15 American Law Reports 3d (1967), p. 992 .. 19

American Medical Association, Policy Regarding Abortion (Resolution of AMA House of Delegates, June 25, 1970) "AMA, Eases Abortion Rules," N.Y. Times, June 26, 1970, p. 1 32

American Medical News, July 12, 1971, p. 9 29

Andres, "Intrauterine Contraceptive Devices," 40 Postgraduate Medicine (1966), pp. 739, 742 41

Blumpass and Westoff, "The Perfect 'contraceptive' Population," (1970), 169 Science pp. 1177, 1179 22

California Department of Public Health, Third Annual Report on the Implementation of the California Therapeutic Abortion Act, (1970), Table 4 .. 28

Clark, "Religion, Morality and Abortion: A Constitutional Appraisal", 2 Loyola University (L.A.) Law Review, (1969), pp. 1, 7 35

Clark, "Religion, Morality, and Abortion: A Constitutional Appraisal," 2 Loyola University (L.A.) Law Review (April, 1969), pp. 1, 9 10

POOR COPY

Page

3 Coke, Institutes (1648), p. 50 16

Committee on Human Reproduction, "Evaluation of Intrauterine Contraceptive Devices," 199 Journal of American Medical Association (1967) p. 647 41

Gold, "Therapeutic Abortions in New York City: A 20-Year Review," 55 American Journal of Public Health, (1965), pp. 964-966 25

Guttmacher, "The Shrinking Non-Psychiatric Indications for Therapeutic Abortion", Rosen (ed.), Therapeutic Abortion, (1954), p. 12 26

Hall, "Abortion in American Hospitals," 57 American Journal of Public Health, (1967), pp. 1933, 1934 24

Hall, Therapeutic Abortion, Sterilization and Contraception," 91 American Journal of Obstetrics & Gynecology, (1965), pp. 518, 519 24

Hall, "Therapeutic Abortion, Sterilization and Contraception," 91 Am. J. Obst. & Gynec., (1965), pp. 518, 519, 522 .....26, 27

82 Harvard Law Review, "Developments in the Law —Equal Protection," (1969) pp. 1065-1130 21

82 Harvard Law Review, "Development in the Law —Equal Protection", p. 1178 32

Kauper, "Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold case," 64 Michigan Law Review (1965) pp. 235, 258 9

Kleegman, "Planned Parenthood: Its Influence on Public Health and Family Welfare," Rosen (ed.), Abortion in America, (1967), pp. 254, 256 26

Page

Lader, Abortion (1966) pp. 29-30 37

Leavy & Kummer, "Criminal Abortion: Human Hardship and Unyielding Laws", 35 Southern California Law Review, (1962), p. 123 28

Mandy, "Reflections of a Gynecologist," Rosen (ed.), Abortion in America, (1967), pp. 288-89 25

Means, "The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality," 14 N.Y.L.F. (1968), pp. 411, 420, 453 18

New York Penal Law, McKinney Supp. 1970, Sec. 125.05 29

New York Times, April 6, 1971, p. 25 29

Niswander, "Medical Abortion Practices in the United States," Smith (ed.), Abortion and the Law, (1967), p. 53 24

Packer & Gampbell, "Therapeutic Abortion: A Problem of Law and Medicine," 11 Stanford Law Review (1959), p. 417 39

Prosser, Law of Torts (4th ed. 1971), p. 336 .. 19

Rosen, "A Case Study in Social Hypocrisy," Rosen (ed.), Abortion in America, (1967), pp. 299, 306-07 27

Rosen, "Psychiatric Implications of Abortion: A Case Study in Social Hyprocrisy," 17 W. Res. Law Review, (1965), pp. 435, 450 27

Tietze, "Morality with Contraception and Induced Abortions," 45 Studies in Family Planning (Sept. 1969), p. 6 16

Page

Tietze, "Therapeutic Abortions in the United States," 101 Am. J. Obst. & Gynec., (1968), pp. 784, 786 25

Williams, The Sanctity of Life and the Criminal Law (1957), p. 197 20

IN THE

Supreme Court of the United States

October Term, 1971
No. 70-18.

JANE ROE, *et al.*,

Appellants,

JAMES HUBERT HALLFORD, M.D.,

Appellant-Intervener,

vs.

HENRY WADE,

Appellee.

On Appeal From the United States District Court for the Northern District of Texas.

Motion for Leave to File Brief Amici Curiae in Support of Appellants.

The National Legal Program on Health Problems of the Poor, the National Welfare Rights Organization and the American Public Health Association hereby respectfully move the Court for leave to file their attached brief *amici curiae* in support of appellants in the above-entitled matter.

The National Legal Program on Health Problems of the Poor is a law reform center funded by the U.S. Office of Economic Opportunity to provide support for OEO Legal Services programs across the country in cases involving health problems of the poor, and to provide, through education, research and legal repre-

sentation, assistance in the preparation of important litigation in health law. In that capacity, the Program participated as *amicus curiae* in this case in the court below. The Program is based at UCLA School of Law.

The National Welfare Rights Organization is a voluntary association with 125,000 members in 50 states, organized to represent the interests of low income people and welfare recipients with regard to redress of legal grievances, to act as a spokesman for such people and to educate and inform them of their legal rights.

The American Public Health Association is a voluntary Association of professionals and others in the field of health care who are concerned about improving the quality and the means of providing for the health care of the American people. The APHA works to identify and study these problems, and to communicate its concerns to the government and the public.

These organizations share the view that restrictive state abortion laws, such as the Texas statute here under review, have a negative effect on the health and well-being of American women, and have a particularly severe impact on the nation's poor and non-white populations. It is the poor and non-white who suffer most from limited access to legal abortion, and it is they who incur greatly disproportionate numbers of deaths and crippling injuries as a result of being forced to seek criminal abortion.

There are a number of grounds for constitutional challenge to the abortion law here under review. *Amici* request leave to file this brief at the invitation of counsel for appellants, in order to present in some depth the argument that the discriminatory application and

effect of the abortion law denies to the poor and non-white the equal protection of the law.

It is the understanding and belief of *amici* and this argument will not be developed in any detail in the principal briefs for appellants, and that appellants rely on the within brief for this purpose. Therefore, the equal protection analysis and issues raised in this brief will not be repetitious of other arguments.

Respectfully submitted,

ALAN F. CHARLES,
National Legal Program on
Health Problems of the Poor,
UCLA School of Law,
Los Angeles, Calif. 90024,

SUSAN GROSSMAN ALEXANDER,
National Legal Program on
Health Problems of the Poor,
UCLA School of Law,
Los Angeles, Calif. 90024,

Attorneys for Amici Curiae.

BRIEF OF AMICI CURIAE.

Summary of Argument.

A woman who seeks an abortion is asserting certain fundamental rights which are protected by the Constitution. Among these are the rights to marital and family privacy, to individual and sexual privacy; in sum, the right to choose whether to bear children or not. These rights are abridged by the state's restriction of abortions to saving the mother's life. To justify such an abridgment, the state must demonstrate a compelling interest; no such compelling interest exists to save the Texas abortion law.

The state's interest in protecting the woman's health no longer supports restrictions on abortion. Medical science now performs abortions more safely than it brings a woman through pregnancy and childbirth. Any state interest in discouraging non-marital sexual relationships must be served by laws penalizing these relationships, and not be an indirect, overly broad prohibition on abortion. There is no evidence, in any case, that abortion laws deter such sexual relationships. The state's purported interest in expanding the population lacks any viability today; government policy in every other area is now squarely against it. And any purported interest in permitting all embryos to develop and be born is not supported anywhere in the Constitution or any other body of law.

Because of its restriction, the Texas statute, denies to poor and non-white women equal access to legal abortions. It is an undeniable fact that abortion in Texas and in virtually every other state in the United States is far more readily available to the white, paying

patient than to the poor and the non-white. Studies by physicians, sociologists, public health experts, and lawyers all reach this same conclusion. The reasons for it are not purely economic, *i.e.*, that because abortion is an expensive commodity to obtain on the medical marketplace, it is therefore to be expected that the rich will have greater access to it. It is also because in the facilities which provide health care to the poor, abortion is simply not made available to the poor and non-white on the same conditions as it is to paying patients. As a result, the poor resort to criminal abortion, with its high toll of infection and death, in vastly disproportionate numbers.

Largely to blame are restrictive abortion laws, such as the Texas statute, in which the legislature has made lay judgments about what conditions must exist before abortions can be legally performed, and has delegated the authority to make such decisions to physicians and committees of physicians with the threat of felony punishment if they err on the side of granting abortion. Unlike more privileged women, poor and non-white women are unable to shop for physicians and hospitals sympathetic to their applications, cannot afford the necessary consultations to establish that their conditions qualify them for treatment, and must largely depend on public hospitals and physicians with whom they have no personal relationship, and who operate under the government's eye, for the relief they seek. The resulting discrimination is easily demonstrated.

Restricting abortion only to treatment necessary to save the mother's life irrationally excludes those classes of women for whom abortion is necessary for the protection of health, or because they will bear a deformed fetus, or who are pregnant due to sexual assault, or

who are financially, socially or emotionally incapable of raising a child or whose families would be seriously disrupted by the birth of another child, and these exclusions bear most heavily on the poor and non-white.

In the absence of any compelling state interest, the harsh discriminatory effect on the poor and the non-white resulting from the operation of the Texas abortion law denied to poor and non-white women the equal protection of the laws in violation of the Equal Protection Clause of the Fourteenth Amendment.

ARGUMENT.

I.

The Texas Abortion Law Infringes Upon the Right to Marital and Individual Privacy Without a Compelling State Interest.

A. *The Statute Infringes Upon the Right to Privacy.*

The right to privacy has been recognized as a constitutionally protected right. The Texas abortion statute (Tex. Pen. Code, Arts. 1191 *et seq.*) infringes on the right to marital privacy and the woman's right to individual privacy.

1. Marital Privacy.

In *Griswold v. Connecticut*, 381 U.S. 479, this Court recognized the right to marital privacy when the Court voided a state statute prohibiting dissemination of contraceptive information and devices. The Court defined the right to privacy in terms of the right to personal solitude and autonomy and applied it to a "zone of privacy in marriage," thereby setting forth a right that may not be disturbed by the state without a compelling and valid interest.

The explicit recognition in *Griswold* of a right of marital privacy is but one decision in a line of decisions, dating over fifty years, giving constitutional protection to various rights in the procreative, marital and family context, none of which is explicitly enumerated in the Bill of Rights. These decisions include *Skinner v. Oklahoma*, 316 U.S. 535, 536 ("the right to have offspring" is a constitutionally protected "human right"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (the right to send one's children to private school is derived from "the liberty of parents and guardians to

direct the upbringing and education of children under their control"); and *Meyer v. Nebraska,* 262 U.S. 390, 399 (the liberty guaranteed by the Fourteenth Amendment denotes "the right of the individual to . . . marry, establish a home and bring up children"). More recently, *Loving v. Virginia,* 388 U.S. 1, 12, specifically held that the Due Process Clause of the Fourteenth Amendment protects "the freedom to marry . . . as one of the vital personal rights essential to the orderly pursuit of happiness by free men".

Recognition of the right of privacy asserted in the case now before the Court thus would not usher in a vast increase in judicial power. What has been said pertaining to *Griswold* applies here:

> It required no judicial roving at large to reach the conclusion that the freedom of the marital relationship is a part of the bundle of rights associated with home, family, and marriage—rights supported by precedent, history and common understanding. . . . In exercising its power in *Griswold* to protect a fundamental personal liberty, the Court, far from advancing to a new milepost on the high road of judicial supremacy, was treading a worn and familiar path. Kauper, "Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The *Griswold* case," 64 *Mich. L. Rev.* 235, 258 (1965).

This Court, in *Griswold,* endorsed the contention that certain areas of one's life are so personal that they are nobody else's business; that there is a right to simply withdraw into personal intimacy without hindrance by the State, and a right to protection of this private sphere. Without any "invasion" of the marital

bedchamber, and without any attempt by the state to obtain incriminating evidence, the Court held the Connecticut statute to be an invasion of the protected "zone of marital privacy." Surely, the State has no interest in invading the sanctity, or privacy, of any other decisions involving family planning.

> Griswold's act was to prevent formation of the fetus. This, the court found, was constitutionally protected. If an individual may prevent conception, why can he not nullify that conception when prevention has failed? Clark, "Religion, Morality, and Abortion: A Constitutional Appraisal," 2 *Loyola U. (L.A.) L. Rev.* 1, 9 (Apr. 1969).

The Texas statute, by prohibiting abortions except to save the mother's life abolishes the married couple's fundamental right to decide whether or not to bear a child at the instant when an ovum is fertilized. Until that moment, the couple has complete freedom of choice as to when, whether, and how often they shall produce children. But once fertilization occurs, their freedom of choice ends and they may no longer choose *not* to have a child. The state thus invades, and even supersedes, a married couple's constitutional right to control the use of their procreative powers. Under *Griswold* it is surely not the means of control, but the *power* to control which is significant.

The existence and enforcement of this statute allows the state to intrude into the very essence of the marital relationship and indeed to affect the very course and fate of the marriage itself. As did the Connecticut anti-contraceptive statute, the Texas abortion statute unconstitutionally "operates directly on an intimate relation of husband and wife." 381 U.S. at 483.

2. The Right of Privacy of the Individual Woman.

The right to privacy, to seclusion and autonomy, established as to married couples in *Griswold, supra,* surely belongs to individuals as well.

The right of a woman to control her own body, specifically whether or not to continue a pregnancy, is inherent in the decision in *Terry v. Ohio,* 393 U.S. 1, 8-9, that "no right is more sacred . . . than the right of every individual to the possession and control of his own person. . . ." *See also Olmstead v. United States,* 277 U.S. 438, 478 (Brandeis, J., dissenting).

The right of the woman to decide whether to terminate an unwanted pregnancy follows inexorably from the broad principle that she is entitled to be "let alone" by the state and its agents. For a state to adopt such provisions as the State of Texas has done in this statute represents an impermissible intrusion into her right to her personal integrity and is a deprivation of her personal liberty. By compelling her, against her will, to continue a pregnancy, the woman may be risking her physical or mental well-being, acquiring the financial and psychological burden of a handicapped child, subjected to the emotional trauma of bearing and raising a child whose conception was forced upon her by rape or incest, or adversely affecting the essential direction and quality of her own life (and perhaps the lives of others with whom she lives and works, as well). If a woman is viewed as an individual entity, and not as a vessel for propagation, each time she determines whether to bear a child or not, she is without doubt making a truly fundamental choice of her life.

Women are no longer a vehicle for a determination by others that supervening social interests require their frequent childbearing for the purpose of adding to the population. Through the medium of the abortion law, however, they are subject to the determination of society in general, which (so far as the lawmaking process is concerned) is largely male, that no woman may make for herself the decision not to complete a pregnancy to term when she does not desire to. As set out below, the state has no compelling interest in demanding that a woman should carry an unwanted child.

Several courts have acknowledged that the woman's right to her physical integrity requires that she be allowed to make the decision as to the termination of her pregnancy without hindrance by the state. These cases stand for the proposition that abortion statutes are wholly inconsistent with the existence of a right so fundamental in nature, and are, therefore, unconstitutional. In none of these cases was the state's interest in the policy expressed in the challenged abortion statute considered to be of sufficiently compelling nature to justify legislative efforts to circumscribe a woman's right to decide, after consultation with her physician, to terminate her pregnancy.

In *People v. Belous,* 71 Cal. 2d 954 (1969), *cert. denied,* 397 U.S. 915, for example, the Supreme Court of California, in striking down as unconstitutional the pre-1967 abortion law of California, stated:

> The rights involved in the instant case are the woman's right to life and to choose whether to bear children. The woman's right to life is involved because childbirth involves risks of death.

> The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this Court's repeated acknowledgement of a "right of privacy" or "liberty" in matters related to marriage, family, and sex. 71 Cal. 2d at 963. (footnotes and citations omitted).

See also *Babbitz v. McCann*, 310 F.Supp. 293 (E.D. Wis. 1970), *appeal dismissed per curiam*, 400 U.S. 1, where the Court said:

> The police power of the state does not . . . entitle it to deny to a woman the basic right reserved to her under the Ninth Amendment to decide whether she should carry or reject an embryo which has not yet quickened. 310 F. Supp. at 302.

The right "to be let alone" has, to be sure, been qualified in a few cases involving physical intrusion into the body, but only where the state interest has been compelling, that is, where th exercise of that right has threatened the rights of other members of the society. For example, the power of the state to require vaccinations and to quarantine persons suffering from contagious diseases, although upheld, has been limited to situations involving "great dangers", and "the safety of the general public." *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1904). In *Jacobson*, even so minor an infringement of liberty and of the individual's sovereignty over his body as vaccination was held to require a strong justification.

Also supporting the individual's right to control his own body are recent cases which have upheld the individual's right to refuse medical treatment, even though

such a refusal will clearly result in death. See, *e.g.*, *Erickson v. Dilgard*, 44 Misc. 2d 27, 252 N.Y.S. 2d 705 (Nassau County Sup. Ct. 1062); *In re Brooks Estate*, 32 Ill. 2d 361, 205 N.E. 2d 435 (1965).

In case where blood transfusions were permitted without the patient's consent, *Pres. & Directors of Georgetown College, Inc. v. Jones*, 231 F. 2d 1000 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978, the court based its order on two grounds: (1) the state had an interest in preserving the life of a woman whose small child might become a public charge if she died; and (2) the patient was too weak from loss of blood to be capable of making a competent decision. This case was followed in *United States v. George*, 239 F. Supp. 752 (D. Conn. 1965), in which blood transfusions were ordered while the patient was semiconscious, but withdrawn several days later when the patient regained consciousness.

These cases demonstrate that an individual has a right to refuse medical treatment unless the state's interest is so great that the rest of society will be endangered absent such treatment. Similarly, the state has no right to *prevent* an individual woman from obtaining medical treatment she *desires*, where that treatment represents no danger to the community as a whole.

B. The Statute Infringes Upon Fundamental Constitutional Rights Without Serving Any Compelling State Interest.

Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling. *Bates v. Little Rock*, 361 U.S. 516, 524.

The Texas abortion statute does not serve any compelling state interest to justify its infringement upon constitutionally protected rights. The statute does not serve any valid health purpose; instead it causes a severe health problem. The state has no valid interest in regulating morality indirectly through an abortion statute. The state has no valid interest in increasing population through an abortion statute. And the state has no interest in requiring that all embryos develop and be born.

1. The Statute Serves No Health Interest of the State; on the Contrary, It Has Created a Severe Health Problem.

Because a state has a valid interest in protecting the health of its citizens, one frequently-asserted justification for restrictive abortion laws has been the state's concern with preserving the health of the woman because of the medical dangers associated with abortion in the past. Indeed, the history of abortion legislation in the United States shows that such a concern was a primary, if not the sole, reason for the passage of such restrictive laws during the nineteenth century. But current medical knowledge and techniques have drastically reduced the hazards of abortion, and any such state interest has disappeared. Now, pregnancy itself, may be more harmful to woman's health than an abortion performed under medically approved conditions.

Abortion before "quickening" (*i.e.*, when the first fetal movements are felt by the pregnant woman, usually about the fourth or fifth month) was not a crime under the common law of England; even after quickening, abortion was only a misdemeanor. 3 Coke, *Insti-*

tutes 50 (1648). American law followed suit until the nineteenth century, when legislation making abortion prior to quickening a crime began to appear. These new laws were designed to protect the health of the woman. As *State v. Murphy*, 27 N.J.L. 112, 114 (Sup. Ct. 1858) declared:

> The design of the [abortion] statute was not to prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts.

The risk of even hospital abortions in the 19th century was formidable, but it is now safer for a woman to have a hospital therapeutic abortion during the first trimester than to bear a child. *People v. Belous, supra* at 965.

> "At the time the abortion laws were passed, the laws made some medical-legal sense. But now, in view of the progress of medical science, these laws . . . make no sense whatsoever." Hall, "Abortion Laws: A Call for Reform," 18 *DePaul L. Rev.* 584, 585 (1969). The rate of maternal mortality from complications of or associated with pregnancy and childbirth (excluding induced abortion) is 18 deaths per 100,000 live births, while the rate of mortality associated with legal abortions performed in hospitals at an early stage of gestation is three deaths per 100,000 abortions. Tietze, "Mortality with Contraception and Induced Abortions," 45 *Studies in Family Planning* 6 (Sept. 1969).

There is no longer any health interest served by the Texas abortion statute.

2. The State Has No Valid Interest in Indirectly Legislating Morality, and the Statute Does Not Actually Serve Any Moral Purpose.

It is sometimes asserted that the State has a moral interest in prohibiting abortion because the availability of abortions will tend to encourage promiscuity. If the Texas legislature is concerned with deterring fornication and adultery, it may enforce statutory prohibitions of and penalties for those acts themselves. "It may not do so, however, by making the penalty a personally, and socially, undesired pregnancy." *Baird v. Eisenstadt*, 429 F. 2d 1398, 1402 (1st Cir. 1970), *prob. juris. noted*, 401 U.S. 934.

Even where premarital or extramarital relationships are banned, as in Connecticut at the time of the *Griswold* opinion, a ban on abortions by married couples in no way reinforces the state's ban on other sexual relationships. "At most [such a] broad ban is of marginal utility to the declared objective." *Griswold v. Connecticut, supra* at 506 (White, J., concurring).

3. The State Has No Interest in Increasing Its Population; on the Contrary, Its Interest, if Any, Is in Limiting Population Growth.

In view of the increasing public concern over our rapidly multiplying population, any supposed state interest in increasing the number of lives in being can hardly be raised as a justification for the prohibition of abortion. Indeed, the growing emphasis of both federal and state agencies upon preplanning of families and limitation of their size makes manifestly inconsistent treating the termination of pregnancy as a crime, while birth control devices are not merely permitted but are openly promoted and encouraged by the govern-

ment. *See, e.g.*, 42 U.S.C. 705(a)(12); 45 C.F.R. 220.20, 220.21.

4. The State Has No Interest in Requiring That All Embryos Develop and Be Born.

There is not now, nor has there ever been, a state interest which requires that all embryos develop and be born.

(a) *The Law Has Never Restricted Abortions for the Purpose of Protecting the Embryo.*

The English common law, followed in this country until the advent of statutory law, permitted abortion before quickening with the woman's consent. The woman's right to abort her pre-quickened fetus was thus "an ancient commonlaw liberty" of which she was not deprived until the nineteenth century. Means, "The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality," 14 *N.Y.L.F.* 411, 420, 453 (1968).

If anything, the historical development of the abortion statutes reflects an interest in protecting the well-being of the woman. "The new statutes were inspired by reverence for life, to be sure; but the life they revered was the pregnant woman's, not that of the unquickened foetus." *Id.* at 508.

(b) *There Is No Legal Recognition of the Fetus as a Person; Live Birth Is Required Before Any Rights Attach.*

All of the statutes and rules which are generally relied upon to show that an embryo or fetus is legally equivalent to a born child "require a live birth or reflect the interest of the parents." *People v. Belous, supra* at 968, 968 n. 12.

(1) No recovery is permitted for injuries negligently inflicted upon a fetus by a third person unless the fetus is *born alive*. Prosser, *Law of Torts* 336 (4th ed. 1971).

(2) No recovery whatsoever is permitted in many states for wrongful death where there is a stillbirth. Even in those jurisdictions which recognize such a cause of action, it is a recognition on behalf of the parents, who have suffered a distressing wrong in the loss of a child whose birth they desired. *Id.* at 337. Moreover, every one of those cases requires that the injury have occurred when the fetus was *viable* (one case says "quick"). *See* 15 A.L.R. 3d 992 (1967).

(3) The fetus has no property rights; it must be *born alive* to take property. *See, e.g., People v. Belous, supra* at 968 n. 12.

(c) *The View That "Human Life" Commences With Conception Is a Philosophical Conclusion Not Supported by Scientific Evidence.*

The view that human life commences with conception cannot be supported by any scientific evidence one way or the other. At what point a fetus becomes a "human being" is a subject more fitting for philosophical debate than for scientific judgment. Precisely because human development is a continuum, any choice of a starting point for an individual human being is largely arbitrary. Choosing the point of fertilization of the egg by the sperm is no more logical or meaningful than choosing any other.

> It is said that, as a biological fact, life begins with the fertlized ovum. But in one sense 'life' began in the prehistoric slime and has been continuous since. The question is not when life begins

but when human personality begins. This is where the phrase 'the unborn child' subtly begs the question.

. . . .

The phrase 'unborn child' can be used, without offense to common sense, in respect of the viable foetus, that if, after about the seventh month of pregnancy, when the foetus is capable of surviving part from the mother. But the further one goes back in the development of the foetus the more questionable its application becomes. Williams, *The Sanctity of Life and the Criminal Law* 197 (1957).

The existence of a conceptus cannot be equated with the life of a grown woman. This woman is—beyond dispute—a human being. To equate her life and her constitutional rights with those of a non-visable fetus is to make a moral judgment. Any individual is entitled to adopt such a moral judgment for guidance in his or her private life, but it is surely a judgment which he cannot enforce upon others through legislation. *See Epperson v. Arkansas,* 393 U.S. 97.

5. Conclusion.

A single conclusion is dictated by all of the above: the Texas abortion statute serves no compelling state interest. Because it fails to serve any compelling state interest, its invasion of fundamental rights is in clear violation of the Federal Constitution.

II.

The Application and Effect of Restrictive Abortion Laws, Such as the Texas Abortion Law, Results in Discrimination Against Poor and Non-White Women in Exercising Their Fundamental Interest in Marital and Individual Privacy, Denying to Them the Equal Protection of the Laws.

While *amici* contend that to receive proper medical care in the form of an abortion approved and performed by a physician is, by itself, a fundamental interest protected by the Constitution (Part I, *supra*), it is not necessary for abortion to be declared a constitutional right to hold that its discriminatory denial violates guarantees of equal protection. Even when an interest is not found to be fundamental under the Due Process Clause, it may be deemed fundamental under the Equal Protection Clause, and unequal treatment with respect to that interest upheld only on a very strong showing of justification. Note, "Developments in the Law—Equal Protection," 82 *Harv. L. Rev.* 1065, 1130 (1969).

A. Factual Data Demonstrate Discrimination Against the Poor and Non-White.

The State of Texas has prohibited all abortions except for "the purpose of saving the mother's life" (Tex. Pen. Code, Art. 1196). On its face, this permits treatment in the case of all women whose lives are similarly endangered, and excludes from treatment all others.

Presumably, therefore, those women who qualify for a legal abortion according to the terms of the statute should be able to obtain one, regardless of their race or socio-economic status. There is nothing demonstrable in the differences of skin color or economic condition

which suggests that a substantially smaller proportion of the poor or the non-white fall into this category than that of the white and the non-poor, or that the poor and non-white have a substantially different moral attitude on abortion.

On the contrary, a recent study of births occurring between 1960 and 1965 led investigators to conclude that one-third of Negro (as contrasted with one-fifth of white) births were unwanted. "This high level of unwanted births among Negroes indicates the magnitude of the burden of unwanted dependents that is borne by this population. . . ." Blumpass and Westoff, "The Perfect 'contraceptive' Population," 169 *Science* 1177, 1179 (1970). Unwanted births were in general more than twice as high for families with incomes of less than $3000 as for those with incomes of over $10,000; this differential was "particularly marked among Negroes." *Id.* The results indicated, in the view of the investigators, that there is a "coincidence of poverty and unwanted births rather than a propensity of the 'poor' to have unwanted children." *Id.*

One explanation for this high level of unwanted births among the poor and the non-white is surely the fact that they do not have equal access to abortions. Data demonstrate that the poor and the non-white do not receive this medical treatment on the same terms as do others. They thus suffer a particularly harsh and adverse effect from the operation of this statute, as they do from that of the other restrictive abortion laws which have existed and currently exist in the United States. Dr. Alan F. Guttmacher has summed up the evidence:

> Both in regard to incidence and indications between patients on private and clinic services and

> voluntary and municipal hospitals . . . it has long been apparent . . that municipal hospitals follow the letter of the law of the abortion statute much more exactly than voluntary hospitals, and also that private patients are generally treated by a more lenient interpretation of the law than service patients. Guttmacher, "Abortion—Yesterday, Today and Tomorrow," in Guttmacher (ed.), *The Case for Legalized Abortion Now* (1967).

The additional burdens placed upon indigent women by public hospitals before these women can obtain abortions (obtainable with far greater ease elsewhere by those who can pay) have been discussed by the two federal courts which examined the procedures at the District of Columbia General Hospital. *Doe v. Gen. Hosp.*, 313 F. Supp. 1170 (D.D.C. 1970), 434 F. 2d 423 and 434 F. 2d 427 (D.C. Cir. 1970). Because the poor rely primarily upon public hospitals for their medical services, denials or delays at those institutions are tantamount to a denial of prompt medical care solely because these women are without funds.

Dr. Robert E. Hall has collected and reported data supporting this conclusion. In New York City, between 1960 and 1962, Dr. Hall found that:

> . . . the ratio of therapeutic abortions to live births in the proprietary hospitals was 1:250; on the private services of the voluntary hospitals, 1:400; on the ward services of the same voluntary hospitals, 1:1,400; and in the municipal hospitals, 1:10,000. The same inequity pertains to ethnic origin. The rate of therapeutic abortions per live births among white women in New York is 1 per

> 380, among nonwhites 1 per 2,000, and among Puerto Ricans 1 per 10,000. Hall, "Abortion in American Hospitals," 57 *Am. J. Pub. Health* 1933, 1934 (1967).

In a survey of 65 randomly selected major American hospitals, Dr. Hall similarly discovered that the rate of therapeutic abortions was *3.6 times higher on the private services of* these hospitals than on their ward services. Hall, "Therapeutic Abortion, Sterilization and Contraception," 91 *Am. J. Obst. & Gynec.* 518, 519 (1965).

Kenneth R. Niswander has substantiated similar data from a study of Buffalo, New York, hospitals. Niswander, "Medical Abortion Practices in the United States," in Smith (ed.), *Abortion and the Law* 53 (1967).

Furthermore, he has written:

> Hospitals vary greatly in their abortion practices. At the Los Angeles County Hospital, which treats only clinic patients, . . . from 1946 to 1951 there was an incidence of one therapeutic abortion per two thousand eight hundred sixty-four (2,864) deliveries. At the opposite extreme, one finds reputable hospitals permitting abortion for one out of every 35-40 deliveries. The variation in the hospitals surveyed by [Robert E.] Hall extended from no abortions in 24,417 deliveries to one in 36 deliveries. It seems inconceivable that medical opinion could vary so widely. *Socioeconomic factors must be playing a major role in the decision to abort in certain institutions. Id.* at 54-55 (emphasis added).

Data collected from New York City by other investigators for the period 1951-1962 revealed that:

> Therapeutic abortion occur[red] most frequently among the white population by a considerable margin. The white ratio [was] more than *five times* that among the nonwhites and *26 times* that among the Puerto Ricans. (Well over 90 per cent of all therapeutic abortions in New York City [were] performed on white women.) Gold *et al.*, "Therapeutic Abortions in New York City: A 20-Year Review," 55 *Am. J. Pub. Health* 964, 966 (1965) (emphasis added).

A nationwide survey of all short-term general hospitals participating in the Professional Activities Survey from 1963 to 1965 led to this conclusion:

> . . . [T]he incidence of therapeutic abortion was almost twice as high among white women as among the nonwhite group . . . . Tietze, "Therapeutic Abortions in the United States," 101 *Am. J. Obst. & Gynec.* 784, 786 (1968).

Similar statistics and conclusions appear throughout the literature in this area:

> Perhaps the greatest injustice resulting from our standard for private and indigent patients. . . . Almost universally greater consideration is extended to the private patient for a multitude of reasons which, not infrequently, include a recognition of their social and economic prestige. Mandy, "Reflections of a Gynecologist," in Rosen (ed.), *Abortion in America* 288-89 (1967).

* * *

The rich and the poor, it should be noted, are not treated alike: many ethical physicians, for in-

> stance, are much more lenient in their application of indications for therapeutic abortion to private patients than to indigent patients on municipal hospital services. It is the 'private practice' patient, therefore, who can more readily obtain a therapeutic abortion. Kleegman, "Planned Parenthood: Its Influence on Public Health and Family Welfare," in Rosen (ed.), *Abortion in America* 254, 256 (1967).

A partial explanation for the marked disparity in these figures appears to lie in the far lower incidence of abortions performed for psychiatric reasons among poor and non-white women. In an era when *non*-psychiatric medical reasons for abortions have steadily decreased (*Guttmacher, "The Shrinking Non-Psychiatric Indications for Therapeutic Abortion"* in Rosen (ed.), *Therapeutic Abortion* 12 (1954)), a steadily increasing number of abortions have been performed for psychiatric reasons. Poor and non-white women have not been the recipients of this treatment, however, to the same extent as their white and wealthier sisters. As Hall wrote in 1965, the discrepancy documented above

> . . . may be attributed to the higher incidence of abortions for psychiatric indications among private patients. Whereas at Sloane Hospital [for Women, in New York City] one therapeutic abortion was performed for psychiatric reasons per 1,149 deliveries on the ward service, the comparable ratio for the private service was one per 104. . . . It would appear therefore that private patients with unwanted pregnancies are more often referred for primary psychiatric evalu-

ation is more easily obtained for private patients. Hall, "Therapeutic Abortion, Sterilization and Contraception," 91 *Am. J. Obst. & Gynec.* 518 519, 522 (1965).

Dr. Hall's survey of 65 major hospitals confirms the same wide discrepancy in granting psychiatrically-related abortions. (Hall, *op. cit.* at 518.)

Why has this phenomenon occurred? Perhaps because

> . . . by the very nature of things, ward patients are less likely to have the necessary consultations requested, including the psychiatric, and to have the necessary recommendations made and accepted by a hospital board, than are their well-to-do sisters. Ethical and conscientious physicians decry this fact, but nevertheless find it impossible to controvert. . . . Rosen, "A Case Study in Social Hypocrisy," in Rosen (ed.), *Abortion in America* 299, 306-07 (1967).

B. As a Result of the Disproportionate Unavailability of Hospital Abortions to Them, the Poor and the Non-White Resort to Unsafe Criminal Abortions Which Lead to High Mortality and Morbidity Rates.

While socioeconomic conditions never *per se* legally warrant therapeutic abortion, socioeconomic status nevertheless frequently determines whether or not an abortion will be performed, and if performed, whether that self-same abortion will be *therapeutic or criminal.* Rosen, "Psychiatric Implications of Abortion: A Case Study in Social Hyprocrisy," 17 *W. Res. L. Rev.* 435, 450 (1965).

Criminal abortion has been described as the greatest single cause of maternal mortality in the United States; it is one of the greatest cause fo disease, infection, and resulting sterilization as well. *See* Leavy & Kummer, "Criminal Abortion: Human Hardship and Unyielding Laws", 35 *So. Cal. L. Rev.* 123 (1962); *see also People v. Belous, supra* at 965-66. The poor and the non-white suffer disproportionately from the "back-alley" abortionists, whose services they seek out in lieu of the medically safe hospital abortions generally denied them.

California, the only state known to officially compile such figures, notes that approximately 7 percent of that state's non-white female population subjected themselves to criminal abortion in 1968, as opposed to only 1½ percent of the state's white female population. (California Dept. of Public Health, *Third Annual Report on the Implementation of the California Therapeutic Abortion Act,* Tab. 4 (1970).)

The often tragic results of these abortions are also documented. In their New York study, Drs. Gold, *et al. op. cit.* at 970-71, noted that the ratio of criminal abortion deaths per 1,000 live births was 4.0 for white women and 16.2 for non-whites. Likewise, Dr. Hall's 1960-62 study led him to conclude that approximately half of the puerperal deaths among New York's Negroes were due to criminal abortions as opposed to only a quarter of the puerperal deaths among white women. Hall, *op. cit.,* 57 Am. J. Pub. Health at 1934.

C. Where Abortion Restrictions Have Been Eliminated, the Poor and the Non-White in Fact Receive Abortion Services in a Non-Discriminatory Manner.

In sharp contrast to the above data has been the experience in New York State since July 1, 1970, when

categorical restrictions on abortion were eliminated. *See* N.Y. Pen. Law §125.05 (McKinney Supp. 1970). On April 5, 1971, New York City health officials reported that the city's public hospitals, which restricted abortions to city residents, were performing an average of 511 a week, and that the "vast majority" of those women would be unable to afford abortions in private hospitals. *N.Y. Times,* April 6, 1971, at 25.

A later report, issued on June 29, 1971, was even more revealing:

> In the first six months, non-whites and Puerto Ricans, who had little access to legal abortions prior to the law, received half the abortions done on women in [New York City]. In the first nine months, 31% of the city's abortions done on state residents were reimbursable under Medicaid. *American Medical News,* July 12, 1971, at 9.

It is clear from this evidence that where the law has eliminated restrictions on the obtaining of abortions, the poor and non-white women who were previously unable to exercise the financial and other kinds of leverage required to have a "therapeutic" abortion, are able to obtain medically safe abortions on an equal basis with all other women, and they do obtain them to at least the same extent as their more privileged sisters. One result has been a drop in the maternal mortality rate: New York City hospitals now report treating far fewer victims of "botched" illegal abortions than they did in years past. "The maternal mortality rate—to which criminal abortions have always contributed a major portion—is now at a record low of 2.3 per each 10,000 live births, compared with 5.2 . . . at this time last year." *Id.*

D. The Impact of the Restrictive Abortion Law Effectively Denies Equal Protection to the Poor and Non-White.

It has been amply demonstrated above that poor and non-white women are not treated equally with other women in obtaining lawful abortions. However neutral its facial appearance, and however unexceptionable its underlying intent, the practical effect of a statute in denying equal treatment to classes of persons, such as the poor or the non-white, must be measured by the Court.

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74.

The standard articulated in *Yick Wo* has been consistently applied by this Court. Moreover, it has been applied to statutes which have a natural discriminatory effect, whether or not there is evidence of any "evil" public administration.

Where the class affected is the poor, *see Griffin v. Illinois,* [351 U.S. 12 (state's provision of criminal appeal, but not of free transcript held to be an effective denial of equal protection to poor defendants); *Harper v. Virginia Bd. of Elections,* 383 U.S. 663 (state's exaction of a poll tax from all voters held to be an effective denial of equal protection to poor voters); *Shapiro v. Thompson,* 394 U.S. 618 (state's re-

fusal to make welfare payments to residents of less than one year held to be an effective denial of equal protection to poor recent residents and to the foreign poor who wish to travel to the state); *Douglas v. California*, 372 U.S. 353 (state's provision of criminal appeal, but where appellate court decides in advance of hearing whether appointment of counsel for indigent would be "helpful", held to be an effective denial of equal protection to poor defendants). *See also Williams v. Oklahoma City*, 395 U.S. 458; *Gardner v. California*, 393 U.S. 367; *Long v. District Court of Iowa*, 385 U.S. 192; *Rinaldi v. Yaeger*, 384 U.S. 305; *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F. 2d 175 (D.C. Cir. 1969).

Where the class affected is non-white, see *Gomillion v. Lightfeet*, 364 U.S. 339 (state's drawing of voting district lines which effectively excluded Negroes from a city district held to be an effective denial of equal protection to Negroes); *Patton v. Mississippi*, 332 U.S. 463, and *Smith v. Texas*, 311 U.S. 128 (state's facially neutral system of jury selection was administered to largely exclude Negroes held to be an effective denial of equal protection to Negroes).

The impact of the cases cited immediately above is that, while the state may not be bound to confer the benefit at issue (here, the categorical exception and "preserving life" to its basic anti-abortion statute), if it chooses to do so it is obliged not to effectively preclude enjoyment of the benefit to classes like the poor and non-white. Thus, in *Griffin v. Illinois, supra*, the state was not obliged by due process to provide appeals from criminal convictions, but since it has chosen to do so, it could not provide them in a manner that ef-

fectively denied poor persons access to the appeal process.

> The effect of the [Griffin] decision is to require Illinois to take account of economic inequities not of its own creation. Note, "Developments in the Law—Equal Protection," *supra*, 82 *Harv. L. Rev.* at 1178.

If the State of Texas had chosen not to regulate the medical practice of abortion, the prevailing standards of medical practice in the United States today would sanction its performance without categorical restrictions. *See* AMA, *Policy Regarding Abortion* (Resolution of AMA House of Delegates, June 25, 1970) discussed in "AMA Eases Abortion Rules," *N.Y. Times*, June 26, 1970, at 1; American College of Obstetrics & Gynecology, *Policy on Abortion*, discussed in *Medical Tribune*, Oct. 12, 1970, at 1. It is true that the poor and non-white would still be limited by obtaining treatment by the natural factors of inability to pay, not having a family physician, and the limited number of free or subsidized-care facilities in their communities. Nevertheless, it is clear that the state's entry into the field has aggravated the natural limitations of the poor and the non-white by imposing artificial limitations which make it extremely difficult for the poor and non-white to receive the treatment. This results in an effective denial of equal protection to the poor and non-white, for which the state has demonstrated no compelling controversial interest.

In sanctioning the vastly disproportionate exclusion of the poor and non-white from abortion services, the state cannot assert that its purpose is to cut down the number of abortions. Where abortion is otherwise lawful, and the poor or non-white woman legally

qualifies, the state has no interest in eliminating that which it does not prohibit. The impact on the poor and non-white cannot be justified in terms of state budget-saving, since restrictive abortion laws do not bear any rational relation to the allocation of state resource, and they are clearly not a mere economic regulation. *See Dandridge v. Williams,* 397 U.S. 471. Even were budget-saving asserted, in that medical care for the poor and non-white is often subsidized by public funds (*e.g.,* the Medicaid program, 42 U.S.C. 1396 *et seq.*), it cannot be accomplished by arbitrarily selecting classes to suffer the deprivation. *Shapiro v. Thompson,* 394 U.S. 618.

III.

The Delegation of Authority to Physicians to Approve Abortions at Their Peril Results in Discrimination Against Poor and Non-White Women, Denying to Them the Equal Protection of the Laws.

The Georgia legislature has a protected class of women who may receive legal abortion: those whose lives would otherwise be lost. Tex. Pen. Code, Art. 1196.

The legislature has then given the authority to determine who falls into this class, and when a life is threatened, to physicians.

Abortion is otherwise criminal in Texas, punishable by a two to five year prison term. Tex. Pen. Code. art. 1191.

Abortions performed outside of the Texas abortion law or performed in error under the statute are criminal abortions. Physicians may clearly be prosecuted even though excepted under the statute, since a prosecutor and jury may not agree with the physician as to

the "life-saving" necessity of the abortion. The burden of going forward with the evidence to prove non-necessity may be on the prosecution, but the decisions of physicians are not immune from prosecution. *See U.S. v. Vuitch,* ..... U.S. ....., 91 S. Ct. 1294, 1298; *but cf. U.S. v. Vuitch,* 91 S. Ct. 1294, 1311-12 (Stewart, J., dissenting in part).

The Texas legislature has assigned to these physicians the task of determining whether a woman falls into this "life-saving" category at their peril. A prosecutor may choose to disagree with the determination in favor of the woman, and a "second-guessing lay jury" may choose to convict. *See U.S. v. Vuitch, supra,* 91 S. Ct. at 1312 (Stewart, J., dissenting in part).

It must be noted here that so long as this second-guessing of medical judgment is permitted, the mere existence of a moral temper adverse to abortion in the prosecutor's office or in the community may have a heavy influence on the making of that judgment. The majority in *Vuitch* suggest that this "danger exists in all criminal cases, not merely those involving abortions." *U.S. v. Vuitch, supra,* 91 S. Ct. at 1299, n. 7. This is not so. In virtually all criminal cases the factual issue for the jury to decide is whether or not the defendant committed the criminal act charged, the act and the crime being one and the same. In abortion cases, commission of the act of abortion by th physician, or its abetment by the committee, may be conceded. The criminality of the act under the statute is, in every case, a matter of qualitative judgment. This is not to say that *voir dire* of jurors and the watchfulness of judges does not blunt the danger (*U.S. v. Vuitch, id.*) but it does point up the danger to physicians in a hostile environment when it is not their com-

mission or abetment of the act which may be criminal, but the quality of their expert judgment. This "danger" does not exist in all criminal cases. Mr. Justice Clark has added:

> . . . [D]octors face an uncertain fate when performing an abortion. This uncertainty will continue unless the legislatures or courts provide relief from liability. Clark, "Religion, Morality and Abortion: A Constitutional Appraisal", 2 *Loy. U. (L.A.) L. Rev.* 1, 7 (1969).

On the other hand, no prosecution or penalty exists for physicians who decide that the woman is not qualified for an abortion. In considering the slanted consequences of this kind of legislative delegation, the California Supreme Court, in that state's landmark abortion case, said:

> The inevitable effect of such delegation may be to deprive a woman of an abortion when under any definition [of the statutory categories] she would be entitled to such an operation, because the state, in delegating the power to decide when an abortion is necessary, has skewed the penalties in one direction: no criminal penalties are imposed where the doctor refuses to perform a necessary operation, even if the women should in fact die. . . . The pressures on a physician to decide not to perform an absolutely necessary abortion are . . . enormous . . . *People v. Belous, supra* at 973.

Amici do not suggest that every physician faced with the possibility of prosecution, and with having his own medical judgment subjected to lay public review, cannot nevertheless render a fair decision on the merits of an application for abortion. But the risk to be run that

the average physician will not be able "to hold the balance nice, clear and true" is substantial, and its impact on Due Process plain. *Tumey v. Ohio,* 273 U.S. 510, 532. This kind of risk of a skewed decision by a personally interested decision-maker has regularly been held to be an invalid delegation of authority. *See In re Murchison,* 349 U.S. 133; *Mayberry v. Pennsylvania,* 400 U.S. 455; *Jackson v. Denno,* 378 U.S. 368; *Tumey v. Ohio, supra.*

Furthermore, the decision-making process under this delegation of authority has all the aspects of a star chamber proceeding. Time is obviously of the essence in considering an application for abortion, and there is no appeal from an abortion committee's decision. The decision is made in private, with no provision for personal appearance by the applicant. And in this situation, the question to be decided may be one of life or death, the most fundamental of all human rights.

Where a poor, non-white woman is in need of abortion, the delegation of this authority results in a denial of equal protection, because the poor woman is restricted by her economic circumstances to seeking abortion in a hospital willing or otherwise obliged to treat indigents. Nothing in the law or in common medical practice prevents the affluent woman from consulting with any physician and going to any hospital most likely to provide the desired treatment. The denial of abortion to a poor woman under these circumstances has the effect of a decision *res judicata.* The more affluent woman may shop among hospitals and doctors until she finds those who will favor her application, even if it has been rejected elsewhere.

The most disastrous result of the abortion committee system has been the economic and social

> discrimination against one group—the ward patients. In large cities the poor . . . are virtually denied the same medical care as the privileged few. Lader, *Abortion* 29-30 (1966).

The abortion practices of hospitals treating the poor, as compared with the same practices respecting the affluent (Part II, *supra*), reflect the discriminatory result of this delegation of authority. Thus, in effect, a denial of equal protection results when a statute conferring a right to an abortion upon certain kinds of women operates to confer decision-making authority as to the affluent upon numerous abortion-providers, but in effect results in limiting decision-making authority as to the poor to one (or none) or a very few lawful abortion providers with substantial and compelling interests impairing thier ability to decide impartially whether a woman is entitled to an abortion.

IV.

The Texas Abortion Law, While Permitting Abortion to Save a Woman's Life, Irrationally Excludes From Its Protection Women Whose Health May Be Seriously Theatened, Who Bear a Deformed Fetus, Who Have Been Victims of Sexual Assault, Who Are Financially, Socially or Emotionally Incapable of Raising a Child and Whose Family Tranquillity and Security Would Be Seriously Disrupted by the Birth of Another Child, Exclusions Which Bear Most Heavily on the Poor and Non-White, and Which Do Not Serve Any Compelling or Reasonable State Interest, Denying to These Women the Equal Protection of the Law.

The Equal Protection Clause of the Fourteenth Amendment requires the states to "exercise their powers so as not to discriminate between their inhabitants ex-

cept upon some reasonable differentiation fairly related to the object of regulations." *Railway Express Agency v. New York*, 336 U.S. 106, 112 (Jackson, J., concurring). The challenged statute operates to deny equal protection to women with compelling reasons for receiving therapeutic abortion, concurred in by their physicians, but whose physicians cannot advance as "medical advice" that the abortion is nesessary to "save" their lives. Tex. Pen. Code, art. 1196. Women so excluded are those who would suffer a serious impairment of physical or mental health from carrying a pregnancy to terms, those whose pregnancies are the result of rape or incest, those whose fetuses will, with high medical certainty, be born with gravely disabling physical or mental defects, and those who are financially unable or emotionally incapable of supporting a child, or of adding another child to a family whose limited resources are already strained by their devotion to raising children in being.

The equal protection infirmity of the Texas law does not arise from any blanket prohibition on abortion, which could be analyzed in strictly Due Process terms. It arises from the recognition by Texas of a class to be protected, for certain compelling reasons, and its refusal to extend that protection to other classes of women whose reasons may be equally compelling.

On its face, Tex. Pen. Code, art. 1196 recognizes "that the pregnant women's right to life takes precedence over any interest the state may have in the unborn." *People v. Belous, supra,* at 969. But, on its face, the state's definition of this right ("for the purpose of saving the mother's life") is itself irrational. Physicians are authorized to protect those in that class, at the risk of heavy penal sanctions for going beyond

it, even though medically its definition makes no sense. Medical science is far from certain in any given case whether pregnancy will in fact lead to death, or whether it will merely impair health or have similar consequences, and this lay judgment of the Texas legislature has no basis in medical knowledge. The court below recognized this when it asked

> How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertainably higher possiblity of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How *imminent* must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years? These questions simply cannot be answered. 314 F. Supp. at 1223.

The classic study of the medical uncertainty of this statutory category may be found in Packer & Gampbell, "Therapeutic Abortion: A Problem of Law and Medicine," 11 *Stan. L. Rev.* 417 (1959), where eleven hypothetical abortion applications were presented to 29 California hospitals, then operating under a similarly worded "life-preserving" abortion law exception (Cal. Pen. Code 274-276 (West 1955), declared unconstitutional in *People v. Belous supra*). The responses of these hospitals as to whether or not they would perform abortions under the law in these hypothetical cases were astonishing in their variety and inconsistency. *Amici* here contend that for the legislature to single out a class of women for medical protection in terms that have no reasonably ascertainable medical meaning is to create an irrational classification *ipse facto*.

Furthermore, the fundamental interest involved in the case of each of the excluded classes of women is as deserving of constitutional protection as the "saving" (whatever it may mean) of the mother's life. Compelling a woman to give birth to a child which is the product of rape or incest, or which will be born deformed, or whose birth will damage the woman's own health or capacity to be a mother to the child or to her existing family, may be as unbearable to the woman as a vague threat to her life itself. That compulsion also puts her physician in the ethically questionable position of having to decide just how much injury he must allow her to bear, despite his obvious ability to prevent that injury, before he can confidently say to the prosecutor that he ultimately acted to save her life.

Certain assumptions must be made and constitutionally accepted to find that there is a basis of rationality to the exclusion of the above-mentioned classes of women from the statute's protection. One is that human-life begins with fertilization of egg by sperm. Another is that this "life" is equivalent to the life of the woman, and the life-saving exception to the abortion law is a rational balancing of interests by the state, analogous to the laws of self-defense.

It is remarkable that the existence of a one-day old fetus is to be equaled with the life of a grown woman. The woman is—beyond doubt—a human being, one upon whom other human beings (husband, children, etc.) depend in a variety of ways essential to the sanctity of the family, and whose impaired health may be critically disruptive to that family; or one who may not consented to sexual intercourse made felonious by the state, yet who is forced to bear the consequences of

that same felonious act. This equivalency of interest between a microscopic embryo and the woman who bears it must be assumed in the Texas law, however, since that statute draws no lines, such as viability, as the time to invoke the state's protection. The *reductio ad absurdum* of constitutionally indulging such an equivalency of lives is demonstrated if one considers the case of the intrauterine device (IUD). This mechanical means of preventing pregnancy is gaining wide national acceptance as a safe and effective alternative to the oral contraceptive pills, which have been found to bear some serious risks (see, *e.g.*, New Drug Regulation on Oral Contraceptives, 21 C.F.R. 130.45). Andres, "Intrauterine Contraceptive Devices," 40 *Postgraduate Medicine* 739, 742 (1966); Comm. on Human Reproduction, "Evaluation of Intrauterine Contraceptive Devices," 199 J.A.M.A. 647 (1967). Yet IUD's are not contraceptives, they are clearly abortificaients, whereby "the life of the fetus or embryo [is] destroyed in the woman's womb" (Tex. Pen. Code, art. 1191). IUD's act to inhibit the implantation and growth of the fertilized egg. Andres, *op. cit., supra* at 742. Thus in Texas and every state with a similar statute, the prescription and use of IUD's is as surely a criminal abortion as any other medical means to that end.

Amici have pointed out in Argument I, *supra*, that there is no support in the Constitution or common law for establishing the fetus as a human life or making that life equivalent, in terms of when the law protects, with its mother. Lacking a sound basis for giving the fetus full human status without any qualification as to its age in the womb, the exclusion of the aforesaid classes of women from access to medical treatment which they want and need, and which their physicians

wish to render, is an arbitrary classification serving no compelling or reasonable state interest; access to that proper medical treatment would seem to be an interest as fundamental as any the Court has heretofore protected against arbitrary discrimination. See Argument I, *supra; Shapiro v. Thompson, supra; Harper v. Virginia Bd. of Elections, supra; Griffin v. Illinois, supra.*

Conclusion.

The equal protection infirmity of a statute whose burden is felt more acutely by the poor has been noted in Mr. Justice White's concurring opinion in *Griswold v. Connecticut, supra* at 503:

> [T]he clear effect of these statutes as enforced is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control. . . . In my view, a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment. *Yick Wo v. Hopkins,* 118 U.S. 356; *Skinner v. Oklahoma,* 316 U.S. 535; *Schware v. Board of Bar Examiners,* 353 U.S. 232; *McLaughlin v. Florida,* 379 U.S. 184, 192.

Because the Texas abortion law has the clear effect of denying disadvantaged citizens access to safe hospital abortions, without any justification, it violates the Equal Protection Clause of the Fourteenth Amendment.

Respectfully submitted,

ALAN F. CHARLES,
SUSAN GROSSMAN ALEXANDER,
Attorneys for Amici Curiae.

FILE COPY

Supreme Court, U.S.
FILED
AUG 17 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

No. 70-18, 1971 Term

JANE ROE, JOHN DOE AND MARY DOE,

Appellants,

JAMES HUBERT HALLFORD, M.D.,

Appellant-Intervenor,

—v.—

HENRY WADE,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, THE AMERICAN PSYCHIATRIC ASSOCIATION, THE AMERICAN MEDICAL WOMEN'S ASSOCIATION, THE NEW YORK ACADEMY OF MEDICINE, AND A GROUP OF 178 PHYSICIANS AS *AMICI CURIAE*

Clyde L. Randall, M.D.
President, American College of Obstetricians and Gynecologists
Professor of Obstetrics and Gynecology
State University of New York Medical Center, Buffalo

(Additional *Amici* appear on inside cover)

Carol Ryan
336 East 55th Street
New York, New York 10022
Attorney for Amici Curiae

American College of Obstetricians and Gynecologists,

the American Psychiatric Association,

the American Medical Women's Association,

the New York Academy of Medicine, and the following physicians:

(continued on inside front cover)

J. Robert Willson, M.D.
Past President, 1970-1971
American College of Obstetricians and Gynecologists
Professor and Chairman
Department of Obstetrics-Gynecology
University of Michigan Medical Center, Ann Arbor

Keith P. Russell, M.D.
Past President, 1969
American College of Obstetricians and Gynecologists
Clinical Professor of Obstetrics and Gynecology
University of Southern California School of Medicine, Los Angeles

Warren E. Magee, Esq.
General Counsel
American Psychiatric Association
Magee & Bulow
Washington, D.C.

Texas

CHARLES E. GIBBS, M.D.
President
Texas Association of Obstetricians and Gynecologists
Associate Professor, Department of Obstetrics and Gynecology
The University of Texas Medical School at San Antonio

HUGH SAVAGE, M.D.
Chairman, Texas Medical Association
Committee to Study Abortion Laws in Texas
Fort Worth

JOSEPH M. WHITE, M.D.
Vice-President for Academic Affairs and Dean of Medicine
The University of Texas Medical Branch
Galveston

CHARLES WILLIAM DAESCHNER, JR., M.D.
Professor and Chairman
Department of Pediatrics
The University of Texas Medical Branch
Galveston

HEINZ F. EICHENWALD, M.D.
Professor and Chairman
Department of Pediatrics
The University of Texas Southwestern Medical School
Dallas

HAMILTON FORD, M.D.
Professor and Chairman
Department of Neurology and Psychiatry
The University of Texas Medical Branch
Galveston

RAYMOND H. KAUFMAN, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Baylor University College of Medicine
Houston

PAUL MacDONALD, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
The University of Texas Southwestern Medical School
Dallas

WILLIAM J. McGANITY, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
The University of Texas Medical Branch
Galveston

JACK PRITCHARD, M.D.
Professor and former Chairman
Department of Obstetrics and Gynecology
The University of Texas Southwestern Medical School
Dallas

JOSEPH SEITCHIK, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
The University of Texas Medical School at San Antonio

ROBERT H. BARNES, M.D.
Professor, Department of Psychiatry
The University of Texas Medical School
at San Antonio

HERMAN L. GARDNER, M.D.
Clinical Professor
Department of Obstetrics and Gynecology
Baylor University College of Medicine
Houston

ROBERT S. GLEN, M.D.
Professor, Department of Psychiatry
The University of Texas Southwestern
Medical School
Dallas

WILLIAM C. LEVIN, M.D.
Professor
Department of Internal Medicine
The University of Texas Medical Branch
Galveston

L. CHARLES POWELL, M.D.
Professor
Department of Obstetrics and Gynecology
The University of Texas Medical Branch
Galveston

ROBERT L. ROESSLER, M.D.
Professor
Department of Psychiatry
Baylor University College of Medicine
Houston

PEGGY JOYCE WHALLEY, M.D.
Professor
Department of Obstetrics and Gynecology
The University of Texas Southwestern
Medical School
Dallas

ROBERT B. WHITE, M.D.
Professor
Department of Neurology and Psychiatry
The University of Texas Medical Branch
Galveston

ALABAMA

CHARLES E. FLOWERS, JR., M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
University of Alabama Medical Center
Birmingham

ARKANSAS

WINSTON K. SHOREY, M.D.
Dean, School of Medicine
University of Arkansas Medical Center
Little Rock

DAVID L. BARCLAY, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
University of Arkansas Medical Center
Little Rock

CALIFORNIA

J. G. MOORE, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
U.C.L.A. School of Medicine
Los Angeles

KENNETH R. NISWANDER, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
School of Medicine
University of California
Davis

WILLIAM L. NYHAN, M.D., Ph.D.
Professor and Chairman
Department of Pediatrics
University of California, San Diego
University Hospital of San Diego County
San Diego

KENNETH J. RYAN, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
University of California, San Diego
La Jolla

EDWIN M. GOLD, M.D.
Professor in Residence
Maternal and Child Health
School of Public Health
University of California
Berkeley

NORMAN KRETCHMER, M.D., Ph.D.
Professor of Pediatrics
Stanford University School of Medicine
Department of Pediatrics
Stanford

JEROME M. KUMMER, M.D.
Clinical Professor
Department of Psychiatry
School of Medicine
University of California
at Los Angeles

CHARLES E. McLENNAN, M.D.
Professor of Gynecology and Obstetrics
Stanford University
Stanford

E. W. OVERSTREET, M.D.
Professor
Department of Obstetrics and Gynecology
University of California
San Francisco

EDWARD B. SHAW, M.D.
Professor of Pediatrics, Emeritus
University of California School of Medicine
San Francisco

GEORGE S. HARRIS, M.D.
Assoc. Clinical Prof. of
Obstetrics & Gynecology
USC School of Medicine
Los Angeles

ALBERT E. LONG, M.D.
Associate Clinical Professor of
Obstetrics and Gynecology
University of California, San Francisco
San Francisco

FRANK BOWMAN, M.D.
Medical Director
Southern Calif. Edison Co.
Los Angeles

COLORADO

H. G. WHITTINGTON, M.D.
Director of Psychiatry
Department of Health and Hospitals
State Department of Health
Denver

DAVID W. TALMAGE, M.D.
Dean, School of Medicine
and Professor of Microbiology
and Medicine
University of Colorado Medical Center
Denver

C. HENRY KEMPE, M.D.
Professor and Chairman
Department of Pediatrics
University of Colorado Medical Center
Denver

E. STEWART TAYLOR, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
University of Colorado
Denver

CONRAD M. RILEY, M.D.
Professor
Departments of Pediatrics
and Preventive Medicine
University of Colorado Medical Center
Denver

CONNECTICUT

NATHAN KASE, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Yale University School of Medicine
New Haven

CLARENCE D. DAVIS, M.D.
Professor of Obstetrics and Gynecology
Yale University School of Medicine
New Haven

DISTRICT OF COLUMBIA

JOHN F. J. CLARK, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Howard University and
Freedmen's Hospital
Washington

ROBERT H. BARTER, M.D.
Professor, Obstetrics and Gynecology
George Washington University
2141 K Street, Northwest
Washington

FLORIDA

E. M. PAPPER, M.D.
Vice President and Dean
School of Medicine
University of Miami
Miami

WILLIAM A. LITTLE, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
University of Miami School of Medicine
Miami

HARRY PRYSTOWSKY, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
University of Florida College of Medicine
Gainesville

GEORGIA

ARTHUR P. RICHARDSON, M.D.
Dean, Emory University School of Medicine
Atlanta

JOHN D. THOMPSON, M.D.
Professor and Chairman
Department of Gynecology and Obstetrics
Emory University School of Medicine
Atlanta

HAWAII

WINDSOR C. CUTTING, M.D.
Dean, School of Medicine
University of Hawaii
Honolulu

ILLINOIS

WILLIAM J. GROVE, M.D.
Executive Dean
University of Illinois College of Medicine
Chicago

ROBERT B. LAWSON, M.D.
Vice President for Health Sciences
Northwestern University
Chicago

D. N. DANFORTH, Ph.D., M.D.
Professor and Chairman
Department of Obstetrics & Gynecology
Northwestern University Medical School
Chicago

ROBERT C. STEPTO, M.D.
Chairman, Department of Obstetrics and Gynecology
Chicago Medical School
Chicago

RALPH M. WYNN, M.D.
Professor and Head
Department of Obstetrics and Gynecology
The Abraham Lincoln School of Medicine
University of Illinois Medical Center
Chicago

FREDERICK ZUSPAN, M.D.
John Bolivar DeLee Professor and Chairman
Department of Obstetrics and Gynecology
The Chicago Lying-In Hospital
The University of Chicago
Chicago

CHARLES FIELDS, M.D.
Clinical Professor
Department of Obstetrics and Gynecology
Mount Sinai Hospital
Chicago

ALBERT DORFMAN, M.D.
Richard T. Crane Distinguished Service Professor of Pediatrics
University of Chicago
Chicago

INDIANA

CARL P. HUBER, M.D.
Coleman Professor
Obstetrics and Gynecology
Indiana University Medical Center
Indianapolis

IOWA

ROBERT C. HARDIN, M.D.
Vice Provost and Dean
Health Affairs
University of Iowa
Iowa City

KANSAS

KERMIT E. KRANTZ, M.D., Litt.D.
Professor and Chairman
Department of Gynecology and Obstetrics
Professor of Anatomy
University of Kansas Medical Center
Kansas City

KENTUCKY

DOUGLAS M. HAYNES, M.D.
Dean and Professor of Obstetrics and Gynecology
University of Louisville School of Medicine
Health Sciences Center
Louisville

W. S. JORDAN, JR., M.D.
Dean
University of Kentucky
College of Medicine
Lexington

TOM F. WHAYNE, M.D.
Associate Dean
University of Kentucky
College of Medicine
Lexington

JOHN W. GREENE, JR., M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
University of Kentucky Medical Center
Lexington

WARREN E. WHEELER, M.D.
Professor and Chairman
Department of Pediatrics
University of Kentucky
Medical Center
Lexington

LOUISIANA

RICHARD L. FOWLER, M.D.
Professor and Head
Department of Pediatrics
Louisiana State University School of Medicine
New Orleans

MARYLAND

DAVID E. ROGERS, M.D.
Dean of the Medical Faculty
Johns Hopkins University School of Medicine
Baltimore

THEODORE M. KING, M.D., Ph.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Johns Hopkins University School of Medicine
Baltimore

A. L. HASKINS, M.D.
Professor of Obstetrics and Gynecology
University of Maryland Hospital
Baltimore

IRVIN M. CUSHNER, M.D.
Director, Center for Social Studies in Human Reproduction
Associate Professor of Obstetrics and Gynecology
Johns Hopkins University School of Medicine
Baltimore

ISADORE A. SIEGEL, M.D.
Emeritus Professor of Obstetrics and Gynecology
University of Maryland Medical School
Baltimore

HELEN B. TAUSSIG, M.D.
Professor Emeritus of Pediatrics
The Johns Hopkins School of Medicine
Baltimore

JOSEPH COUDON, M.D.
South Atlantic Association of Obstetrics and Gynecology
Diplomate, American Board of Obstetrics and Gynecology
Perryville

Massachusetts

ROBERT H. EBERT, M.D.
Dean of the Faculty of Medicine
Harvard Medical School
Boston

GEORGE V. SMITH, M.D.
Wm. H. Baker Professor of Gynecology, Emeritus
Harvard Medical School
Boston

SOMERS H. STURGIS
Professor of Gynecology
Harvard Medical School
Boston

ALLAN M. BUTLER, M.D.
Professor of Pediatrics, Emeritus
Harvard Medical School
Boston

DAVID CHARLES, M.D.
Director, Department of Obstetrics and Gynecology
Boston City Hospital
Boston

Michigan

T. N. EVANS, M.D.
Acting Dean and
Chairman, Department of Gynecology and Obstetrics
Wayne State University
Detroit

ANDREW D. HUNT, JR., M.D.
Dean
College of Human Medicine
Michigan State University
East Lansing

WILLIAM B. WEIL, JR., M.D.
Professor and Chairman
Department of Human Development
Michigan State University
East Lansing

Minnesota

DAVID G. DECKER, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Mayo Clinic
Rochester

JOSEPH H. PRATT, M.D.
Professor of Surgery
University of Minnesota School of Medicine
Head, Gynecological Surgery
Mayo Clinic
Rochester

MARY E. MUSSEY, M.D.
Consultant in Gynecology
Department of Obstetrics and Gynecology
Mayo Clinic
Rochester

H. MEAD CAVERT, M.D.
Associate Dean
University of Minnesota School of Medicine
Minneapolis

JOHN J. SCIARRA, M.D.
Professor and Head
Department of Obstetrics and Gynecology
University of Minnesota Hospitals
Minneapolis

HARRY FOREMAN, M.D.
Director, Center for Population Studies
University of Minnesota
Mayo Memorial Hospital
Minneapolis

FRANK W. QUATTLEBAUM, M.D.
Associate Professor of Surgery
School of Medicine
University of Minnesota
Minneapolis

JANE E. HODGSON, M.D.
Assistant Clinical Professor of Obstetrics and Gynecology
School of Medicine
University of Minnesota
Minneapolis

HAROLD G. RAVITS, M.D.
President, Ramsey County Medical Society
Chairman, and Clinical Professor
Department of Dermatology
University of Minnesota School of Medicine
St. Paul

DWIGHT MARTIN, M.D.
President-elect, Ramsey County Medical Society
Clinical Assistant Professor
Department of Medicine
University of Minnesota School of Medicine
St. Paul

DAVID M. CRAIG, M.D.
Past-president, Ramsey County Medical Society
Clinical Associate Professor
Department of Medicine
University of Minnesota School of Medicine
St. Paul

CARL RICE, M.D.
Editor, *Minnesota Medicine*
Clinical Associate Professor
Department of Surgery
University of Minnesota School of Medicine
Minneapolis

ERICK Y. HAKANSON, M.D.
Chairman and Associate Professor
Department of Obstetrics and Gynecology
St. Paul Ramsey Hospital
St. Paul

JOHN W. FROST, M.D.
Chairman and Professor
Department of Medicine
St. Paul Ramsey Hospital
St. Paul

ROBERT G. B. BJORNSON, M.D.
Chairman and Associate Professor
Department of Radiology
St. Paul Ramsey Hospital
St. Paul

ROBERT J. GUMNIT, M.D.
Chairman and Professor
Department of Neurology
St. Paul Ramsey Hospital
St. Paul

THEODORE T. WATSON, M.D.
Clinical Assistant Professor
Department of Obstetrics and Gynecology
University of Minnesota School of Medicine
Minneapolis

FRED A. LYON, M.D.
Clinical Assistant Professor
Department of Obstetrics and Gynecology
University of Minnesota School of Medicine
Minneapolis

MELVIN T. BAKEN, JR., M.D.
Clinical Assistant Professor
Department of Obstetrics and Gynecology
University of Minnesota School of Medicine
Minneapolis

JOHN F. PERRY, M.D.
Professor of Surgery
University of Minnesota School of Medicine
Minneapolis

WILLIAM BERNSTEIN, M.D.
Clinical Professor of Surgery
University of Minnesota School of Medicine
Minneapolis

SAMUEL W. HUNTER, M.D.
Clinical Associate Professor of Surgery
University of Minnesota School of Medicine
Minneapolis

MILTON M. HURWITZ, M.D.
Clinical Professor of Medicine
University of Minnesota School of Medicine
Minneapolis

ROBERT B. BENJAMIN, M.D.
Clinical Associate Professor of Surgery
University of Minnesota School of Medicine
Minneapolis

MISSISSIPPI

ROBERT E. BLOUNT, M.D.
Director and Dean
University of Mississippi School of Medicine
Jackson

MISSOURI

JAMES C. WARREN, M.D.
Professor and Head, Designate
Department of Obstetrics and Gynecology
Washington University Medical School
St. Louis

NEBRASKA

ROBERT B. KUGEL, M.D.
Dean, College of Medicine
The University of Nebraska
Omaha

WARREN H. PEARSE, M.D.
Foundation Professor and Chairman
Department of Obstetrics and Gynecology
University of Nebraska Medical Center
42nd and Dewey Streets
Omaha

NEW HAMPSHIRE

CARLETON B. CHAPMAN, Dean
Dartmouth Medical School
Hanover

New Mexico

ROBERT A. MUNSICK, M.D., Ph.D.
Professor and Chairman
Department of Obstetrics and Gynecology
University of New Mexico School of Medicine
Albuquerque

New York

ALAN F. GUTTMACHER, M.D.
President, Planned Parenthood/World Population
New York

LOUIS M. HELLMAN, M.D.
Professor Emeritus of Obstetrics and Gynecology
State University of New York
Downstate Medical Center
Brooklyn

GEORGE JAMES, M.D.
President
Mount Sinai Medical Center
New York

HAROLD C. WIGGERS, M.D.
Executive Vice President and Dean
Albany Medical College
Albany

FRITZ FUCHS, M.D.
Given Foundation Professor and Chairman
Department of Obstetrics and Gynecology
Cornell University Medical College
New York

S. B. GUSBERG, M.D., D.Sc.
Professor and Chairman of Obstetrics and Gynecology
Mt. Sinai School of Medicine
of the City University of New York
New York

ROBERT J. HAGGERTY, M.D.
Professor and Chairman
Department of Pediatrics
University of Rochester School of Medicine and Dentistry
Rochester

SAUL KRUGMAN, M.D.
Professor and Chairman
Department of Pediatrics
New York University Medical Center
New York

JONATHAN T. LANMAN, M.D.
Professor and Chairman
Department of Pediatrics
Downstate Medical Center
Brooklyn

CURTIS J. LUND, M.D.
Professor and Chairman
Department of Obstetrics-Gynecology
University of Rochester School of Medicine and Dentistry
Rochester

JAMES H. NELSON, JR., M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
State University of New York
Downstate Medical Center
Brooklyn

ROBERT E. L. NESBITT, JR., M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
State University of New York
Upstate Medical Center
Syracuse

SEYMOUR L. ROMNEY, M.D.
Professor and Chairman
Albert Einstein College of Medicine
Bronx Municipal Hospital Center
Pelham Parkway and Eastchester Road
Department of Gynecology and Obstetrics
Bronx

DONALD P. SWARTZ, M.D.
Director, Department of Obstetrics and Gynecology
Harlem Hospital Center
New York

HAROLD M. M. TOVELL, M.D.
Professor of Obstetrics and Gynecology
College of Physicians and Surgeons
Columbia University
New York

RAYMOND L. VANDE WIELE, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Director of the Ob-Gyn Service
Columbia-Presbyterian Medical Center
New York

JEAN A. CORTNER, M.D.
Professor of Pediatrics
State University of New York
Buffalo

EDWARD C. CURNEN, JR., M.D.
Carpentier Professor of Pediatrics
College of Physicians and Surgeons
Columbia University
New York

GORDON W. DOUGLAS, M.D.
Professor of Obstetrics and Gynecology
New York University School of Medicine
New York

HARRY H. GORDON, M.D.
Professor of Pediatrics
Albert Einstein College of Medicine
Bronx

RICHARD L. DAY, M.D.,
Emeritus Professor of Pediatrics
Mount Sinai School of Medicine
New York

HERBERT G. WINSTON, M.D.
Clinical Professor of Obstetrics and Gynecology
Albert Einstein College of Medicine
Bronx

North Carolina

W. G. ANLYAN, M.D.
Professor of Surgery and
Vice President for Health Affairs
Duke University Medical Center
Durham

MANSON MEADS, M.D.
Vice President for Medical Affairs and Dean
The Bowman Gray School of Medicine
Winston-Salem

RICHARD L. BURT, M.D.
Professor and Chairman
Bowman Gray School of Medicine
Winston-Salem

ROY T. PARKER, M.D.
J. Bayard Carter Professor and Chairman, Department of Obstetrics and Gynecology
Duke Medical Center
Durham

North Dakota

WALLACE W. NELSON, M.D.
Assistant Dean, Student Affairs
School of Medicine
University of North Dakota
Grand Forks

Ohio

CLIFFORD G. GRULEE, JR., M.D.
Dean
University of Cincinnati
College of Medicine
Cincinnati

FREDERICK C. ROBBINS, M.D.
Dean, School of Medicine
Case Western Reserve University
Cleveland

M. A. AYERS, M.D.
Acting Chairman
Department of Obstetrics and Gynecology
Medical College of Ohio
Toledo

ROBERT G. PAGE, M.D.
Dean and Professor of Medicine and Pharmacology
Medical College of Ohio
Toledo

E. L. PRATT, M.D.
Director, Department of Pediatrics
University of Cincinnati,
College of Medicine
Children's Hospital
Cincinnati

RICHARD W. STANDER, M.D.
Professor and Chairman, Department of Obstetrics and Gynecology
University of Cincinnati Medical Center
Cincinnati

FRANK FALKNER, M.D., M.R.C.P.
Fels Professor of Pediatrics
University of Cincinnati College of Medicine
Cincinnati

Oklahoma

JAMES A. MERRILL, M.D.
Professor and Head
Dept. of Gynecology and Obstetrics
University of Oklahoma
School of Medicine
Oklahoma City

HARRIS D. RILEY, JR., M.D.
Professor of Pediatrics
Children's Hospital
University of Oklahoma
Oklahoma City

Oregon

RALPH C. BENSON, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
University of Oregon
Medical School, Hospitals and Clinics
Portland

Pennsylvania

ROBERT L. BRENT, M.D.
Professor and Chairman
Department of Pediatrics
Stein Research Center
Jefferson Medical College
Philadelphia

ELSIE R. CARRINGTON, M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Medical College of Pennsylvania
Philadelphia

RUSSELL R. de ALVAREZ, M.D.
Chairman Emeritus and
Professor of Obstetrics and Gynecology
Temple University Hospital
Philadelphia

ROY G. HOLLY, M.D.
Chairman, Department of Obstetrics and Gynecology
Jefferson Medical College
Philadelphia

S. LEON ISRAEL, M.D.
Professor of Obstetrics and Gynecology
School of Medicine, University of Pennsylvania
Philadelphia

JOSEPH P. LONG, M.D.
Associate Professor of Obstetrics and Gynecology
Jefferson Medical College
Philadelphia

DONALD N. MEDEARIS, JR., M.D.
Professor of Pediatrics
Dean, School of Medicine
University of Pittsburgh
Pittsburgh

WILLIAM G. SLATE, M.B., Ch.B., M.S.
Professor of Obstetrics and Gynecology
Temple University School of Medicine
Chairman, Division of Gynecology and Obstetrics
Albert Einstein Medical Center
Philadelphia

VICTOR C. VAUGHAN III, M.D.
Professor and Chairman
Department of Pediatrics
Temple University School of Medicine
Philadelphia

South Carolina

LAWRENCE L. HESTER, JR., M.D.
Professor and Chairman
Department of Obstetrics and Gynecology
Medical University of South Carolina
Charleston

D. STROTHER POPE, M.D.
Secretary, S.C. Medical Society
Past-President (1966)
S.C. Obstetrical and Gynecological Society
Columbia

South Dakota

GEORGE W. KNABE, JR., M.D.
Dean
School of Medicine
University of South Dakota
Vermillion

Tennessee

STEWART A. FISH, M.D.
Professor and Chairman
Department of Obstetrics and Gynecolog
University of Tennessee College of Medicine
Memphis

DONALD A. GOSS, M.D.
Professor and Chairman
Department of Obstetrics and Gynecolog
Vanderbilt University School of Medicin
Nashville

W. F. BERNELL JAMES, M.D.
Professor and Chairman
Department of Obstetrics and Gynecolog
Meharry Medical College
Nashville

Utah

THOMAS C. KING, M.D.
Provost
University of Utah
School of Medicine
Salt Lake City

Vermont

WILLIAM H. LUGINBUHL, M.D.
Dean
University of Vermont
College of Medicine
Burlington

JOHN VAN S. MAECK, M.D.
Professor and Chairman
Department of Obstetrics and Gynecolog
Chief of Service
University of Vermont College of Medic
Burlington

Virginia

LEO J. DUNN, M.D.
Professor and Chairman
Department of Obstetrics and Gynecolog
Medical College of Virginia
Health Science Division
Virginia Commonwealth University
Richmond

W. G. THURMAN, M.D.
Professor of Pediatrics
Department of Pediatrics
University of Virginia School of Medicine
Charlottesville

W. NORMAN THORNTON, JR., M.D.
Chairman
Department of Obstetrics and Gynecology
University of Virginia School of Medicine
Charlottesville

WASHINGTON

BERNARD GOMBERG, M.D.
Clinical Assistant Professor of
Obstetrics and Gynecology
University of Washington School of
Medicine
Seattle

RALPH J. WEDGWOOD, M.D.
Professor and Chairman Department of
Pediatrics
University of Washington School of
Medicine
Seattle

WEST VIRGINIA

WALTER A. BONNEY, M.D.
Professor and Chairman Department of
Obstetrics and Gynecology
West Virginia University School of
Medicine
Morgantown

WILLIAM G. KLINGBERG, M.D.
Professor and Chairman Department of
Pediatrics
West Virginia University School of
Medicine
Morgantown

WISCONSIN

BEN M. PECKHAM, M.D.
Chairman, Department of Gynecology and
Obstetrics
Associate Dean, Clinical Affairs
University of Wisconsin Medical School
Madison

INDEX

	PAGE
Interest of *Amici Curiae*	1
ARGUMENT	4
I. The Statute Is Unconstitutionally Vague	4
A. The Statutory "Saving Life" Test Is Void For Vagueness	4
B. The Statute Mandates The Use Of A Test Which Is Inconsistent With The Best Medical Practice And Sets No Standards For The Application Of Its Test	6
II. The Texas Anti-Abortion Statute Infringes Upon Constitutionally Protected Fundamental Rights Of Physicians And Of Patients	10
A. The Statute Unconstitutionally Interferes With The Physician's Right To Practice Medicine	10
B. The Statute Deprives Patients Of Their Constitutionally Protected Right To Medical Treatment	11
C. The State, Through The Physician, Denies Patients Due Process Because The Physician Making The Decision Has A Direct Personal Interest In Deciding Against Abortion	13
D. The Statute Interferes With The Constitutionally Protected Right Of Patients To Privacy	15
CONCLUSION	18

Table of Authorities

PAGE

Constitutional Provisions:

United States Constitution—
Amendment IV 15-16
Amendment V 5
Amendment IX 12
Amendment XIV 10, 14

Statutes:

2A Texas Penal Code arts. 1191-94, at 429-35 (1961) ..... 4, *passim*
2A Texas Penal Code art. 1196, at 436 (1961) ..... 4, *passim*
22 D.C. Code 201 5

Cases:

Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis. 1970) *per curiam, appeal dismissed,* McCann v. Babbitz, 400 U.S. 1 (1970) 18
Bonham's Case, 8 Coke 113b, 77 Eng. Reprint 646 (1610) 14
Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 13

Connally v. General Construction Co., 269 U.S. 385 (1926) 4

Doe v. Bolton, 319 F. Supp. 1048 (N.D. Ga. 1970), *supplemental opinion,* Oct. 14, 1970, *per curiam, juris. postponed,* 402 U.S. —— (No. 971, 1970 Term; renumbered 70-40, 1971 Term) 18

PAGE

Doe v. Scott, 321 F. Supp. 1385 (N.D. Ill. 1971), *appeal docketed sub nom.* Hanrahan v. Doe, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (No. 1522, 1970 Term; renumbered No. 70-105, 1971 Term) .. 18

Giaccio v. State of Pennsylvania, 382 U.S. 399 (1966) 4
Griswold v. Connecticut, 381 U.S. 479 (1965) 11, 15, 17

Jacobson v. Massachusetts, 197 U.S. 11 (1905) 12

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 4
Lombard v. Louisiana, 373 U.S. 267 (1963) 13
Loving v. Virginia, 388 U.S. 1 (1967) 17

Mapp v. Ohio, 367 U.S. 643 (1961) 16
McCandless v. State, 166 N.Y.S. 2d 272 (Ct. Cl. 1956, *rev'd on other grounds and modified,* 3 A.D. 2d 600 (3d Dept. 1957), *aff'd* 4 N.Y.2d 797 (1958) .. 15
Meyer v. Nebraska, 262 U.S. 390 (1923) 17

Olmstead v. United States, 277 U.S. 438 (1928) 15

People v. Barksdale, —— Cal. App.3d ——, —— Cal. Rptr. ——, 1 Crim. 9526 (Calif. Dist. Ct. App. July 22, 1971) 17
People v. Belous, 71 Cal. 2d 996 (1969) 17
Peterson v. City of Greenville, 373 U.S. 244 (1963) .. 13
Pierce v. Society of Sisters, 268 U.S. 510 (1925) 17

Rogers v. Danforth, No. 315512 (Mo. Cir. Ct. St. Louis, June 7, 1971 17

Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) 10

PAGE

Skinner v. Oklahoma, 316 U.S. 535 (1942) 17
Stanley v. Georgia, 394 U.S. 557 (1969) 16

Terry v. Ohio, 392 U.S. 1 (1968) 16
Tumey v. Ohio, 273 U.S. 510 (1927) 14

United States v. Vuitch, 91 Sup. Ct. 1294 (1971) 5

Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) 10

Other Authorities:

Aarons, *Therapeutic Abortion and the Psychiatrist,* 124 Am. J. Psychiatry, 745 (1967) 11

Annotation, Judge, Interest in Fine or Penalty, 50 A.L.R. 1256 (1927) 14

Bates & Zawadzki, Criminal Abortion 3 (1964) 13

Black, Law Dictionary (4th ed. 1951) 6

Calderone, Abortion in the United States (1958) 5

1 Davis, ADMINISTRATIVE LAW TREATISE 445 (1958) 15

Moritz & Thompson, *Septic Abortion,* 95 Am. J. Obst. & Gynec. 46 (1966) 13

Niswander, *Medical Abortion Practices in the United States,* 17 W. Res. L. Rev. 403 (1965) 14

Random House Dictionary (1967) 5

Rosen, *Psychiatric Implications of Abortion: A Case Study in Social Hypocrisy,* 17 W. Res. L. Rev. 435 (1965) 14, 17

Williams, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 171 (1957) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-18 1971 Term

JANE ROE, JOHN DOE AND MARY DOE,

Appellants,

JAMES HUBERT HALLFORD, M.D.,

Appellant-Intervenor,

—v.—

HENRY WADE,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, THE AMERICAN PSYCHIATRIC ASSOCIATION, THE AMERICAN MEDICAL WOMEN'S ASSOCIATION, THE NEW YORK ACADEMY OF MEDICINE, AND A GROUP OF 178 PHYSICIANS AS *AMICI CURIAE*

Interest of *Amici Curiae*

The individuals whose names are appended hereto as *amici curiae* are deans and vice presidents of medical schools, heads of departments of obstetrics, gynecology

and pediatrics in medical schools, practicing physicians and surgeons who are specialists in those fields, and other physicians and psychiatrists having a particular interest in the subject matter of this brief. The organizations whose names are appended hereto are among the largest, oldest and most respected national organizations in the medical profession. These organizations are devoted to the promotion of the highest possible quality health care and it is toward that end that they join in this brief as *amici*. They include many leaders in the medical profession and renowned teachers in medical schools. As teachers, they are impelled to seek to protect the right of their students—the future generations of doctors—to give their patients the benefit of knowledge acquired in the medical schools. As practicing physicians, *amici* are bound by oath to give their patients the benefit of the best medical knowledge. These physicians are concerned that the Texas anti-abortion law prevents them from fulfilling their sworn duties and responsibilities in the highest traditions of their profession. They believe that the Texas anti-abortion statute is wrong in principle, fundamentally unsound in the light of present-day medical and surgical knowledge, and a serious obstacle to good medical practice. *Amici* believe that the restrictions imposed by the Texas statute on the performance of medically indicated therapeutic abortions interfere with the physician-patient relationship and with the ability of physicians to practice medicine in accordance with the highest professional standards. *Amici* are also concerned with the burden the law places on physicians to interpret, at their peril, a statute whose meaning and scope are not clear. Accordingly, *amici* deem it appropriate to offer arguments with respect to this area of law which is of vital concern to them.

The American Psychiatric Association is a non-profit, tax exempt, scientific and educational medical organization, comprised of those 18,783 qualified Doctors of Medicine who specialize as psychiatrists in the diagnosis, care and treatment of mental diseases and defects of the mind. Abortions are of prime interest to psychiatrists because pregnancy, child bearing, birth and abortions can have material effects upon the mental processes of patients requiring psychiatric diagnosis, evaluation and care.

The Board of Trustees of the APA on December 12-13, 1969, upon recommendation of the Committee on Psychiatry and Law, approved the following:

"Position Statement on Abortion

A decision to perform an abortion should be regarded as strictly a medical decision and a medical responsibility. It should be removed entirely from the jurisdiction of criminal law. Criminal penalties should be reserved for persons who perform abortions without medical license or qualification to do so. A medical decision to perform an abortion is based on the careful and informed judgments of the physician and the patient. Among other factors to be considered in arriving at the decision is the motivation of the patient. Often psychiatric consultation can help clarify motivational problems and thereby contribute to the patient's welfare."

ARGUMENT

I.

The Statute* Is Unconstitutionally Vague.

A. *The Statutory "Saving Life" Test Is Void For Vagueness.*

Under Texas law, abortion is permitted only "for the purpose of saving the life of the mother." If, following the performance of an abortion, under this law, a physician is brought to trial and the jury disagrees with the physician's interpretation of the meaning of these quoted words, the physician is liable to imprisonment for from two to five years in the penitentiary.**

This Court has declared that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). "No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939). See also *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402-403 (1966). Under this standard the statute must fall, because *amici* respectfully submit that neither they, nor Dr. Hallford nor any other similarly situated physician receive proper

---

* The criminal laws relating to abortion, i.e., 2A Texas Penal Code, arts. 1191-94, 1196 at 429-35, 436 (1961) are collectively referred to as "the statute."

** 2A Texas Penal Code, arts. 1191-94, 1196, at 429-35, 436 (1961).

notice from the statute of what acts and consultations in their daily practice of medicine will subject them to criminal liability. This Court's rejection of the vagueness argument in *United States* v. *Vuitch,* 91 Sup. Ct. 1294 (1971) does not vitiate the point in the instant case. In *Vuitch* the District Court rested its finding that the District of Columbia statute prohibiting abortions was vague on two grounds: first, that the burden of establishing that the decision to abort was within the statutory exception fell upon the accused physician in violation of the Fifth Amendment; and, second, that the statute prohibiting abortions except "as necessary for the preservation of the mother's life or health. . . ." * was vague for failing to make clear, *inter alia,* whether mental health as well as physical health was included. This Court held that the burden of pleading and proving that an abortion was not within the statutory exception fell not upon the defendant-physician, but upon the prosecutor, and that the term "health" included mental as well as physical well-being.

Amici rest their vagueness argument upon different grounds. *Amici* contend that the phrase "for the purpose of saving the life" is so indefinite and vague that physicians must guess at its meaning and do in fact differ as to the meaning of the phrase.** The word "save" has a broad range of possible meanings. The Random House Dictionary lists, *inter alia,* "to rescue from danger or possible harm, . . . to avoid . . . the waste of, . . . to treat carefully in order to reduce wear, fatigue, etc. . . ."

---

* 22 D. C. Code 201.

** Calderone, Abortion in the United States, 34, 35, 52, 167 (1958).

The term "life" has been defined as:

> 1. "That state of animals and plants or of an organized being, in which its natural functions and motions are performed or in which its organs are capable of performing such function." Black, Law Dictionary (4th ed. 1951).

And as

> 2. "The sum of forces by which death is resisted." *Id.*

Life may mean the vitality, the joy, the spirit of existence, as well as merely not dying. The possible interpretations of the statute range therefore from a test requiring imminence of death to one which would permit abortion if desirable to preserve an enjoyable life, *i.e.*, a test under which the physician could consider the effect of pregnancy upon the quality of the patient's life and not merely upon the fact of life as not death. The statute forces the physician to decide at his peril whether a strict or liberal interpretation, or one in between, is the one intended by the statute. It forces him at his peril to make a decision which may be gainsaid by a jury of non-peer laymen whose guess will be as good as his as to the meaning of this statute. In sum the statute fails to provide the certainty required of penal laws.

B. *The Statute Mandates The Use Of A Test Which Is Inconsistent With The Best Medical Practice And Sets No Standards For The Application Of Its Test.*

Physicians have a professional obligation to preserve and advance the health of their patients. Assuming *arguendo* that the statute should be read as requiring a judg-

ment by the physician that without an abortion the patient will die, the statute conflicts with the physician's obligation because it commands him to ignore all the health interests of his patient with respect to termination of pregnancy unless he can predict that she will die without an abortion. Moreover, the statute does not tell the doctor what factors he may properly consider in making this prediction; nor how certain his prediction must be before he may decide to terminate his patient's pregnancy; nor how soon she must die if she does not have an abortion.

The process of predicting whether a person will die is highly complex. One of the factors in making such a prediction is the treatment given the patient. Often, alternative treatments are available to the doctor, and which treatment he will use depends on many factors and assumptions about his patient. The statute does not give the doctor any guidance as to the factors and assumptions he may take into account in determining if he may use termination of pregnancy to save his patient's life.

From a purely physiological viewpoint, other treatments than abortion may be available to save the life of the patient. However, doctors commonly must take account of factors that are not purely physiological. The factors that must be taken into account include: (1) the relative physical risk of alternative treatment, (2) the ability of a patient to sustain a rigid course of treatment, (3) her willingness to complete other treatment, (4) whether she will have good medical facilities available to her, (5) the doctor's own ability to effectively prescribe and complete alternative treatments, (6) the availability of alternative treatment from scarce specialists, (7) whether her mode of life will allow alternative treatment (*e.g.*, must she care for a family

or work, rather than take an extended rest cure), and (8) what she can afford.

In deciding whether he may terminate a woman's pregnancy, the doctor must guess at which of these factors he may consider in predicting whether abortion is necessary to save life, and he must guess at the relative weight he may give to any factor.

After examining his patient and considering all the information available to him, the physician may arrive at a probability that the woman will die if she does not have an abortion. The statute does not tell the doctor how certain of her death he must be before he may terminate her pregnancy. The statute does not tell him that he may terminate pregnancy only if it is more likely than not that she will otherwise die, or only if there is an even chance she will die, or only if there is a "significant" or "substantial" chance that she will die.

If a doctor predicts that a woman may die without an abortion, he may also be able to predict when she will die. Death may be imminent, it may come before delivery, it may come at or soon after delivery, or it may come some time after delivery. The only definite statutory requirements for an abortion appear to be that death be caused by continued pregnancy, and that death be sooner than if the woman did not complete her pregnancy. But almost any impairment of health will shorten life; continued pregnancy may impair a woman's health and shorten her life by some period of time. Her doctor then must guess at what life shortening must occur before he may terminate her pregnancy. He must guess whether the statute allows abortion only if his patient would otherwise die before de-

livery or if it is sufficient that her life would be significantly shortened thereafter.

If a patient threatens suicide, physicians do not know if they may rely upon the threat as a basis for abortion to save life. Psychiatric consultation may not be available because the woman may refuse such treatment. The non-psychiatrist may then be forced to evaluate the probability of suicide. The physician does not know how he may determine safely whether the patient is sincere in her threat. Furthermore, a woman who does not overtly threaten may be as inclined toward suicide as one who makes clear her threat. The non-psychiatrist doctor is not told whether he may consider suicidal tendencies whether they are stated by his patient, or not.

If a doctor may properly consider the fact that his patient may take her own life unless she receives an abortion, the question is opened whether he may consider the fact that she may seriously imperil her life by obtaining an illegal abortion. *See* WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 171 (1957). For a doctor to consider his patient's threat to obtain an illegal abortion by an unlicensed person is a logical step from his considering her threat of suicide, because such illegal abortions are extremely hazardous and are in fact a common cause of maternal deaths.

Physicians are unable to agree on the meaning of the statute because its words have no medical meaning. Medical standards have been established for treating patients and for terminating pregnancy as part of that treatment. The statute cuts across those standards and requires physicians to apply an unclear legal test which supersedes and may negate their medical judgment.

II.

The Texas Anti-Abortion Statute Infringes Upon Constitutionally Protected Fundamental Rights of Physicians and of Patients.

A. *The Statute Unconstitutionally Interferes With The Physician's Right To Practice Medicine.*

Unquestionably there is a constitutionally protected right to practice one's chosen profession.

> "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 238-9 (1957). See also *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96 (1963).

The practice of medicine clearly includes the treatment of pregnancy and its attendant conditions. The statute interferes with a physician's practice of medicine by substituting the mandate of a vague legalism for the doctor's best professional judgment as to the medically indicated treatment for his pregnant patients.

Physicians and surgeons in many special branches of medicine routinely make extremely serious decisions regarding their patients' best medical welfare, often with life or death in the balance. But those physicians treating pregnant women run the risk of criminal charges as the result of their professional decisions.

The statute unfairly discriminates against those physicians treating pregnant women and thus denies these physicians equal protection of the laws.

A criminal lawyer must often make weighty decisions on behalf of his client and sometimes the client's very life hangs in the balance. But no lawyer runs the risk of criminal prosecution and of being judged on his professional decisions by a jury of non-peer laymen.

The statute also burdens the physician-patient relationship in this situation with conflicting objectives, rendering candor and confidence impossible to achieve. Normally physician and patient share the same goal and work together in an atmosphere of mutuality and privacy toward that goal. In the situation of a pregnant woman seeking an abortion the physician-patient relationship deteriorates into an adversary proceeding with the patient trying to persuade and the physician trying to judge correctly to protect himself. Aarons, *Therapeutic Abortion and The Psychiatrist*, 124 Am. J. Psychiatry, 745 (1967).

B. *The Statute Deprives Patients Of Their Constitutionally Protected Right To Medical Treatment.**

The statute forbids all abortions except those necessary to save the life of the mother. Construing the statute to intend its narrowest possible meaning, *i.e.*, that abortions are lawful only when they will prevent certain and imminent death, it is clear that the operation of the statute may deny women abortions when the abortion would prevent injury or safeguard or preserve the patient's mental or physical health. Thus a woman suffering from heart disease, diabetes or cancer whose pregnancy worsens the underlying pathology may be denied a medically indicated therapeutic abortion under the statute because death is

* Physicians have standing to assert the constitutional rights of their patients. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

not certain. Such a patient is effectively denied a fundamental constitutional right reserved to her under the Ninth Amendment—the right to medical treatment.

In *Jacobson* v. *Massachusetts,* 197 U.S. 11 (1905) this Court upheld a compulsory vaccination law, on the ground that the State could validly require vaccinations under its police power to protect the public health from contagious disease. Anyone for whom the vaccination would pose a serious impairment of health would, however, be excepted from the statute's application. This Court held:

> "It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of his health or body, would be cruel and inhuman in the last degree. We are not to be understood as holding that . . . the judiciary would not be competent to interfere and protect the health and life of the individual concerned." *Id.* at 38-39.

A state may not require that a citizen impair his or her health, even if the individual's right to good health and medical care infringes upon some legitimate state interest. The State of Texas may not in pursuit of its policy infringe upon the constitutionally protected right of its pregnant citizens to the medical treatment they require to maintain their good health.

The anti-abortion statute denies women their right to secure the best medical treatment available and, further, positively and seriously impairs their health by forcing them to turn to illegal abortionists, most of whom are not licensed physicians and do not have the most advanced and safest medical techniques available for their

use. Statistics are necessarily uncertain, but a frequent estimate is that over one million criminal abortions occur in the United States each year, resulting in an estimated 5,000 maternal deaths annually. Moritz & Thompson, *Septic Abortion,* 95 Am. J. Obst. & Gynec. 46 (1966); Bates & Zawadzki, Criminal Abortion 3 (1964).

That 5,000 American women a year should be denied medically safe procedures and thus be driven to their untimely deaths to avoid bearing unwanted children is unconscionable.

Death due to complications following illegal abortion procedures are only part of the problem. Many thousands of other women needlessly suffer serious infections following these procedures in addition to pain, suffering and emotional trauma.

C. *The State, Through The Physician, Denies Patients Due Process Because The Physician Making The Decision Has A Direct Personal Interest In Deciding Against Abortion.*

The State of Texas is ultimately responsible for the decisions not to terminate pregnancies made by physicians in the course of their private medical practices. The State is imposing its will upon the behavior of private parties and cannot claim these decisions are private ones. See *Lombard* v. *Louisiana,* 373 U.S. 267 (1963); *Peterson* v. *City of Greenville,* 373 U.S. 244 (1963); *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961).

The physician is not disinterested in the decision he renders; he cannot make an impartial decision. The State declares that if he wrongly decides that an abortion is necessary to save life, he will be subject to criminal penalties. It shocks one's sense of justice when the person

who administers the law stands to gain or lose personally by a decision he makes. If that person has a direct, personal, substantial, pecuniary interest in the decision it violates the Fourteenth Amendment to the Constitution. *Tumey* v. *Ohio*, 273 U.S. 510, 523 (1927). A doctor has a direct, personal, substantial interest for his decision may send him to jail.

Not only does the State prevent the physician from making an impartial decision about terminating his patient's pregnancy, it unfairly influences this decision in a shocking way. The State says that only if the physician wrongly decides that the operation is needed to preserve her life is he criminally liable. If he wrongly decides the operation is not needed to preserve her life, he is subject to no criminal penalties. The State of Texas thus requires that all errors in a doctor's evaluation of his patient's need for termination of pregnancy be on the side of her death.*

One of the oldest and most famous cases stating that an impartial decision is required by the basic precepts of law involved medical doctors. *Bonham's Case*, 8 Coke 113b, 77 Eng. Reprint 646 (1610); *see also Annotation, Judge, Interest in Fine or Penalty*, 50 ALR 1256 (1927). In *Bonham's Case*, Lord Coke held that a panel of doctors could not decide a case, as required by Parliament, in which they had a personal, pecuniary interest. Moreover, the necessity of an impartial decision has been confirmed by a New York Court reviewing the decision of a panel of doctors to per-

* That this is not merely suppositious is evident from the comments of doctors who have examined therapeutic abortion practices. See Rosen, Psychiatric Implications of Abortion: A Case Study in Social Hypocrisy, 17 W. Res. L. Rev. 435, 443-444 (1965). See also Niswander, Medical Abortion Practices in the United States, 17 W. Res. L. Rev. 403, 418-419 (1965).

form an abortion. *McCandless* v. *State*, 166 N.Y.S. 2d 272 (Ct. Cl. 1956), *rev'd on other grounds and modified*, 3 A.D. 2d 600 (3d Dept. 1957), *aff'd* 4 N.Y.2d 797 (1958). In *McCandless*, the court stated that the decision to perform an abortion "should have been carried on by physicians and/or psychiatrists *whose only concern was the life of the patient.*" 166 N.Y.S. 2d at 276 (emphasis added).

A physician practising medicine under the Texas statute cannot keep as his sole concern his patient's life. A doctor would have to be superhuman if he were able to ignore the fact that his decision can be second-guessed by a jury which may totally disregard medical evidence. Therefore, his patient cannot receive the impartial decision required by due process of law.*

D. *The Statute Interferes With The Constitutionally Protected Right Of Patients To Privacy.*

The opinion of Mr. Justice Goldberg in *Griswold* v. *Connecticut*, 381 U.S. 479, 494 (1965) refers to the following statement of Mr. Justice Brandeis in his dissent in *Olmstead* v. *United States*, 277 U.S. 438 (1928) as "comprehensively summariz[ing] the principles underlying the Constitution's guarantees of privacy":

> "the makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the

---

* *Amici* do not contend that a formal adversary hearing is required to meet the standards of due process. Within the legal bounds which might be established, *amici* believe that the decision is a medical one, requiring a technical, medical judgment. For this reason, an adversary hearing is not required by due process standards. See 1 DAVIS, ADMINISTRATIVE LAW TREATISE, 445-448 (1958). Due process however, does require an unbiased medical decision, where that decision determines whether a woman may live or die.

> most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." 277 U.S. at 478.

The right to "personal security" and "privacy" against unreasonable governmental intrusion has been consistently protected as a basic right. See, *e.g.*, *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

> "[F]undamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969).

The freedom to be the master of her own body, and thus of her own fate, is as fundamental a right as a woman can possess.

The Texas statute, by forcing a woman to carry to full term an embryo—regardless of her wishes, her health, her circumstances, her finances, her family or her future—is the most severe and extreme invasion of her right to privacy.

She is forced to function as a baby factory for an unwanted child. In addition to the gross invasion by the state into a pregnant woman's physical autonomy, the law imposes enormous additional obligations on this woman toward her child once it is born. Furthermore, these obligations, involuntarily assumed, continue for many years throughout the child's minority.

This Court has repeatedly recognized the right to privacy in matters involving the family. Thus, matters involving child rearing (*Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *State of Nebraska*, 262 U.S. 390 (1923)), marriage (*Loving* v. *Virginia*, 388 U.S. 1 (1967)) and child bearing (*Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965)) have been held by this Court to involve fundamental rights not subject to abridgement by the state. The statute clearly has its major impact on intimate intra-family relations—compelling reproduction which is not wanted. Most abortions are obtained by married mothers. Rosen, *Psychiatric Implications of Abortion: A Study In Social Hypocrisy*, 17 W. Res. L. Rev. 435, 436 (1965).

Both the *Skinner* and *Griswold* cases dealt with the issue of the constitutionality of state regulation of the right to reproduce and on both occasions this Court acted to protect those rights from state interference.

It is unthinkable for a state to compel reproduction against a woman's wishes. The right of a woman to avoid pregnancy following conception has been recently recognized in State and Federal Courts.

People v. *Belous*, 71 Cal. 2d 996 (1969); *People* v. *Barksdale*, —— Cal. App. 3d ——, —— Cal. Rptr. ——, 1 Crim. 9526 (Calif. Dist. Ct. App. July 22, 1971); *Rogers* v. *Danforth*, No. 315512 (Mo. Cir. Ct., St. Louis, June 7, 1971); *Babbitz* v. *McCann*, 310 F. Supp. 293 (E.D. Wis. 1970), *per curiam, appeal dismissed, McCann* v. *Babbitz*, 400 U.S. 1 (1970); *Doe* v. *Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970) *supplemental opinion* Oct. 14, 1970 *per curiam, juris. postponed*, 402 U.S. —— (No. 971, 1970 Term; renumbered

70-40, 1971 Term); *Doe* v. *Scott*, 321 F. Supp. 1385 (N.D. Ill. 1971), *appeal docketed sub nom. Hanrahan* v. *Doe*, 39 U.S.L.W. 3438 (U.S. Mar. 29, 1971) (No. 1522, 1970 Term; renumbered No. 70-105, 1971 Term). This Court should not fail to protect the fundamental constitutional right of women to decide whether they want to have children.

CONCLUSION

For the reasons hereinabove stated, it is respectfully requested that the relief sought by appellants and the appellant-intervenor be granted.

Respectfully submitted,

CAROL RYAN
Attorney for Amici

No. 70-18

Following papers filed August 25, 1971, NOT PRINTED:

Opposition to motion of the New Women Lawyers, et al., for leave to file a brief, as amici curiae.

Opposition to motion of American Association of University Women, et al., for leave to file a brief, as amici curiae.

Opposition to motion of Planned Parenthood Federation of America, Inc., et al., for leave to file a brief, as amici curiae.

Opposition to motion of State Communities Aid Association for leave to file a brief, as amicus curiae.

Opposition to motion of American Ethical Union, et al., for leave to file a brief, as amici curiae.

Opposition to motion of The National Legal Program on Health Problems of the Poor, et al., for leave to file a brief, as amici curiae.

FILE COPY

Supreme
FI
AUG
E. ROBERT SE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 70-18

JANE ROE, ET AL.,

Appellants,

vs.

HENRY WADE,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
N. D. TEXAS, DALLAS DIVISION.

BRIEF OF AMERICANS UNITED FOR LIFE, AMICUS CURIAE, IN SUPPORT OF APPELLEE.

CHARLES E. RICE,
820 Cavanaugh,
South Bend, Indiana 46617,
219 233-6919,
Attorney for Americans United for Life.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Interest of the Amicus Curiae	1
Constitutional and Statutory Provisions Involved	2
Question Presented	2
Summary of Argument	4
Argument	4
I. The Child in the Womb Is a Person Within the Meaning of the Equal Protection Clause of the Fourteenth Amendment	4
II. If the Law Were to Allow the Child in the Womb to Be Killed Where It Is Not Necessary to Save the Life of His Mother, It Would Make Him the Victim of an Unreasonable Classification and an Invidious Discrimination in Violation of the Equal Protection Clause of the Fourteenth Amendment	7
Conclusion	11

CASES.

Bonbrest v. Kotz, 65 F. Supp. 138 (D. C., Dist. Col., 1946)	5
In re Holthausen's Will, 175 Misc. 1022, 26 N. Y. S. 2d 140 (Surr. Ct., 1941)	6
Kwaterski v. State Farm Mut. Ins. Co., 34 Wis. 2d 14, 148 N. W. 2d 107 (1967)	5
Kyne v. Kyne, 38 Cal. App. 2d 122, 100 P. 2d 806 (1940)	6
Levy v. Louisiana, 391 U. S. 68, 20 L. Ed. 2d 436, 88 S. Ct. 1509 (1968)	4, 7

McLaughlin v. Florida, 379 U. S. 184, 13 L. Ed. 2d 222, 85 S. Ct. 283 (1964) 9

Metzger v. People, 98 Colo. 133, 53 P. 2d 1189 (1936) .. 6

Raleigh Fitkin—Paul Morgan Memorial Hospital v. Anderson, 42 N. J. 421, 201 A. 2d 537 (1964), cert. denied 377 U. S. 985, 12 L. Ed. 2d 1032, 84 S. Ct. 1894 (1964) 6

Regina v. Dudley (1884) 15 Cox C. C. 624, 14 Q. B. D. 273 9

In re Sankey's Estate, 199 Cal. 391, 249 Pac. 517 (1926) 6

Skinner v. Oklahoma, 316 U. S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942) 8

Smith v. Brennan, 31 N. J. 353, 157 A. 2d 497 (1960) .. 4

State to Use of Odham v. Sherman, 234 Md. 179, 198 A. 2d 71 (1964) 5

Takahaski v. Fish & Game Commission, 334 U. S. 410, 92 L. Ed. 1478, 68 S. Ct. 1138 (1948) 7

Thellusson v. Woodford, 4 Ves. 227, 31 Eng. Rep. 117 (1798) 5

United States v. Holmes (E. D. Pa. 1842) 1 Wall. Jr. 1, Fed. Cas. No. 15,383 9

Williamson v. Lee Optical of Oklahoma, 348 U. S. 483, 99 L. Ed. 563, 75 S. Ct. 461 (1955) 8

Wyman v. James, 400 U. S. 309, 27 L. Ed. 2d 408, 91 S. Ct. 381 (1971) 10

STATUTES.

29 U. S. C. 622-623 9

Texas Penal Code, Articles 1191, 1192, 1193, 1194, 1196 2

CONSTITUTIONS.

Fourteenth Amendment to the United States Constitution 2

BOOKS.

Bradley M. Patten, M. D., Foundations of Embryology (1964) 7

William L. Prosser, Handbook of the Law of Torts (4th Ed., 1971) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 70-18.

JANE ROE, ET AL.,

Appellants,

vs.

HENRY WADE,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
N. D. TEXAS, DALLAS DIVISION.

BRIEF OF AMERICANS UNITED FOR LIFE, AMICUS CURIAE, IN SUPPORT OF APPELLEE.

INTEREST OF THE AMICUS CURIAE.

Americans United for Life is a national, non-sectarian, educational organization of citizens who affirm the sacredness of all human life from conception to natural death. Its principal offices are at 422 Washington Building, Washington, D. C. 20005. It is a particular purpose of Americans United for Life to promote a wider application of constitutional rights to children in the womb. It is this purpose which gives Americans United for Life an interest in this appeal. For this appeal involves the issue of whether the child in the womb is entitled to the protection of constitutional rights in the specific situation where his abortion is sought where it is not necessary to save the life of the mother.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The aspect of this case argued in this brief involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and Articles 1191, 1192, 1193, 1194 and 1196 of the Texas Penal Code. The specific portion of the Fourteenth Amendment involved reads as follows: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The pertinent provisions of the Texas Penal Code forbid abortion where it is not necessary to save the life of the mother; they are set forth verbatim in the briefs of appellant and appellee.

QUESTION PRESENTED.

Whether an injunction should issue to bar enforcement of the Texas statutes that forbid abortion where it is not necessary to save the life of the mother.

SUMMARY OF ARGUMENT.

The child in the womb is a person within the meaning of the equal protection clause of the Fourteenth Amendment. The equal protection clause forbids classifications by law that are arbitrary, capricious or unreasonable. To allow the child in the womb to be killed by abortion, where it is not necessary to save the life of his mother, would be to subject him to an arbitrary, capricious and unreasonable classification. This is so because he is in fact a living human being and his young age and his situation do not provide a sufficient basis for a legal determination that he is subject to death where older human beings are not so subject. Enforcement of the statute in question should not be enjoined since such an injunction would allow the child in the womb to be killed by abortion where it is not necessary to save the life of his mother. It would therefore deprive him of the equal protection of the laws.

ARGUMENT.

I.

THE CHILD IN THE WOMB IS A PERSON WITHIN THE MEANING OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

In *Levy* v. *Louisiana*, 391 U. S. 68, 70, 20 L. Ed. 2d 436, 439, 88 S. Ct. 1509 (1968), the Court said:

> We start from the premise that illegitimate children are not "nonpersons." They are humans, live, and have their being. They are clearly "persons" within the meaning of the Equal Protection Clause of the Fourteenth Amendment.

The child in the womb meets these criteria of personhood under the Equal Protection Clause. He is human, he lives and he has his being. That is, he is a living human being. As the highest court of New Jersey summarized the state of scientific knowledge, "Medical authorities have long recognized that a child is in existence from the moment of conception." (*Smith* v. *Brennan*, 31 N. J. 353, 362, 157 A 2d 497, 502 (1960))

The character of the child in the womb as a person is clearly recognized in the law of torts. The attitude of the law of torts toward the child in the womb was summarized by Dean William L. Prosser:

> So far as duty is concerned, if existence at the time is necessary, medical authority has recognized long since that the child is in existence from the moment of conception, and for many purposes its existence is recognized by the law. The criminal law regards it as a separate entity, and the law of property considers it in being for all purposes which are to its benefit, such as taking by will or descent. After its birth, it

> has been held that it may maintain a statutory action for the wrongful death of the parent. So far as causation is concerned, there will certainly be cases in which there are difficulties of proof, but they are no more frequent, and the difficulties, are no greater, than as to many other medical problems. All writers who have discussed the problem have joined in condemning the old rule, in maintaining that the unborn child in the path of an automobile is as much a person in the street as the mother, and in urging that recovery should be allowed upon proper proof. [Prosser, Handbook of the Law of Torts (4th Ed., 1971), 336]

It is significant that a majority of courts, keeping pace with advancing scientific knowledge, now hold that even a stillborn child may maintain a wrongful death action where his death was caused by a prenatal injury. [*Kwaterski* v. *State Farm Mut. Ins. Co.*, 34 Wis. 2d 14, 148 N. W. 2d 107 (1967); *State to Use of Odham* v. *Sherman*, 234 Md. 179, 198 A. 2d 71 (1964); see discussion in Prosser, Handbook of the Law of Torts (4th Ed., 1971)]

A similar trend can be seen in the law of property. As long ago as 1946, it was noted in *Bonbrest* v. *Kotz*, 65 F. Supp. 138, 140 (D. C., Dist. Col., 1946), that, "From the viewpoint of the civil law and the law of property, a child *en ventre sa mere* is not only regarded as a human being, but as such from the moment of conception—which it is in fact." The law of property has long recognized the rights of the child in the womb for purposes which affect the property rights of that child. In *Thellusson* v. *Woodford*, 4 Ves. 227, 31 Eng. Rep. 117, 163 (1798), the court rejected the contention that a devise for the life of a child in the womb was void because such a child was a non-entity:

> Let us see, what this non-entity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions . . . He may take by devise. He may be entitled

> under a charge for raising portions. He may have an injunction; and he may have a guardian.

When the property rules of the English common law were adopted by American courts the same approach was taken:

> It has been the uniform and unvarying decision of all common law courts in respect of estate matters for at least the past two hundred years that a child *en ventre sa mere* is "born" and "alive" for all purposes for his benefit. [In re Holthausen's Will, 175 Misc. 1022, 1024, 26 N. Y. S. 2d 140, 143 (Surr. Ct., 1941)]

Indeed, there is authority for the proposition that the child in the womb will be regarded as in existence even where it is against his interest to do so. [In re Sankey's Estate 199 Cal. 391, 249 Pac. 517 (1926)]

For purposes of equity, too, the law has recognized the existence of the child in the womb. An unborn child, for example, can compel his father to provide him support. [*Kyne* v. *Kyne*, 38 Cal. App. 2d 122, 100 P. 2d 806 (1940); *Metzger* v. *People*, 98 Colo. 133, 53 P. 2d 1189 (1936)] He can compel his mother to undergo a blood transfusion for his benefit, even where such transfusion is forbidden by the mother's religious beliefs. In *Raleigh Fitkin-Paul Morgan Memorial Hospital* v. *Anderson*, 42 N. J. 421, 423, 201 A. 2d 537, 538 (1964), cert. denied 377 U. S. 985, 12 L. Ed. 2d 1032, 84 S. Ct. 1894 (1964), the mother for religious reasons refused to have blood transfusions which were medically necessary to save the life of the child in her womb. The court held that the child's right to live outweighed even the mother's right to the free exercise of her religion. The court said:

> We are satisfied that the unborn child is entitled to the law's protection and that an appropriate order should be made to insure blood transfusions to the mother in the event that they are necessary in the opinion of the physician in charge at the time.

POOR COPY

It would be possible to multiply medical opinions [See, for example, Bradley M. Patten, M.D., Foundations of Embryology (1964), 35, 82] and reinforcing legal decisions in support of the proposition that the child in the womb should be recognized as a person within the meaning of the Equal Protection Clause. Suffice it to say that the child in the womb satisfies the three criteria for personhood—he is human, he lives and he has his being—enunciated in *Levy* v. *Louisiana*, 391 U. S. 68, 70, 20 L. Ed. 2d 436, 439, 88 S. Ct. 1509 (1968). He is clearly alive and in being. As the living offspring of human parents, he can be nothing else but human. As a living human being he is therefore a person within the meaning of the Equal Protection Clause.

Even if one somehow does not concede that the child in the womb is a living human being, one ought at least to give him the benefit of the doubt. Our law does not permit the execution, or imprisonment under sentence, of a criminal unless his guilt of the crime charged is proven beyond a reasonable doubt. The innocent child in the womb is entitled to have us resolve in his favor any doubts we may feel as to his living humanity and his personhood.

II.

IF THE LAW WERE TO ALLOW THE CHILD IN THE WOMB TO BE KILLED WHERE IT IS NOT NCESSARY TO SAVE THE LIFE OF HIS MOTHER, IT WOULD MAKE HIM THE VICTIM OF AN UNREASONABLE CLASSIFICATION AND AN INVIDIOUS DISCRIMINATION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

In *Takahaski* v. *Fish and Game Commission*, 334 U. S. 410, 420, 92 L. Ed. 1478, 1487, 63 S. Ct. 1138 (1948), the Court said, "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy

that all persons lawfully in this country shall abide "in any state" on an equality of legal privileges with all citizens under non-discriminatory laws." It is true that the Equal Protection Clause does not forbid all classifications. "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." [*Williamson* v. *Lee Optical of Oklahoma*, 348 U. S. 483, 489, 99 L. Ed. 563, 573, 75 S. Ct. 461 (1955).]

In *Skinner* v. *Oklahoma*, 316 U. S. 535, 541, 86 L. Ed. 1655, 1660, 62 S. Ct. 1110 (1942), the Court invalidated an Oklahoma compulsory sterilization statute on the ground that it denied equal protection of the laws because it arbitrarily determined who would be subject to sterilization. One comment by the Court in Skinner is particularly relevant in this abortion case because it emphasizes the special scrutiny that must be given to statutes that interfere with basic rights:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races and types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.

The right to live is more basic even than the right to procreate. And there is "no redemption" for the aborted child

in the womb. The abortion is to his "irreparable injury" and by it he "is forever deprived of a basic liberty." Any law which interferes with the right to live must therefore be carefully scrutinized. It is appropriate to apply here the principles which govern the application of the Equal Protection Clause to another basic right—the right to be free from racial discrimination. The Court declared in *McLaughlin* v. *Florida,* 379 U. S. 184, 196, 13 L. Ed. 2d 222, 231, 85 S. Ct. 283 (1964), that a state law "which trenches upon the constitutionally protected freedom from invidious official discrimination based on race . . . even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld only if it is necessary, and not merely rationally related to the accomplishment of a permissible state policy."

There is no sufficient necessity which justifies a law which permits the killing of the child in the womb where it is not necessary to save the life of his mother. We are not concerned in this appeal with the question of whether a state law can constitutionally allow abortion where it is necessary to save the life of the mother. Rather the issue is whether the constitution permits the child in the womb to be killed where it is not necessary to save the life of his mother. To permit the child in the womb to be killed in such a case improperly discriminates against him on account of his age and situation. For the law does not allow a born child or an adult to be killed at the discretion of another or in any other situation where his killing is not necessary to save the life of another. (See *United States* v. *Holmes* (E. D. Pa. 1842) 1 Wall Jr. 1, Fed. Cas. No. 15,383; *Regina* v. *Dudley* (1884) 15 Cox C. C. 624, 14 Q. B. D. 273)

Discrimination in employment on account of age is now forbidden by federal law which enunciates a strong public policy. [29 U. S. Code 622-23] And while age may be a reasonable criterion for determining the right to vote or to

drive a car, it can hardly be contended that it is a reasonable basis for determining whether one has a right to continue living. The child in the womb should have the same right as his older brother or sister not to be killed where it is unnecessary to save the life of his mother. Nor should the fact that he temporarily reposes in his mother's womb rather than in an incubator or a crib operate to deprive the child of the right to continue living.

The child's right to continue living ought not to be considered inferior to any asserted right of the mother in this case, where her own life is not in danger. This includes the mother's right to privacy. In *Wyman* v. *James*, 400 U. S. 309, 318, 27 L. Ed. 2d 408, 414, 91 S. Ct. 381 (1971), the Court held that a home visit by a welfare caseworker was not an infringement on the right of privacy of the plaintiff, a mother who was a recipient of Aid to Families with Dependent Children. Significantly, the Court noted:

> The public's interest in this particular segment of the area of assistance to the unfortunate is protection and aid for the dependent child whose family requires such aid for that child. The focus is on the *child* and, further, it is on the child who is *dependent*. There is no more worthy object of the public's concern. The dependent child's needs are paramount, and only with hesitancy would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights. (Emphasis in original)

The dependent child in the womb is entitled to similar protection when what is involved is his very right to continue living.

CONCLUSION.

For the reasons stated herein Americans United for Life respectfully submits that the judgment appealed from, denying an injunction against the enforcement of the Texas statutes forbidding abortion where it is not necessary to save the life of the mother, should be affirmed on the ground that those statutes are constitutional.

Respectfully submitted,

CHARLES E. RICE,
820 Cavanaugh,
South Bend, Indiana 46617,
219 233-6919,
Attorney for Americans United for Life.

MOTION FILED

FILE COPY

SEP 17 1971

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
SEP 17 1971
E. ROBERT SEAVER, CLERK

October Term, 1971
No. 70–18

JANE ROE, *et al*

Appellant,

vs.

HENRY WADE

Appellee

ON APPEAL FROM THE UNITED STATED DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

MOTION FOR LEAVE TO SUBMIT A BRIEF
AMICI CURIAE
BRIEF OF WOMEN FOR THE UNBORN ET AL
IN SUPPORT OF APPELLEES

Eugene J. McMahon
Attorney for
Women For The Unborn
et al
103-42 Lefferts Boulevard
Richmond Hill, New York

INDEX

	Page
MOTION	2
INTEREST OF THE AMICI CURIAE	2
BRIEF OF AMICI CURIAE	8
SUMMARY OF ARGUMENT	9
ARGUMENT	10
I	10
II	12
III	16
CONCLUSION	18

TABLE OF CITATIONS

Miscellaneous:

"Cabbies Accused of Fleecing Abortion-Case Women, *The New York Times,* September 9, 1971, p. 87. 14

"Consultants' Report On Abortion," *British Medical Journal* (May 30, 1970), p. 534 16

Eastman, N. and Hellman, L., *William's Obstetrics* (Meredith Publishing Company), p. 345 13

Harris Poll of June 1970 16

Hilgers, T. and Shearin, R., *Induced Abortion: A Documented Report* (Written Presentation to Minnesota State Legislature, January 1971), p. 17 12

Hook, K., "Refused Abortion: A Follow Up Study of 249 Women Whose Applications Were Refused by the National Board of Health in Sweden," Proceedings of the Scandinavian Psychiatric Association, Vol. 39: Supplement 168, 1963. 13

Kolstad, P., "Therapeutic Abortion: A Clinical Study Based Upon 968 Cases From a Norwegian Hospital, 1940-53" in the Proceedings of the Scandinavian Gynecological and Obstetrical Society, Vol. 36: Supplement 6, 1957. 13

Long Island Press, February 22, 1970. 11

IN THE

Supreme Court of the United States

October Term, 1971

No. 70–18

JANE ROE, *et al*

Appellant,

vs.

HENRY WADE

Appellee

ON APPEAL FROM THE UNITED STATED DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

MOTION FOR LEAVE TO SUBMIT A BRIEF *AMICI CURIAE* BRIEF OF WOMEN FOR THE UNBORN ET AL IN SUPPORT OF APPELLEES

Eugene J. McMahon
Attorney for
Women For The Unborn
et al
103-42 Lefferts Boulevard
Richmond Hill, New York

MOTION FOR LEAVE TO SUBMIT A BRIEF AMICI CURIAE

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Women For The Unborn et al respectfully move for leave to file the accompanying brief in these cases as *amici curiae.*

INTEREST OF THE AMICI CURIAE

The interest of the organizations and the persons listed below as *amici curiae* in this case arises from the fact that there are appearing before this Court *amici curiae* and other groups of women who are advancing the rights of women alone. We are stressing the rights of the unborn without overlooking the rights of the mothers. This brief will treat the psychological, medical and other factors involved as well as legal points. However, it will not duplicate material presented in other briefs.

Respectfully submitted,

Women For The Unborn
Diane Arrigan, President
1714 Laurel Street
Merrick, New York
Representing 2000 women

Celebrate Life
Lucille Buffalino, Chairman
6 Howe Street
Huntington Station, New York
Representing 1500 women

Women Concerned For The Unborn Child
Mrs. Norbet Winter, President
1708 Fallowfield Avenue
Pittsburgh, Pennsylvania
Representing 1500 women

Minnesota Citizens Concerned For Life, Inc.
Mrs. Robert Joyce, Central District Coordinator
1248 North 13th Avenue
St. Cloud, Minnesota
Representing 8000 women

New York State Council Columbiettes
Mrs. Edward Ahl, President
21 Manor Place
Kingston, New York
Representing 10,000 women

Regina Bakcta, R.N.
168 E. Loines Avenue
Merrick, New York

Ruth Manning, R.N.
1812 Gormley Avenue
Merrick, New York

Rosemary Johnson, R.N.
20 Sheridan Street
Old Bethpage, New York

Claire Hoode, R.N.
77 Morton Blvd.
Plainview, New York

Sue McRedmond, R.N.
31, Sheridan Street
Old Bethpage, New York

Carmela Sardi, R.N.
18 Beacon Lane
Hicksville, New York

Kay Mulaney, R.N.
92 Cafry Avenue
Bethpage, New York

E. J. Picon, R.N.
29 Deborah Drive
Plainview, New York

Ann Devaney, R.N.
7 Cullen Drive
East Northport, New York

Mary Collin, R.N.
9 Pall Alto Drive
Plainview, New York

Peg McCale, R.N.
453 Atlantic Street
East Northport, New York

Regina Pfeiffer, R.N.
314 Blue Point West
Holtsville, New York

Maureen O'Rourke, R.N.
608 Baylor Drive
East Northport, New York

Margaret Taylor, R.N.
47-42 245th Street
Douglaston, New York

Mary Plascyk, R.N.
101 Roundtree Drive
Plainview, New York

Marilyn Bauer, R.N.
98 Menroe Street
Massapequa, New York

Eleanor Krauss, R.N.
69 Hewlett Street
Hempstead, New York

Mary Heil, R.N.
71-11 Yellowstone Blvd.
Forest Hills, New York

Barbara Donohue, R.N.
10 Acorn Circle
Tawson, Maryland

Regina Beaver, R.N.
5320 Fifth Street
Pittsburgh, Pennsylvania

Blanche McCabe, R.N.
141 DeForest Road
Dix Hills, New York

Jane Farrell, R.N.
7 Hampton Place
Lynbrook, New York

Johanna Lutz, R.N.
150 East 91st Street
New York, New York

Ann Flood, R.N.
97-71 Fux Ford Road
Richmond, Virginia

Agnes Plessner, R. N.
18 North Third Street
Peekskill,New York

Rosemarie Hargrave, R.N.
158 Whaley Street
Freeport, New York

Frances Donofrio, R. N.
45-11 156th Street
Flushing, New York

Jeraldine Cohug, R.N.
26 Pershing Street
Dumont, New Jersey

Mary Jane Tobin, R.N.
168 Elsie Avenue
Merrick, New York

Judith Foye, R. N.
20 Alan Avenue
Danbury, Connecticut

Imelda Jensen, R.N.
16 Lark Avenue
Old Bethpage, New York

Janet Ott R.N.
621 South Long Avenue
Pittsburgh, Pennsylvania

Eileen Doyle, R.N.
28 Rockville Avenue
Rockville Centre, New York

Frances Eagan, R.N.
60-37 69th Lane
Masbeth, New York

Mary Jane Russo, R.N.
956 Fairview Drive
Toms River, New Jersey

Ann Ward, M.D.
754 Montauk Highway
West Islip, New York

Therese Kutz, M. D.
35 Ingram Blvd.
Hempstead, New York

Mary Patricia Warner, M.D.
328 E. Irbin
Hagerstown, Maryland

Jeanette DeAngelis, M.D.
375 E. Main Street
Bayshore, New York

Mary L. Bailey, M.D.
4148 Rockwood Drive
Pittsburgh, Pennslyvania

Helen Uhlrick, Ph. D.
5320 5th Avenue
Pittsburgh, Pennslyvania

Dolores Amar, M.D.
36-12 Tonobah Street
Seaford, New York

Patricia Squillace, M.D.
287 Hempstead Avenue
Rockville Centre, New York

Marilyn Galligan,R.N.
98 Sterling Road
Elmont, New York

Florence Bernhardi, R.N.
3822 Allen Court
Seaford, New York

Loretta Kearney, R.N.
466 Argyle Road
Mineola, New York

Jeraldine Mattingly, R.N.
267 Haypath Road
Old Bethpage, New York

Mary Ann Donohue, R.N.
89 Round Tree Drive
Plainview, New York

Mary Zorro, R.N.
57 Grover Lane
East Northport, New York

Sheila Ryan, R.N.
175-44 Henly Road
Jamicia, New York

Jane Cummings, R.N.
90 Georgia Lane
Syosset, New York

Eileen McCormack, R.N.
1818 Hanover Place
Merrick, New York

Regina Vente, R.N.
2 Arbor Gate
Old Bethpage, New York

Olga Peters, R.N.
1 Gordon Avenue
Plainview, New York

Marilyn Webb, R.N.
7 Hunter Lane
Levittown, New York

Nora Fagan, R.N.
10 Jefferson Avenue
E. Islip, New York

Stephanie Horan, R.N.
162 Whitetail Lane
Central Islip, New York

Gloria Pipolo, R.N.
274 East 17th Street
Huntington Station, New York

Rita Mazzetilli, R.N.
10 Montana Street
Huntington Station, New York

Catherine Tower, R.N.
North Shore Hospital
Manhasset, New York

Mary Ellen Quinn, R.N.
3218 Perrysville Avenue
Pittsburgh, Pennsylvania

Joan Arslanian, R.N.
2 Farragut Place
Huntington, New York

Barbara Shellock, R.N.
102 Manchester Street
Westbury, New York

Ruth Sekora, R.N.
19 Landview Drive
Dix Hills, New York

Jean Dillinger, R.N.
45 Broadway
Rockville Centre, New York

Ruth Braune, R.N.
34 King Street
Floral Park, New York

Regina Geib, R.N.
3 Francis Path
Rocky Point, New York

Bridgit Norell, R.N.
218 Gilling Road
Seaford, New York

Dorothy Short, R.N.
63-02 39th Avenue
Woodside, New York

Margaret Glacier, R.N.
34 Stonyhollow Road
Centerport, New York

Jane Donohue, R.N.
635 Lochner Road
Columbia, South Carolina

Eileen Donlon, R.N.
45-54 39th Place
Sunnyside, New York

Jodi McCarthy, R.N.
8 Pinook Court
Huntington Station, New York

Patricia Tymann, R.N.
18 Fox Place
Levittown, New York

Pat Killoran, R.N.
536 Beech 22nd Street
Far Rockaway, New York

Jean Dealy, R. N.
347 Harrison Drive
Massapequa, New York

Eleanor Penisi, R.N.
44 Columbia Place
Rockville Centre, New York

Jacqueline Licalzi, R.N.
17 Andover Road
Rockville Centre, New York

Joan Morrissey, R.N.
15 Central Parkway
Merrick, New York

Margaret M. Nicholson, M.D.
1801 I Northwest
Washington Medical Building
Washington, D.C.

Mary Lou Cook, R.N.
139 Bellwood Lane
Munhall, Pennsylvania

Josephine Milstone, R.N.
11 Longridge Road
Plainview, New York

Marilyn Webb, R.N.
7 Hunter Lane
Levittown, New York

Laura Tracy, R.N.
6 Charles Street
Islip Terrace, New York

Jane Cummings , R.N.
90 Georga Lane
Syosset, New York

Lorraine Wagner, R.N.
485 Maritta Place
Pittsburgh, Pennsylvania

Valerie Detwiler , R.N.
26 Alabama Street
Long Beach, New York

Rosemary Rathgeber
2687 E. Bayview Avenue
Merrick, New York

Linda Beldy, R.N.
101 Hillwood Lane
Plainview, New York

Consulting Physicians

Paul Barunstein, M.D.
375 East Main Street
Bayshore, New York

Jerald Buetow, M.D.
754 Montauk Highway
W. Islip, New York

Robert McCormack, M.D.
375 E. Main Street
Bayshore, New York

Francis Bauer, M.D.
5 Whitehall Drive
Huntington Station, New York

John R. DeFilippi, M.D.
181 Main Street
Huntington, New York

Walter Del Gaudio, M.D.
46 Randolph Drive
Dix Hills, New York

James Halloran, M.D.
155 W. Merrick Road
Freeport, New York

Lew E. Sibeu, M.D.
419 Conetquot Avenue
Islip Terrace, New York

Bernard Ryan, M. D.
375 East Main Street
Bayshore, New York

Vincent Moriarity, M.D.
325 Park Avenue
Huntington, New York

Joseph Martocci, M.D.
47 Jerome Street
Lindenhurst, New York

Charles J. Derrico, M.D.
61 Ridge Drive
Plainview, New York

John McCloy, M.D.
345 E. Old Country Road
Hicksville, New York

Joseph Dottino, M.D.
79 Grand Avenue
Massapequa, New York

Joseph Noya, M.D.
4277 Hempstead Tpke.
Bethpage, New York

Hamdi Oruci, M.D.
316 Boundry Avenue
Massapequa, New York

Neal Palladino, M.D.
206 Water Lane South
Levittown, New York

Anthony Carotenuto, M.D.
404 Jerusalem Avenue
Hicksville, New York

Anthony Barbaro, M.D.
79 Grand Avenue
Massapequa, New York

Thomas R. Quinn, D.D.S.
89 Widgeon Court
Great River, New York

Neil Shoor, D.D.S.
2980 Hewlett Avenue
Merrick, New York

Vincent DeAnglis, M.D.
375 E. Main Street
Bayshore, New York

Francis O'Malley, M.D.
24 Brentwood Road
Bayshore, New York

William McCully, M.D.
92 Arnold Avenue
West Babylon, New York

Thomas McGowan, M.D.
269 Huntington Bay Road
Huntington Bay, New York

Paul MacNamarra, M.D.
P. O. Box 324
South Jamesport, New York

Edgar Tonna, Ph. D.
9 Geiger Place
Huntington, New York

Anthony Firenzi, M.D.
81 New Street
Huntington, New York

Raymond Portu, M.D.
16 Ebbtide Lane
Dix Hills, New York

Richard Simpovich, M.D.
7 High Street
Huntington, New York

Peter Januzzi, M.D.
180 East Pulaski Road
Huntington, New York

Anthony Cherry, M.D.
180 East Pulaski Road
Huntington Station, New York

Arthur Marrese, M.D.
1257 Montauk Highway
West Islip, New York

Robert Ryan, M.D.
294 West Merrick Road
Freeport, New York

Eugene Mickiewicz, M.D.
2851 Jerusalem Avenue
Wantagh, New York

Walter Clarkson, M.D.
761 Montauk Highway
West Islip, New York

James LaVine, M.D.
294 West Merrick Road
Freeport, New York

John McCormack, M.D.
101 Fairview Road
Massapequa, New York

John Egner, M.D.
754 Montauk Highway
West Islip, New York

Charles Molano, M.D.
364 Redmaple Drive
Wantagh, New York

William DeVries, M.D.
520 Franklin Avenue
Garden City, New York

John Rooney, M.D.
2 Anding Place
North Merrick, New York

Alfred Marx, M.D.
21-16 Merrick Avenue
Merrick, New York

John Battenfeld, M.D.
360 North Village Avenue
Rockville Centre, New York

William McCully, M.D.
92 Arnold Avenue
West Babylon, New York

Joseph Kennedy, M.D.
747 Montauk Highway
West Islip, New York

Francis B. Martin, M.D.
321 North Village Avenue
Rockville Centre, New York

Thomas Kilcours, M.D.
1145 Montauk Highway
West Islip, New York

Murray Elkins, M.D.
10101 159th Avenue
Howard Beach, New York

George Lawrence, M.D.
40-27 Murray Street
Flushing, New York

Joseph Tormey, M.D.
520 Franklin Avenue
Garden City, New York

Thomas McManus, M.D.
1145 Montauk Highway
West Islip, New York

Lester Candela, M.D.
112-25 Queens Blvd.
Forest Hills, New York

Thomas Lyons, M.D.
1145 Montauk Highway
West Islip, New York

Eugene J. McMahon
Counsel for
Women For The Unborn et al

September 17, 1971

BRIEF OF WOMEN FOR THE UNBORN ET AL AS *AMICI CURIAE*

SUMMARY OF ARGUMENT

Women have traditionally been the guardians of life.

It is to plead on behalf of life that we have prepared this brief. As women and mothers, we ask the Justices of the Supreme Court to consider our views, which can be summed up in the following four statements:

(1) The unborn child is a distinct individual. Modern genetics has confirmed scientifically what women have long felt intuitively—the presence of another human life, a life to be reverenced and protected.

(2) Many women who seek abortions are acting from an overpowering but temporary fear. Most of these women really desire to have their baby, and they will later be glad that their effort to secure an abortion was unsuccessful. In order to react constructively to the stresses and tensions of pregnancy, women need the support of society—not the address of the nearest abortion clinic.

(3) While abortion is an easy solution for many social problems, it is not a true solution for any. Its availability may prevent more constructive solutions from emerging.

(4) The social consequences of unlimited abortion are as yet unknown. Furthermore, both the moral and the legal arguments for abortion-on-demand have attained popularity only within the last few years. Since the test of time has not been applied, should a final decision be made which would extend abortion-on-demand to the entire country?

ARGUMENT
I
The unborn child is a distinct individual.

In August 1963, in a pamphlet entitled "Plan Your Children For Health and Happiness," Planned Parenthood had this to say about abortion:

> "An abortion requires an operation. It kills the life of a baby after it has begun. It is dangerous to your life and health. It may make you sterile so that when you want a child you cannot have it. Birth control merely postpones the beginning of life." [1]

Aside from the medical factors, we ask the Court to note the clear statement—made in the manner of a truism—that the life involved is a "baby" and that what abortion does is to "kill the life of a baby after it has begun." The moral distinction between postponing life and taking human life after it has begun could not be put more succinctly.

We realize that the pro-abortionists are often acting out of mercy. They want to save the mother—and occasionally the child—from future suffering. But is that sufficient reason to kill?

The answer to that depends upon what we are killing. When a dog or a cat is suffering terribly, we kill it out of mercy. When a man or a woman is suffering terribly, we do not kill. Why? Not because we think less of a man than of a cat, but because we think more. We believe that the man has a certain infinite dignity we should respect.

---

1) Although Planned Parenthood in 1971 looks more favorably on abortion, we believe this 1963 quotation is important because of ad hominem arguments that are frequently made against people opposing abortion. "Abortion kills the life of a baby after it has begun." If this is only an unusual Roman Catholic religious belief, would it follow that in 1963 Planned Parenthood was dominated by the Catholic Church? Or would it follow that Planned Parenthood was ignorant of modern medicine? Is either hypothesis a plausible one? Like other important social questions, the abortion question must be settled on the evidence itself—not on speculation about the motives or religion of people on either side.

Dr. Mortimer J. Adler, a leading authority on the history of moral questions, wrote the following on February 22, 1970:

> "The classical debate over abortion always centered on its relation to homicide. . .As far back as ancient Greece, the prevailing opinion seems to have been that the destruction of a human life free of personal guilt was murder, and that the distinction between a human child within and a human child outside the womb did not affect this principle."[2]

According to Dr. Adler, the only unsolved question concerned the existence of human life in the very early stages of pregnancy.[3] Until modern times, no certain answer could be given to that question since the necessary biological information was not available. But, in Dr. Adler's words, "the advances in medical knowledge seems to have had only one relevant effect: everything we now know about the chemical structure of the genes and their relation to life seems to indicate that the embryo is a fully potential human being from

---

2) The February 22, 1970 quotations from Dr. Adler are taken from his column in the Long Island Press.

3) Now that modern science has thrown light on this question, it should be noted that advocates of abortion are increasingly abandoning any distinction between early and late pregnancy.

Consider, for example, the position taken by New Yorkers for Abortion Law Repeal (Box 240, Planetarium Station, New York City, New York). During the 1971 New York legislative session, this organization lobbied extensively for a removal of that part of the new abortion law restricting abortion-on-demand to the first 24 weeks. In their informational material, New Yorkers for Abortion Law Repeal raised the question, "Isn't there a possibility that after 24 weeks the fetus will survive?" and replied, "With recent developments in medical technology, it is rapidly becoming possible for a fetus to survive outside the uterus at ANY stage of development–but this is not adequate reason to forbid abortion." (The emphasis on the word "any" was made by the abortion organization itself.)

We request the Court to note the two statements: first, that viability is becoming possible at any stage of development; second, that it makes no difference whatever.

the moment of conception. It is not surprising, therefore, that the proponents of abortion in the contemporary controversy tend to disregard the question of the human status of the embryo."

In considering the constitutionality of laws restricting abortion, is not the human status of the unborn child a significant consideration?

II

The woman is acting from fear.

Would it not be best to leave the abortion decision to the woman herself? After all, should not every woman possess the right to control her own body?

While these questions are sincerely asked, we believe they overlook two important factors. The first we have already discussed. A woman should have the right to control her own body, but the unborn baby is not just a part of her body.

But there is also a second factor. Let us consider the pregnant woman herself.

A woman who is pregnant experiences periods of great stress. Like most people at moments of high tension, she is often tempted to do certain things which she would not contemplate for an instant under normal circumstances. The fear within her is so overpowering that all long-range considerations fade away.

We do not want to overstate our case. Rarely does the fear result in suicide or permanent psychological damage to the woman. (In fact, suicide in the pregnant woman is about 1/6th the rate seen in nonpregnant women of the same age.[4]) Nevertheless, the temporary fear is great enough to

4) Hilgers, T. and Shearin, R., Induced Abortion: A Documented Report (Written Presentation to Minnesota State Legislature, January 1971), p. 17.

bring many of us to near-panic. On such occasions, we can actually do what we really do not want to do—unless there is someone who will both restrain us from taking "the easy way out" and help us to face our fear in a constructive way.

What we are describing is something very common, as is pointed out by Gardiner in Williams Obstetrics, 13th edition, 1966. Here is what he says:

> "It is not unusual (however) for women who will become good mothers, or those who have already demonstrated their excellent maternal qualities with their older children, to react initially to the diagnosis of pregnancy with resentment, frustration and depression, only to express strong, genuine, positive feelings of acceptance as the pregnancy advances and fetal movements appear."[5]

A Norwegian study by P. Kolstad[6] confirms Gardiner's statement. Kolstad reports on 113 women who were refused a legal abortion and who then carried the pregnancy to term. 84% were later glad that the pregnancy was not terminated, 9% were uncertain, and only 7% were discontented.

(Incidentally, this study, as well as a similar study by Hook[7] in Sweden, disputes the claim that a woman refused a legal abortion will simply go elsewhere. In the Swedish study, which involved 249 women refused a legal abortion,

---

5) Eastman, N. and Hellman, L., William's Obstetrics (Meredith Publishing Company), p. 345.

6) Kolstad, P., "Therapeutic Abortion: A Clinical Study Based Upon 968 Cases From a Norwegian Hospital, 1940-53" in the Proceedings of the Scandinavian Gynecological and Obstetrical Society, Vol. 36: Supplement 6, 1957.

7) Hook, K., "Refused Abortion: A Follow Up Study of 249 Women Whose Applications Were Refused by the National Board of Health in Sweden," Proceedings of the Scandinavian Psychiatric Association, Vol. 39: Supplement 168, 1963.

86% did not go elsewhere and carried their pregnancy to term.)

If so many women seeking an abortion really want their children, why do they act in this way? Gardiner describes the emotional reactions of the women involved as "so real and life-threatening" that they "reject the existence of the pregnancy before they, themselves, are engulfed and destroyed." He refers to this phenomenon as a "spell" of "distorted thinking and reasoning."[8]

In other words, a pregnant woman often feels like a person with claustrophobia. The walls are closing in. There is an overpowering desire to escape. Just as a man with claustrophobia may try to leave a moving train, although he will later be glad that someone restrained him, so a woman may seek an abortion but afterwards rejoice that she has been allowed to give birth.

If all this is true, is it really merciful for our society to step aside?

On September 9, 1971, an article in the New York Times expressed concern about young girls arriving in New York for abortions.[9] According to the article, some taxicab drivers were taking advantage of them. Because of the strain the young girls were under as well as their relative inexperience, they could not protect themselves from the excessive prices charged by unscrupulous drivers.

Imagine! Because she is young, fearful, and alone, society is afraid to leave to the girl herself the decision about the proper taxicab to take from the airport. But society is

---

8) Eastman and Hellman, op. cit., p. 346.

9) "Cabbies Accused of Fleecing Abortion-Case Women," The New York Times, p. 87.

BLEED THROUGH POOR COPY

now asked to let that same girl face alone[10] the most awesome decision of all—whether to take the life within her or give birth to her child.

As women,[11] we believe the state laws restricting abortions protect both thousands of unborn babies and thousands of mothers. Therefore, we respectfully ask the Justices of this Court not to strike them down.

---

10) It is sometimes said that the abortion decision would be left to the woman and her doctor.

While this might have some validity in cases of therapeutic abortion, does it apply to abortions performed for economic and social reasons—not for medical reasons? Since a medical judgment is not involved, the doctor's role in the decision for a socio-economic abortion is likely to be no greater than the bus driver's role in a woman's decision to take a bus trip to Chicago. While the driver is needed as an instrument, would one be justified in claiming that the decision for such a journey had been made by the woman and her bus driver?

Forgetting that medical factors are not involved, the argument is sometimes raised that the prohibition against socio-economic abortions interferes with a doctor's right to practice medicine as he judges best. In reality, socio-economic abortions have nothing to do with medicine—any more than piercing the ears or operating on the nose for reasons of facial beauty are connected with medicine. A socio-economic abortion does not improve the woman's health. Needless to say, it certainly does not improve the health of the child.

11) How representative of American women are the views we are expressing? According to a Harris Poll of June 1970, 55% of American women opposed abortion-on-demand, while only 37% favored it. Opposition to abortion crossed religious lines, as the following breakdown indicates:

Abortion-On-Demand	Approve	Disapprove	Not Sure
Total Population	40%	50%	10%
By Religion:			
Protestant	39%	49%	12%
Catholic	30%	64%	6%
Jewish	71%	18%	11%

III

The easy solution of abortion discourages more constructive solutions.

Even if one overlooks the biological evidence concerning the unborn child, or the psychological testimony that most women seeking to take the life of their unborn baby, like most persons seeking to take their own life, desire to be stopped by someone, is abortion really a satisfactory solution to any social problem?

Will the availability of the easier abortion "solution" discourage our society from seeking deeper and more permanent solutions?

Such a fear appears to lie behind the opposition to abortion-on-demand within the black community. Despite assurances by abortion advocates, many members of the black community seem to suspect that numerous abortion clinics in ghetto areas could end up as the "white man's" solution to the problems of poverty and race.[12]

When the poor cry out for bread, what response will they receive? The more difficult response—an equitable distribution of society's resources? Or the easier response—a list of centers where abortions can be performed on those who would not seek them except for their desperate poverty? While these two responses are not mutually exclusive, to what extent will the availability of the second lessen society's incentive to seek the first?

Sponsors of non-abortional family planning have also expressed concern that reliance on abortion could lessen the effectiveness of their efforts.[13] Could abortion-on-demand adversely affect other programs which require a commitment

---

12) According to the 1970 Harris Poll, 57% of the black community opposed abortion-on-demand, 29% favored it, and 14% were uncertain.

13) "Consultants' Report On Abortion," British Medical Journal (May 30, 1970), p. 534.

BLEED THROUGH POOR COPY

of society's resources—e.g., programs to assist the unwed mother or efforts to provide easily accessible counseling services for all women who need such support in order to respond constructively to the anxieties they experience during pregnancy?

Perhaps these fears about the adverse social effects of easy abortion will turn out to be unfounded. At the moment, however, that is far from certain. Until some kind of definite evidence is available concerning the social pattern that is emerging in those states which have removed all restrictions on abortion, should a final decision be made which would extend abortion-on-demand to the entire country? For if easy abortion does indeed produce such undesirable social effects, would this not be a ground in itself for state regulation of the practice?

If a verdict of unconstitutionality is reached concerning state laws which protect the unborn child and the mother herself from an immediate decision to terminate life, then the legislative discussion is over. If these laws are held to be constitutional, their wisdom will continue to be debated in our state and national legislatures.

If any doubt exists, would it not be better to allow the discussion to continue?

On behalf of the unborn child. . .the mother. . .and society itself. . .we ask the Court to preserve the right of the state to protect unborn human life.

CONCLUSION

For the reasons stated herein, Women For The Unborn *et al* respectfully submit that the statutes challenged herein should be sustained on the grounds that permissive abortion constitutes an infringement on the rights and interests of women as well as of unborn children.

Respectfully submitted,

Eugene J. McMahon
Attorney for
Women For The Unborn
et al
103-42 Lefferts Boulevard
Richmond Hill, New York

MOTION FILED

OCT 8 1971

FILE COPY

IN THE

Supreme Court of the United States

No. 70-18

JANE ROE, *et al.*, *Appellants*,

v.

HENRY WADE, *Appellee*.

Supreme Court, U.S.
FILED
NOV 9 1971
E. ROBERT SEAVER, CLERK

On Appeal from the United States District Court
for the Northern District of Texas

No. 70-40

MARY DOE, *et al.*, *Appellants*,

v.

ARTHUR K. BOLTON, *et al.*, *Appellees*.

On Appeal from the United States District Court
for the Northern District of Georgia

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

JUAN J. RYAN
1351 Springfield Avenue
New Providence, New Jersey 07974

JOSEPH V. GARTLAN, JR.
815 Connecticut Avenue
Washington, D.C. 20006

ALFRED L. SCANLAN
MARTIN J. FLYNN
734 Fifteenth Street, N.W.
Washington, D.C. 20005

ROBERT M. BYRN
140 West 62nd Street
Lincoln Center
New York, New York 10023

Attorneys for The National Right to Life Committee, Amicus Curiae

OF COUNSEL:
Shea & Gardner
734 Fifteenth Street, N.W.
Washington, D.C. 20005

October 8, 1971.

Washington, D.C. THIEL PRESS 202 393 0625

IN THE

Supreme Court of the United States

No. 70-18

JANE ROE, *et al.*, *Appellants,*

v.

HENRY WADE, *Appellee.*

On Appeal from the United States District Court
for the Northern District of Texas

No. 70-40

MARY DOE, *et al.*, *Appellants,*

v.

ARTHUR K. BOLTON, *et al.*, *Appellees.*

On Appeal from the United States District Court
for the Northern District of Georgia

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

PURPOSE OF THE MOTION

The opposing parties in No. 70-18 (the Texas case) have given their written consent for The National Right to Life Committee[1] to file an *amicus curiae* brief. The appellants in No. 70-40 (the Georgia case) have also given written consent to the filing of such a brief.[2] While declining to give written consent to the filing of an *amicus curiae* brief by

[1] Hereinafter usually referred to as "NRLC".

[2] These consents have been filed with the Clerk.

NRLC, the appellees in the Georgia case have stated in writing that they do not object to this motion.[3]

INTEREST OF THE AMICUS CURIAE

1. *Identification of the Amicus.* The National Right to Life Committee is a non-sectarian, interdisciplinary organization that is committed to informing and educating the general public on questions related to the sanctity of human life. Protecting the right to life of the unborn child is of central concern for NRLC. The Committee believes that proposals for total repeal or relaxation of present abortion laws represent a regressive approach to serious human problems. NRLC is in favor of a legal system that protects the life of the unborn child, while recognizing the dignity of the child's mother, the rights of its father, and the responsibility of society to provide support and assistance to both the mother and child.

NRLC opposes the repeal of existing laws preventing or restricting an abortion, whether this be achieved by legislation or through court order. It is for this reason that NRLC seeks the Court's permission to participate in these two cases. In both, the appellants raised in the lower court, and again attempt to argue in this Court, grave constitutional questions concerning the power of state legislatures to enact laws which restrict the taking of life through the destruction of a live fetus. Candidly, NRLC has reservations concerning the Georgia statute, which permits abortion in several situations beyond that when abortion is necessary to save the life of a mother. Nevertheless, NRLC believes that neither the Texas nor the Georgia statute should be held unconstitutional on any basis urged by the appellants in the two cases at bar.

2. *The Legal Position of NRLC in These Cases.* As indicated, if the question before this Court were the most desir-

[3] A copy of their letter to that effect has been filed with the Clerk.

able form of abortion legislation, only the Texas statute would come close to the ethical and political position of NRLC;[4] the Georgia statute would fall substantially short of that position.[5] In these cases, however, NRLC is not concerned with the most desirable legislative resolution of opposing concepts of public morality and welfare, but with fundamental issues of constitutional power and policy. Accordingly, while not endorsing either the Texas or especially the Georgia statute as the ideal abortion law, NRLC, if granted leave by the Court to submit this brief, will argue that neither statute should be declared unconstitutional on any grounds raised by the appellants in the courts below and reiterated by them in this Court. In view of the Fifth and Fourteenth Amendments, there can be no doubt that protection of human life against destruction without due process of law is one of the most fundamental values in American constitutional policy. To the extent that Texas and Georgia have acted to protect the unborn child against arbitrary destruction by private individuals, including doctors and mothers, Texas and Georgia have acted well within their constitutional power.

3. *Justification for Participation as Amicus Curiae.* On the basis of the motions filed in response to the jurisdictional statements filed in these two cases, it appears that in neither do the appellees intend to address themselves to several of the important constitutional issues which appellants have sought to raise. These issues are of major concern to this *amicus.* If considered and decided by this Court, their resolution will have a national impact, affecting the laws of

---

[4]The Texas statute permits abortion *only* "for the purpose of saving the life of the mother."

[5]The Georgia statute permits abortion in a case where "(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or (2) The fetus would be very likely born with a grave, permanent, and irremediable mental or physical defect; or (3) The pregnancy resulted from forcible or statutory rape."

many states and going far in determining what are to be acceptable public mores.

Under these circumstances NRLC believes that both the spirit and the text of Rule 42(3) sanction its appearance as *amicus curiae* in these two cases for the purpose of arguing, *inter alia*, that the two statutes challenged were within the constitutional competence of Texas and Georgia to enact, since those states have a compelling interest in protecting human life, in the form of a living fetus, from destruction by abortion.

CONCLUSION

For the reasons stated herein, and as more fully expanded in the accompanying brief, NRLC respectfully requests that the Court grant its motion and accept for filing the *amicus curiae* brief submitted herewith.

Respectfully submitted,

ALFRED L. SCANLAN
MARTIN J. FLYNN
734 Fifteenth Street, N.W.
Washington, D.C. 20005

ROBERT M. BYRN
140 West 62nd Street
Lincoln Center
New York, New York 10023

JUAN J. RYAN
1351 Springfield Avenue
New Providence,
New Jersey 07974

JOSEPH V. GARTLAN, JR.
815 Connecticut Avenue
Washington, D.C. 20006

Attorneys for The National Right to Life Committee, Amicus Curiae

OF COUNSEL:

Shea & Gardner
734 Fifteenth Street, N.W.
Washington, D.C. 20005

October 8, 1971.

BRIEF

TABLE OF CONTENTS

	Page
INTRODUCTORY STATEMENT	1
QUESTIONS PRESENTED	2
SUMMARY OF ARGUMENT	2
ARGUMENT	9
I. Both Courts Should Have Abstained from Granting Declaratory Relief	9
A. *The Texas Three-Judge Federal Court Should Have Abstained from Granting Declaratory Relief*	9
B. *The Georgia Three-Judge Federal Court Also Should Have Abstained from Granting Declaratory Relief*	14
II. Neither the Ninth nor the Fourteenth Amendment Prohibits a State from Protecting Against the Destruction or Abortion of Human Life	19
A. *A State's Interest in Protecting the Rights of a Live Fetus Rests on a Now Indisputable Medical Basis*	20
B. *In Anglo-Saxon Law the State Has Always Had a Compelling Interest in Preventing the Destruction of Unborn Children*	24
C. *The Law's Recognition of the Property Rights of an Unborn Child*	29
D. *Evolving Rights Afforded an Unborn Child in the Law of Torts*	32
E. *Equity and the Unborn Child*	36
1. The Right to Parental Support	37
2. The Right to Life	37
F. *Life Should Take Constitutional Precedence Over Privacy*	42
G. *The Right to Life Has Not Been Undermined by Judicial Decision*	48
III. The Statutes Are Not Unconstitutionally Vague	53

Page

IV. The Remaining Constitutional Arguments Advanced by the Appellants and the *Amici Curiae* Supporting Them Are Without Merit 55

A. *The Statutes Do Not Abridge Either First or Fourteenth Amendment Rights of Doctors* 55

B. *Nor Do the Statutes Draw Invidious and Unconstitutional Discriminations Between the More Affluent and the Poor* 56

V. Appellants' Public Policy Arguments Are Misplaced 58

CONCLUSION 60

TABLE OF CITATIONS

CASES:

Application of the President and Directors of Georgetown College, Inc., 331 F.2d 1000 (C.A. D.C., 1964), *cert. den.*, 377 U.S. 978 (1964) 37, 38, 46

Babbitz v. McCann, 306 F. Supp. 400 (E.D. Wisc., 1969), *app. dism.*, 400 U.S. 1 (1970) 46

Baggett v. Bullitt, 377 U.S. 360 (1964) 17

Barnett v. Pinkston, 238 Ala. 327, 191 So. 371 (1939) 31

Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958) 33

Board of Education v. Barnette, 319 U.S. 624 (1943) 37

Bonbrest v. Kotz, 65 F. Supp. 138 (D. D.C., 1946) 33, 34

City of Greenwood v. Peacock, 384 U.S. 808 (1968) 15

Craig v. Rowland, 10 App. D.C. 402 (1897) 31

Daley v. Meier, 33 Ill. App. 2d 218, 178 N.E. 2d 691 (1961).... 33

Damasiewicz v. Gorsuch, 197 Md. 417, 79 A.2d 550 (1951) ... 33

Dietrich v. Northhampton, 138 Mass. 14 (1884) 33

Doe, et al. v. Bolton, et al., 319 F. Supp. 1048 (1970), *prob. juris. noted*, 402 U.S. 941 (1971) ..... passim

Doe v. Clarke, 2 H. Bl. 399, 126 Eng. Rep. 617 (1795) 29

Mary Doe, et al. v. General Hospital of the District of Columbia, et al., C.A. No. 24,011 54

Dombrowski v. Pfister, 380 U.S. 479 (1965) 11, 15

Page

Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921) 21

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) 18

Ferguson v. Skrupa, 372 U.S. 726 (1963) 48

Fisch v. General Motors Corp., 169 F.2d 266 (C.A. 6, 1948) . . . 57

Giboney v. Empire Storage and Ice Co., 336 U.S. 490 (1949) . . . 55

Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) . . . 39, 40, 47, 54

Great Lakes Co. v. Huffman, 319 U.S. 293 (1953) 17

Griswold v. Connecticut, 381 U.S. 479 (1965) . . . 7, 47, 50, 51, 52

Gunn v. University Committee, 399 U.S. 383 (1970) 13

Hall v. Hancock, 15 Pick. 255 (Mass., 1834) 30

Helvering v. Lerner Stores Co., 314 U.S. 463 (1941) 13

Hodgson v. Randall, 314 F. Supp. 32 (D. Minn., 1970), *aff'd*, 402 U.S. 967 (1971) 18

Hoener v. Bertinato, 67 N.J.S. 517, 171 A.2d 140 (1961) . . . 38

Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E. 2d 727 (1956) 33

Ide v. Scott Drilling Co., Inc., 341 Mich. 164, 67 N.W.2d 133 (1954) 31

In Re Sankey's Estate, 199 Cal. 391, 249 P. 517 (1926) 31

In Re Well's Will, 221 N.Y.S. 417 (1927) 30

Jones v. Jones, 208 Misc. 721, 144 N.Y. Supp.2d 820 (Sup. Ct., 1955) 24

Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953) 33, 34, 35

Keyes v. Constr. Serv., Inc., 340 Mass. 633, 165 N.E.2d 912 (1960) 33

Konigsberg v. State Bar of Cal., 366 U.S. 36 (1961) 56

Kyne v. Kyne, 38 Cal. App.2d 122, 100 P.2d 806 (1940) 37

La Blue v. Specker, 358 Mich. 558, 100 N.W.2d 445 (1960) . . . 31

Lochner v. New York, 198 U.S. 45 (1905) 48

Loving v. Virginia, 388 U.S. 1 (1967) 49

Lukas v. Alexander, 279 U.S. 573 (1928) 14

Page

Mallison v. Pomeroy, 205 Ore. 690, 291 P.2d 225 (1955) 33

McGowan v. Maryland, 366 U.S. 420 (1961) 29

McNeese v. Board of Education, 373 U.S. 668 (1963) 16, 17

Miller v. Bennett, 190 Va. 162, 56 S.E.2d 217 (1949) 51

Mitchell v. Donovan, 398 U.S. 427 (1970) 13

O'Neill v. Morse, et al., ___ Mich. ___, ___ N.W.2d ___ (1971) 35

Parker v. County of Los Angeles, 338 U.S. 327 (1949) 9

Penfield Co. v. S.E.C., 330 U.S. 585 (1947) 14

People v. Estergard, ___ Colo. ___, 457 P.2d 698 (1969) 37

People v. Yates, 114 Cal. App. Supp. 782, 298 P. 961 (1931) 37

Peterson v. Nationwide Mutual Insurance Co., 26 Ohio App. 2d 246, 197 N.E.2d 194 (1964) 36

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 49, 50

Planned Parenthood Association, et al. v. Nelson, et al., 327 F. Supp. 1290 (D. Ariz., 1971) 18

Prince v. Massachusetts, 321 U.S. 158 (1943) 39

Public Service Commission v. Wycoff Co., 344 U.S. 237 (1952) 9, 17

Railway Express Agency v. New York, 336 U.S. 106 (1949) ... 57

Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964), *cert. den.*, 377 U.S. 985 (1964) 38, 39, 46

Regina v. Wycherly, 8 Car. & P. 262, 173 Eng. Rep. 486 (Nisi Prius, 1838) 26

Riggs National Bank v. Summerlin, et al., C.A. 187-69, Memo. Opinion (D. D.C., 1969) 31

Roe, et al. v. Wade, 314 F. Supp. 1217 (1970), *prob. juris. noted*, 402 U.S. 808 (1971) ..... passim

Samuels v. Mackell, 401 U.S. 66 (1971) ..... passim

Scott v. McPheeters, 33 Cal. App.2d 629, 92 P.2d 678 (1939) .. 33

Seattle-First Nat'l Bank v. Rankin, 59 Wash.2d 288, 367 P.2d 835 (1962) 24, 33

Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960) 33

Page

Skinner v. Oklahoma, 316 U.S. 535 (1942) 49

Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960) 33

Sox v. United States, 187 F. Supp. 465 (E.D. S.C., 1960) 36

State v. Moretti, 52 N.J. 182, 244 A.2d 499 (1968), *cert. den.*, 393 U.S. 952 (1968) 54

Steinberg v. Rhodes, et al., 321 F. Supp. 741 (N.D. Ohio, 1970) 41

Swain v. Bowers, 91 Ind. 307, 158 N.E. 598 (1927) 31

Sylvia v. Gobeille, 101 R.I. 76, 220 A.2d 222 (1966) 24, 34

Thelluson v. Woodford, 4 Ves. 227, 31 Eng. Rep. 117 (1798) . . . 30

Torigian v. Watertown News Co., 352 Mass. 446, 225 N.E.2d 926 (1967) 33

Tursi v. New England Windsor Co., 19 Conn. Supp. 242, 111 A.2d 14 (1955) 33

United States v. American Ry. Express Co., 265 U.S. 425 (1924) 14

United States v. Vuitch, 402 U.S. 62 (1971) 7, 9, 53, 54

United States v. Wurzbach, 280 U.S. 396 (1930) 54

Wallis v. Hodson, 2 Atk. 117 30

Williams v. Marion Rapid Transit, Inc., 152 Ohio 144, 87 N.E.2d 334 (1949) 33

Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) 56

Womack v. Buchhorn, ___ Mich. ___, 187 N.W.2d 218 (1971) 35

Wyman v. James, 400 U.S. 309 (1971) 44

Younger v. Harris, 401 U.S. 37 (1971) . . . . . passim

Zwikler v. Koota, 389 U.S. 241 (1967) 17

CONSTITUTIONAL AND STATUTORY PROVISIONS:

California Penal Code § 274 54

22 D.C. Code 201 (1967) 53

La. Rev. Stat. Ann., § 14.79.2 59

Page

Miscarriage of Women Act, 43 Geo. 3 c. 58 (1803) 27

28 U.S.C. 1253 13

United States Constitution:

First Amendment ..... passim
Fourth Amendment 41
Fifth Amendment 41, 44
Sixth Amendment 41
Ninth Amendment ..... passim
Fourteenth Amendment ..... passim

MISCELLANEOUS:

American Medical Association, Minutes of the Annual Meeting 1859, Tenth Annual Medical Gazette 409 (1859) 28

Bishop, Commentaries on the Law of Statutory Crimes, Section 746 (2d Ed., 1883) 27

Black's Law Dictionary 1415 (4th Ed., 1968) 26, 30

I Blackstone's Commentaries 456 ..... 26, 52

Blake, *Abortion and Public Opinion: The 1960-1970 Decade,* 171 Science 540 (1971) 48

Bracton, De Legibus et Consuetudinibus Angliae, 3.2.4 (London, 1640) 25

Cavanagh, *Reforming the Abortion Laws: A Doctor Looks at the Case,* America, April 18, 1970, p. 408 59

Chicago Sun-Times, May 6, 1971, p. 12 39

Coke, The Third Part of the Institutes of England, Section 50 (London, 1797) 25

Coniff, *The World of the Unborn,* New York Times Magazine, January 8, 1967, p. 41 22

Fox, Abortion, a Question of Right or Wrong, 57 A.B.A.J. 667, 671 (1971) 25, 27

Frankl, the Doctor and the Soul, 37 (1969) 56

Gordon, *The Unborn Plaintiff,* 63 Mich. L.R. 579, 627 (1965). . 33, 34

Gottleib, Developmental Genetics 17 (1966) 22

Granfield, The Abortion Decision 25 (1969) 23, 47

Gruenwald, *Growth of the Human Fetus,* 94 Am.J. Obstetrics and Gynecology 1112 (1966) 34

Page

Guttmacher, Pregnancy and Birth 86 (1960) 51

Harper and James, Torts, Sec. 18.3 (1956) 33

Hellegers, *Abortion, the Law, and the Common Good,* 3 Medical Opinion and Review, No. 5 (May 1967), pp. 84, 90.... 45, 54

Hellegers, *Law and the Common Good,* 86 Commonweal 418 (1967) 41

Justinian, Digest 25.4.1.1 21

Liley, Modern Motherhood 26-27 (1967) 23

Maledon, *The Law and the Unborn Child: The Legal and Logical Inconsistencies,* 46 N.D. Lawyer 349, 356-57 (1971) 35

Markham, *Foeticide and Its Prevention,* 9 Journal of the American Medical Association 805 (1888) 28

Means, *The Law of New York Concerning Abortion and the Status of the Fetus 1664-1968: A Case of Cessation of Constitutionality,* 14 N.Y. Law Forum 411, 439, n. 64 (1968) 27

Montagu, *Hemolytic Disease of the Fetus,* Intra-Uterine Development 443, 455 (A. Barnes ed. 1968) 21

Montagu, Life Before Birth 2 (1964) 22

Morison, Foetal and Neonatal Pathology 99-100 (1963)..... 34

New York Times, July 2, 1970, p. 1 58

Noonan, *Amendment to the Abortion Law: Relevant Data and Judicial Opinion,* 15 The Catholic Lawyer, No. 2 (Spring, 1969) 40

Noonan, Contraception 491 (1965) 51

Noonan, *Freedom To Reproduce. Cautionary History, Present Invasions, Future Assurance.* Biennial Conference on the "Control of One's Own Body," New York University, New York (1970) 59

Noonan, The Morality of Abortion 224 (Harvard U. Press, 1970) 28, 41

Packer & Gamspell, *Therapeutic Abortion, A Problem in Law and Medicine,* 11 Stanford L.R. 418, 444 (1959)..... 54

Patterson, Law in Scientific Age 5 (1963) 36

Page

Perkins, Criminal Law 28-29 (2d Ed., 1969) 26

Prosser on Torts, Sec. 56 (1964) 32, 33, 36

Quay, *Justifiable Abortion*, 40 Georgetown L.J. 173, 430-31 (1961) 25

Quimby, *Introduction to Medical Jurisprudence*, 9 Journal of the American Medical Association 164 (1887) 28

Report of the Third Committee of the General Assembly, Official Records, 14th Session, p. 593 43

Rosen, Therapeutic Abortion, Medical, Psychiatric, Anthropological and Legal Considerations (1954) 45

Time Magazine, February 25, 1960, p. 86 42

Uhrus, *Some Aspects of the Swedish Law Governing Termination of Pregnancy*, The Lancet 1292 (1964) 58

United Nations, *Declaration of the Rights of the Child*, Official Records of the General Assembly 19-20, 14th Session (1959) 43

Washington Post, September 7, 1971, page A-1 59

Zacchia, Quaestiones Medico-Legales 9.1 (1621) 21

IN THE

Supreme Court of the United States

No. 70-18

JANE ROE, *et al.*, *Appellants,*

v.

HENRY WADE, *Appellee.*

On Appeal from the United States District Court
for the Northern District of Texas

No. 70-40

MARY DOE, *et al.*, *Appellants,*

v.

ARTHUR K. BOLTON, *et al.*, *Appellees.*

On Appeal from the United States District Court
for the Northern District of Georgia

BRIEF AMICUS CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE

INTRODUCTORY STATEMENT

The interests and identification of the *amicus curiae* are stated in the motion which NRLC has filed. The facts of record, the pertinent provisions of the Texas and Georgia statutes, the provisions of the United States Constitution involved and the opinions of the courts below are found either in the printed appendices or in the briefs filed by the appellants and appellees. This *amicus* accepts them for purposes of its own brief.

QUESTIONS PRESENTED

A. These cases raise issues both of jurisdiction and of constitutionality. The basic jurisdictional question appears to this *amicus* to be whether the two lower courts should have abstained from exercising jurisdiction and granting declaratory judgments.

B. Should the Court conclude that the courts below properly exercised jurisdiction and that jurisdiction on appeal also exists in this Court, then it would be confronted with the following substantive issues:

1. Did either the Texas or Georgia court abuse discretion in refusing to issue the injunction sought by the respective appellants?[1]

2. Do the Georgia and Texas abortion statutes invade any alleged constitutional right of privacy on the part of a woman to abort an unborn child?

3. Are the statutes unconstitutionally vague?

4. Do the statutes impair First Amendment or Due Process rights of doctors to practice their profession?

5. Do the statutes deny equal protection of the laws to poorer citizens?

SUMMARY OF ARGUMENT

I.

A. The Texas three-judge federal court should have abstained from granting declaratory relief. At the time the suit was instituted, state court criminal proceedings were pending against the doctor-plaintiff charging him with violations of the Texas abortion statute. In such a case, as this Court recently ruled, "relief by way of declaratory judgment

---

[1]This issue has been adequately briefed by the appellees in both cases. NRLC supports those arguments and therefore will not speak further to that particular question.

should have been denied without consideration of the merits." *Samuels v. Mackell*, 401 U.S. 66, 73 (1971).

B. The Georgia case presents the fact situation to which this Court referred but left undecided in *Younger v. Harris*, 401 U.S. 37 (1971); *i.e.*, no criminal prosecution was "pending in state courts at the time the federal proceeding . . . [was] begun." 401 U.S., at 41. The principles laid down in the *Mackell, Younger* and related cases decided by the Court at the last Term should also apply in this case. The state statute has never been construed by the Georgia courts, and those courts are available to provide both declaratory and injunctive relief in an appropriate case. Therefore, traditional principles of equity, federalism, comity and sound judicial administration support the proposition that the Georgia three-judge federal court should have denied declaratory relief without reaching the merits of the constitutional issues raised by the appellants.

II.

A. Whatever the metaphysical view, the legal concepts as to the nature and rights of an unborn child have drastically changed, based on expanding medical knowledge over the last 2,500 years. As recently as 1921, a respected state court could maintain that the child in the womb is part of his mother. The findings of medical science have destroyed that myth. The leading doctors and scientists in the field now agree that life begins at conception. They further agree that a developing fetus is alive, not only in the sense that he is composed of living tissue, but also in the sense that he is a living, striving human being, from the very beginning. Very early in the pregnancy the fetus manifests a working heart and brain different from his mother. There is absolutely no question but that his existence as an individual begins no later than the stage at which the cells which make up the fetus separate from those cells which later become the placenta. Thus, the state's interest in the preservation of human life in the womb rests upon the undisputed medical evidence.

B. From Bracton's day abortion was regarded at common law as a serious evil or wrong which should be prevented in order to curtail or stop the unnecessary destruction of human life. For a brief period difficulties of proving that an abortion had in fact caused the termination of an "unquick" child prevented application of the serious sanctions of the criminal law to some cases. However, when medical science eliminated those difficulties of factual proof, there was no longer any question but that one of the prime purposes of the abortion statutes was to prevent the destruction of the unborn fetus at all stages of gestation. Therefore, the compelling interest which Texas and Georgia have in prohibiting and regulating unjustifiable abortions is not one newly discovered or advanced as an afterthought argument.

C. The law has recognized the rights of an unborn child in other important areas. For example, the property rights of an unborn child, at all stages of fetal development, were recognized by English law before the end of the eighteenth century. The same recognition was afforded the property rights of an unborn child by American courts. In property law there was no requirement that the fetus must be "quick," *i.e.*, that his presence within her body be felt or recognized by the mother. The rules protecting property rights of an unborn child have been applied even where their application benefited some third party rather than the child, and even where the child himself suffered disadvantage because of such application. We believe it would be an ironic and inexplicable perversion of both human and constitutional values if it were to be the law that a state has an interest in protecting the property rights of an unborn child but has no compelling, constitutionally justifiable interest in regulating the circumstances and conditions under which he may be destroyed.

D. In the field of tort law there has been a dramatic development and complete change in the law in response to expanding scientific knowledge and medical facts that formerly were unavailable. Until well into the twentieth cen-

BLEED THROUGH POOR COPY

tury most American decisions denied recovery in tort to the human offspring harmed in the womb, primarily on the ground that the defendant owed no duty to a person who was not in existence at the time of the tort. The premise here, of course, was the now repudiated notion that the unborn child was a part of his mother. Almost every jurisdiction which has considered the issue in the last 30 years has upheld the right of an infant to sue for injuries sustained prior to birth, including the right to sue under a wrongful death statute, whether or not the injury occurred at the time the unborn child was viable or not. If the state may protect the unborn child by a court action awarding damages for a tort, *a fortiori* it cannot be impotent to protect the same living being by criminal sanctions which prohibit his arbitrary destruction.

E. It is also now established that the law will recognize an unborn child's right to support by his parents. If a state has sufficient justification to require a father to support an unborn child which he may not want, can it be fairly maintained that the same state has no justifiable interest in protecting from destruction as a living being a child which his mother may not want? This Court has firmly settled that the free exercise of religion rights guaranteed by the First Amendment are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. Nevertheless, the right of an unborn child to live has served to permit the state's abridgement of or interference with a mother's religious convictions when necessary to save the life of an unborn child. These are cases where the court has to override the religious convictions of a mother and order a blood transfusion in order to save an unborn child within the womb. Either expressly or impliedly such judicial results are based on the findings of modern medical science concerning the nature of the fetus and constitute recognition of the right of the child in the womb to the protection of the law.

F. The *amicus* believes that in any balancing of constitutional values or rights, life must be preserved over alleged privacy. Even if there is a certain right of privacy on the part of a woman arising from the marital relationship, with which the state cannot unjustifiably interfere, there is another right involved here, and the most fundamental of the personal liberties protected by the Due Process Clause, *i.e.*, the unborn child's right not to "be deprived of life," in the very words of that constitutional provision. Thus, the Court is not confronted with a balancing between a right of personal liberty on the one hand and some lesser competing state interest on the other. The choice here is between a nebulous and undefined right of privacy on the part of a woman with respect to the use of her body and the personal right to life of an unborn child, with a concomitant right on the part of a state to prevent its unjustifiable destruction.

The state's interest in regulating abortion is not bottomed exclusively on its concern for the health of the mother. The state interest which justifies what the Congress had done rests on concern for the preservation of human life, even though that life be within the womb. There are no decisions of this Court which suggest the existence of an unrestricted right of bodily integrity on the part of a woman sufficient to permit her alone to decide, for whatever reason, whether to terminate a pregnancy. Nor does a married couple's right to plan a family and to space their offspring encompass the right to intentionally destroy an unborn, but living, fetus any more than it would justify infanticide. Moreover, to sustain the attack on the statute which the appellants make in urging that it offends against an alleged right of privacy would require this Court's unabashed return to the long-repudiated concept of substantive due process which plagued its decisions for several generations.

Public and medical opinion with respect to relaxation of the abortion laws is divided. However, the predilections of the populace, much less the individual preferences of judges, cannot serve as a basis to strike down legislation within the

competence of a state to enact, especially when such legislation is aimed at protecting the most fundamental of the personal liberties protected by the Due Process Clause, that is, the right not to "be deprived of life."

G. All the cases cited by the appellants in support of the claim that a right of privacy is constitutionally guaranteed are clearly distinguishable on their facts. The only one that even superficially might be regarded as an analogy to support appellee's position here is *Griswold v. Connecticut*, 381 U.S. 479 (1965). *Griswold* stands only for the proposition that a law outlawing the use of contraceptives, enforcement of which would require invasion of the marital bedroom, transgressed on the intimacies of and the right of privacy inherent in the marital relationship, including the sexual relationship. The Texas and Georgia abortion statutes do not affect the sexual relationships of husband and wife. Moreover, in *Griswold* the Court was not called upon to choose between the right to privacy and the right to life, the choice it must make in this case. Nor can it seriously be argued that abortion, a crime at common law, is a fundamental, albeit "penumbral," liberty reserved by the Ninth Amendment.

III.

This Court's decision in *United States v. Vuitch*, 402 U.S. 62 (1971) is dispositive of the appellants' claims that the Texas and Georgia statutes are unconstitutionally vague. Doctors are neither in doubt nor in fear as to where abortions permitted by those statutes end and where those barred by them begin.

IV.

A. In both cases appellants urge that the particular statute "chills and deters plaintiffs from practicing their profession as medical practitioners and thus offends rights guaranteed by the First and Fourteenth Amendments." However, neither statute proscribes speech or medical advice but

merely prohibits the commission of the criminal acts specified. If the acts outlawed by the statutes are within the constitutional competency of Texas and Georgia to proscribe as criminal conduct, then the argument is closed.. Criminal acts do not fall within the freedom of speech which the First Amendment protects. The same rationale also answers appellants' claims that the freedom to pursue the profession of medicine guaranteed by the Due Process Clause is offended by the statutes involved in these cases.

B. Nor does the statute effect any invidious discrimination between rich and poor, as contended by the appellants. It applies to all persons committing the acts condemned by it and there is no suggestion that it seeks to discriminate on any invidious basis, including that of income. Even if it is true that the rich are in a better position to go to a jurisdiction where abortions are legal or to engage the services of more sympathetic physicians, the answer would be no different. There is no requirement of equal protection that all evils of the same genus be eradicated, or none at all. If the law in this instance, as in so many others, bears more oppressively on the less financially fortunate, the remedy lies in the elimination of the causes of poverty and the reform of the administration of criminal justice, not by the selective invalidation of otherwise lawfully enacted statutes.

C. Appellants also argue that the common welfare would be better served by more relaxed abortion laws. They profess concern about the unsafe conditions which surround criminal abortions and also claim to be moved by the problem of world overpopulation. Whatever the efficacy of such arguments, it is to the Congress, not to this Court, that they should be directed. Apart from that, however, the *amicus* questions their persuasiveness. The evidence is that liberalization of abortion laws has effected no substantive reduction in the rate of illegal abortions in other countries, so all that is done is to increase the total number of abortions. Finally, so far as the problem of overpopulation is concerned, an abortion, whether on the free demand of a woman or pur-

suant to the intimidating command of the state, appears to us as a singularly ineffective, and indeed extremely dangerous, way to attempt to solve the population problem, at least in the context of the humanistic values traditional to Western Civilization. In any event, this Court is not the forum, and these cases are not the occasion, to debate whether unrestricted abortion would best serve the general welfare of the people of Texas and Georgia.

ARGUMENT

I.

BOTH COURTS SHOULD HAVE ABSTAINED FROM GRANTING DECLARATORY RELIEF

This *amicus* is primarily concerned about the ultimate disposition of the important constitutional issues which the appellants have attempted to raise in the two cases. Nevertheless, NRLC is also concerned that these issues not be determined either prematurely or disparately and in the context of litigation where federal jurisdiction, if not absent, rests on an uncertain or disputed basis. *Parker v. County of Los Angeles,* 338 U.S. 327, 333 (1949). This Court has postponed the question of jurisdiction in both cases. 402 U.S. 941 (1971). NRLC respectfully suggests, for the reasons set out below, that this Court should either: (1) note probable jurisdiction and vacate the orders entered by the courts below on the ground that they should have abstained from granting declaratory as well as injunctive relief, *Samuels v. Mackell,* 401 U.S. 66, 72 (1971); or (2) dismiss both cases for want of a substantial federal question, in that the judgments entered below do not constitute final determinations of federal constitutional rights. *Public Service Commission v. Wycoff Co.,* 344 U.S. 237, 247 (1952).

A. *The Texas Three-Judge Federal Court Should Have Abstained from Granting Declaratory Relief.* One of the plaintiffs in the Texas case was a doctor who was permitted to intervene on the ground that he had been charged with violating the Texas abortion statute in two cases "now

pending in the Criminal District Court of Dallas County, Texas. . . ." (App. 22).[2] Last Term, this Court held that federal courts should not exercise jurisdiction to enjoin pending state criminal prosecutions except under extraordinary circumstances where the danger of irreparable loss is both great and immediate in that there is a threat to the plaintiff's federally protected rights which cannot be eliminated by his defense of a criminal prosecution brought against him. *Younger v. Harris*, 401 U.S. 37 (1971). Speaking for a majority of the Court, Mr. Justice Black pointed out that the ancient doctrine of equitable abstention which grew up in the British judicial system "is equally important under our Constitution, in order to prevent erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted."[3]

Continuing, he said:

> ". . . This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' The concept

---

[2] *State of Texas v. James H. Hallford*, No. C-69-5307-H, and *State of Texas v. James H. Hallford*, No. C-69-2524-H. References to the printed appendices in the two cases are designated herein as "(App. ____)".

[3] *Id.*, at 44.

> does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."[4]

The *Younger* case is square authority in support of the refusal of the Texas three-judge federal court to grant the injunction requested by the appellants. In this case, as in *Younger*, criminal prosecutions were pending involving one of the plaintiffs. Moreover, in both cases, there is no showing that a situation exists "in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights." *Dombrowski v. Pfister*, 380 U.S. 479, 485-86 (1965). However, the three-judge federal court in the Texas case, despite its refusal to issue an injunction, did grant a declaratory judgment striking down the Texas abortion statute as unconstitutional under the Ninth and Fourteenth Amendments and on grounds of vagueness under the Due Process Clause of the Fourteenth Amendment. 314 F. Supp., at 1225. Here, the court below erred; it should have abstained from the grant of such relief.

On the same day that this Court decided *Younger v. Harris*, it handed down its opinion in *Samuels v. Mackell*, 401 U.S. 66 (1971). There, the Court held that the same principles which govern the propriety of issuing federal injunctions against state court criminal proceedings also apply to the granting of federal declaratory judgments. In

---

[4] *Ibid.*

Samuels, the appellants had been indicted under New York's Criminal Anarchy Law. They brought an action seeking declaratory as well as injunctive relief against their prosecutions on the ground that the statute violated the First and Fourteenth Amendments of the Constitution of the United States. A three-judge district court upheld the law and dismissed the complaints on the merits. After sustaining the lower court's refusal to grant injunctive relief, this Court held that the decision below should be affirmed *but* on the ground that "relief by way of declaratory judgment should have been denied without consideration of the merits." 401 U.S., at 73. Speaking for the Court, Mr. Justice Black said that:

> ". . . in cases where the state criminal prosecution was begun prior to the federal suit, the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and that where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well."[5]

A majority of the Court thus discerned no difference between the propriety of issuing declaratory relief as opposed to injunctive relief where a "criminal proceeding was begun prior to the federal civil suit . . . ." In both situations, "deeply rooted and long settled principles of equity have narrowly restricted the scope for federal intervention, and ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long standing policy limiting injunctions was designed to avoid." 401 U.S., at 72.

The efficacy of a policy which restricts the grant of federal declaratory relief as well as the issuance of an injunction when criminal proceedings are threatened or, as in the Texas case, in existence at the time a civil suit is filed is further

---

[5] *Id.*, at 73.

demonstrated when we consider the inequity and procedural awkwardness of the situation facing the State of Texas, which lost on the merits in the court below. It is settled that neither the grant nor the refusal of a declaratory judgment, without more, will support a direct appeal to this Court under 28 U.S.C. 1253. *Mitchell v. Donovan*, 398 U.S. 427 (1970); *Gunn v. University Committee*, 399 U.S. 383 (1970). The State of Texas, therefore, has only one avenue through which to appeal directly the declaratory judgment voiding its abortion statute and that is to the Fifth Circuit and, if unsuccessful there, by attempting to invoke the *certiorari* jurisdiction of this Court.[6] Rarely has this Court tolerated the unnecessary bifurcation of constitutional litigation. Yet, should the Court hold in this case that the three-judge court properly granted declaratory relief but improperly denied injunctive relief, it then might be faced at least indirectly, as we now show, with consideration and decision of the same constitutional issues that are being directly raised by the appellees in the Court of Appeals for the Fifth Circuit.

As stated, Texas is foreclosed from any direct appeal to this Court of the decision of the three-judge court in declaring its abortion statute unconstitutional. However, if this Court finds that the lower court acted properly in taking jurisdiction and deciding the case on the merits, then Texas presumably would argue that the court below did not err in refusing to grant injunctive relief. Under the rule that permits an appellee, even though he has not cross-appealed, to urge in support of the judgment under review any grounds which were fairly presented but ignored or rejected by the trial court, Texas could maintain that the three-judge court acted properly since the statute in question did not trespass upon any fundamental constitutional rights. *Helvering v.*

---

[6]The Texas defendants have appealed to the U. S. Court of Appeals for the Fifth Circuit (App. 135). On October 29, 1970 a panel of the Fifth Circuit granted plaintiffs' motion holding the defendants' appeal in that court in abeyance pending the decision of this Court in the case at bar (App. 140).

Lerner Stores Co., 314 U.S. 463, 467 (1941); *United States v. American Ry. Exp. Co.*, 265 U.S. 425, 435 (1924). Yet, there would appear to be definite limits on the ability of the Texas appellee to argue the constitutional validity of the statute in contending that injunctive relief was properly withheld. Compare *Penfield Co. v. S.E.C.*, 330 U.S. 585, 594 (1947), with *Lukas v. Alexander*, 279 U.S. 573 (1928). Texas' position must be that the three-judge court did not err in declining to issue an injunction, but that it declined to do so for the wrong reasons. That is, the court below correctly refused an injunction because the Texas statute did not violate the constitutional rights of any of the appellants, even though the same lower court had held, by way of declaratory judgment, that the statute did violate such constitutional rights! The fact that the Texas litigation, and the Georgia case as well, if permitted to go forward in this Court, might evolve to the posture just described, where the state is forced to argue that the lower court was right but for the wrong reasons, seriously suggests that the important substantive constitutional issues which inhere in this litigation first should be subjected to consideration and determination either by (1) the courts of Georgia, or (2) the Court of Appeals for the Fifth Circuit, and should not be considered, even indirectly, by this Court, at this time and on this appeal.

For these additional reasons, we contend that the holding in *Samuels v. Mackell, supra*, is applicable here and that the court below should have abstained from exercising jurisdiction or, in the alternative, should have stayed further proceedings pending the outcome of the criminal prosecutions already under way in the Texas courts.

B. *The Georgia Three-Judge Federal Court Also Should Have Abstained from Granting Declaratory Relief.* While the general principles of abstention that, in our view, should be controlling in the Texas case also should be applicable in the Georgia case, there is a factual difference between the two. So far as the record in the Georgia case shows, no criminal prosecutions were pending at the time appellants' civil action

was brought, although, according to the complaint filed in the Georgia case, the doctor-plaintiffs alleged a "threat of . . . prosecution" under the statute which deterred them "from exercising their rights of free speech . . ." (App. 14). Does this factual distinction between the two cases argue for a different jurisdictional result in the Georgia litigation? For the reasons stated, we think not.

In the *Younger* case, the majority opinion said: "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun."[7] In our view, the Georgia case appears to raise the precise issue that this Court deliberately left unresolved in *Younger*.

There are several situations in which a three-judge federal court should have the duty to act against a state criminal statute, whether or not criminal proceedings are pending. One of these is where the statute on its face will have the inevitable effect of "chilling" or deterring the exercise of fundamental constitutional rights guaranteed by the First Amendment, as made applicable to the States through the Fourteenth Amendment. *Dombrowski v. Pfister*, 380 U.S. 479, 489-90 (1965). Another area where federal courts should be free to act, whether or not state court criminal proceedings are pending, is where a defendant's federal rights "will inevitably be denied by the very act of bringing the defendant to trial in the state court." *City of Greenwood v. Peacock*, 384 U.S. 808, 828 (1968). Neither circumstance exists here. As the three-judge court said in the Texas case: "We do not believe that plaintiffs can seriously argue that the . . . Abortion Laws are vulnerable 'on their face as abridging free expression'." 314 F.Supp., at 1224. Nor is there any suggestion in this record that the mere initiation of a criminal prosecution by the State of Georgia under its statute, by itself, would "inevitably" deny any rights of those made defendants in such a proceeding. In addition, as we have

---

[7] 401 U.S., at 41.

argued earlier in this brief, should this Court sustain the propriety of the three-judge federal court's grant of declaratory judgment, while at the same time leaving the state to pursue its appeal through the Fifth Circuit, there again would be presented the cumbersome and, we believe, undesirable procedural situation where the same substantive constitutional issues were being litigated in two separate federal forums, albeit directly in one and indirectly in the other. Even apart from principles of equity, federalism and comity, sound judicial administration also argues against this Court's toleration of such instances of disparate adjudication of constitutional questions.

There is also the additional fact that the Georgia statute, which was only passed in 1968, has never been construed by the Georgia courts. One of the plaintiff's complaints was that the statute is unconstitutional because there is no "formal administrative procedure or body for establishing rules, regulations *or official interpretation*[8] of the provisions of said statute" (App. 14). If this Court must ultimately decide the validity of the Georgia statute under the Ninth and Fourteenth Amendments to the Constitution of the United States, it will undoubtedly be faced with the difficult duty of balancing any alleged rights of privacy possessed by pregnant women as opposed to the right to life possessed by an unborn child. That delicate task might be made easier if this Court had the benefit of an interpretation by the Supreme Court of Georgia as to the scope of the exception which the Georgia statute permits for aborting a pregnancy which "would seriously and permanently injure [the mother's] . . . health; . . . " Thus, an "underlying issue of state law" bears very pertinently on the alleged constitutional right which appellants claim a pregnant woman has to determine whether or not she wishes to carry an unborn baby to full term. *McNeese v. Board of Education*, 373 U.S. 668, 674 (1963).

---

[8]Emphasis supplied throughout this brief.

NRLC raises one final point in arguing that the proper course for the three-judge federal court would have been to abstain from the grant of declaratory, as well as injunctive, relief. That concerns the effect of the declaratory judgment that has been rendered in this case. If the provisions of the statute struck down in the declaratory judgment are now null and void, the same considerations which prompted this Court to uphold the abstention rule in the *Younger* and *Samuels* cases, *supra*, should apply. On the other hand, if the decision below is not determinative, if the state can institute criminal proceedings under the statute, despite its emasculation by the court below, and if a state court can take evidence and decide the matter afresh, then "the federal judgment serves no useful purpose as a final determination of [federal] rights." *Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 247 (1952); *Samuels v. Mackell*, 401 U.S. 66, 72 (1971); see also *Great Lakes Co. v. Huffman*, 319 U.S. 392 (1953).

Moreover, there has been no showing that the courts of Georgia are not open to the plaintiffs for testing their claim of deprivation of federal constitutional rights. This Court has recognized, and we do not dispute, that "Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims." *Zwikler v. Koota*, 389 U.S. 241, 248 (1967). Nor are we arguing that the Georgia three-judge federal court should have abstained "simply to give state courts the first opportunity to vindicate the federal claim" of the appellants. *McNeese v. Board of Education*, 373 U.S. 668, 672 (1963). We do maintain, however, that the "special circumstances"[9] surrounding the challenge to the constitutionality of the Georgia abortion statute should have led the three-judge federal court to abstain until the Georgia courts had had some reasonable opportunity to construe the statute,

---

[9] *Baggett v. Bullitt*, 377 U.S. 360, 375-79 (1964).

especially the exception for preserving the health of the mother which the Georgia law provides. Since the Georgia courts were available to the appellants for the vindication of constitutional rights which they attempt to bring to this Court for a final determination at this time, they would suffer no inequity, hardship or denial of fundamental constitutional rights by being required first to seek relief in such a forum. At the same time, requiring plaintiffs first to proceed in the Georgia courts would serve the principles of equitable abstention and federal comity on which this Court relied in its decisions in the *Younger* and *Samuels* cases, *supra*.

On May 17, 1971, this Court affirmed a three-judge federal court ruling that a physician who had performed an abortion but who had not been prosecuted under a Minnesota abortion law is not entitled to a federal court declaration against its enforcement when there was available a state statute under which declaratory relief could be obtained. *Hodgson v. Randall*, 314 F.Supp. 32 (D. Minn., 1970), aff'd, 402 U.S. 967 (1971). Again, on January 11, 1971, a three-judge federal district court in Arizona reached a similar result in dismissing an attack on Arizona statutes prohibiting criminal abortions. *Planned Parenthood Association, et al. v. Nelson, et al.*, 327 F.Supp. 1290 (D. Ariz., 1971). In dismissing the suit, the Arizona court said:

> "Weighing the legitimate state and national interests involved in this case, and considering particularly the abstract nature of plaintiffs' complaint and the ready availability of state remedies, we find that the plaintiffs' need for a federal forum is not sufficiently great to override the interests of comity and justify federal interference with state activities."

The cases cited further support the *amicus* in urging that this Court vacate the decision of the Georgia three-judge federal court with directions to it that it either dismiss the complaint without prejudice or retain jurisdiction in the case pending a reasonable time for the plaintiffs to pursue their rights in a state court of appropriate jurisdiction. *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415-17 (1964).

Moreover, there is really no justification for a three-judge federal court to void a state criminal statute, under which no criminal prosecutions have yet been instituted, and at the same time to refuse to enjoin state officials from future enforcement of such a statute. It should be made clear that unconstitutional criminal statutes are also unenforceable. Therefore, the instant cases, we believe, present an opportunity for the Court to clarify some of the jurisdictional and procedural complexities which frequently arise when a three-judge federal court is permitted to grant declaratory relief, while eschewing the issuance of injunctive relief. NRLC respectfully urges that the Court use this opportunity to lay down rules or guidelines for observation by three-judge federal courts which, while protecting federal constitutional rights, will follow traditional principles of equitable abstention, serve the cause of federalism and comity and accord with sound principles of judicial administration when those principles must be applied to the adjudication of federal constitutional questions.

II.

NEITHER THE NINTH NOR THE FOURTEENTH AMENDMENT PROHIBITS A STATE FROM PROTECTING AGAINST THE DESTRUCTION OR ABORTION OF HUMAN LIFE

Assuming that this Court concludes that the courts below were correct in exercising jurisdiction in the pending cases and that these appeals, in their present posture, present substantial federal questions, it then must take up the appellants' claim that the lower courts erred in refusing to issue injunctive relief, after having granted declaratory judgments which, in one case, struck down the Texas statute and, in the other, voided the essential provisions of the Georgia act. NRLC further assumes that in resolving this claim the constitutionality of the two statutes must almost of necessity be resolved on their merits in the instant litigation. It is to these consti-

tutional issues that the *amicus* now speaks in the remaining sections of its brief.

The primary or basic constitutional contention of the appellants is that both the Texas and Georgia statutes violate alleged rights of privacy guaranteed a woman by the Ninth and Fourteenth Amendments to abort a live fetus for any reason she asserts and in which her physician concurs. It is the position of the NRLC that any right to privacy which a woman possesses does not include the right to abort a live fetus. NRLC further argues that a state has a compelling interest to protect human life from unjustified destruction by abortion. In short, a state's important and compelling interest in protecting human life, in the form of a live fetus, justifies it in prohibiting abortions that destroy such a life, without demonstration of the strongest justification, such as abortion for the purpose of preserving another human life, *i.e.*, that of the mother. We show in the immediately following sections of this brief the precise and compelling nature of a state's interest in prohibiting abortions except in circumstances where the mother's life would be endangered.

A. *A State's Interest in Protecting the Rights of a Live Fetus Rests on a Now Indisputable Medical Basis.* The compelling evidence of modern medical science which supports this proposition is set out in considerable length in the brief filed in these cases by the State of Texas. We believe that those findings are both clearly stated and irrefutable. Accordingly, we will resist the temptation to repeat them at any length in this brief. We would like to emphasize, however, that modern medicine has proved that life exists within the womb in the very earliest stages of pregnancy and that its findings to that effect should be of persuasive import in the resolution of the constitutional issues with which the Court is confronted, including any attempted balancing of alleged rights of privacy possessed by the mother on the one hand against the right to life possessed by a living fetus on the other. Thus, while avoiding any detailed repetition of Texas' thorough presentation to this

Court, we now summarize the relevant evidence supplied by modern medical science.

Whatever might be the metaphysical view, it is beyond argument that legal concepts as to the nature and rights of an unborn child have drastically changed, based on expanding medical knowledge, over the last 2500 years. In the ancient world, a child in the womb was considered as part of his mother.[10] And up to the 17th Century it was prevailing doctrine, based upon Aristotle's notion, that 40 to 80 days after conception the fetus underwent a transformation that placed him in the human class. This notion was successfully demonstrated to be medical nonsense as early as 1621.[11] Thereafter, the medical profession gradually accepted the view that no valid line could be drawn within the womb. The law followed, but dragged considerably behind, the medical lead. For example, as recently as 1921, the Court of Appeals of New York, with Judge Cardozo dissenting, could hold that when "justice or convenience requires, the child in the womb is dealt with as a human being although physiologically it is part of the mother, . . ." *Drobner v. Peters*, 232 N.Y. 220, 133 N.E. 567, 568 (1921).

At this point in time, however, there is simply no respectable medical opinion supporting the ancient notion that a fetus is "part" of his mother. The unassailable medical evidence to the contrary has now been convincingly confirmed by the findings of the new science of fetology, which has received widespread recognition by virtue of Liley's work on blood transfusions in the fetus.[12] Some of

[10]This view was expressly incorporated in Roman law. Justinian, Digest 25.4.1.1.

[11]Zacchia, Quaestiones Medico-Legales 9.1 (1621).

[12]Liley's pioneering work not only has opened new avenues in the treatment of erythroblastosis fetalis, but has inspired the whole new sub-specialty of 'fetology' and created a need for fetological surgeons and fetological medical specialists for the future." Montagu, *Hemolytic Disease of the Fetus*, Intra-Uterine Development 443, 455 (A. Barnes ed. 1968).

the observations and opinions on the question held by the most eminent of doctors specializing in the field may be of interest to this Court, although, as stated, a much more comprehensive discussion of the medical evidence is to be found in the brief filed by the Texas appellants.

Professor Ashley Montagu of Columbia University has stated it very concisely:

> "The basic fact is simple: Life begins, not at birth, but at conception.
>
> "This means that a developing child is alive, not only in the sense that he is composed of living tissue, but also in the sense that from the moment of conception, things happen to him, even though he may be only two weeks old, and he looks more like a creature from another world than a human being—he reacts. In spite of his newness and his appearance, he is a living, striving human being from the very beginning."[13]

It is now undisputed, for example, that the new fetus possesses at the moment of conception a genetic code of its own which is the transmitter of all the potentialities that make men human, something that is not present in either the spermatozoon or ovum. Gottleib, Developmental Genetics 17 (1966). When conception takes place, scientists now generally agree "a new life begins—silent, secret, unknown."[14] Moreover,

> "The child may be parasitic and dependent, but it is a functioning unit, an independent life. A child is not, in the words of Mr. Justice Holmes, 'a part of its mother.' However visceral may be its temporary residence, however dependent it may be before birth—and for some years after birth—it is a living being, with its separate growth and development,

---

[13]Montagu, Life Before Birth 2 (1964).

[14]Coniff, *The World of the Unborn*, New York Times Magazine, January 8, 1967, p. 41.

with its separate nervous system and blood circulation, with its own skeleton and musculature, its brain and heart and vital organs."[15]

A most vivid description of the fetus within the womb is found in the report of Dr. Liley and his wife, both pioneers of the new science of fetology. In 1967 they said:

> "Because the fetus is benignly protected, warmed and nourished within the womb, it was long thought that the unborn must have the nature of a plant, static in habit and growing only in size. Recently through modern techniques of diagnosing and treating the unborn baby, we have discovered that little could be further from the truth.
>
> "The fluid that surrounds the human fetus at 3, 4, 5 and 6 months is essential to both its growth and its grace. The unborn's structure at this early stage is highly liquid, and although his organs have developed, he does not have the same relative bodily proportions that a newborn baby has. The head, housing the miraculous brain, is quite large in proportion to the remainder of the body and the limbs are still relatively small. Within his watery world, however (where we have been able to observe him in his natural state by closed circuit x-ray television set), he is quite beautiful and perfect in his fashion, active and graceful. He is neither an acquiescent vegetable nor a witless tadpole as some have conceived him to be in the past, but rather a tiny human being as independent as though he were lying in a crib with a blanket wrapped around him instead of his mother."[16]

These proven medical facts explain why the great majority of doctors, practicing their profession in good faith, treat the

---

[15]Granfield, The Abortion Decision 25 (1969).

[16]Liley, Modern Motherhood 26-27 (1967). Moreover, the modern technique of fertilizing human eggs in test tubes further establishes that life begins at conception.

fetus or unborn child as a second *patient*, different from the mother. This is acceptable medical practice and is almost universally observed in the field of obstetrics. It may be the only area of medical practice where a doctor treats two patients at the same time, taking that unique fact into account in his treatment of both patients. This practice has been favorably noted in at least one reported decision. In *Jones v. Jones*, 208 Misc. 721, 144 N.Y. Supp.2d 820 (Sup. Ct., 1955), the court found that the unborn child:

> ". . . became a patient of the mother's obstetrician, as well as the mother herself. In so holding I can think of the infant as a third party beneficiary of the mother-doctor contract or perhaps a principal for whom the mother acted as agent."[17]

And it has been held that a child may recover damages for a prenatal injury suffered as the result of the negligence of his doctor. *Sylvia v. Gobeille*, 101 R.I. 76, 220 A.2d 222 (1966); *Seattle-First National Bank v. Rankin*, 59 Wash.2d 288, 367 P.2d 835 (1962).

However, NRLC sees no point in belaboring the scientifically obvious. Life begins at conception and for practical medical purposes can be scientifically verified within 14 days. Within three weeks, at a point much before "quickening" can be felt by the mother, the fetus manifests a working heart, a nerve system, and a brain different from and independent of the mother in whose womb he resides; the unborn fetus is now a living human being. It is universally agreed that life has begun by the time the mother realizes she is pregnant and asks her doctor to perform an abortion.

B. *In Anglo-Saxon Law the State Has Always Had a Compelling Interest in Preventing the Destruction of Unborn Children.* The appellants, and those allied with them as *amici curiae* in this case, are hard put to deny that a state has a grave and important interest in preventing the destruction of human life through unjustifiable abortion. However,

---

[17] 144 N.Y. Supp.2d, at 826.

POOR COPY

they argue that even assuming such an interest, the abortion laws do not reflect that interest since, they claim, such laws were passed for another purpose, *i.e.*, to protect the life and health of pregnant women who submit to illegal, and what once were highly dangerous, operations. Their position here crumbles before the thrust of the history of Anglo-Saxon law both in England and in this Country. That history shows conclusively that the protection of the life of the unborn child was always a major purpose, if not the paramount purpose, surrounding the enactment of the abortion laws in both England and the United States.

In Roman law the unborn child was deemed a part of his mother, and a parent had absolute dominion over his offspring. Fox, *Abortion, a Question of Right or Wrong*, 57 A.B.A. J. 667, 671 (1971). Due initially to the influence of ecclesiastical law and precedents, the Anglo-Saxon law of abortion developed in the other direction. The first reference to abortion in the English criminal law occurs in the writings of Bracton. He transposed the canon, *Sicut ex*, to England by saying that aborting a woman by blow or poison is homicide if the fetus were "formed and especially if it were ensouled."[18] Early in the 17th Century, Lord Coke repeats what Bracton said in a passage which begins: "If a woman be quick with child . . . this is a great misprision and so murder."[19] Coke's authority on this point has been questioned. If the word "ensouled" is translated as "alive", it could be argued that Coke may have mistranslated Bracton and as a result erroneously imposed the requirement that to constitute a felony a woman must be "quick" with child.[20] "Quickening", of course, is "the first motion of the fetus in the womb felt by the mother",

---

[18]Bracton, De Legibus et Consuetudinibus Angliae, 3.2.4 (London, 1640).

[19]Coke, The Third Part of the Institutes of England, Section 50 (London, 1797).

[20]Quay, *Justifiable Abortion*, 40 Georgetown L.J. 173, 430-31 (1961).

and a "quick" child is defined as a child "that has developed so that it moves within the mother's womb."[21] However, Lord Coke more likely was taking into realistic account the practical difficulties, in view of the state of 17th Century medical knowledge, of proving that the act of an accused abortionist was the cause of a death of a live fetus. At that time, unless a child was born alive after an induced abortion, it would have been virtually impossible to prove that the abortional act caused his death since the fetus might have died in the womb from some other cause concurrent in time with the abortion. At English common law, for example, if a victim of an assault died after a year and a day following the assault, his assailant could not be convicted of homicide. Proof of causality between the assault and the death was precluded by the passage of time. Perkins, Criminal Law 28-29 (2d Ed., 1969). Under the circumstances, at this point in the development of the criminal law, it was understandable that the abortionist, as a defendant, should enjoy the benefit of doubt as to (a) whether the fetus was alive or dead, or even in existence, at the time of the alleged act, and (b) whether the abortional act, in fact, killed the fetus. On the other hand, when a pregnant woman was sentenced to be executed, the law held that she could not be executed for the crime until after birth, even though the child had not yet quickened. *Regina v. Wycherly*, 8 Car. & P. 262, 264, 173 Eng. Rep. 486-87 (*Nisi Prius*, 1838).[22] In the case of the pregnant woman scheduled for execution, the fetus as a possible innocent victim of the execution was entitled to the benefit of the doubt as to whether he was present and alive in the womb even though he had not manifested life by perceptible movement.

The first statutory regulation of abortion in England became effective in 1803. The statute made it a felony punishable by death to administer poison "to cause and

---

[21] Black's Law Dictionary 1415 (4th Ed., 1968).

[22] 1 Blackstone's Commentaries 456.

procure the miscarriage of any woman then quick with child" and a felony punishable by fine, imprisonment, pillory, whipping or transportation to attempt by drug or instrument to procure the miscarriage of any woman "not being or not being proved to be quick with child."[23] Thus, in this first abortion statute, Parliament did away with any distinction in law, except for the punishment prescribed, between abortions occurring before quickening and those committed after quickening. The preamble to the 1803 Act explains the reason, saying that "no adequate means have hitherto been provided for the prevention and punishment of such *offenses*."[24]

At the time Lord Coke wrote, "quickening" of the child furnished the only positive proof to 17th Century men that it was alive within the womb. However, when Parliament turned to the regulation of abortion in the early 19th Century, medical science was able to supply proof of the existence of an animated fetus prior to the movement of the child within the womb first felt by the mother. At last, Parliament was able to make criminal that which was always regarded as an offense, evil or wrong but one incapable of being proved.[25]

In 19th Century America, the requirement of "quickening" hung on in some of the statutes, but a tendency soon was manifest for courts to interpret abortion statutes as applicable to any stage of the pregnancy.[26] Medical writers in this Country were critical of the retention of a distinction between abortions based on the presence or absence of quickening. In 1887, a distinguished doctor wrote:

---

[23]Miscarriage of Woman Act, 43 Geo. 3c 58 (1803).

[24]Means, *The Law of New York Concerning Abortion and the Status of the Fetus 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y. Law Forum 411, 439, n. 64 (1968).

[25]Fox, *supra*, at 671.

[26]Bishop, Commentaries on the Law of Statutory Crimes, Section 746 (2d Ed., 1883).

> "This fallacious idea that there is no life until quickening takes place has been the foundation of, and formed the basis of, and has been the excuse to ease or appease the guilty conscience which had led to the destruction of *thousands of human lives.*"[27]

During the course of the 19th Century, the House of Delegates of the American Medical Association several times called on the states to reform their laws to prevent abortion.[28] In 1859, a Committee on Criminal Abortion of the American Medical Association obtained unanimous adoption of a resolution which condemned abortion at every period of gestation except as necessary for preserving the life of either the mother or child. The reason for the resolution was stated to be the increasing frequency "of such unwarrantable destruction of human life."[29]

In summary, from Bracton's day abortion was regarded at common law as a serious evil or wrong which should be prevented in order to curtail or prevent the unnecessary destruction of human life. For a brief period, difficulties of proving that abortion had in fact caused the termination of an "unquick" child prevented application of the serious sanctions of the criminal law to some cases. When medical science eliminated those difficulties of factual proof, there was no longer any question but that one of the prime purposes of the abortion statutes then on the books, or subsequently enacted, was to prevent the destruction of the unborn fetus at all stages of gestation. Therefore, the compelling interest which the States of Texas and Georgia both have in prohibiting and regulating unjustifiable abortions is not one newly discovered, or advanced as an afterthought argument. It is true that the findings of modern fetology

---

[27] Quimby, *Introduction to Medical Jurisprudence*, 9 Journal of the American Medical Association 164 (1887); see also Markham, *Foeticide and Its Prevention, Id.*, at 805 (1888).

[28] Noonan, The Morality of Abortion 224 (Harvard U. Press, 1970).

[29] American Medical Association, Minutes of the Annual Meeting 1859, Tenth Annual Medical Gazette 409 (1859).

help demonstrate the cruel and distasteful nature of the abortion of a human fetus more vividly than previously had been known. Nevertheless, the state's legitimate interest in preventing the infliction of such carnage on unborn children has never been open to serious debate.

However, even if it were true that the compelling state interest in preventing or regulating abortion is an interest arising only recently as a result of the findings and research of modern medicine, no different legal conclusions should result. The fact that a statute or law may originally have been enacted to serve one purpose does not serve to condemn it when the same statute, with the passage of time, serves another equally valid public purpose, such as preventing the destruction of the life of an unborn child.[30] Both Texas and Georgia still could claim that their respective statutes serve a compelling state interest than of which there are few higher, *i.e.*, outlawing the unjustifiable taking of human life.

In the next several sections of this brief, the *amicus* shows that during the same period in which the criminal law of abortion developed, other areas of the law also manifested concomitant concerns for important subsidiary rights of unborn children derivative from their right to life. These are their rights of contract, tort and parental support.

C. *The Law's Recognition of the Property Rights of an Unborn Child.* The first area where the rights of the unborn child, at all stages of fetal existence, were recognized by the law was in the realm of property law. In *Doe v. Clarke*, 2 H. Bl. 399, 126 Eng. Rep. 617 (1795), the court interpreted the ordinary meaning of "children" in a will to include a child in the womb: "An infant *en ventre sa mere*, who by the course and order of nature is then living, comes clearly within the description of 'children living at the time of his

[30] *McGowan v. Maryland*, 366 U.S. 420, 429-30 (1961), upholding, as having a valid, non-religious basis under the state's police powers, Sunday Closing statutes which at their inception served religious purposes.

decease'." In *Thelluson v. Woodford*, 4 Ves. 227, 31 Eng. Rep. 117 (1798), the court rejected the contention that this was a mere rule of construction invoked for the benefit of the child: "Why should not children *en ventre sa mere* be considered generally as in existence. They are entitled to all the privileges of other persons." *Id.*, at 323. To the argument that such a child was a nonentity it replied:

> "Let us see, what this non-entity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the statute of distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian." *Id.*, at 322.

When the English property rules were adopted by American courts, the same approach was taken. In *Hall v. Hancock*, 15 Pick. 255 (Mass., 1834), the issue was whether a bequest to grandchildren "living at my decease" was valid, and the court was asked to say that "*in esse*" was not the same as "living" and that for a child to be "living," the mother must be at least "quick".[31] Chief Justice Shaw held that a *conceived child* fell within the meaning of the language and quoted with approval Lord Hardwicke in *Wallis v. Hodson*, 2 Atk. 117: "The principal reason I go upon is, that a child *en ventre sa mere* is a person in *rerum natura*, so that, both by the rules of the civil and common law, he is to all intents and purposes a child, as much as if born in the father's lifetime."

In *In Re Well's Will*, 221 N.Y.S. 417 (1927), a trust fund originating from the estate of the deceased was to be divided into "as many parts as I have grandchildren living at the date of my decease." The decedent died on May 22, 1922;

---

[31] "Quickening" of the child means only that his presence in the womb is felt by the mother for the first time. Black's Law Dictionary, *supra*, at 1415. "Quickening" served to prove the existence of life to common law men. Modern medicine now can prove the same existence long before it can be seen by the eye or felt by the mother.

BLEED THROUGH POOR COPY

a granddaughter of the decedent was conceived on May 1, 1922. The granddaughter was held to be entitled to a share in the trust estate. See also *Swain v. Bowers*, 91 Ind. 307, 158 N.E. 598 (1927).[32]

In the case of *La Blue v. Specker*, 358 Mich. 558, 100 N.W.2d 445 (1960), an unborn illegitimate child was held to be a child or "other person" having standing to bring suit under a dram shop act, for the death of his father, which had occurred before the child's birth. Quoting from *Ide v. Scott Drilling Co., Inc.*, 341 Mich. 164, 67 N.W.2d 133 at 135, the court in the *La Blue* case stated:

> "For certain purposes, indeed for all beneficial purposes, a child *en ventre sa mere* is to be considered as born . . . . It is regarded as *in esse* for all purposes beneficial to itself, but not to another. . . . Formerly, this rule would not be applied if the child's interests would be injured . . . thereby, but for purposes of the rule against perpetuities such a child is now considered a life in being, even though it is prejudiced by being considered born . . . . *Its civil rights are protected at every period of gestation.*"[33]

The foregoing approach has not been a sentimental concession to the supposed benefit of some forgotten posthumous child. The rule has been applied even where its application benefited some third party, *Barnett v. Pinkston*, 238 Ala. 327, 191 So. 371 (1939), and also in cases where the child himself has been injured by the rule, *In re Sankey's Estate*, 199 Cal. 391, 249 P. 517 (1926), in which a child conceived but not born was held bound by a decree entered against the living heirs.

---

[32]The English and American common law doctrine under which an unborn child is considered as a "child" or as "in existence" for purposes of inheritance and trusts also has long been followed in the District of Columbia. *Craig v. Rowland*, 10 App. D.C. 402 (1897). The rule was recently applied in *Riggs National Bank v. Summerlin, et al.*, C.A. 187-69, Memo. Opinion (D. D.C., 1969).

[33]100 N.W.2d, at 449.

This *amicus* believes that it would be an ironic and an inexplicable perversion of both human and constitutional values if it were to be the law that the state has an interest in protecting the property rights of an unborn child, but has no constitutionally justifiable interest in regulating the circumstances and conditions under which such a child may be destroyed, *i.e.*, put out of existence and denied further life as a human being. Nor is it any answer to reply that the property rights of a fetus which are protected by the state are merely contingent and depend upon his having been born. It is only the *remedy*, not *the right*, which is contingent. Existence as an unborn child is the basis of the state's interest in granting and protecting the property rights of an unborn child. The fact that the child may not survive to enjoy those rights does not denigrate the state's interest or deny its authority to implement that interest by law. We should assume that the proposition would have special applicability when the state's interests and action are directed at insuring that the existence of life of the unborn child, and all such contingently enforceable property rights as he may possess, are not exterminated by his deliberate destruction, at least short of an overwhelming countervailing interest such as the protection of the life of another human being–the mother.

D. *Evolving Rights Afforded an Unborn Child in the Law of Torts.* Perhaps even more demonstrably so than in the case of purely property rights, including rights of inheritance, it is in the law of torts where we witness a dramatic development, indeed, an abrupt change, of the law in response to expanding scientific knowledge and medical facts formerly unavailable.

Well into the 20th Century most American decisions denied recovery in tort to the human offspring harmed in the womb. The denial was based in part on the danger of fraudulent claims, in part on the difficulty of proving causation, but principally on the ground that "the defendant could owe no duty of conduct to a person who was not in existence at the time of his action," Prosser on Torts,

BLEED THROUGH POOR COPY

Sec. 56 (1964). The theory followed was that succinctly expressed by Justice Holmes in *Dietrich v. Northhampton*, 138 Mass. 14, 17 (1884): "The unborn child was a part of the mother at the time of the injury."

There is no doubt of the sweeping nature of the reversal of the *Dietrich* doctrine that the unborn child is a part of the mother and therefore cannot sue for pre-natal injuries. Almost every jurisdiction which has considered the issue in the last 30 years has upheld the right of an infant to sue for injuries sustained prior to his birth. Prosser on Torts, Sec. 56; Gordon, *The Unborn Plaintiff*, 63 Mich. L.R. 579, 627 (1965). Moreover, it appears that a majority of jurisdictions now recognize that a wrongful death action may be brought for negligently inflicted injury to the unborn child resulting in its death, whether or not it was viable at the time of the injury, and whether born alive or still born. *Torigian v. Watertown News Co.*, 352 Mass. 446, 225 N.E.2d 926, 927 (1967); Harper and James, Torts, Sec. 18.3 (1956).

Many of the early cases required that the unborn child have reached the stage of viability (*i.e.*, capable of living outside of the mother's uterus) at the time the injuries were inflicted in order to maintain an action.[34] The modern trend, and more in accord with the medical facts, however, has been to reject any distinction based on viability and to allow recovery whenever the injury was received, provided that the elements of causation are properly established.[35]

---

[34] *Bonbrest v. Kotz*, 65 F.Supp. 138 (D. D.C., 1946); *Scott v. McPheeters*, 33 Cal. App.2d 629, 92 P.2d 678 (1939); *Tursi v. New England Windsor Co.*, 19 Conn. Supp. 242, 111 A.2d 14 (1955); *Damasiewicz v. Gorsuch*, 197 Md. 417, 79 A.2d 550 (1951); *Keyes v. Constr. Serv., Inc.*, 340 Mass. 633, 165 N.E.2d 912 (1960); *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio 144, 87 N.E.2d 334 (1949); *Mallison v. Pomeroy*, 205 Ore. 690, 291 P.2d 225 (1955); *Seattle-First Nat'l Bank v. Rankin*, 59 Wash. 2d 288, 367 P.2d 835 (1962).

[35] *Hornbuckle v. Plantation Pipe Line Co.*, 212 Ga. 504, 93 S.E.2d 727 (1956); *Daley v. Meier*, 33 Ill. App.2d 218, 178 N.E.2d 691 (1961); *Bennett v. Hymers*, 101 N.H. 483, 147 A.2d 108 (1958); *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960); *Kelly v. Gregory*, 282 App.Div. 542, 125 N.Y.S.2d 696 (1953); *Sinkler v. Kneale*, 401

The District of Columbia 25 years ago repudiated the notion that an unborn child must be considered as part of his mother and unable to sue for prenatal injuries in *Bonbrest v. Kotz*, 65 F. Supp. 138 (D. D.C., 1946). The court pointed out in that case that under the civil law and the common law of real property a child *en ventre sa mere* is regarded "as a human being . . . from the moment of conception—which it is in fact." Referring to the state of medical knowledge in 1946 and noting the resilient, unstatic features of the common law of torts, it found no difficulty in upholding the right of an unborn child to sue for damages in tort. 65 F. Supp., at 142.[36]

Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696, contains language which summarizes precisely the basis of the rejection on the part of modern tort law of the antiquated notion of the common law that an unborn child is merely part of his mother's body:

> "We ought to be safe in this respect in saying that legal separability should begin where there is biological separability. We know something more than the actual process of conception and foetal development now than when some of the common law cases were decided; and *what we know makes it possible to demonstrate clearly that separability begins at conception.*
>
> "The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so

Pa. 267, 164 A.2d 93 (1960); *Sylvia v. Gobeille*, 101 R.I. 76, 220 A.2d 222, 223-24 (1966). "Viability" of a fetus is not a constant but depends on the anatomical and functional development of the particular baby. J. Morison, Foetal and Neonatal Pathology 99-100 (1963). The weight and length of the fetus are better guides than age to the state of fetal development, and weight and length vary with the individual. Gruenwald, *Growth of the Human Fetus*, 94 Am. J. Obstetrics and Gynecology 1112 (1966).

[36] "The battle in jurisprudence is almost over. Development of the infant's right of action has illustrated the inherent capacity of legal systems to adjust to new situations." Gordon, *supra*, at 627.

BLEED THROUGH POOR COPY

> throughout its life. That it may not live if its protection and nourishment are cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe the conditions under which life will not continue."[37]

Very recent demonstrations of the adaptability of the common law to the findings of modern medicine are furnished by two cases decided by the Supreme Court of Michigan. On June 1, 1971, that court repudiated the doctrine of *stare decisis* to hold, despite earlier precedents to the contrary, that a surviving child could recover for prenatal brain injuries suffered in an automobile accident occurring during the fourth month of pregnancy.[38] Little more than a month later, the Michigan Supreme Court, again departing from *stare decisis* and affirming the "wisdom of [a] public policy [which] regards unborn persons as being entitled to the protection of the law", held that the administrator of the estate of an unborn child is entitled to sue under the Michigan wrongful death statute for injuries which caused the death of an unborn 8-month infant *en ventre sa mere*.[39] In deciding the case, the Michigan Supreme Court noted rhetorically, but perceptively:

> "If property interests of unborn persons are protected by the law, how much more solicitous should the law be of the first unalienable right of man—the right to life itself?"[40]

At the present time the right to recover for prenatal injuries has been recognized by 30 states and the District of Columbia.[41] Compensation for prenatal injuries has also

---

[37] 125 N.Y.S.2d, at 697.

[38] *Womack v. Buchhorn*, ___ Mich. ___, 187 N.W.2d 218 (1971).

[39] *O'Neill v. Morse, et al.*, ___ Mich. ___, 188 N.W.2d 785 (1971).

[40] 188 N.W.2d, at 788.

[41] Maledon, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 N.D. Lawyer 349, 356-57 (1971).

been allowed under the Federal Tort Claims Act in an action against the United States. *Sox v. United States*, 187 F. Supp. 465 (E.D. S.C., 1960). Finally, an Ohio court has held an unborn child in the 24th week of gestation is a "person" within the meaning of a family compensation clause of an automobile liability insurance policy. *Peterson v. Nationwide Mutual Insurance Co.*, 26 Ohio App.2d 246, 197 N.E.2d 194 (1964). Is it possible for a human life to be both legally insurable and, as the appellants would have it, legally destructible at the same moment in time?

The emergence of the rights in tort of unborn children is referred to as a prime example of the effect of scientific development on law in the instructive book of Professor Patterson–Law In a Scientific Age (1963). He concludes: "that the meaning and scope of even such a basic term as 'legal person' can be modified by reason of changes in scientific facts–the unborn child has been recognized as a legal person, even in the law of torts."[42]

The revolution in tort law has thus, by the majority rule, recognized rights in the fetus at every stage of life and has refused to condition recovery on survivorship. The dean of authorities on tort law notes that all writers on the subject have maintained "that the unborn child in the path of an automobile is as much a person in the street as the mother." Prosser on Torts, Sec. 56. Can such a child become less a person when, instead of an automobile, another agency is directed to his destruction? If the state may protect this person by court action awarding damages for tort, *a fortiori* the state cannot be impotent to protect the same living being by criminal sanctions.

E. *Equity and the Unborn Child.* The emerging rights of unborn children to recover in tort have been matched by developing concern for their rights in equity. Decisions in this area bear not only on his right to parental support but on the fetus' right to life itself.

---

[42]Patterson, *supra*, at 5.

1. The Right to Parental Support

It is now established that the law will recognize an unborn child's right to support by his parents. *Kyne v. Kyne*, 38 Cal. App.2d 122, 100 P.2d 806 (1940), involved a suit brought by the guardian *ad litem* of a fetus against the natural father. At the time the suit was instituted, the unborn child was less than six months old. The court held that both the father and mother of such a child owed him the duty of support. See also *People v. Yates*, 114 Cal. App. Supp. 782, 298 P. 961 (1931), and *People v. Estergard*, ___ Colo. ___, 457 P.2d, at 698, 699 (1969). If the law holds that a state has sufficient justification to require a father to support an unborn child which he may not want, it cannot be true that the state has no justifiable interest in protecting that child from extinction as a living being where his mother may not want him.

2. The Right to Life

Since this Court's decision in *Board of Education v. Barnette*, 319 U.S. 624 (1943), it has been firmly settled that the Free Exercise of Religion rights guaranteed by the First Amendment (as incorporated in the Fourteenth Amendment) are "susceptible of restriction only to prevent grave and immediate danger *to interests which the state may lawfully protect.*" 319 U.S., at 639. Nevertheless, the right of an unborn child to life has served in several recent instances to permit the state's abridgement of or interference with a mother's religious convictions, when necessary to save the life of an unborn child. One case touching upon, but not deciding, the point was decided in the District of Columbia. In *Application of the President and Directors of Georgetown College, Inc.*, 331 F.2d 1000 (C.A. D.C., 1964), *cert. den.*, 377 U.S. 978 (1964), the Court of Appeals upheld an order of the District Court authorizing a hospital to administer a blood transfusion to a woman patient who, on religious grounds, was unwilling to consent to the transfusion and where the husband also was unwilling to consent,

where the transfusion was necessary to save her life. The adamant mother had a seven-month-old child at the time the terrible dilemma arose. In resolving this Hobson's choice, Judge Wright said:

> "The child cases point up another consideration. The patient, 25 years old, was the mother of a seven-month-old child. The state, as *parens patriae*, will not allow a parent to abandon a child, and so it should not allow this most ultimate of voluntary abandonment. The patient had a responsibility to the community to care for her infant. Thus the people had an interest in preserving the life of this mother."[43]

Other crucial decisions bearing directly on the unborn child's right to life have been handed down during the past decade. In one such case, where there was a possibility that a child might be born with a possibly fatal blood condition, a New Jersey juvenile court held that the state, in the interests of the child's welfare, had a right to authorize the hospital to give life-saving transfusions, even though the parents objected on religious grounds.[44] The court made it clear that the state, pursuant to its *parens patriae* jurisdiction, not only had a right but also a duty to protect children within its jurisdiction–including an unborn child–notwithstanding the wishes of his parents.

More precisely in point is *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421, 201 A.2d 537 (1964), *cert. den.*, 377 U.S. 985 (1964). There, a court was asked to decide whether the rights of a child in the mother's womb were violated by her refusal, on religious grounds, to submit to a blood transfusion necessary to preserve the lives of both. The New Jersey court found it unnecessary to decide whether an adult may be compelled to submit to medical treatment necessary to save his own life. However, the court had no difficulty, after finding a parity of rights possessed by both unborn and after born

[43] 331 F.2d, at 1008.

[44] *Hoener v. Bertinato*, 67 N.J.S. 517, 171 A.2d 140 (1961).

children, in deciding that the unborn child was entitled to the law's protection and ordering the transfusion. In sustaining the unborn child's right to life, even over his mother's right to practice her religion, the court said:

> "In State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1963), we held that the State's concern for the welfare of an infant justified blood transfusions notwithstanding the objection of its parents who were also Jehovah's Witnesses, and in Smith v. Brennan, 31 N.J. 533, 157 A.2d 497 (1960), we held that a child could sue for injuries inflicted upon it prior to birth. We are satisfied that the *unborn child is entitled to the law's protection* and that an appropriate order should be made to insure blood transfusions to the mother in the event that they are necessary in the opinion of the physician in charge at the time." (201 A.2d, at 538)[45]

Also worthy of note in the context of a claim of a mother's right to freedom over the use of her body is *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967). In that case, the plaintiffs sought damages against doctors who had attended the mother during pregnancy. They alleged their child had been born with birth defects and that the defendants had negligently failed to warn the child's mother and father that an attack of German measles which she suffered during pregnancy might result in such defects. The failure to give the warning, it was alleged, deprived the parties of the opportunity of terminating the pregnancy. In affirming the trial court's dismissal of the

---

[45] An Illinois court recently followed the rationale of the *Raleigh Fitkin* case in ordering that doctors may give an emergency blood transfusion to a pregnant Chicago mother who had refused such treatment on religious grounds. *Chicago Sun-Times*, May 6, 1971, p. 12. This Court too has had no trouble in sustaining as superior a state's interest in, and authority with respect to, children over their parents' free exercise of religion rights, noting that the "right to practice religion freely does not include liberty to expose . . . the child . . . to ill health or death." *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1943).

complaint, the majority of the New Jersey Supreme Court emphasized the child's right not to be aborted, saying:

> "The right to life is inalienable in our society . . . . We are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of the single human life is the decisive factor in this suit in tort. Eugenic considerations are not controlling. We are not talking here about the breeding of prize cattle. *It may have been easier for the mother and less expensive for the father to have terminated the life of their child while he was an embryo, but these alleged detriments cannot stand against the preciousness of a single human life to support a remedy in tort.* Cf. Jonathan Swift, 'A Modest Proposal' in Gulliver's Travels and Other Writings, 488-496 (Modern Library ed. 1958).
>
> "Though we sympathize with the unfortunate situation in which these parents find themselves, we firmly believe the right of their child to live is greater than and precludes their right not to endure emotional and financial injury."[46]

The line of cases discussed in this section of the *amicus'* brief, all of which are based either impliedly or expressly on the findings of modern medical science concerning the nature of the fetus, is a recognition of the right of a child in the womb to the protection of the law. From this, a learned commentator has gone on to reason that:

> ". . . it seems established by analogy that to remove the protection of the criminal law from the child in the womb would be itself an unconstitutional act. The civil rights cases have established that for the Government to fail to protect a class is itself an unconstitutional denial of civil rights."[47]

In point of fact, if the issue had been raised in these cases, this *amicus* would be arguing that *both* due process

---

[46] 227 A.2d, at 693.

[47] Noonan, *Amendment to the Abortion Law: Relevant Data and Judicial Opinion,* 15 The Catholic Lawyer, No. 2 (Spring 1969).

and equal protection of law should prevent a state from permitting the abortion of a live fetus, except when necessary to save the life of the mother.[48] "Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it." *Steinberg v. Rhodes, et al.*, 321 F. Supp. 741 (N.D. Ohio, 1970). At the minimum, NRLC would contend, as suggested by several scholars in the field, that the unborn child is entitled to the traditional protections of due process, including representation by counsel at some type of adversarial hearing, before he is doomed to death either at his mother's whim or upon her physician's unreviewable moral-medical judgment that his life is less important than his mother's state of mind.[49] Some doctors might balk at that suggestion because of the technicalities and delays which observance of due process of law sometimes entails. The same argument is often made by prosecutors faced with claims of Fourth, Fifth or Sixth Amendment rights, but in neither case is the position a valid one. The legitimacy of an abortion operation is more than merely a medical decision; it involves legal, moral, ethical, philosophical, theological, sociological and psychological considerations. These realities cannot be brushed aside merely by calling the problem "medical". Moreover, the primary training and function of physicians is to diagnose and heal, not to adjudicate.[50] And if war is too important to be entrusted solely to the generals, the ultimate issues of life and death are too important to be entrusted solely to the surgeons. Both logic and experience warrant the presumption that the unborn child would want his chance at life.[51] Surely, the ingenuity of Ameri-

[48]Under this analysis the Texas, but not the Georgia, statute would be constitutional.

[49]Noonan, *supra* n. 28, at 254-57.

[50]Hellegers, *Law and the Common Good*, 86 Commonweal 418 (1967).

[51]As Artur Rubenstein put it: "My mother did not want a seventh child, so she decided to get rid of me before I was born. Then a marvelous thing happened. My aunt dissuaded her, and so I was permitted to

can law for fashioning procedural protections when constitutional rights are threatened justifies optimism that our legal system could be utilized to provide such protections for the unborn child faced with destruction, but who, at the present time, has no voice to plead his case and no forum in which to make it.

However, as we have said, the due process argument need not be pressed in the instant litigation since the issue has not been raised by any of the parties. Nevertheless, the point has relevancy. It serves to emphasize that in evaluating the legitimacy of any alleged right to privacy on the part of a pregnant woman to destroy her unborn child the Court must take into countervailing account the fundamental right of that child to be protected by the State from arbitrary and capricious destruction of its existence merely because it is unwanted.

F. *Life Should Take Constitutional Precedence over Privacy.* In this section of its brief, the *amicus* discusses the judicial balancing which necessarily is involved in weighing competing claims of an unborn child's right to life and the alleged right of privacy which appellants and their allies in these cases assert is possessed by all pregnant women. In deciding the relative priority which the Constitution should afford, on the one hand, to a woman's right to destroy her unborn child and, on the other, to the right of that child to live, certain relevant facts are beyond argument. First, the medical evidence is unchallengeable—life begins at conception, and from that point on the fetus has a living existence, including a heart and a brain, separate and independent from his mother. Secondly, as NRLC previously has shown, the common law has not been impervious to the findings of modern science in changing and adjusting its concepts and rules regarding the legal rights possessed by a child in the womb. *Supra,* pp. 32-36.

---

be born. Think of it! It was a miracle! Time Magazine, Feb. 25, 1960, p. 86.

We might also add at this point that the approach taken by American law in recognizing important legal rights of an unborn child is not some national aberration explained, perhaps, by some latent puritanical instincts in American society alone. For example, in 1959 the United Nations adopted a "Declaration of the Rights of the Child" which supplemented the United Nations' statement entitled the "Universal Declaration of Human Rights". One reason for this supplementary declaration, as stated in its Preamble, was because, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." General Assembly of the United Nations, "Declaration of the Rights of the Child", adopted unanimously in the plenary meeting of November 20, 1959, *Official Records of the General Assembly*, 14th Session, pp. 19-20. Thus, the representatives of most of the civilized nations of the world recognized that the being before birth deserved recognition as a "child". They further recognized that a child, so defined, needed special legal protection. The committee report on this declaration noted that "representatives of the most diametrically-opposed social systems find common ideals in discussing the privileges of childhood". *Report of the Third Committee of the General Assembly*, *Official Records*, 14th Session, p. 593. The committee thus underlined that the rights asserted by the United Nations as applicable to the fetus represented a commitment which had commended itself to all of the various social systems represented within that worldwide body.

If, then, an unborn child can inherit by will and by intestacy, be the beneficiary of a trust, be tortiously injured, be represented by a guardian seeking present support from the parent, be preferred to the religious liberties of his parents, be protected by the criminal statutes on parental neglect, and enjoy the specific concern of the United Nations' General Assembly, are there not interests here which the State may guard from intentional extinction? If not, then all of these rights are meaningless, capable of being destroyed through the exercise of an unrestrictable right simply to destroy their possessor—the unborn fetus.

Let us then address ourselves specifically to the question of balancing the two rights which may appear to be in conflict in these cases. That question must be: To what extent can the State protect the right of an unborn infant to continue its existence as a living being in the face of a claim of right of privacy on the part of a woman to decide whether or not she wishes to remain with child?

This Court has decided that the Constitution protects certain rights of privacy on the part of a woman arising from the marital relationship which cannot be unjustifiably interferred with by the State. NRLC believes that the genesis of such rights, to the extent such rights may exist, must be found among the "penumbral" personal liberties protected by the Due Process Clause of the Fifth Amendment. Yet equally unchallengeable is the proposition that an unborn child's right not to "be deprived of life", to quote the words of the the Due Process Clause itself, is also a fundamental personal right or liberty protected by that same amendment and entitled to the traditional searching judicial scrutiny and review afforded when basic personal liberties are threatened by state action, whether legislative or judicial in character. Therefore, it is very clear that this case is not one, as the appellants would portray it, which involves merely the balancing of a right of personal liberty (i.e., a married woman's privacy) against some competing, generalized state interest of lower priority or concern in an enlightened scheme of constitutional values, such as the state's police power.[52] Here, the Court must choose between a nebulous and undefined legal "right" of privacy on the part of a woman with respect to the use of her body and the State's right to prevent the destruction of a human life. That election involves the determination as to whether the State's judgment that human life is to be preferred is a prohibited exercise of legislative power.

---

[52] Even in this area the Court, by closely divided vote, has held that a "dependent child's needs are paramount" and rarely are to be placed in "a position secondary to what the mother claims as her rights". *Wyman v. James*, 400 U.S. 309, 318 (1971).

There would be no question of the answer, of course, if the choice were between a woman's "right to privacy" and the destruction of an unwanted *after* born child. Yet abortion is distinguishable from infanticide only by the event of birth. The recent findings of medical science now suggest that any distinction, at least from a medical if not a legal point of view, disappears very early in a woman's pregnancy and in the life of the unborn child within the womb. Contrary to the appellants' assumption in these cases, a state's interest in regulating abortion is not bottomed exclusively on concern for the health of the mother, a concern which admittedly would be of less than persuasive effect, since it cannot be successfully established that abortions during the early period of pregnancy performed by competent physicians in hospital surroundings represent a substantially high medical risk to the life and health of the mother.[53] The state interest which justifies what Texas and Georgia have done rests on a concern for human life, even though that life be within the womb of the mother. Such an interest on the part of the State has existed since the common law of England. Now the separate, early and independent existence of fetal life has been conclusively proven by medical science. While it may be impossible for the State to insist on maintaining such a life under all circumstances, can it seriously be maintained that the Government is powerless to insist on protecting it from intentional destruction, absent danger to the mother's life.

Under the analysis set out above, the appellant's argument in support of a woman's "sovereignty . . . over the use of her

[53]The *amicus* has one reservation here, however. Evolving research into the complications that may follow abortion indicates a 2% sterility rate with an approximate 10% rate of moderate or severe psychic sequelae. Hellegers, *Abortion, the Law, and the Common Good*, 3 Medical Opinion and Review, No. 5 (May 1967). Indeed, respectable studies raise the question of whether the guilt complex evoked by an abortion may itself constitute a more severe psychiatric problem than any pre-existing mental health problem serving to justify the abortion in the first instance. Rosen, Therapeutic Abortion, Medical, Psychiatric, Anthropological and Legal Considerations (1954).

body" cannot stand. Either (1) the argument means that she has a "private right" or personal freedom which permits her to decide, for any reason whatsoever, whether to sustain and support, or whether to eliminate, a life which she alone may decide is unwanted; or (2) it means that she has some kind of right to bodily integrity which permits her and her alone to decide under all circumstances whether to retain, or permit to be destroyed, a human life contained within her own body.

In all fairness we doubt that the first is the correct understanding of the basis of the "private right of personal freedom" for which the appellants contend. For, were that principle ever to be accepted as the law, there would have crept into the Constitution a potentially terrifying principle that, with very little more logic than the appellants have relied upon to sustain their position in these cases, would equally justify infanticide and euthanasia, at least if the victims were those in a relationship of dependence with the person or persons who wished to destroy them. Nor would the laws which forbid abandonment, failure of support and child neglect be immune from attack.

If the appellants and their supporting *amici* are maintaining that a woman has a right to the integrity of her body sufficient to permit her alone to decide, for whatever reason, whether to terminate a pregnancy, the proposition cannot prevail.[54] If a woman has sovereignty over her body of the degree suggested by the appellants, how could the States ban prostitution, outlaw suicide or prohibit the use of harmful drugs?

However, in the *amicus* brief filed by the American Association of University Women and other women's organizations, the "sovereignty of the body" argument is made in a disguised and superficially more plausible form. These *amici* assert a woman's right of "reproductive autonomy". This they define as the "personal, constitutional right of a woman

[54] See also the *Georgetown College* and *Raleigh Fitkin* cases discussed *supra*, pp. 37-39; *cf. Babbitz v. McCann*, 306 F. Supp. 400 (E.D. Wisc., 1969), *app. dism.*, 400 U.S. 1 (1970).

to determine the number and spacing of her children, and thus to determine whether to bear a particular child . . . ." Such a right, those *amici* argue, evolves inevitably from the recognition which this Court has afforded to those human interests "which relate to marriage, sex, the family and the raising of children". It is true that the Court has upheld the right of a married couple to plan their offspring prior to contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965), a case which, as we show in the next section of this brief, has no applicability to the issues presented in these cases. Parents may have a constitutional right to plan for the number and spacing of children. Still, that right cannot be extended to permit the destruction of a living human being absent a threat to the life of the mother carrying the unborn baby. Family planning, including the contraceptive relationship, is a matter between a man and a woman alone. The abortion relationship, on the other hand, is between the parents and the unborn child. "This additional party changes the whole structure of the situation. The freedom of the parents is limited by the rights of the child." Granfield, The Abortion Decision 184-85 (1969); see also *Gleitman v. Cosgrove*, *supra*, at 30-31. Thus, while a man and woman may have the right to plan their family free from interference by the State, which the Court upheld in *Griswold*, surely such a right cannot be projected, indeed distorted and debased, to serve as justification for the destruction of a third party, the unborn but living child. The right to plan a family no more encompasses the right to intentionally destroy a 2, 3, 4, 5, 6, 7 or 8 month unborn child than it would encompass the right to destroy a one-day-old baby. We do not believe, therefore, that it can successfully be maintained that the Texas and Georgia abortion statutes, and the balancing between any alleged constitutional right to plan a family and the right of an unborn child to life which they attempt to effect, should be struck down as unconstitutional.[55] To reach the contrary result

[55]We show in the next subsection of this brief that the one decision on which appellants might rely, at least by attenuated analogy, to support a claim of the unfettered right of a married woman to termi-

would require this Court's unabashed return to the long-repudiated concept of substantive due process which plagued its decisions for several generations, albeit in another context, *i.e.*, economic and social legislation. The fact that a law might not impress the judiciary as a good law, or might appear to them as futile or unworkable, no longer can serve as a basis for its invalidation.[56] Moreover, even though many doctors, representatives of women's organizations and well known public figures may claim that these abortion statutes are illiberal, outmoded and restrictive of women's rights, this is not the general viewpoint of the American people. A recent careful analysis of abortion and public opinion by demographer Judith Blake indicates that 78% of the population disapproved legalization of abortion when the parents desired no more children.[57] In any event, at this stage of American constitutional development there is no need to remind the Court that the predilections of the populace, much less the individual preferences of judges, cannot serve as a basis to strike down legislation within the competence of the state to enact, especially where the laws so challenged are aimed at protecting the most fundamental of personal liberties protected by the Due Process Clause, *i.e.*, the right not to "be deprived of life".

G. *The Right to Life Has Not Been Undermined by Judicial Decision.* The *amicus* has demonstrated the persuasive medical basis supporting the compelling substantial state interests which justify the Texas and Georgia abortion laws. Beyond that, and contrary to the contentions of the appellants and the *amici* who have filed briefs in their support,

---

nate a pregnancy does not support the proposition in behalf of which it is summoned.

[56]Compare *Lochner v. New York*, 198 U.S. 45 (1905), with *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

[57]Blake, *Abortion and Public Opinion: The 1960-1970 Decade*, 171 Science 540, 544 (1971). The same study shows that there are wide disparities in American attitudes toward abortions. Women, for example, disapprove of it more than men. *Ibid.*

NRLC disputes the assertion that a woman enjoys any right of privacy, as yet undefined in American law, which vests in her alone the absolute authority to terminate a pregnancy for any reason whatsoever. No precedents of this Court have gone so far. Nevertheless, the proponents of abortion on demand always advance three or four decisions of the Court from which they argue that the Court has impliedly recognized a startling and dangerous extension of a right of privacy that they now ask the Court to enunciate expressly in the cases at bar. We discuss those alleged analogies in this section of our brief. None of them, we believe, can serve as analogy, much less precedent, for the grave proposition of constitutional law which the appellants seek to establish in this litigation.

A case usually cited by those challenging state abortion laws is *Loving v. Virginia*, 388 U.S. 1 (1967). There, this Court held that a state anti-miscegenous marriage statute violated the Equal Protection Clause of the Fourteenth Amendment. 388 U.S., at 12. As a supporting ground for its decision, the Court also found that such statutes deny due process, since "the freedom of choice to marry [can] not be restricted by invidious racial discrimination." *Ibid. Loving*, therefore, is no precedent in support of the appellants' notion of the extreme scope of a woman's constitutional right of privacy. It is purely an invidious racial discrimination holding.

Other cases on which the appellants rely must similarly fail in their role as alleged analogies for their position. *Skinner v. Oklahoma*, 316 U.S. 535 (1942), decided that the compulsory sterilization of some types of habitual criminals and not others represented an invidious discrimination condemned by the Fourteenth Amendment. Thus, *Skinner* is most accurately read as a case prohibiting the imposition of unreasonable impediments on the right to procreate and, in any event, cannot logically be stretched to serve as an analogy for the unrestricted right to abort. Likewise missing the mark as a supporting precedent is *Pierce v. Society of*

Sisters, 268 U.S. 510 (1925). This was the Court's landmark decision upholding, over the requirements of a state's compulsory school attendance law, the freedom of parents, guaranteed by the Due Process Clause of the Fourteenth Amendment, "to direct the upbringing and education of [their] children . . . " 268 U.S., at 534. Once more, the liberty which was protected in the *Pierce* case was not a "right of privacy" and again the legislation which was struck down had "no reasonable relation to some purpose within the competency of the State." 268 U.S., at 535.

When the obviously unanalogous authorities tendered by the appellants are put aside, they are left only with *Griswold v. Connecticut*, 381 U.S. 479 (1965), as the one slim reed of alleged precedent to which they cling in arguing for the awesome right of privacy which they would have the Court enunciate in this case. That decision, too, is insufficient to carry such a heavy burden. The *Griswold* case produced a number of opinions by the Justices of this Court, concurring and dissenting. The actual holding in the case, however, was that a statute which forbade the use of contraceptives by married couples violated a "penumbral" right of marital privacy, older than the Bill of Rights and one falling within a "zone of privacy created by several constitutional guarantees." 381 U.S., at 485. Three of the Justices who decided that case, two dissenting and one concurring, refused to recognize any constitutionally protected right of privacy whatsoever. The remaining six Justices agreed only that a law, the enforcement of which would require the invasion of the marital bedroom, transgressed on the intimacies of, and the right of privacy inherent in, the marital relationship.

The particular aspect of the marital relation with which the Connecticut statute at issue in *Griswold* interfered was the sexual relationship. The state made it criminal for a married couple to have sexual intercourse using contraceptives. Enforcement of the statute would have required actual invasion of the marital bedchamber. The Connecticut law challenged was more stringent and sweeping than any statute,

civil or ecclesiastical, in the history of social efforts to control contraception. Noonan, Contraception 491 (1965). In contrast, the Texas and Georgia statutes do not affect the sexual relations of husband and wife. Pregnancy does not interfere with these relations except under some circumstances at limited times. Guttmacher, Pregnancy and Birth 86 (1960).

Further, it is a distortion of both the "penumbral" and Ninth Amendment approaches relied on by the majority in *Griswold* to assert them as a basis for challenging state regulation of abortion as unconstitutional. Centuries of judicial and legislative history refute the argument that the unrestricted right to abort is an "emanation" of any specific guarantees of the Bill of Rights necessary to give them "life and substance". 381 U.S., at 484. Where, for example, after considering the "traditions and [collective] conscience of our people", will this Court find the right to unrestricted abortion a principle "so rooted [there] . . . as to be ranked as fundamental"? 381 U.S., at 493 (Goldberg, J. *concurring*). Rather, in the words of a state court on the subject, the tradition has been that: "Unnecessary interruption of pregnancy is universally regarded as highly offensive to public interest." *Miller v. Bennett*, 190 Va. 162, 169, 56 S.E.2d 217 (1949).

In relying on the *Griswold* case, the appellants have not considered that in this case, as opposed to that decision, there is another important interest at stake, the life of an unborn child. If, despite all the medical evidence and legal history on the point, the unborn child is not to be considered a person within contemplation of the law with legally protectable interests, then *Griswold* possibly might be stretched to serve as a precedent for the result that the appellants urge this Court to reach. On the other hand, if terminating pregnancy is something different from preventing it, if abortion is different from cosmetic surgery, if the fetus is not in the same class as the wart, and if we are dealing with something other than an inhuman organism, then *Griswold* is totally

inapposite. As medical knowledge of prenatal life has expanded, the rights of the unborn child have been enlarged. And even if it could still be argued that the fetus is not fully the equal of the adult, the law, through centuries of judicial decision and legislation, and following the lead supplied by medical science, has raised the equivalency of that life to such a status that the unborn child may not be deprived of it, absent the demonstrated necessity of protecting a reasonably equivalent interest on the part of the mother. *Griswold*, of course, presented no such conflict and therefore is not controlling in this case.

Finally, as we have previously argued,[58] abortion was always condemned at common law. In Blackstone's words, it was regarded as a "heinous misdemeanor".[59] American law gave it the same hostile reception. Therefore, any argument that by virtue of the passage of the Ninth Amendment there was reserved to pregnant women a "penumbral" constitutional right of privacy entitling her to abort for any reason and that such a "right" was one of the fundamental liberties of American citizens recognized before the Bill of Rights and retained by them thereafter is completely without support in either British or American constitutional history. There was no "right" to abort at common law. Rather, abortion–in contrast to contraception–was considered a serious criminal act.

Thus, on any fair analysis, the appellants' alleged precedents, including *Griswold*, furnish no support for their claim that there is a constitutional basis on which to claim that a woman has a right to abort, for any reason, an unborn child which she does not want.

---

[58] *Supra*, pp. 24-29.

[59] Blackstone, *supra* n. 22, at 129-30.

III.

THE STATUTES ARE NOT UNCONSTITUTIONALLY VAGUE

In both cases, the appellants attacked the statutes in the courts below on the additional ground that they were unconstitutionally vague. The Texas three-judge federal court agreed. 314 F.Supp., at 1223. The Georgia three-judge court impliedly rejected the argument, but struck the statute down on other constitutional grounds. 319 F.Supp., at 1055. The appellants again raise the vagueness issue in their briefs which they have filed in this Court.

Neither of the courts below had the advantage of this Court's decision in *United States v. Vuitch*, 402 U.S. 62 (1971), at the time they handed down their decisions. In that case, this Court reversed the decision of a district court judge who had found that the District of Columbia abortion law was unconstitutionally vague.[60] The District of Columbia statute outlawed abortions except when "necessary for the preservation of the mother's life or health."[61] This Court's holding in *Vuitch* should be dispositive of the vagueness issue in these cases. The exception clause which this Court upheld in *Vuitch* is no more or less certain of meaning than the exception found in the Texas statute, *i.e.*, "for the purpose of saving the life of the mother". Likewise, the exceptions permitted under the Georgia statute are stated in language free of any inhibiting unconstitutional vagueness or ambiguity.

Doctors are neither in doubt nor in fear as to where abortions permitted by the Texas and Georgia statutes end and where those barred by them begin. For example, a recent study in California, whose abortion statute at the time had an exception limited solely to cases where termination of

---

[60] 305 F.Supp. 1032 (D. D.C., 1969).

[61] 22 D.C. Code 201.

the pregnancy is necessary to preserve the life of the mother,[62] shows that there has never been a prosecution for an abortion performed in a hospital by a physician licensed to practice medicine in that state. Packer & Gamspell, *Therapeutic Abortion, A Problem in Law and Medicine*, 11 Stanford L.R. 418, 444 (1959). Other recent studies show the same has been true in New York and in Maryland. Hellegers, *Abortion, the Law, and the Common Good*, 3 Medical Opinion and Review, No. 5 (May 1967), p. 84. The *amicus* is confident that the same experience holds for Texas and Georgia and that in those jurisdictions, as in others, "the law has not gone out of its way to make things difficult for the physician, . . ."[63]

The words of Mr. Justice Holmes, as in so many other areas of constitutional law, supply the answer to any claim of the alleged vagueness of these two statutes. Speaking for the Court in *United States v. Wurzbach*, 280 U.S. 396, 399 (1930), he said:

> "Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to to make him take the risk."[64]

Accordingly, we urge the Court to adhere to its decision in *Vuitch* and reject any contention that these two statutes are

---

[62]Cal. Penal Code § 274.

[63]Hellegers, *supra*, at 84. Indeed, a recent decision of the Court of Appeals for the District of Columbia Circuit suggests, should appellants prevail on this appeal, that any "doctor's dilemma" will not be whether he will be punished if he performs an abortion but whether he will be punished if he does not. *Mary Doe, et al. v. General Hospital of the District of Columbia, et al.*, C. A. No. 24,011. For a recent case showing this is not an illusory concern see *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967).

[64]See also, *State v. Moretti*, 52 N. J. 182, 244 A.2d 499 (1968), *cert. den.*, 393 U.S. 952 (1968).

unconstitutionally vague in prescribing what is criminal conduct on the part of doctors and what is not.

IV.

THE REMAINING CONSTITUTIONAL ARGUMENTS ADVANCED BY THE APPELLANTS AND THE AMICI CURIAE SUPPORTING THEM ARE WITHOUT MERIT

In addition to their primary claim that the Texas and Georgia statutes violate rights of privacy guaranteed by the Ninth and the Fourteenth Amendments, the appellants in these cases, or the *amici curiae* who filed briefs in support of the appellants, attempt to raise several other constitutional issues. For instance, the doctor-appellants argue that the statutes in question transgress First and Fourteenth Amendment rights which guarantee them the right to pursue their chosen profession. Additionally, the appellants claim that the statutes under challenge in this litigation violate equal protection of the laws, so far as poorer citizens are concerned. These contentions are meritless.

A. *The Statutes Do Not Abridge Either First or Fourteenth Amendment Rights of Doctors.* In both cases, the doctor-appellants alleged that the particular statute in question "chills and defers plaintiffs from practicing their profession as medical practitioners" and thus offends rights guaranteed by the First and Fourteenth Amendments.[65] The dispositive answer to these contentions is that neither statute proscribes speech or medical advice but prohibits the commission of the criminal *acts* specified in the statute. If, as this *amicus* maintains, the acts outlawed by the statutes are within the constitutional competency of Texas and Georgia to proscribe as criminal conduct, then the argument is closed. Criminal acts do not fall within the "freedom of speech" which the First Amendment protects. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). On the other

[65] App. 19 in No. 70-18 and App. 14 in No. 70-40.

hand, if we are wrong and these statutes do represent unconstitutional invasions of a woman's right to privacy, then the free speech argument advanced by the doctor-appellants becomes superfluous. Apart from that, however, we do not believe that the appellants can seriously argue that these abortion statutes are vulnerable on their face as abridging a doctor's or anyone else's right of free expression.

The identical rationale also answers appellants' claims that any freedom to pursue the profession of medicine guaranteed by the Due Process Clause of the Fourteenth Amendment is offended by the statutes involved in these cases. *Cf., e.g., Konigsberg v. State Bar of Calif.*, 366 U.S. 35, 44 (1961), with *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 102-03 (1963). And it legitimately could be asked whether the deliberate destruction of the unborn child, absent a threat to a mother's life or a serious menace to her health, is really the practice of the "healing art" of medicine. Frankl, The Doctor and the Soul 37 (1969).

B. *Nor Do the Statutes Draw Invidious and Unconstitutional Discriminations Between the More Affluent and the Poor.* As so often happens in such cases, the parties attacking abortion statutes argue that they discriminate against the economically deprived. Specifically, appellants contend that there is an advantage to the class which is able to obtain abortions and that this advantage is enjoyed only by the more affluent people of Texas, Georgia and the rest of the United States. We doubt that this contention rises to the level of a constitutional argument which must be dealt with in these cases. If it were necessary, NRLC would point out that the statutes on their face apply to all persons committing the acts condemned and that there is no suggestion that they seek to discriminate on any invidious basis, including that of income.

Of course, departing from the facts of the two cases, it might be argued abstractly that (1) a poor woman finds it more difficult than a rich woman to leave Texas or Georgia in order to get an abortion in a jurisdiction where that might

be legal, and (2) she cannot afford treatment by a private physician who, some might say, would be more inclined to find a legal reason for the abortion. Hence, the two statutes bear unequally upon the poor. However, the same theoretical argument could be made of many types of conduct proscribed by the criminal laws of Texas and Georgia. There are jurisdictions to which wealthy persons may travel in order to indulge in the doubtful pleasures of gambling at will, using narcotics without restraint, and enjoying a plurality of wives. Could these doubtful "advantages" on the part of the rich be relied on as any basis to set aside the criminal statutes of Texas or Georgia proscribing such activities within those jurisdictions?

And even if it were assumed to be true that the rich are more likely than the poor to secure the services of a sympathetic physician for purposes of terminating an unwanted pregnancy, such a result, unintended by the statute, would not rise to the level of a constitutional infirmity. "It is no requirement of equal protection that all evils of the same genus be eradicated or none at all." *Railway Express Agency v. New York*, 336 U.S. 106, 110 (1949). If the statute is to fail, it must be shown that on its face it takes away a right guaranteed to the poor by the Constitution. *Fisch v. General Motors Corp.*, 169 F.2d 266, 270 (C. A. 6, 1948). No such showing is possible in these cases.

Unfortunately, Anatole France's sardonic comment about the "majestic equality" of the law much too often has proved to be true. Many criminal laws in actual practice do bear with unequal severity upon the poor. It is they who are more likely than the rich to be caught, to be unable to post bail bond, to be prosecuted, to be unskillfully defended, to be convicted and to be punished. However, the remedy for these injustices of society lies in the elimination or mitigation of the conditions and causes of poverty and in the reform of the administration of criminal justice, not by the selective invalidation of otherwise lawfully enacted criminal statutes.

V.

APPELLANTS' PUBLIC POLICY ARGUMENTS ARE MISPLACED

In addition to their arguments of unconstitutionality, the appellants, and their supporting *amici*, dwell at some length on what they believe is the poor public policy inherent in the Texas and Georgia abortion statutes in particular and in abortion laws generally. Attention is called to the fact that the presence of strict abortion statutes requires women often to go to non-medical practitioners for the performance of illegal abortions conducted under poor hygienic conditions. The problem of world overpopulation is also touched upon in the appellants' marshalling of their reasons why they think abortion laws are a bad thing. Finally, in the brief of at least one of the *amici*, there is the suggestion that abortion laws stand in the way of women's liberation and represent a stamp of servility imposed by men upon the women of America.

In our opinion, the validity of all of these arguments is very questionable. In any case, their assertion, directly or indirectly, in this litigation is misplaced. They should be directed to the legislatures of Texas and Georgia, not to this Court. Moreover, we point out that in recent years it has not been impossible to convince state legislatures that their abortion statutes should be revised.[66] Even if the appellants' public policy arguments were addressed to a legislative body, NRLC would dispute their validity. For example, Sweden, a country not unlike ours, and the nation which has had the longest experience with state-regulated abortions in Western Europe, has produced no evidence that criminal abortions, estimated at 20,000 a year when the law was passed in 1938, have been substantially reduced since that time. Uhrus,

[66]New York has enacted an abortion statute which permits abortion for any reason within 24 weeks from the commencement of pregnancy. That act became effective on July 1, 1970. *New York Times*, July 2, 1970, p. 1. Laws almost, but not quite, as unrestrictive as the New York statute have recently been approved in Alaska, Hawaii and Washington State.

POOR COPY

Some Aspects of the Swedish Law Governing Termination of Pregnancy, the Lancet 1292 (1964). Other studies confirm the belief that liberalization of abortion laws effect no reduction in the rate of criminal abortions and all that is done is to increase the total number of abortions. "Thus it is not unlikely that liberalization may increase rather than decrease maternal mortality." Cavanagh, *Reforming the Abortion Laws: A Doctor Looks at the Case*, America, April 18, 1970, p. 408.

So far as any alleged problem of overpopulation is concerned, abortion, whether on the free demand of a woman or on the intimidating command of the State, appears as a completely ineffective and extremely dangerous way to deal with such a problem, if it exists.[67] For instance, one side effect of the repeal of abortion statutes and the fostering of abortion through state auspices is that no group will be more likely to feel the sting more bitingly than the mothers of illegitimate children. Already, laws making the birth of illegitimate children a crime suggest the squeeze to which the poor mother might be subjected in an age of unrestricted, and state-sponsored, abortion.[68]

Finally, the suggestion that laws against abortion were enacted by men to constrain the behavior of women has nothing to support it except the historical accident that most of the criminal statutes, including abortion laws, were enacted by male legislators in the 19th Century when women were unable to vote. It is not evident how this general condition of political freedom influenced abortion laws more than it influenced other developments in the criminal law. Moreover, more women than men currently disapprove of elective,

---

[67]In point of fact, recent statistics indicate that the population of the United States is approaching a zero growth rate. *Washington Post*, September 7, 1971, page A-1.

[68]*E.g.*, La. Rev. Stat. Ann. § 14.79.2; see Noonan, *Freedom To Reproduce: Cautionary History, Present Invasions, Future Assurance*, Biennial Conference on the "Control of One's Own Body", New York University, New York (1970).

or unrestricted, abortion.[69] The suggestion that abortion laws are peculiarly the product of a male-dominated government is especially inapposite in the case of Georgia, which enacted the abortion statute involved in this litigation in 1968. This *amicus* applauds the continuing process by which illegal discriminations against women have been removed. However, the claim that a woman should be free to destroy a human being whom she has conceived by voluntarily having sexual intercourse can only make sense if that human being be regarded as part of herself, a part which she may discard for her own good. However, at this point, the evolution of social doctrine favoring freedom for women collides squarely with modern scientific knowledge and with the medical and judicial recognition that the fetus in the womb is a living person. A woman should be left free to practice contraception; she should not be left free to commit feticide.

CONCLUSION

NRLC has stated its doubts that the lower courts should have exercised jurisdiction in these cases and urges that the decisions below be vacated on those grounds. However, if the Court does note probable jurisdiction in these two case, we respectfully ask, for the reasons stated in this brief,

[69] *Supra* note 57.

that it affirm those portions of the judgments below which denied injunctive relief and reverse those portions which awarded declaratory relief.

Respectfully submitted,

JUAN J. RYAN
1351 Springfield Avenue
New Providence, N. J. 07974

ALFRED L. SCANLAN
MARTIN J. FLYNN
734 Fifteenth Street, N. W.
Washington, D. C. 20005

JOSEPH V. GARTLAN, JR.
815 Connecticut Avenue, N. W.
Washington, D. C. 20006

ROBERT M. BYRN
140 West 62nd Street
Lincoln Center
New York, New York 10023

Attorneys for The National Right to Life Committee, Amicus Curiae

OF COUNSEL:

Shea & Gardner
734 Fifteenth Street, N. W.
Washington, D. C. 20005

October 8, 1971.

TABLE OF CONTENTS

	PAGE
MOTION OF AMICUS	i
SUMMARY OF ARGUMENT AND INTEREST OF AMICUS	iii,iv
TITLE PAGE	1
INTRODUCTORY STATEMENT	2
INTEREST OF AMICUS AND HIS POSITION IN THE CASE	2
1. Interest of Amicus	2
2. The Position of the Amicus on the Issues	3
QUESTION PRESENTED	3
ARGUMENT	4
CONCLUSION	13
CERTIFICATE OF SERVICE	14
APPENDIX A (Order of U.S.D.C. Judge Sidney O. Smith, Jr.)	16

TABLE OF CITATIONS - Page 1

Cases:	PAGE
Brazier v. Cherry, 293 F.2d 401 (U.S.C.A. 5th, 1961)	4
Edwards v. People of State of Calif., 314 U.S. 160 (1941)	8
Fallow v. Hobbs, 113 Ga. App. 181, 147 S.E. 2d 517	5
Hornbuckle, b/n/f v. Plantation Pipeline Co., 212 Ga. 504, 93 S.E. 2d 727	4
Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S.Ct. 784 (1944)	7
Raleigh Fitkin-Paul Morgan. Mem. Hosp. v. Anderson, 201 A. 2d 537 (1964)	5,6
Roth v. United States, 354 U.S. 476 (1957)	9
Tucker v. Carmichael & Sons, Inc., 208 Ga. 201, 65 S.E.2d 909	4,5
Wagner v. Finch, 413 F. 2d 267 (C.A. 5th 1969)	6
Wesco Hotel Co. v. Parrish, 300 U.S. 379 (1937)	8
Zemel v. Rusk, 381 U.S. 1 (1965)	8

PAGE

Constitutional and Statutory Provisions:

United States Constitution, Amendments IV, V, VI, VIII, IX and XIV ---------- 4

42 U.S.C.A. 1983 ---------- ii,4
42 U.S.C.A. 1985 ---------- ii,4

Ga. Code § 26-1202 (c) ---------- 4
Ga. Code § 26-2801 ---------- 6
Ga. Code § 74-105 ---------- 5
Ga. Code § 74-109 ---------- 6
Ga. Code § 74-111 ---------- 5
Ga. Code § 74-9903 ---------- 5
Ga. Code § 88-1716 ---------- 6

Miscellaneous:

Annotation, 15 A.L.R. 2d 992 --------- 5
Annotation, 27 A.L.R. 2d 1256 -------- 5

Marshall, The Continuing Challenge of the Fourteenth Amendment, 3 Georgia Law Review 1 (1968) ---------- 11

Kauper, Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case, 64 Mich. Law Review 235 ---------- 9

Pound, A Survey of Social Interests, 57 Harvard Law Review 1, (1943) ------ 9

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Ferdinand Buckley moves the Court for leave to file a brief annexed hereto as Amicus Curiae. Appellees Arthur K. Bolton, as Attorney General of the State of Georgia and Lewis R. Slaton, as District Attorney of Fulton County, Georgia, have consented to the filing of the proposed brief. The Appellants, and Herbert T. Jenkins, as Chief of Police of the City of Atlanta, Georgia, have refused to consent to the filing of the attached brief.

By order of Judge Sidney O. Smith, Jr., dated April 25, 1970, Ferdinand Buckley was appointed guardian ad litem of the unborn child of Mary Doe. On May 5, 1970, Judge Smith passed an order revoking the appointment of Ferdinand Buckley as guardian ad litem and granted Ferdinand Buckley leave to participate in the case only as amicus curiae, which he did, filing briefs and taking part in oral argument. Subsequently, Ferdinand Buckley duly filed a motion for reconsideration of said order of May 5, 1970, and also filed a motion for leave to intervene in behalf of the unborn child of Mary Doe and on behalf of all unborn children in the State of Georgia who might be affected by a judgment in the action. Both of these motions were overruled in the Court's opinion of July 31, 1970, but were not expressly passed upon in the Court's judgment of August 25, 1970. Ferdinand Buckley therefore filed on September 3, 1970, a motion to alter or amend said judgment of August 25, 1970. By order of October 13, 1970, the Court expressly overruled Ferdinand Buckley's motion for reconsideration of the order of May 5, 1970, revoking his appointment as guardian ad litem and also overruling his motion to intervene in behalf of the unborn child of

Mary Doe and other unborn children in the State of Georgia.

After Judge Smith appointed said guardian ad litem of the unborn child of Mary Doe, and before Judge Smith passed his order of May 5, 1970, revoking said appointment, the guardian ad litem filed an answer and counterclaim in behalf of said unborn child. In said counterclaim, the guardian ad litem averred that plaintiffs had conspired to deprive the unborn child of Mary Doe of life in violation of the legal rights of said unborn child secured to him by the United States Constitution, the Georgia Constitution of 1945, and Title 42, Sections 1981, 1985 and 1988 of the United States Code. Said unborn child of Mary Doe prayed for an injunction against plaintiffs depriving him of said rights as provided by Title 42, Section 1983, of the United States Code.

A Notice of Precautionary Appeal from the judgment of the United States District Court for the Northern District of Georgia entered on August 24, 1970, was filed on behalf of said unborn child with the United States Court of Appeals for the Fifth Circuit on September 18, 1970.

A motion for leave to appeal in forma pauperis was also filed in behalf of the unborn children.

On July 12, 1971, the United States District Court entered an order (Appendix A) refusing to permit the appeal in forma pauperis by Ferdinand Buckley as next friend of the unborn child of Mary Doe and other unborn children in the State of Georgia, but expressly authorizing an appeal in forma pauperis by Ferdinand Buckley in his own name.

Amicus, as next friend of the unborn child of Mary Doe and of all unborn children similarly situated in the State of Georgia, sought to appeal the judgment of the United States District Court to the Supreme Court of the United States. By order dated May 3, 1971, said appeal was dismissed for want of jurisdiction.

SUMMARY OF ARGUMENT

The unborn child of Mary Doe is a "person" and as such is entitled to protection under 42 USCA, §§ 1983 and 1985, as well as under the Fourth, Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution.

The fundamental right to life of the unborn child must be protected against arbitrary extinguishment. For such extinguishment without benefit of his rights being considered is an absolute denial of due process and equal protection of the law.

INTEREST ON AMICUS

The interest of the Amicus is to present certain arguments to this Court with the sole objective of preserving the life of the unborn child of Mary Doe as well as the lives of all other unborn children in the State of Georgia similarly situated.

While it is true that the Attorney General of the State of Georgia has sought to preserve the life of the unborn child of Mary Doe, he has done so only within the context of upholding the constitutionality of the Georgia Abortion Statute now under attack. Also, the primary objective of the remaining appellees, District Attorney of

Fulton County, Georgia, and the Chief of Police of Atlanta, is merely to demonstrate that neither is now prosecuting or threatening to prosecute Mary Doe or any of the other plaintiffs in the case below for any violation of the Georgia Abortion Statute in question. Most assuredly, Appellants are not interested in preserving the life of said unborn but in fact are dedicated to its destruction.

Therefore, since none of the parties hereto have as their sole objective the preservation of the life of the unborn child of Mary Doe and other unborn children, it becomes of paramount importance for this Court to conside the arguments advanced on behalf of the unborn child by this amicus curiae who has actively participated in every phase of the subject case.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 70-40

MARY DOE, ET AL., [1]

Appellants

against

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; LEWIS R. SLATON, as District Attorney of Fulton County, Georgia; and HERBERT T. JENKINS, as Chief of Police of the City of Atlanta, Georgia,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF OF FERDINAND BUCKLEY, AMICUS CURIAE IN SUPPORT OF APPELLEES

1/ Appellants, whose names do not appear on the caption are: PETER G. BOURNE; ROBERT HATCHER; LILLAS L. JAMES; JAMES WATERS; CORBETT TURNER; NEWTON LONG; EDWARD LEADER; WILLIAM H. BIGGERS; GEORGE VIOLIN; PATRICIA S.

(continued on next page)

INTRODUCTORY STATEMENT

The facts of record in this case, the pertinent Georgia statute, and the opinion of the court below are found in the briefs of the parties of record. The District Court's opinion is officially reported at 319 Fed. Sup. 1048 (D.C. N.D. Ga. 1970). This Amicus accepts said statements of fact for purposes of this brief.

INTEREST OF AMICUS AND HIS POSITION IN THE CASE

1. Interest of the Amicus. The Amicus is a member of the Bar of the State of Georgia, the United States District Court for the Northern District of Georgia, and of this Court The Amicus was appointed guardian ad litem for the unborn child of Mary Doe by order of the court below of April 25, 1970. That order was revoked by order of the lower court of May 5, 1970, which expressly permitted the Amicus to continue to appear as Amicus Curiae in behalf of the unborn child of Mary Doe and other unborn children similarly situated in Georgia in all further proceedings in the court below.

This Amicus feels that as a member of the Bar who has participated and spoken in the proceedings below in behalf of the unborn child

---

SMITH; JENNIE WILLIAMS; JUDITH BOURNE; SUZANNE DUNAWAY; JOYCE PARKS; LOU ANN IRION; MARY LONG; J. EMMETT HERNDON; SAMUEL L. WILLIAMS; EUGENE PICKETT; RICHARD DEVOR; DONALD DAUGHTRY; JUDITH ZORACH and KAREN WEAVER; RESIDENTS OF THE STATE OF GEORGIA; PLANNED PARENTHOOD ASSOCIATION OF ATLANTA, INC., a GEORGIA CORPORATION, and GEORGIA CITIZENS FOR HOSPITAL ABORTION, INC., a GEORGIA CORPORATION,

(continued on next page)

of Mary Doe and other unborn children in the State of Georgia similarly situated he has a continuing obligation to assert the rights of unborn children with reference to this appeal.

2. The position of the Amicus on the issues. This Amicus supports the position of appellee Arthur K. Bolton, as Attorney General of the State of Georgia, that the Georgia statute in question is constitutional. However, this Amicus also asserts that an unborn child of a pregnant woman seeking an abortion in the State of Georgia not only has rights which are protected under the statutes and Constitutions of the United States and the State of Georgia, but also has a right to appear as a party by guardian ad litem or next friend in any legal proceeding in which those rights are put in issue.

3. Question presented. This Amicus submits that the determinative question presented by this appeal is whether or not the unborn child of a pregnant woman seeking an abortion in the State of Georgia is, from the moment of conception, a person within the meaning of the United States Constitution and that of the State of Georgia so as to be entitled to enjoy all constitutional rights, privileges and immunities conferred on a person by the United States Constitution and the Constitution of the State of Georgia. This Amicus contends that that question must be answered in the affirmative.

FOR AND ON BEHALF OF ALL PERSONS AND ORGANIZATIONS SIMILARLY SITUATED.

ARGUMENT

The Declaration of Independence provides, inter alia, that ". . . all men are created equal, that they are endowed by their creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." At what point in time does an unborn child become a human being endowed with fundamental rights which are protected by our Federal and State Constitution? Logically, if men are created equal and are endowed with unalienable rights by their creator, it would seem to follow that they are endowed with these rights at the time of their initial creation.

There is no question that in Georgia a person is endowed with his legal rights from the moment of conception. Both the Georgia Supreme Court and the Georgia legislature have recognized this principal. The Supreme Court of Georgia has stated clearly that the right of a child to be secure in his person commences with his conception. Hornbuckle, b/n/f v. Plantation Pipeline Co., 212 Ga.504, 93 S.E. 2d 727. Cf., Tucker v. Carmichael & Sons, Inc., 208 Ga. 201, 65 S.E.2d 909. The principle of the Hornbuckle case was recognized by the legislature in the provisions of Ga. Code § 26-1202 (c) giving a right of action for declaratory or injunctive relief in behalf of an unborn child.

In order to determine at what point in time an unborn child becomes a "person" entitled to protection under 42 USCA, §§ 1983 and 1985, as well as under the Fourth, Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution, the Federal Court should look to Georgia law. Brazier v. Cherry, 293 F.2d 401 (USCA 5th,

1961). In this regard, Georgia law is clear. The unborn child's rights begin at conception.

There is no basis in logic or justice either to an unborn child or to society-at-large for the law to protect the property of an unborn child, but to refuse to protect the very person of such unborn. Tucker v. Carmichael & Sons, Inc., supra. Moreover, the vast majority of courts which have passed upon the question within the last twenty years have recognized the right of an unborn child to be secure in its person, at least from the time it is "quick". See "Prenatal Injury As Ground Of Action," 27 A.L.R. 2d 1256, and "Action For Death Of Unborn Child," 15 A.L.R. 3d 992.

It has been held in Georgia that the negligence of a mother of an unborn child could not be imputed to the unborn child so as to affect the right of such child to recover damages for injuries inflicted upon him by a negligent third party. Fallaw v. Hobbs, 113 Ga. App. 181, 147 S.E.2d 517. It follows that this recognition by the Georgia Court of Appeals of the fact that an unborn child is a person with legal rights separate and distinct from those of his mother is based on the premise that the rights of the mother are not paramount but must be considered in conjunction with the right of the unborn child to life. Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson, 201 A. 2d 537 (1964).

The law of Georgia manifests a particular concern for children, born and unborn. For example, Ga. Code § 74-9903 prohibits the abandonment of an unborn child, and Ga. Code § 74-105 prohibits the abandonment of the child after birth. Also, Ga. Code § 74-111 requires every physician in this State who has reason to believe that physical injury was inflicted

upon a child by a parent to make a report of such findings. See also Ga. Code § 74-109 permitting the Ordinary to appoint a guardian for a child who is subject to cruel treatment by his parents; Ga. Code § 26-2801 making it a crime for one who has custody of a child under the age of eighteen years of age to deprive him of necessary sustenance or to maliciously cause the child excessive physical or mental pain; Ga. Code § 88-1716 requiring a registration of all fetal deaths.

In seeking to balance the conflicting interests of mother and child, the Supreme Court of New Jersey in the case of Raleigh Fitkin-Paul Morgan Mem. Hosp. vs. Anderson, supra, was concerned with an action by a hospital seeking authority to administer blood transfusions to a pregnant woman who did not wish to have same for the reason that they were contrary to her religious conviction as a Jehovah's Witness. The Court stated, at page 438:

> "We are satisfied that the unborn child is entitled to the law's protection and that an appropriate order should be made to insure blood transfusions to the mother in the event they are necessary in the opinion of the physician in charge at the time."

The United States Supreme Court denied certiorari in 377 U.S. 985 (1964).

Similarly, in Wagner vs. Finch, 413 F.2d 267 (CA 5th) (1969), it was held that the illegitimate child of a deceased father, conceived before, but born after, the father's death, was sufficiently in being to be capable of living with the father at the time of

his death so as to qualify said child for benefits under the Social Security Act. Thus, the unborn child was "in being" so as to be entitled to the law's protection.

Thus, we see that the child in his mother's womb has legal rights which are entitled to protection in the State of Georgia as well as in most, if not all, of the states of this country. And, as already seen, the unborn child is a "person" for many legal purposes, and the Fourteenth Amendment expressly provides that no state shall "deprive any person of life . . . without due process of law."

In this case the appellants assert various assorted alleged rights of privacy as a basis for their attack upon the constitutionality of the Georgia statute under consideration. Opposed to those alleged rights is the unborn child's fundamental right to life itself.

In Price vs. Commonwealth of Massachusetts, 321 U.S. 158, 64 S. Ct. 784 (1944), this Court recognized that a State may act as parens patriae in behalf of a child to protect the child from his own parent. The Court stated, at 321 U.S. 166:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder . . . and it is in recognition of this that these decisions have respected the private realm of family life which the State cannot enter. But the family itself is not beyond regulation in the public interest, as against a claim of

> religious liberty. (Citation omitted). And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interests in youth's well-being, the State as parens patriae may restrict the parents' control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because a parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."

. While the Constitution prohibits the deprivation of liberty without due process of law, "The Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has a history and connotation. But the liberty safeguarded is a liberty in a social organization which requires the protection of law against the evils which meance the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." Wesco Hotel Co. vs. Parrish, 300 U.S. 379, 391 (1937). See also Zemel vs. Rusk, 381 U.S. 1, 14 (1965); Edwards vs. People of State of Calif., 314

U.S. 160 (1941); and Roth vs. United States, 354 U.S. 476 (1957).

> "The basic problem is not whether a court in exercising the power of judicial review may pass judgment on legislative acts, but rather how wisely it exercises this power in identifying, appraising and weighin the competing interests.", Prof. Paul G. Kauper: "Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold case", 64 Mich. Law Review 235, 257, 258.

In "A Survey of Social Interests," 57 Harvard Law Review 1 (1943), Dean Roscoe Pound stated much the same proposition thusly:

> "Looked at functionally, the law is an attempt to satisfy, to reconcile, to harmonize, to adjust these overlapping and often conflicting claims and demands either through securing them directly and immediately, or through securing certain individual interests, or through delimitations or compromises of individual interest, so as to give effect to the greatest total interests or to the interests that weigh most in our civilization, with the least sacrifice of the scheme of interests as a whole."

So we see that the General Assembly of Georgia was confronted with the various conflicting interests which surround and are intertwined with the interests on the one hand of the pregnant woman and her health and self preservation of the life of the unborn child. The General Assembly provided certain

circumstances under which an abortion might be performed, and prohibited all other abortions. The General Assembly further provided that any Solicitor General (now District Attorney) in a Judicial Circuit in which an abortion is to be performed under the Georgia Abortion Act, or any person who would be a relative of the child within the second degree of consanguinity, may petition the Superior Court of the county in which the abortion is to be performed for a declaratory judgment as to whether the performance of such an abortion would violate any constitutional or other legal rights of the fetus. The General Assembly further provided that if the Court determined that such an abortion would violate the constitutional or other legal rights of the fetus, the Court should so declare and should restrain the physician from performing the abortion. The General Assembly of Georgia did that which it was required to do; it provided a procedure for raising and asserting the constitutional rights of the unborn child.

The appellees have vigorously sought to uphold the constitutionality of the Georgia statute. However, without in any way diminishing the splendid efforts of the appellees, we believe that it is only fair to state that the primary objective of the appellees is to uphold the constitutionality of the Georgia abortion statute and to assert that the appellees in their respective official capacities are violating no constitutional rights of the appellants.

On the other hand, the sole objective of this Amicus is to preserve the life of the unborn child of Mary Doe and the lives of other unborn children in the State of Georgia similarly situated, whether or not the Georgia abortion statute in question can meet

constitutional requirements.

Speaking of the Fourteenth Amendment, Mr. Justice Thurgood Marshall once said:

> "This self-executing language is, however, deceiving. Its positive form does not guarantee automatic enforcement. The courts, naturally enough, exercise the power in cases brought before them to decree when the rights guaranteed by the amendment have been infringed. But these rights cannot be enforced unless those who possess them know they exist and are given the legal means to vindicate them. Without the commitment of the bar, those protected by the amendment will ordinarily possess neither the knowledge nor the skills needed to make the promises of the amendment meaningful. Without the commitment of large numbers of lawyers, of 'private attorneys-general' if you will the amendment will mean nothing.
>
> "Ironically enough, this basic point about the role of the judiciary was made pointedly by one of the Justices concurring in the Dred Scott decision, the decision reversed by the combined force of a civil war and the fourteenth amendment itself. In deciding Dred Scott, Mr. Justice Wayne declared: '[T]he court neither sought nor made the case.' And so today, under far different concepts of right and justice, the courts still cannot 'make' cases. They must be brought by litigants, well-informed of their rights, through lawyers dedicated to the principles

which lie behind that great amendment." 3 Ga. Law Review 1, 3 (1968).

* * *

"Today, the legislatures, the courts the bar, and the people of this country are demonstrating a concern for fairness and justice unparalleled in the history of our nation. Can we say that the fight has been won? Can we rest upon our past accomplishments? If we do, we have not learned well the lessons of the past one hundred years. We have not learned that constant vigilance is necessary to maintain justice and freedom. We have not learned that solemn declarations and victories have a way of fading in the face of other national concerns. We have not learned that inequality and injustice are complex, pervading cancers. The framers of the fourteenth amendment thought a solemn declaration would forever solve the problem of social injustice. As they were wrong, we would be wrong in assuming that the victories of the last decade will establish and maintain that goal. Vigilance is necessary to prevent backsliding. But more important are the goals of the future. They are many and diverse--they are familiar to you--meaningful compliance with the legacy of Brown, effective counsel and defense for the criminally accused, and perhaps most important, the need for 'legal power' on the side of the socially and economically depressed. These are your goals. It is your job as future

lawyers, future judges, future legislators, and as legal educators to see that the nation's concerns for justice through law does not again go the way of the fourteenth amendment. For if you do not seek these goals, the nation that depends upon you for leadership will soon forget the lessons of the past one hundred years. Elihu Root spoke to the point in 1904. His words still hold true: 'The lawyer's profession demands of him something more than the ordinary public service of citizenship. He has a duty to the law. In the cause of peace and order and human rights against all injustice and wrong, he is the advocate of all men, present and to come.'" Id. at 9, 10.

CONCLUSION

This Court should recognize the fundamental right of the unborn child to life, and the responsibility of the State to protect the life of the unborn child. It is this fundamental right to life of the unborn child of Mary Doe and of all unborn children similarly situated which should be recognized and protected by this Court. This Court should further recognize that the unborn child has a right to be heard through a guardian ad litem or next friend in any action in which his right to life is in issue.

We therefore respectfully submit that the judgment of the court below should be reversed, and the court below should be instructed to enter an order dismissing the

plaintiffs' complaint.

Respectfully submitted.

Ferdinand Buckley

James A. Eichelberger

Hugh Robinson, Jr.

Attorneys for Amicus

CERTIFICATE OF SERVICE

This is to certify that I am of Counsel of Record for Amicus Curiae Ferdinand Buckley and have this day served one copy of the Brief of said Amicus on each of the following persons:

Dorothy T. Beasley
Assistant Attorney General
132 State Judicial Building
40 Capitol Square
Atlanta, Georgia 30334

Margie Pitts Hames
210 Brighton Road, N.E.
Atlanta, Georgia 30309

Tony Hight
Assistant District Attorney
Atlanta Judicial Circuit
136 Pryor Street, S.W.
Atlanta, Georgia

Henry L. Bowden
Ralph H. Witt
2614 First National Bank Building
Atlanta, Georgia 30303

by depositing a copy of same, addressed as above with postage prepaid in the United States Mail, before filing.

This 13th day of October, 1971.

Hugh Robinson, Jr.

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al.,	:	
	:	
Plaintiff	:	
	:	CIVIL ACTION
vs.	:	
	:	
ARTHUR K. BOLTON, as Attorney General of the State of Georgia LEWIS R. SLATON, as District Attorney of Fulton County, Georgia, and HERBERT T. JENKINS, as Chief of Police of the City of Atlanta,	:	NUMBER 13676
	:	
Defendants	:	

In this case, Ferdinand Buckley was originally appointed as guardian ad litem for the unborn child of Mary Doe. Upon consideration by the court, the order of appointment was revoked. A motion was made to reconsider and/or to intervene on behalf of all unborn children who might be affected by the order, which was likewise denied. However, Mr. Buckley was invited and allowed to participate in the case as amicus curiae.

In the instant motion, Mr. Buckley seeks to appeal the court's orders denying his right to proceed as guardian ad litem or as intervener. In the present motion, he characterizes himself as "next friend" and "attorney of record" of the affected class. It is, of course, the court's desire that he be allowed to appeal

the court's previous orders and, under the circumstances, it is appropriate that it be done in forma pauperis. However, by such order, the court does not designate Mr. Buckley as "next friend" for the class or as "attorney of record" for such class nor confer any standing upon Mr. Buckley to represent the class, as such act would be inconsistent with the previous orders of the court.

Accordingly, the motion for leave to appeal in forma pauperis is granted to Mr. Ferdinand Buckley. Otherwise it is denied.

IT IS SO ORDERED.

This the 12th day of July, 1971.

Sidney O. Smith, Jr.
United States District Judge

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 70-18

JANE ROE, ET AL.,

Appellants,

vs.

HENRY WADE,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

No. 70-40

MARY DOE, ET AL.,

Appellants,

vs.

ARTHUR K. BOLTON, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

PURPOSE OF THE MOTION.

All parties in No. 70-18 (the Texas case) have given their written consent to Dr. Bart Heffernan, one of the amici herein, to file an *amicus curiae* brief.[1] The appellants in No. 70-40 (the Georgia case) have never responded to a request for consent. The appellees do not object to these *amici* filing in this cause.[2]

INTEREST OF THE AMICI.

1. Identification of the *amici.* Dr. Bart Heffernan has an appeal presently pending before this Court in the case of *Heffernan, et al.* v. *Doe, et al.,* docketed as No. 70-106, October 1971 term, which case involves the constitutionality of the Illinois criminal abortion statute, and is similar to both *Jane Roe, et al.* v. *Wade,* No. 70-18, and *Mary Doe, et al.* v. *Bolton,* No. 70-40. The Jurisdictional Statement in the *Heffernan* case was filed on March 29, 1971, but no action was taken thereon during the last term of Court.

Any ruling on the merits in the Georgia and Texas cases could profoundly and perhaps adversely affect the outcome of the Illinois case, in which case Dr. Heffernan was appointed *guardian ad litem* for the class of unborn children. He asks leave of this Court to file this *amicus curiae* brief on behalf of his wards.

The other *amici* are physicians, professors and certain Fellows of the American College of Obstetrics and Gynecology who seek to place before this Court the scientific evidence of the humanity of the unborn so that the Court may know and understand that the unborn are developing

1. Written consents have been filed with the clerk of this court.

2. Response of appellees has been filed with the clerk of this court.

human persons who need the protection of law just as do adults.

These *amici* also desire to bring to the Court's attention the medical complications of induced abortion, both in terms of maternal morbidity and mortality (as well as the mortality to the child), and to show that these are questions of considerable debate in medicine.

2. The Legal Position of these *Amici* in these cases. The unborn child is a developing human being who is entitled to the law's protection just as is an adult.

3. Justification for Participation as *Amici*. As previously stated, the issues in these cases, as well as the pending case of *Heffernan* v. *Doe*, No. 70-106, October 1971 term, are of the most profound significance dealing with the most basic and fundamental of human rights: The Right to Life.

In reviewing the Briefs filed in both cases it appears that no attempt was made to advise the Court of the scientific facts of life from conception to birth, or of the medical complications of induced abortion, and it is urged that presentation of this information is a reasonable justification for participation by these *amici*.

CONCLUSION.

For the reasons stated and for additional reasons as contained in and expanded upon in the Brief itself, these *amici* respectfully request this Court to grant this Motion and grant leave for filing this Brief served herewith.

Respectfully submitted,

DENNIS J. HORAN,
JEROME A. FRAZEL, JR.,
THOMAS M. CRISHAM,
DOLORES B. HORAN,
JOHN D. GORBY.

LIST OF AMICI.

Leon L. Adcock, M.D. FACOG
Asst. Prof. Dept. OB Gyn
Univ. Minnesota Medical School

Raymond J. Albrecht, M.D. FACOG
Clin. Asst. Prof. OB Gyn
Univ. Minnesota Medical School

Leo Alexander, M.D.
Asst. Clin. Prof. Psychiatry
Tufts University Medical School—Boston

Paul H. Andreini, M.D.
Consultant in Internal Medicine & Rheumotology—Mayo Clinic

Richard Applebaum, M.D. FAAP
Miami, Florida

Henry G. Armitage, Jr., M.D. FACS
Senior Surgeon
Lawrence General and Bon Secours Hospitals
Lawrence, Massachusetts

James L. Barnard, M.D.
Corpus Christi, Texas

Alex Barno, M.D. FACOG
Chief Field Investigator, Maternal Mortality Comm. of State Health Dept.
Chm. Comm. OB Gyn & Mat. Welfare, Minn. State Med. Assoc.
Clin. Assoc. Prof. OB Gyn
Univ. Minn. Med. Sch.

A. Sidney Barritt, Jr., M.D. FACOG
Gynecology Dept. of Brooklyn Hosp.
Brooklyn, New York

Peter J. Bartzen, M.D. FACOG
Duluth, Minnesota

Frederick C. Battaglia, M.D. FAAP
Dir. Div. of Perinatal Med.
Prof. OB Gyn and Prof. Pediatrics
Univ. Colorado Med. Center, Denver

Woodard Beacham, M.D. FACOG
Co-founder & First Pres. of Amer. College of OB Gyn
Clinical Prof. OB Gyn Tulane Univ. Medical School

Jacob E. Bearman, Ph.D.
Professor Department of Public Health—Biostatistics
Univ. Minnesota Medical School
Member U. S. National Committee on Vital and Health Statistics U. S. Dept. H. E. W.

Christopher Bellone, M.D. FACS
Founder, New Orleans OB Gyn Society

Karl L. Bergener
Roswell, New Mexico 88201

William F. Bernhard, M.D. FACS
Prof. Surgery
Harvard Med. Sch.
Senior Assoc. Cardiovascular Surgery, Children's Hosp. Med. Ctr. Boston

Irving Bernstein, M.D. FACOG
Clinical Professor of Psychiatry and OB Gyn
Univ. Minnesota Medical School

Lester J. Bossert, M.D., FACOG
Clin. Prof. OB Gyn
Univ. Cincinnati College of Med.

John G. Boutselis, M.D., FACOG
Prof. OB Gyn
Ohio State U. Med. Sch.

Watson A. Bowes, Jr., M.D.
Prof. OB Gyn
Univ. of Colorado Med. Center, Denver

Benjy Brooks, M.D. FAAP
Clin. Asst. Prof. Ped. Surgery
Baylor College of Medicine
Assoc. Prof. Ped. Surgery
Univ. Texas Grad. School Biological Science

Richard Bryant, M.D. FACOG
Founding Fellow Amer. College OB Gyn
Clin. Prof. OB Gyn
Univ. of Cincinnati

Ray H. Buzbee, M.D. FACOG FACS
Chief of Staff OB Gyn
Hendricks Hospital, Abilene, Texas

Jesse Caldwell, M.D. FACS
Gastonia, North Carolina

Dennis Cavanaugh, M.D. FACOG
Prof. OB Gyn
Univ. of Tasmania Med. School
Tasmania, Australia

John J. Cochoran, M.D. FACOG
Albuquerque, New Mexico

Evis J. Coda, M.D.
Dir. Kennedy Child Study Center
Santa Monica, Calif.

William E. Cohenour, M.D.
Albuquerque, New Mexico

Jason H. Collins, M.D. FACOG
Prof. & Acting Chairman Dept. OB Gyn
Tulane School of Medicine, New Orleans

Vincent Collins, M.D.
Prof. Anesthesiology
Northwestern U. School of Medicine

William E. Colliton, Jr., M.D. FACOG FACS
Clinical Instructor
Georgetown University School of Medicine

R. Vernon Colpitts, M.D. FACOG
Clin. Instructor OB Gyn, Baylor College of Med.
Clin. Assoc. in OB Gyn, Univ. of Texas—Houston

John P. Connelly, M.D. FAAP
Assoc. Prof. Pediatrics
Harvard Medical School

John G. Cope, M.D.
Albuquerque, New Mexico

Robert A. Cosgrove, M.D. FACOG FACS
Clinical Prof. OB Gyn
New Jersey College of Medicine

Joseph T. Crapanzano, M.D. FACOG
Associate Professor of OB Gyn
Dir. of Med. Education, La. State U. Div.
Louisiana State Univ. School of Medicine
New Orleans, Louisiana

Donald H. Cummings, M.D.
Dept. of Psychiatry
Lovelace-Bataan Medical Center
New Mexico

Ever Louise Curtis, M.D.
New Orleans, Louisiana
Harry R. Dailey, M.D. FACOG
Pittsburgh, Pennsylvania

Jack Davies, M.D.
Professor & Chairman Dept. of Anatomy
Vanderbilt Univ. School of Medicine
Nashville, Tennessee

Van A. Davison, M.D. FACOG FACS
Member Bd. of Governors, Tulane Med. School, New Orleans
Assoc. Prof. OB Gyn, Southwestern Med. School

Daniel Degallier, M.D. FACOG
Winona, Minnesota

James J. Delaney, M.D. FACOG
Asst. Prof. OB Gyn
Univ. Colorado Med. Center, Denver

John P. Delaney, M.D.
Ph.D. Physiology & Surgery
Assoc. Prof. Surgery
Univ. of Minnesota School of Med., Minneapolis

Eugene F. Diamond, M.D. FAAP
Prof. Pediatrics
Stritch School of Medicine
Maywood, Ill.

William J. Dignam, M.D. FACOG
Prof. OB Gyn
UCLA Medical Center
Los Angeles, California

James R. Dillon, M.D. FACOG
Evanston, Illinois

Malcolm B. Dockerty, M.D.
Prof. of Pathology
Mayo Graduate School of Medicine
Univ. of Minnesota
Sr. Consultant Section of Surgical Pathology
Mayo Clinic

Robert Dolehide, M.D.
Chicago, Illinois

Jerome A. Dolan, M.D. FACOG FACS
Assoc. Clin. Prof. OB Gyn
New Jersey Medical College

Edward P. Donatelle, M.D.
Clin. Asst. Prof. in Family Practice
Univ. of Minnesota Med. School, Minneapolis

Michael M. Donovan, M.D. FACS
Cons. in Surgery, Univ. Texas
Chief Surgeon Houston Unit of Shriners Hosp.

John H. Doran, M.D. FACOG
Detroit, Michigan

Ronald V. Dorn, Jr., M.D.
Assoc. Staff & Preceptor Dept. of Internal Medicine, New Mexico
Univ. School of Medicine

Bernard J. Dreiling, M.D.
Asst. Prof. of Med.
Univ. of Miss. Med. Center

J. Englebert Dunphy, M.D.
Chairman, Dept. of Surgery and Prof. of Surgery
Univ. of California Medical Center
San Francisco, California

Isadore Dyer, M.D. FACOG
Clinical Prof. OB Gyn
Tulane Sch. of Med.

Laura E. Edwards, M.D. FACOG
Assoc. Prof. Dept. OB Gyn
Univ. of Minnesota Med. School

Homer Smith Ellsworth, M.D. FACOG
Assistant Clinical Professor OB Gyn
Univ. of Utah

George J. Ellis, Sr., M.D. FACOG
Past Clinical Prof.
Georgetown Univ. School of Medicine

Joseph P. Evans, M.D. Ph.D.
Prof. Neurological Surgery Emeritus
Univ. of Chicago Medical School
Chicago, Illinois

John L. Falls M.D., FACOG
Chm. Public Policy Comm. Minn. State Med. Assoc.
Red Wing, Minn.

John A. Ferris, M.D.
Harlingen, Texas

Howard W. Fisher, M.D.
Clin. Asst. Prof. Depts. Psychiatry and OB Gyn
Univ. of Minnesota Med. School

John Flynn, M.D. FACOG
Med. School
State Univ. of N.Y., Buffalo

Thomas Flynn, M.D. FAAP
Clinical Instructor of Pediatrics
Yale Medical School

William E. Flynn, M.D.
Assoc. Prof. of Psychiatry
Georgetown Univ. School of Med.

Norman J. Foit, M.D. FACOG
Kenmore, New York

Thomas Foley, M.D. FACOG
Manchester, New Hampshire

Stephen A. Foote, Jr., M.D. FACP
Past Pres. (1969) Texas Academy Internal Med.
Assoc. Clin. Prof. of Med., Baylor College of Med.
Former Asst. Prof. Med., Univ. of Texas
Bio-Medical Div., Houston

Archibald F. Forster, M.D. FACOG
Asst. Clinical Prof. OB Gyn
UCLA Medical Center
Los Angeles, California

Francis A. Fote, M.D. FACOG
Lackawanna, New York

Donald J. Frank
Associate Professor of Pediatrics
University of Cincinnati, College of Medicine

Rupert H. Friday, M.D. FACOG
Clin. Asst. Inst. OB Gyn
Univ. Pittsburgh

Harold L. Gainey, M.D. FACOG
Emeritus Clin. Prof. OB Gyn
Univ. of Missouri, Kansas City

Eugene Gedgaudas, M.D.
Prof. and Chairman Dept. of Radiology
Univ. of Minnesota Med. Sch.

Hans E. Geisler, M.D. FACOG
Assist. Prof. OB Gyn
Indiana—Purdue Univ. School of Med., Indianapolis

John M. Gibbons Jr., M.D. FACOG
Assoc. Prof. OB Gyn
Univ. of Conn. Medical School

John Glenn, M.D. FACOG
Dir. Dept. OB Gyn
Provident Hospital
Cincinnati, Ohio

M. Benjamin Glover, M.D.
Dept. of Neurosurgery
Lovelace-Bataan Medical Center
New Mexico

Frederick C. Goetz, M.D.
Prof. of Medicine
Univ. of Minn. Med. Sch.

Severin T. Golojuch, M.D., FACOG
Pres. Middlesex County Med. Soc.
New Brunswick, New Jersey

William E. Goodwin, M.D.
Assoc. Clinical Prof. of Medicine
Univ. of Southern California Medical School
Los Angeles, California

Hymie Gordon, M.D.
Chief of Genetics Consulting Clinic
Mayo Clinic

John L. Grady, M.D.
Chm. Dept. OB Gyn Glades Gen. Hosp.
Belle Glade, Florida

William Graf, M.D. FACOG
Asst. Prof. OB Gyn
Univ. of Cincinnati

Robert E. Gross, M.D. FACS
Prof. Pediatric Surgery
Harvard Med. Sch.

Labib M. Habashy, M.D.
M.S., OB Gyn
Dickenson, Texas

Joseph I. Hamel, M.D. FACOG
Clinical Instructor OB Gyn
Univ. of Minnesota Med. School, Minneapolis

T. R. Hannon, M.D.
Assoc. Prof. OB Gyn, Baylor Med. School
Houston, Texas

D. G. Harrel, M.D. FACS FACOG
Clin. Prof. OB Gyn
Univ. of Texas Southwestern Med. Sch.
Dallas, Texas

Marjorie Hartig, M.D. FACOG
Dir. Family Planning Clinic
Member, Amer. Assoc. Planned Parenthood Physicians
St. Paul, Minnesota

Robert C. Hartmann, M.D. FACP
Prof. Med. Vanderbilt Univ.

Grant E. Hartnagel, M.D. FACOG FACS
Minneapolis, Minnesota

Barbara Hastings, M.D.
Research Fellow Dept. of Neurology
Univ. Minnesota Hospitals

Robert L. Hatton, M.D. FACOG
Pahokee, Florida

Allan L. Haynes, M.D
Clovis, New Mexico

Bart Heffernan M.D.
Asst. Clinical Prof. Med.
Stritch School of Medicine
Maywood, Ill.

Andre Hellegers, M.D. FACOG
Prof. OB Gyn
Georgetown Univ. School of Medicine

H. C. Henderson, Jr., M.D. FACS FACOG
Assoc. Clin. Prof. OB Gyn
University of Texas Southwestern Med. Sch.
Dallas, Texas

Leo T. Heywood, M.D. FACOG
Founding Fellow—Amer. College OB Gyn
Prof. OB Gyn
Creighton Med. Sch.

John F. Hillabrand, M.D. FACOG
Pres. Nat. Comm. Human Life & Repro.
Toledo, Ohio

Thomas Hilgers, M.D.
Resident OB Gyn Mayo Clinic

Milton Hoffman, M.D., FACOG
Clinical Associate Prof.
Tulane School of Medicine

William J. Hossley, M.D.
Deming, New Mex.

Richard V. Jaynes, M.D. FACOG
Garden City, Michigan

Mildred F. Jefferson, M.D.
Clin. Instr. Surgery
Boston University School of Medicine

Emmit M. Jennings, M.D.
Roswell, New Mex.

Marilyn Johnson, M.D. FACOG
Clin. Instructor OB Gyn
Baylor College of Med., Houston
Clin. Instructor OB Gyn Texas Post-Grad.
School of Med., Houston

Hugh F. Kabat, Ph.D.
Prof. and Chairman Dept. of Clin. Pharmacy
College of Pharmacy
Univ. of Minnesota

James E. Kelly, M.D. FACOG
Van Nuys, California

Robert F. Kelly, M.D. FACOG
Los Angeles, California

Robert T. Kelly, M.D.
Clin. Asst. Prof. Dept. of Family Practice
and Community Health
Univ. of Minnesota Med. School

Joseph Kiefer, M.D.
Prof. of Urology
Univ. of Ill. School of Medicine

Edward Kilroy, M.D.
Clin. Inst. Thoracic Surgery
Case Western Reserve School Med.
Cleveland, Ohio

Daniel Kozera, M.D. FACOG
Buffalo, New York

Charles Kramer, M.D. FACOG
Pres. Ill. OB Gyn Soc.

Gerard F. Lanchantin, Ph.D.
Prof. Biochemistry, Univ. of Southern Cal.
Sch. Med., Los Angeles

William Leen, M.D. FACOG
Dir. OB Gyn
St. Vincent's Medical Center
Staten Island, New York

George Leicht, M.D. FACOG
Director of Department OB Gyn
Fairview General Hospital
Cleveland, Ohio

Albert W. Liley, M.D.
Research Prof. in Perinatal Physiology
Post. Grad. School of Obstetrics & Gynaecology
National Women's Hosp.
Auckland, New Zealand

George Loehfelm, M.D.
Methodist Hospital
Brooklyn, New York

Francis Long, M.D.
Wyoming

Robert J. Lowden, M.D. FACOG
Assoc. Clin. Prof. U. of Washington Med. School
Seattle

Robert J. Luby, M.D.
Prof. and Assoc. Dir. Dept. OB Gyn
Asst. Dean of Medical School
Creighton Univ.

Joseph Lucci, Jr., M.D. FACOG
Clin. Assoc. Prof. OB Gyn
Univ. of Texas School of Bio-Medical Science, Houston and Univ. of Texas Med. Branch, Galveston

John H. McArdle, M.D. FACOG
Tonawanda, New York

Charles McCarthy, M.D. FACOG
Clin. Inst. OB Gyn
Univ. Minnesota Med. School and St. Paul Ramsey Hospital

John J. McCarthy, M.D. FACOG
Pittsburgh, Pennsylvania
Lawrence F. McCarty, M.D.
Laramie, Wyoming

Thomas E. McCarthy, M.D.
Vice-Pres., Magee Women's Hosp.
Pittsburgh, Pennsylvania

James McCutchon, M.D.
Corpus Christi, Texas

Robert McDonald, M.D.
Chm. Med. Div. March of Dimes
Chm. Sch. & Child. Comm.
Alleghany Cty. Med. Soc.
Pittsburgh, Pennsylvania

Richard N. McGarvey, M.D. FACOG
Pres. Pittsburgh OB Gyn Soc.
John L. McKelvey, M.D.
Prof. & Chairman Emeritus Dept. OB Gyn
Univ. of Minnesota Med. School

James V. McNulty, M.D. FACOG
Assoc. Clinical Prof. OB Gyn
U. S. C. School of Medicine

Edgar L. Makowski, M.D. FACOG
Prof. OB Gyn
U. Colorado Med. Center, Denver

John R. Marchese, M.D. FACOG
Boone, North Carolina

Richard A. Marshall, M.D.
Prof. Med. Okla. Univ. Sch. Med.

B. L. Martin, M.D. FACOG
Kingsville, Texas

Charles C. Mary, Jr., M.D.
Clinical Assoc. Prof. La. State and Tulane Universities
Schools of Medicine

Maurice Moss, M.D. FACOG
Clin. Inst. OB Gyn
Case Western Reserve Univ. School Med.
Cleveland, Ohio

Fred Mecklenburg, M.D. FACOG
Clinical Instructor, OB Gyn
Univ. of Minnesota Med. Sch.
Dir. Family Planning Programs, U. Minn.,
Member Amer. Assoc. Planned
Parenthood Physicians
Chr. Dept. OB Gyn, St. Louis Park Med. Ctr.,
Consultant in Family Planning Programs, OEO

Peter Meister, M.D. FACOG
Dunkirk, New York

Maurice J. Meynier, Jr., M.D. FACOG
Clin. Assoc. Prof. OB Gyn
Baylor College of Medicine, Houston
and Univ. of Texas Post-Grad. School, Houston
Past. Pres. Texas Assn. OB Gyn

Abe Mickal, M.D. FACOG FACS
Professor and Head Dept. OB Gyn
La. State University School of Medicine

John F. Miller, M.D. FAAP
Clin. Assoc. Prof. Dept. of Ped.
The Medical College of Ohio, Toledo

S. D. Mills, M.D.
Assoc. Prof. of Clinical Pediatrics
Mayo Graduate School of Medicine
Univ. of Minnesota
Sr. Consultant Pediatrics Mayo Clinic

William C. Moloney, M.D. FACP
Prof. of Medicine
Harvard Medical School

James P. Molloy, Jr., M.D.
Chief of Staff, Psychiatric Serv.
Bellaire General Hosp., Bellaire, Texas
Clin. Instructor, Baylor College of Med., Houston

James A. Moriarity, M.D.
Asst. Prof. of Neurology
Univ. of Minnesota Med. School, Minneapolis

Francis S. Morrison, M.D. FACP
Assoc. Prof. of Medicine
Chief, Div. of Hematology
Univ. of Miss. Medical Center
Jackson, Miss.

James G. Mulé, M.D. FACOG
Prof. OB Gyn Louisiana State
Univ. School of Medicine

Paul F. Muller, M.D.
Asst. Prof. OB Gyn
Indiana-Purdue Univ. School of Med., Indianapolis

A. J. Murrieta, Jr., M.D. FACOG
Los Angeles, California

G. C. Nabors, M.D. FACOG
Asst. Clin. Prof. OB Gyn
Univ. of Texas Southwestern Med. Sch.
Dallas, Texas

John Neufeld, M.D. FACOG
Dept. OB Gyn
Lovelace-Bataan Medical Center
Albuquerque, New Mex.

David Nichols, M.D. FACOG
Med. School
State Univ. of N. Y., Buffalo

Samuel A. Nigro, M.D.
Senior Instr. Child Psychiatry
Case Western Reserve Univ. Sch. Med. &
U. Hospitals

Fred Nobrega, M.D. FACP MPH
Dept. of Medical Statistics
Epidiemology and Population Genetics
Mayo Clinic

Robert K. Nixon, M.D.
Asst. Prof. of Med.
Univ. Mich. Med. Sch.

Franklin T. O'Connell, Jr., M.D. FACOG
Evanston, Illinois

William T. O'Connell, M.D. FACOG
Brighton, Mass.

Joseph O'Connor, M.D. FACOG
Clin. Instr. OB Gyn
Stritch School of Medicine
Maywood, Ill.

Henry J. Osekowski, M.D.
Clin. Asst. Prof. Psychiatry
Univ. Minnesota Med. School, Minneapolis

J. Cuthbert Owens, M.D. FACS
Prof. of Surgery
Univ. of Colorado Med. Center, Denver

Richard R. Parlour, M.D.
Assoc. Clin. Prof. of Psychiatry
Loma Linda Univ. Sch. Med.
Montclair, Calif.

Lucien Pascucci, M.D.
Pres. Okla. State Med. Soc.

Edward Perry, M.D. FACOG
Manchester, New Hampshire

Bernard Pisani, M.D. FACOG
New York

Matt K. Plasha, M.D.
Past Pres. Minnesota Academy of Gen. Prac.

Frank M. Posey, Sr., M.D. FACOG FACS
Clin. Prof. OB Gyn
Univ. of Texas Med. School, San Antonio

Konald A. Prem, M.D. FACOG
Prof. OB Gyn
University of Minnesota Medical School
Associate Editor Modern Medicine

James T. Priestley, M.D.
Emeritus Prof. of Surgery
Mayo Graduate School of Medicine
Univ. of Minnesota
Chairman of Board of Governors
1957-1963 Mayo Clinic

Venustiano Pulido, M.D.
Instr. Pediatrics
U. S. C. Medical School
Sherman Oaks, California

Herbert Ratner, M.D.
Public Health Dir., Oak Park, Ill.
Assoc. Clin. Prof. Family & Community Med.
Stritch Sch. of Med.
Maywood, Ill.

William Standish Reed, M.D. FACS
Tampa, Florida

R. J. Reitemeier, M.D.
Prof. of Internal Medicine
Mayo Graduate School of Medicine
Univ. of Minnesota
Chairman Dept. Internal Medicine
Mayo Clinic

Joseph J. Ricotta, M.D. FACOG
Med. School
State Univ. of N. Y., Buffalo

Jules Rivkind, M.D. FACOG
Chm. OB Gyn
Mercy Hosp. Pittsburgh

Jonas Robitscher, J.D., M.D.
Asst. Prof. Clin. Psychiatry
Univ. of Pennsylvania Sch. Med.

Barbara A. P. Rockett, M.D.
Student Health Services
Emanuel College
Boston, Massachusetts

Richard R. Romanowski, M.D. FACOG
Med. School
State Univ. of N. Y., Buffalo

William W. Rueve, M.D. FACOG
Assoc. Prof. Dept. OB Gyn
Creighton Univ. Med. School, Omaha

Ben Allen Rutledge, M.D.
Assistant Prof. Orthopedic Surgery
Emery Univ. Medical School

Joseph P. Salerno, M.D. FACOG
Assoc. Prof. OB Gyn
Baylor College of Med., Houston

Carl Sarnacki, M.D. FACOG
Warren, Michigan

Lester R. Sauvage, Jr., M.D. FACS
Dir. Cardio-Vascular Research Center, Seattle
Chief Children's Surgery, Children's Orthopedic Hosp., Seattle
Assoc. Clin. Prof. Univ. Washington for Cardio-Vascular & Ped. Surgery

Richard T. F. Schmidt, M.D. FACOG
Assoc. Clin. Prof. OB Gyn
Univ. of Cincinnati College of Med.

Leonard M. Schuman, M.D.
Prof. and Chairman Div. of Epidemiology
School of Public Health
Univ. of Minnesota

Adolph Sellman, M.D. FACOG
Assoc. Prof. OB Gyn
Louisiana State Univ. Medical School

Mildred Shelley, M.D.
Psychiatrist
Cleveland Heights, Ohio

Philip Sheridan, M.D. FACS
Clinical Assoc. Surgery
Univ. Ill. Medical School

Bernard Sicuranza, M.D., FACOG
Asst. Dir. Gynecology
St. Mary's Hospital
Brooklyn, New York

Eugene J. Slowinski, M.D. FACOG
Prof. OB Gyn
New Jersey College of Medicine
Newark, New Jersey

James Smiggen, M.D. FACOG
Southfield, Michigan

Robert Spencer, M.D.
Assoc. Prof. of Proctology
Mayo Graduate School of Medicine
Univ. of Minn.

Richard H. Stanton, M.D. FACS
Clin. Prof. Surgery
Tufts Medical School

Joseph R. Stanton, M.D. FACP
Assoc. Clin. Prof. of Medicine
Tufts Medical School

Bruce W. Steinhauer, M.D.
Asst. Prof. Medicine
University of Michigan

R. A. Stevenson, M.D.
Victoria, Texas

Allen T. Stewart, M.D. FACOG
Lubbock, Texas

John F. Sullivan, M.D.
Neurologist-in-Chief
New England Medical Center
Prof. of Neurology
Tufts University School of Medicine
Boston, Massachusetts

Bernard J. Sullivan, M.D.
Laramie, Wyoming

Charles L. Sullivan, M.D. FACS FACOG
Boston, Massachusetts

Matthew Talty, M.D. FACOG
Clin. Assoc. Prof. OB Gyn
Baylor College of Medicine, Houston

James Tate Thigpen, M.D.
Univ. of Miss. Med. Center
Jackson, Miss.

Leslie Tisdall, M.D. FACOG
Dir. of Gynecology
St. Mary's Hospital
Brooklyn, New York

Robert G. Tompkins, M.D. FACP
Tulsa, Okla.

Bane Travis, M.D. FACOG
Cheyenne, Wyo.

Jack L. Turner, M.D. FACOG FACS
Asst. Clin. Prof. OB Gyn, Univ. of Texas
Southwestern Med. School, Dallas

Gloria Marie Volini, M.D.
Wilmette, Ill.

Alphonse R. Vonderahe, M.D.
Prof. Neuro-Anatomy
Univ. of Cincinnati, College of Med.

Henry P. Wager, M.D. FACOG FACS
Clin. Assoc. Prof. OB Gyn
New Jersey Med. School
Med. Dir.—Margaret Hague Maternity Hosp.
Jersey City, N. J.

John W. Walker, M.D. FACOG FACS
Decatur, Georgia

John Ward, M.D.
Chief Pathologist, Mercy Hosp.
Pittsburgh, Pennsylvania

Joseph Watts, M.D. FACOG
Southfield, Michigan

Joseph P. Williams, M.D.
Neurosurgical Resident
Emery Univ.

John C. Willke, M.D. ABFP
Author, Handbook on Abortion
Cincinnati, Ohio

Leonard G. Wilson, Ph.D.
Prof. of History of Med.
Univ. Minn.

Robert B. Wilson, M.D. FACOG
Prof. Clinical OB Gyn
Mayo Graduate School
Univ. of Minnesota
Head Section OB Gyn 1960-69 at Mayo

Charles J. Woeppel, M.D. FACOG
Med. School
State Univ. of N. Y., Buffalo

Charles E. Wood, M.D. FACOG
Casper, Wyo.

Doris Wright, M.D.
Asst. Prof. Community & Family Health Med.
Matthew Walker Health Center
Nashville, Tennessee

Karl Ziesmann, M.D. FACOG
Clin. Instr. OB Gyn
Univ. of Cincinnati
Natl. Pres. American Assoc. of Maternal and Child Health
Edward A. Zimmermann, M.D.
Prof. OB Gyn
Univ. of New Mex. School of Medicine

TABLE OF CONTENTS.

PAGE

Argument

I. The Humanity of the Unborn Offspring of Human Parents Has Been the Critical Issue in Lower Federal Court Abortion Cases 2

II. The Unborn Offspring of Human Parents Is an Autonomous Human Being 6

A. The Unborn Person Is Also a Patient 8

B. The Doctor Treats the Unborn Just as He Does Any Patient 26

III. Medical Hazards of Legally Induced Abortion .. 32

A. Professional Organizations Speak on Medical Hazards 33

B. New York City Abortion Data Unreliable .. 35

C. Eastern European Abortion Mortality Rates Complex and Often Incomplete 37

D. Child Mortality 46

E. Other Complications 47

F. Early Physical Complications 47

G. The Late Physical Complications of Legally Induced Abortion 51

1. Premature Labor and Delivery 52

2. Ectopic Pregnancies 53

3. Complications with Subsequent Pregnancies (Pathologic Sequelae) 53

4. Sterility 54

5. Transplacental Hemorrhage 54

6. Other Late Physical Complications 55

H. Psychiatric Sequelae 55

I. Conclusion 58

IV. The Unborn Offspring of Human Parents Is a Person Within the Meaning of the 5th and 14th Amendments of the U. S. Constitution 58

A. The Standard for Decision 58

B. The Court Must Apply This Same Standard to Itself 60

C. Application of the Standard for Decision to the Case at Bar—the Rules of Constitution Applied 61

Medical Bibliography 65

CASES.

Babbitz v. McCann, 310 F. Supp. 293 30

Barrows v. Jackson, 346 U. S. 249, 97 L. Ed. 1586, 93 S. Ct. 1031 (1953) 61

Corkey v. Edwards, 322 F. Supp. 1248 (N. D. North Carolina 1971) 4

Deal v. Sexton, 144 N. C. 110, 56 S. E. 691 (1907) 63

Doe v. Bolton, 319 F. Supp. 1048 (N. D. Ga. 1970) 3

Griswold v. Connecticut, 381 U. S. 479, 85 S. Ct. 1628 (1965) 59

Harper v. Virginia State Board of Elections, 383 U. S. 663, 86 S. Ct. 1079 (1966) 59

Loving v. Commonwealth of Virginia, 388 U. S. 1, 87 S. Ct. 1817 (1967) 59

McLaughlin v. Florida, 379 U. S. 184, 85 S. Ct. 282 (1964) 59

Poe v. Ullman, 367 U. S. 497, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (J. Harlan dissenting) 5

Prince v. Massachusetts, 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645 5

Railway Express Agency v. New York, 336 U. S. 106, 93 L. Ed. 533, 69 S. Ct. 463 (1949) 59, 60

Raleigh Fitkin-Paul Memorial Hospital v. Anderson, 42 N. J. 421, 201 A. 2d 537 cert. denied 377 U. S. 985 (1964) 61

Reynolds v. Sims, 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) 59

Roe v. Wade, 314 F. Supp. 1217 (1970) (N. D. Tex. 1970) 2

Rosen v. Louisiana State Board of Medical Examiners, 318 F. Supp. 1217 (E. D. Louisiana 1970) (J. Cassibry dissenting) 4

Shapiro v. Thompson, 394 U. S. 618, 89 S. Ct. 1322 (1969) (J. Harlan dissenting) 59

Shelley v. Kraemer, 334 U. S. 1, 92 L. Ed. 161, 68 S. Ct. 836 (1948) 61

Shelton v. Tucker, 364 U. S. 479, 485, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960) 5

Skinner v. Oklahoma, 316 U. S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942) 59

Steinberg v. Brown, 321 F. Supp. 741 (N. D. Ohio 1970) (J. Green dissenting) 3

Tomlin v. Laws, 301 Ill. 616, 134 N. E. 24 (1922) 63

Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667 61

BOOKS AND ARTICLES.

Cohen, M. R., The Process of Judicial Legislation, in Law and the Social Order (1933); also collected in Cohen, Readings in Jurisprudence and Legal Philosophy 60

Fuller, The Morality of Law, Yale University Press, p. 81H 60

Grey, The Nature and Sources of the Law (2 ed. 1921) pp. 172-173 60

Lucas, Federal Constitutional Limitations of the Enforcement and Administration of State Abortion Statutes, 46 N. C. L. Rev. 730, 744 (1968) 5

Pound, An Introduction to the Philosophy of Law, Yale University Press, p. 53 60

Suffolk University Law Review, 3 S. L. R. 225, Abortion, the Law and Defective Children: A Legal-Medical Study (Vol. III, Spring 1969, pp. 225-276). 62

Tussman & Tenbrock, 37 Calif. L. Rev. 341 (1949), Selected Essays on Constitutional Law, 789 (1969).. 59

FOR MEDICAL ARTICLES SEE MEDICAL BIBLIOGRAPHY.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 70-18

JANE ROE, ET AL.,

Appellants,

vs.

HENRY WADE,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 70-40

MARY DOE, ET AL.,

Appellants,

vs.

ARTHUR K. BOLTON, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF AMICUS CURIAE OF CERTAIN PHYSICIANS, PROFESSORS AND FELLOWS OF THE AMERICAN COLLEGE OF OBSTETRICS AND GYNECOLOGY IN SUPPORT OF APPELLEES.

I.

THE HUMANITY OF THE UNBORN OFFSPRING OF HUMAN PARENTS HAS BEEN THE CRITICAL ISSUE IN LOWER FEDERAL COURT ABORTION CASES.

The immediate and intended consequence of an induced abortion is the destruction of life of the unborn. It is in the light of this reality that this Court must consider and decide the profound and far-reaching issues in these abortion cases.

The *amici* are concerned physicians, many of whom are fellows of the American College of Obstetrics and Gynecology (FACOG), who *urge* this Court to consider the current medical and scientific evidence of the humanity of the unborn which is contained in this Brief.

The *amici* also urge this Court to give careful consideration to the section of this Brief concerning the medical complications of legally induced abortions. Any consideration of the "safety" of legally induced abortions must consider the full range of medical complications including early and late physical and psychological complications, as well as maternal and *child* mortality.

The Courts below reached their conclusions without considering whether the victim, i.e. the unborn, of the abortion has constitutionally protected rights. In *Roe* v. *Wade*,[1] the U. S. District Court for the Northern District of Texas, without once mentioning, discussing or considering whether the unborn is a "person" under the Fifth and Fourteenth Amendments, or otherwise has legally protected interests involved, concluded that the "Texas Abortion Laws must be declared unconstitutional because they deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children."

1. *Roe* v. *Wade*, 314 F. Supp. 1217 (1970) at 1221 (N. D. Tex. 1970).

In *Doe* v. *Bolton*,[2] the U. S. District Court for the Northern District of Georgia touched, but only in passing, upon the primary issue in this litigation, i.e. the legal "personality" of the unborn for constitutional purposes. At one point in the opinion, the Court wrote that it did not ". . . (posit) the existence of a new being with its own identity and federal constitutional rights, . . ."[3] Elsewhere in the opinion the Court, in denying a reconsideration of the Court's previous order revoking another's appointment as *guardian ad litem* for the unborn person, wrote that ". . . the Court does not postulate the existence of a new being with federal constitutional rights at any time during gestation".

The *Bolton* Court was thus able to conclude that, while procedures for obtaining an abortion may be controlled, the "reasons for which an abortion may be obtained" may not be regulated "because such action unduly restricts a decision sheltered by the constitutional right to privacy".[4]

The *Bolton* Court did point out that once conception has occurred and the embryo has formed, ". . . the decision to abort its development cannot be considered a purely private one affecting only husband and wife, man and woman".[5]

Other three-judge federal courts presented with the same clash of "rights" between mother and the unborn have not ignored the developments of many areas of the law which have found legal rights in the unborn. For example, in *Steinberg* v. *Brown*[6] the majority gave careful consideration to both the rights of the woman and the unborn, and concluded that ". . . the state has a legitimate interest to

2. *Doe* v. *Bolton*, 319 F. Supp. 1048 (N. D. Ga. 1970).
3. *Ibid.* p. 1055.
4. *Ibid.* p. 1076.
5. *Ibid.* p. 1055.
6. 321 F. Supp. 741 (N. D. Ohio 1970) (J. Green dissenting).

legislate for the purpose of affording an embryonic or fetal organism an opportunity to survive."[7] This Court concluded that the state did have that right ". . . and on balance it is superior to the claimed right of a pregnant woman or anyone else to destroy the fetus except when necessary to preserve her own life."[8]

In *Rosen* v. *Louisiana State Board of Medical Examiners*[9] the Court recognized that it was not dealing merely with the question whether a woman has a generalized right to choose whether to bear children ". . . but instead with the more complicated question whether a pregnant woman has the right to cause the abortion of the embryo or fetus she carries in her womb."[10] Without deciding whether the unborn per se is a person protected by the constitution since that was not the issue that Court faced, the *Rosen* Court concluded that the state of Louisiana had intended to and could legitimately protect fetal life against destruction.[11]

In *Corkey* v. *Edwards*[12] the Court concluded also that the issue involved ultimately a consideration of more than just the issue of whether a woman has a right not to bear children:

> "The basic distinction between a decision whether to bear children which is made before conception and one which is made after conception is that the first contemplates the creation of a new human organism, but the latter contemplates the destruction of such an organism already created."[13]

---

7. *Ibid.* p. 746.

8. *Ibid.* p. 746.

9. 318 F. Supp. 1217 (E. D. Louisiana 1970) (J. Cassibry dissenting).

10. *Ibid.* p. 1223.

11. *Ibid.* p. 1225.

12. *Corkey* v. *Edwards*, 322 F. Supp. 1248 (N. D. North Carolina 1971).

13. *Ibid.* p. 1252.

Finding protection of fetal life an adequate state interest in invading the woman's claimed right of privacy, the *Corkey* Court concluded:

> "To determine the state interest we shall not attempt to choose between extreme positions. Whether possessing a soul from the moment of conception or mere protoplasm, the fertilized egg is, we think, 'unique as a physical entity', Lucas, Federal Constitutional Limitations of the Enforcement and Administration of State Abortion Statutes, 46 N. C. L. Rev. 730, 744 (1968), with the potential to become a person. Whatever that entity is, the state has chosen to protect its very existence. The state's power to protect children is a well established constitutional maxim. See, *Shelton* v. *Tucker*, 364 U. S. 479, 485, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960); *Prince* v. *Massachusetts*, 321 U. S. 158, at 166-168, 64 S. Ct. 438, 88 L. Ed. 645. That this power should be used to protect a fertilized egg or embryo or fetus during the period of gestation embodies no logical infirmity, but would seemingly fall within the 'plenary power of government'. *Poe* v. *Ullman*, 367 U. S. 497, at 539, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (Harlan, J., dissenting). That there is a state interest has until recently been taken for granted. History sides with the state." [14]

Even this brief review of five federal decisions involving the constitutionality of state abortion laws makes it clear that whether or not the Court considers the developing humanity of the unborn is critical in its resolution of the issues.[15]

The *amici* therefore ask this Court to consider the material in this Brief concerning the modern medical discoveries of the development of the unborn.

---

14. *Ibid.* p. 1253.

15. Even the *Bolton* Court preserved the Georgia statute after alluding in its decision to the creation of a new life after conception, thus making any decision involving abortion one affecting the state since it involved developing human life.

An expansion of the right to privacy to include the right of a woman to have an abortion without considering the interests of the unborn person decides this question against the unborn. The necessary consequence of that expansion would be a direct and unavoidable conflict between the unborn person's right to life and the woman's extended right of privacy. Assuming such a conflict, it is the position of the *amici* that the more fundamental and established of the conflicting rights must prevail where they clash. The right to life is most certainly the most fundamental and established of the rights involved in the cases facing the Court today.

II.

THE UNBORN OFFSPRING OF HUMAN PARENTS IS AN AUTONOMOUS HUMAN BEING.*

Even before implantation in the wall of the uterus the unborn child is responsible for the maintenance of the pregnant state in the maternal metabolism (1). The child whose tissue is antigenically different from the mother sets up protective mechanisms to prevent maternal immunologic responses from causing fetal distress (2). The newly formed child has a remarkable degree of metabolic autonomy (3). For example, the fetal endocrine system functions autonomously (4).

The recent recognition of this autonomy has led to the development of new medical specialties concerning the unborn child from the earliest stages of the pregnancy (56).

Modern obstetrics has discarded as unscientific the concept that the child in the womb is but tissue of the mother. As Dr. H. M. I. Liley, the New Zealand pediatrician, and

*In this section the citations are according to medical journal practices. The numbers in the parenthesis refer to the correspondingly numbered work in the medical bibliography.

research assistant to her famous husband, Dr. Albert Liley who perfected the intrauterine transfusion, has said:

> "Another medical fallacy that modern obstetrics discards is the idea that the pregnant woman can be treated as a patient alone. No problem in fetal health or disease can any longer be considered in isolation. At the very least two people are involved, the mother and her child." (5 at p. 207.)

The courts have also abandoned that concept (7):

> "We ought to be safe in this respect in saying that legal separability should begin where there is biological separability. We know something more of the actual process of conception and foetal development now than when some of the common law cases were decided; and what we know makes it possible to demonstrate clearly that separability begins at conception.
>
> The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe the conditions under which life will not continue."

Yet the attack on the statutes below assume this discredited scientific concept and argues that abortions should be considered no differently than any medical measure taken to protect maternal health (see Texas appellant's brief, pp. 94-98), thus completely ignoring the developing human being in the mother's womb.

It is our task in the next subsections to show how clearly and conclusively modern science—embryology, fetology, genetics, perinatology, all of biology—establishes the humanity of the unborn child. We submit that the data not only shows the constitutionality of the legislature's effort to save the unborn from indiscriminate extermination, *but*

in fact suggests a duty to do so. We submit also that no physician who understands this will argue that the law is vague, uncertain or overbroad for he will understand that the law calls upon him to exercise his art for the benefit of his *two* patients: mother *and* child.

A. The Unborn Person Is Also a Patient.

From conception the child is a complex, dynamic, rapidly growing organism. By a natural and continuous process the single fertilized ovum will, over approximately nine months, develop into the trillions of cells of the newborn. The natural end of the sperm and ovum is death unless fertilization occurs. At fertilization a new and unique being is created which, although receiving one-half of its chromosomes from each parent, is really unlike either (8) (6) (9) (10 at p. 18).

About seven to nine days after conception, when there are already several hundred cells of the new individual formed, contact with the uterus is made and implantation begins. Blood cells begin at 17 days and a heart as early as 18 days. This embryonic heart which begins as a simple tube starts irregular pulsations at 24 days, which, in about one week, smooth into a rhythmic contraction and expansion (8) (9) (10) (6).

Straus, et al. have shown that the ECG on a 23 mm embryo (7.5 weeks) presents the existence of a functionally complete cardiac system and the possible existence of a Myoneural or humoral regulatory mechanism. All the classic elements of the adult ECG were seen (11). Marcel and Exchaquet observed occasional contractions of the heart in a 6 mm (2 week) embryo. They also obtained tracings exhibiting the classical elements of the ECG tracing of an adult in a 15 mm embryo (5 weeks) (12).

One commentator has indicated that about 4 days post-conception under a special microscope the prospective sex can already be determined (10 at p. 23).

Commencing at 18 days the developmental emphasis is on the nervous system even though other vital organs, such as the heart, are commencing development at the same time. Such early development is necessary since the nervous system integrates the action of all other systems. By the end of the 20th day the foundation of the child's brain, spinal cord and entire nervous system will have been established. By the 6th week after conception this system will have developed so well that it is controlling movements of the baby's muscles, even though the woman may not be aware that she is pregnant. By the 33rd day the cerebral cortex, that part of the central nervous system that governs motor activity as well as intellect may be seen (8) (13) (10).

The baby's eyes begin to form at 19 days. By the end of the first month the foundation of the brain, spinal cord, nerves and sense organs is completely formed. By 28 days the embryo has the building blocks for 40 pairs of muscles situated from the base of its skull to the lower end of its spinal column. By the end of the first month the child has completed the period of relatively greatest size increase and the greatest physical change of a lifetime. He or she is ten thousand times larger than the fertilized egg and will increase its weight six billion times by birth, having in only the first month gone from the one cell state to millions of cells (8) (9) (10) (6) (13). [See Fig. 1.]

Shettles and Rugh describe this first month of development as follows:

> "This, then, is the great planning period, when out of apparently nothing comes evidence of a well integrated individual, who will form along certain well-tried patterns, but who will, in the end, be distinguishable from

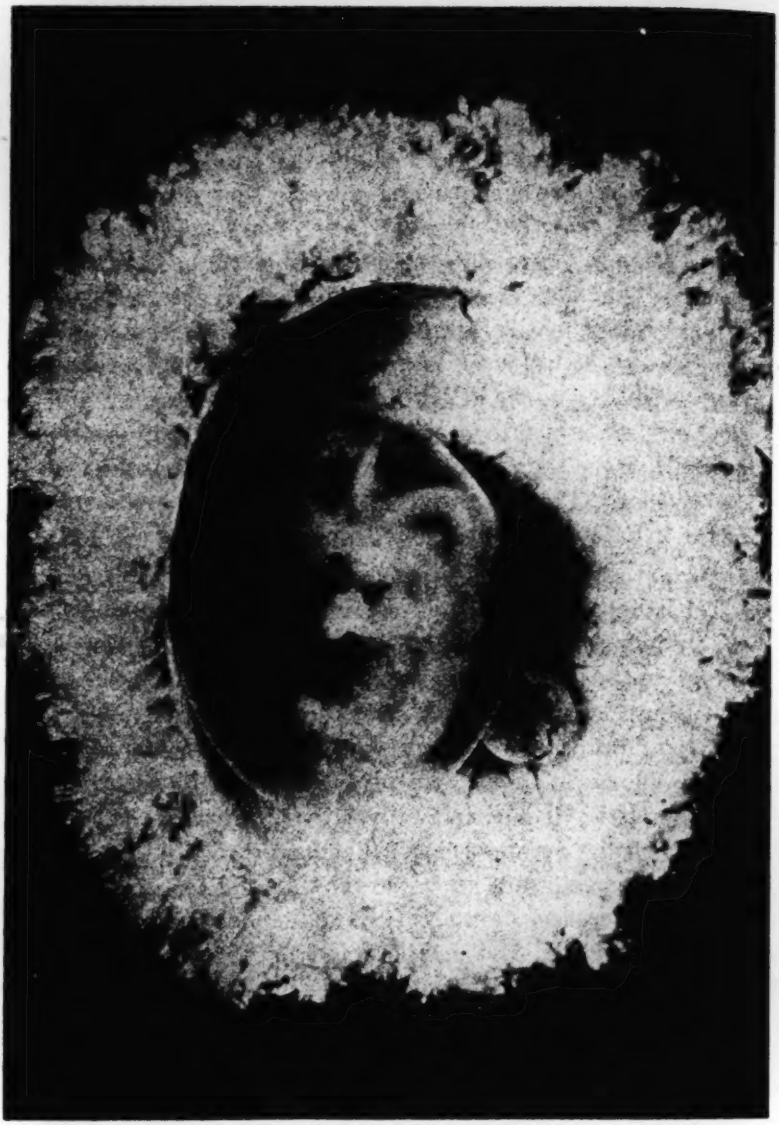


Fig. 1—40 days.

every other human being by virtue of ultra microscopic chromosomal differences." (10 at p. 35.)

By the beginning of the second month the unborn child, small as it is, looks distinctly human. (See Fig. 1.) Yet, by this time the child's mother is not even aware that she is pregnant (6).

As Shettles and Rugh state:

> "And as for the question, 'when does the embryo become human?' the answer is that it *always* had human potential, and *no other*, from the instant the sperm and the egg came together because of its chromosomes." (Emphasis in original.) (10 at p. 40.)

At the end of the first month the child is about ¼ of an inch in length. At 30 days the primary brain is present and the eyes, ears and nasal organs have started to form. Although the heart is still incomplete, it is beating regularly and pumping blood cells through a closed vascular system (8). The child and mother do not exchange blood, the child having from a very early point in its development its own and complete vascular system (8) (9) (10) (12) (13).

Earliest reflexes begin as early as the 42nd day. The male penis begins to form. The child is almost ½ inch long and cartilage has begun to develop (8) (9). [See Fig. 2.]

Even at 5½ weeks the fetal heartbeat is essentially similar to that of an adult in general configuration (12) (13). The energy output is about 20% that of the adult, but the fetal heart is functionally complete and normal by 7 weeks (12) (13). Shettles and Rugh describe the child at this point of its development as a 1-inch miniature doll with a large head, but gracefully formed arms and legs and an unmistakably human face (10 at p. 54). [See Fig. 2]

By the end of the seventh week we see a well proportioned small scale baby. In its seventh week, it bears the

Fig. 2—6 weeks.

familiar external features and all the internal organs of the adult, even though it is less than an inch long and weighs only 1/30th of an ounce. The body has become nicely rounded, padded with muscles and covered by a thin skin. The arms are only as long as printed exclamation marks, and have hands with fingers and thumbs. The slower growing legs have recognizable knees, ankles and toes (8) (9) (10) (6). [See Figs. 3 and 4]

The new body not only exists, it also functions. The brain in configuration is already like the adult brain and sends out impulses that coordinate the function of the other organs. The brain waves have been noted at 43 days [14]. The heart beats sturdily. The stomach produces digestive juices. The liver manufactures blood cells and the kidneys begin to function by extracting uric acid from the child's blood (13) (49). The muscles of the arms and body can already be set in motion (15).

After the eighth week no further primordia will form; *everything* is already present that will be found in the full

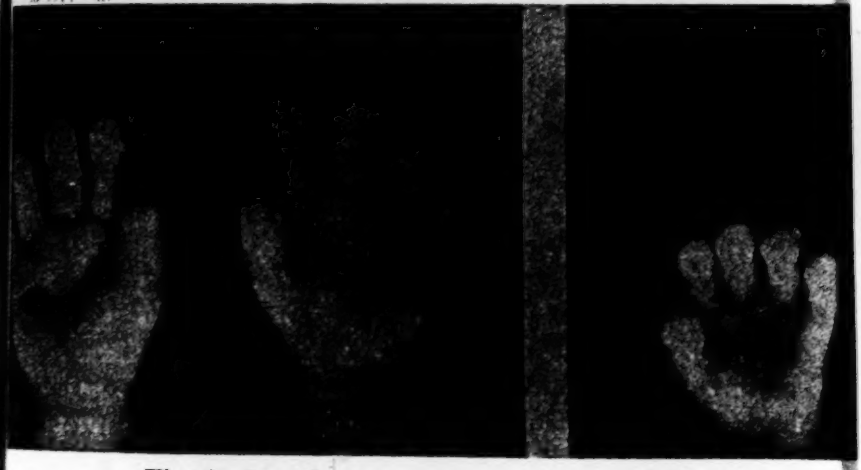


Fig. 3—9 weeks. 7 weeks.

Fig. 4—10 weeks. 6 weeks.

term baby (10 at p. 71). As one author describes this period:

> "A human face with eyelids half closed as they are in someone who is about to fall asleep. Hands that soon will begin to grip, feet trying their first gentle kicks." (10 at p. 71)

From this point until adulthood, when full growth is achieved somewhere between 25 and 27 years, the changes in the body will be mainly in dimension and in gradual refinement of the working parts (8) (46).

The development of the child, while very rapid, is also very specific. The genetic pattern set down in the first day of life instructs the development of a specific anatomy. The ears are formed by seven weeks and are specific, and may resemble a family pattern (16). The lines in the hands start to be engraved by eight weeks and remain a distinctive feature of the individual (45) (49). [See Fig. 3]

The primitive skeletal system has completely developed by the end of six weeks (8) (9). This marks the end of the child's embryonic (from Greek, to swell or teem within) period. From this point, the child will be called a fetus (Latin, young one or offspring) (9). [See Fig. 2]

In the third month, the child becomes very active. By the end of the month he can kick his legs, turn his feet, curl and fan his toes, make a fist, move his thumb, bend his wrist, turn his head, squint, frown, open his mouth, press his lips tightly together (15). He can swallow and drinks the amniotic fluid that surrounds him. Thumb sucking is first noted at this age. The first respiratory motions move fluid in and out of his lungs with inhaling and exhaling respiratory movements (13) (15). [See Fig. 5]

The movement of the child has been recorded at this early stage by placing delicate shock recording devices on the mother's abdomen and direct observations have been made by the famous embryologist, Davenport Hooker, M.D. Over the last thirty years, Dr. Hooker has recorded the movement of the child on film, some as early as six weeks of age. His films show that prenatal behavior develops in an orderly progression (15) (17) (18).

The prerequisites for motion are muscles and nerves. In the sixth to seventh weeks, nerves and muscles work together for the first time (8). If the area of the lips, the first to become sensitive to touch, is gently stroked, the child responds by bending the upper body to one side and making a quick backward motion with his arms. This is called a total pattern response because it involves most of the body, rather than a local part. Localized and more appropriate reactions such as swallowing follow in the third month. By the beginning of the ninth week, the baby moves spontaneously without being touched. Sometimes his whole body swings back and forth for a few moments. By eight and a half weeks the eyelids and the palms of the

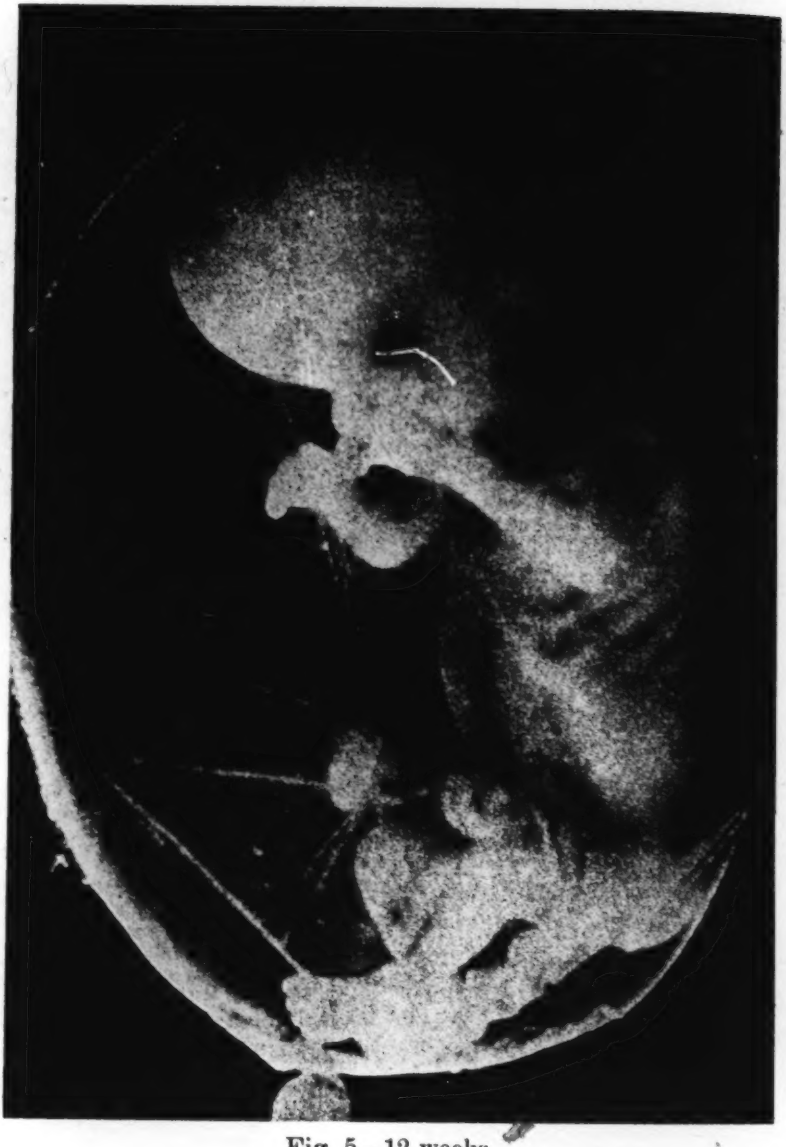


Fig. 5—12 weeks.

hands become sensitive to touch. If the eyelid is stroked, the child squints. On stroking the palm, the fingers close into a small fist (17) (15) (13) (64).

In the ninth and tenth weeks, the child's activity leaps ahead. Now if the forehead is touched, he may turn his head away and pucker up his brow and frown. He now has full use of his arms and can bend the elbow and wrist independently. In the same week, the entire body becomes sensitive to touch (7) (15). [See Fig. 6]

The twelfth week brings a whole new range of responses. The baby can now move his thumb in opposition to his fingers. He now swallows regularly. He can pull up his upper lip; the initial step in the development of the sucking reflex (5). By the end of the twelfth week, the quality of muscular response is altered. It is no longer marionette-like or mechanical—the movements are now graceful and fluid, as they are in the newborn. The child is active and the reflexes are becoming more vigorous. *All this is before the mother feels any movement* (5) (64). [See Figs. 5 and 7]

The phenomenon of "quickening" reflects maternal sensitivity and not fetal competence.* Dr. Hooker states that fetal activity occurs at a very early age normally in utero and some women may feel it as early as thirteen weeks.

---

*If the Court is interested in the actual medical history of nineteenth century legislative opposition to abortion, it may consult the American Medical Association, *1846-1952 Digest of Official Actions* (edited F. J. L. Blasingame 1959), p. 66, where a list of the repeated American Medical Association attacks on abortion are compiled. It will be seen that the great medical battle of the nineteenth century was to persuade legislatures to eliminate the requirement of quickening and to condemn abortion from conception, see Isaac M. Quimby *Introduction to Medical Jurisprudence*, Journal of American Medical Association, August 6, 1887, Vol. 9, p. 164 and H. C. Markham *Foeticide and Its Prevention*, ibid, Dec. 8, 1888, Vol. 11, p. 805. It will be seen that the Association unanimously condemned abortion as the destruction of "human life" American Medical Association, *Minutes of the Annual Meeting 1859*, The American Medical Gazette 1859, Vol. 10, p. 409.

Fig. 6—10 weeks.

Others feel very little as late as twenty weeks and some are always anxious because they do not perceive movement (17).

Dr. Liley states:

> "Historically 'quickening' was supposed to delineate the time when the fetus became an independent human being possessed of a soul. Now, however, we know that while he may have been too small to make his motions felt, the unborn baby is active and independent long before his mother feels him. Quickening is a maternal sensitivity and depends on the mother's own fat, the position of the placenta and the size and strength of the unborn child." (5 at pp. 37, 38)

Every child shows a distinct individuality in his behavior by the end of the third month. This is because the actual structure of the muscles varies from baby to baby. The alignment of the muscles of the face, for example, follow an inherited pattern. The facial expressions of the baby in his third month are already similar to the facial expression of his parents (13) (14) (49). [See Figs. 5 and 7]

Dr. Arnold Gesell states that: "By the end of the first trimester (12th week) the fetus is a sentient moving being. We need not pause to speculate as to the nature of his psychic attributes but we may assert that the organization of his psychosomatic self is now well under way." (49 at p. 65)

Further refinements are noted in the third month. The fingernails appear. The child's face becomes much prettier. His eyes, previously far apart, now move closer together. The eyelids close over the eyes. Sexual differentiation is apparent in both internal and external sex organs, and primitive eggs and sperm are formed. The vocal cords are completed. In the absence of air they cannot produce sound; the child cannot cry aloud until birth, although he is capable of crying long before (8) (13) (9) (5).

Dr. Liley relates the experience of a doctor who injected an air bubble into an unborn baby's (eight months) amniotic sac in an attempt to locate the placenta on x-ray. It so happened that the air bubble covered the unborn baby's face. The moment the unborn child had air to inhale, his vocal cords became operative and his crying became audible to all present, including the physician and technical help. The mother telephoned the doctor later to report that whenever she lay down to sleep, the air bubble got over the unborn baby's face and he was crying so loudly he was keeping both her and her husband awake (5 at p. 50) (15 at p. 75).

The taste buds and salivary glands develop in this month, as do the digestive glands in the stomach. When the baby swallows amniotic fluid, its contents are utilized by the child. The child starts to urinate (8) (13) (19).

From the twelfth to the sixteenth week, the child grows very rapidly (50). His weight increases six times, and he grows to eight to ten inches in height. For this incredible growth spurt the child needs oxygen and food. This he receives from his mother through the placental attachment —much like he receives food from her after he is born. His dependence does not end with expulsion into the external environment (8) (9) (13) (6) (10). We now know that the placenta belongs to the baby, not the mother, as was long thought (5). [See Fig. 8]

In the fifth month, the baby gains two inches in height and ten ounces in weight. By the end of the month he will be about one foot tall and will weigh one pound. Fine baby hair begins to grow on his eyebrows and on his head and a fringe of eyelashes appear. Most of the skeleton hardens. The baby's muscles become much stronger, and as the child becomes larger his mother finally perceives his many activities (8). The child's mother comes to recognize the movement and can feel the baby's head, arms and legs.

Fig. 8—16 weeks.

BLEED THROUGH POOR COPY

She may even perceive a rhythmic jolting movement —fifteen to thirty per minute. This is due to the child hiccoughing (13) (5) (6). The doctor can already hear the heartbeat with his stethoscope (8) (13) (6). [See Figs. 9 and 10]

The baby sleeps and wakes just as it will after birth (63) (5). When he sleeps he invariably settles into his favorite position called his "lie". Each baby has a characteristic lie (5). When he awakens he moves about freely in the buoyant fluid turning from side to side, and frequently head over heel. Sometimes his head will be up and sometimes it will be down. He may sometimes be aroused from sleep by external vibrations. He may wake up from a loud tap on the tub when his mother is taking a bath. A loud concert or the vibrations of a washing machine may also stir him into activity (13). The child hears and recognizes his mother's voice before birth (19) (20). Movements of the mother, whether locomotive, cardiac or respiratory, are communicated to the child (19).

In the sixth month, the baby will grow about two more inches, to become fourteen inches tall. He will also begin to accumulate a little fat under his skin and will increase his weight to a pound and three-quarters. This month the permanent teeth buds come in high in the gums behind the milk teeth. Now his closed eyelids will open and close, and his eyes look up, down and sideways. Dr. Liley feels that the child may perceive light through the abdominal wall (20). *Dr. Still has noted that electroencephalographic waves have been obtained in forty-three to forty-five day old fetuses, and so conscious experience is possible after this date (14).*

The electrophysiologic rhythm develops early. Detailed EEG tracings have been taken directly from the head end of the 16mm (crown rump) human embryo at 40-odd days of gestation in Japan (172).

Fig. 10—18 weeks.

As one writer said:

> "Thus at an early prenatal stage of life the EEG reflects a distinctly individual pattern that soon becomes truly personalized." (173)

In the sixth month, the child develops a strong muscular grip with his hands. He also starts to breathe regularly and can maintain respiratory response for twenty-four hours if born prematurely. He may even have a slim chance of surviving in an incubator. The youngest children known to survive were between twenty to twenty-five weeks old (13). The concept of *viability* is not a static one. Dr. Andre Hellegers of Georgetown University states that 10% of children born between twenty weeks and twenty-four weeks gestation will survive (44A and 44B). Modern medical

intensive therapy has salvaged many children that would have been considered non-viable only a few years ago. The concept of an artificial placenta may be a reality in the near future and will push the date of viability back even further, and perhaps to the earliest stages of gestation (43) (48). After twenty-four to twenty-eight weeks the child's chances of survival are much greater.

Our review has covered the first six months of life. By this time the individuality of this human being is clear to all unbiased observers. Dr. Arnold Gesell has said:

> "Our own repeated observation of a large group of fetal infants (an individual born and living at any time prior to forty weeks gestation) left us with no doubt that psychologically they were individuals. Just as no two looked alike, so no two behaved precisely alike. One was impassive when another was alert. Even among the youngest there were discernable differences in vividness, reactivity and responsiveness. These were genuine individual differences, already prophetic of the diversity which distinguishes the human family." (49 at p. 172)

B. The Doctor Treats the Unborn Just as He Does Any Patient.

When one views the present state of medical science, we find that the artificial distinction between born and unborn has vanished. As Dr. Liley says:

> "In assessing fetal health, the doctor now watches changes in maternal function very carefully, for he has learned that it is actually the mother who is a passive carrier, while the fetus is very largely in charge of the pregnancy." (5 at p. 202) (65)

The new specialty of fetology is being replaced by a newer specialty called perinatology which cares for its patients from conception to about one year of extrauterine existence (56). The Cumulative Index Medicus for 1969 con-

tains over 1400 separate articles in fetology. For the physician, the life process is a continuous one, and observation of the patient must start at the earliest period of life. (See 42 U. S. C. 289(d).)

A large number of sophisticated tools have been developed that now allow the physician to observe and measure the child's reactions from as early as ten weeks. At ten weeks it is possible to obtain the electrocardiogram of the unborn child (22) (11) (12). At this stage also the heart sounds can be detected with new ultrasonic techniques (45). The heart has already been pumping large volumes of blood to the fast growing child for six weeks. With present day technology, the heart of the child is now monitored during critical periods of the pregnancy by special electronic devices, including radiotelemetry (23) (60). Computer analysis of the child's ECG has been devised and promises more accurate monitoring and evaluation of fetal distress (14). A number of abnormal electrocardiographic patterns have been found before birth. These patterns forewarn the physician of trouble after delivery (57) (58) (62). Analysis of heart sounds through phonocardiography is also being done (25) (53).

With the new optical equipment, a physician can now look at the amniotic fluid through the cervical canal and predict life-threatening problems that are reflected by a change in the fluid's color and turbidity (26) (27). In the future, the physician will undoubtedly be able to look directly at the growing child using new fiber optic devices (through a small puncture in the uterus) and thereby diagnose and prescribe specific treatment to heal or prevent illness or deformity (21) (55).

For the child with severe anemia, the physician now gives blood, using an unusual technique developed by Dr. A. Liley of New Zealand. This life saving measure is carried out by using new image intensifier x-ray equipment. A

needle is placed through the abdominal wall of the mother and into the abdominal cavity of the child. For this procedure the child must be sedated (via maternal circulation) and given pain relieving medication, since it experiences pain from the puncture and would move away from the needle if not premedicated. As Dr. H. M. I. Liley states:

> "When doctors first began invading the sanctuary of the womb, they did not know that the unborn baby would react to pain in the same fashion as a child would. But they soon learned that he would. By no means a 'vegetable' as he has so often been pictured, the unborn knows perfectly well when he has been hurt, and he will protest it just as violently as would a baby lying in a crib." (5 at p. 50)

The gastro-intestinal tract of the child is outlined by a contrast media that was previously placed in the amniotic fluid and then swallowed by the child (52). We know that the child starts to swallow as early as fourteen weeks (5).

Some children fail to get adequate nutrition when in utero. This problem can be predicted by measuring the amount of estradiol in the urine of the mother and the amount of PSP excreted after it is injected into the child (29). Recent work indicates that these nutritional problems may be solved by feeding the child more directly by introducing nutrients into the amniotic fluid which the child normally swallows (250 to 700 cc a day). In a sense, we well may be able to offer the child that is starving because of a placental defect a nipple to use before birth (30).

The amniotic fluid surrounding the unborn child offers the physician a convenient and assessable fluid that he can now test in order to diagnose a long list of diseases, just as he tests the urine and blood of his adult patients. The doctor observes the color and volume of amniotic fluid and tests it for cellular element enzymes and other chemicals. He can tell the sex of his patient and gets a more precise

idea of the exact age of the child from this fluid. He can diagnose conditions such as the adrenogenital syndrome, hemolytic anemia, adrenal insufficiency, congenital hyperanemia and glycogen storage disease. Some of these, and hopefully in the future all of these, can be treated before birth (31) (32) (33) (34) (35) (36) (37).

At the time of labor, the child's blood can be obtained from scalp veins and the exact chemical balance determined before birth. These determinations have saved many children who would not have been considered in need of therapy had these tests not been done (38) (39). The fetal EEG has also been monitored during delivery (61).

A great deal of work has been done to elucidate the endocrinology of the unborn child. Growth hormone is elaborated by the child at seventy-one days, and ACTH has been isolated at eleven weeks gestation (40). The thyroid gland has been shown to function at ten and a half weeks (51), and the adrenal glands also at about this age (40). The sex hormones—estrogen and andiogen—are also found as early as nine weeks (40).

Surgical procedures performed on the unborn child are few. However, surgical cannulation of the blood vessels in an extremity of the child has been carried out in order to administer blood. Techniques are now being developed on animals that will be applicable to human problems involving the unborn child. Fetal surgery is now a reality in the animal laboratory, and will soon offer help to unborn patients (28) (41) (42).

The whole thrust of medicine is in support of the notion that the child in its mother is a distinct individual in need of the most diligent study and care, and that he is also a patient whom science and medicine treats just as it does any other person (21) (5).

This review of the current medical status of the unborn serves us several purposes. Firstly, it shows conclusively

the humanity of the fetus by showing that human life is a continuum which commences in the womb. There is no magic in birth. The child is as much a child in those several days before birth as he is those several days after. The maturation process, commenced in the womb, continues through the post-natal period, infancy, adolescence, maturity and old age. Dr. Arnold Gesell points out in his famous book that no king ever had any other beginning than have had all of us in our mother's womb (49).

Secondly, we have shown that quickening is a relative concept which depends upon the sensitivity of the mother, the position of the placenta, and the size of the child. At the common law, the fetus was not considered alive before quickening*, and therefore we can understand why commentators like Bracton and Coke placed so much emphasis on quickening. But modern science has proven conclusively that any law based upon quickening is based upon shifting sands—a subjective standard even different among races. We now know that life precedes quickening; that quickening is nothing other than the mother's first subjective feeling of movement in the womb. Yet the fetus we know has moved before this. In spite of these advances in medicine, some courts and legislatures have continued to consider quickening as the point when life is magically infused into the unborn. (See *Babbitz* v. *McCann*, 310 F. Supp. 293) No concept could be further from the scientific truth.

Thirdly, we have seen that viability is also a flexible standard which changes with the advance of these new medical disciplines some of which are hardly a half dozen years old. New studies in artificial placentas indicates that

*See 4 Blackstone, *Commentaries on the Laws of England*, 394-95 (1769) where it is said:

"In case this plea is made in stay of execution, the judge must direct a jury of twelve matrons or discreet women to inquire the fact, and if they bring in their verdict 'quick with child' (for barely, 'with child', unless it be alive in the womb, is not sufficient, . . .)"

viability will become an even more relative concept and children will survive outside of the womb at even earlier ages than the 20-28 weeks in the past. Fetology and perinatology are only a few years old as specialties. Obstetrics is only sixty years old as a specialty.

Fourthly, we have seen that the unborn child is as much a patient as is the mother. In all the literature opting for permissive abortion, this simple truth is ignored. There are many doctors who know that the unborn is also their patient and that they must exercise their art for the benefit of both mother and child. When the physician accepts that he has two patients, he has no difficulty applying his skill for the benefit of child *and* mother. Every doctor practicing can tell this court when in his medical judgment an abortion is necessary to preserve life. There is no medical mystery on that point. A review of the relevant obstetrics texts will list the indications—psychiatric as well—for therapeutic abortion* When the doctor makes the decision

*See Quay, *Justifiable Abortion*, 49 Georgetown Law Journal 173, 1960, pp. 180-241, where the medical reasons for therapeutic abortions as stated in the standard obstetric works from 1903 to 1960 are stated and analyzed. Dr. Guttmacher has stated:

"On the whole, the over-all frequency of therapeutic abortion is on the decline. This is due to two facts: first, cures have been discovered for a number of conditions which previously could be cured only by termination of pregnancy; and second, there has been a change in medical philosophy. Two decades ago, the accepted attitude of the physicians was that if a pregnant woman were ill, the thing to do would be to rid her of her pregnancy. Today it is felt that unless the pregnancy itself intensifies the illness, nothing is accomplished by the abortion." (66 at p. 13) (See also 67).

Dr. Guttmacher has also said:

"Today it is possible for almost any patient to be brought through pregnancy alive, unless she suffers from a fatal illness such as cancer or lukemia and, if so, abortion would be unlikely to prolong, much less save, life." (68 at p. 9).

Dr. Guttmacher has also said:

"There is little evidence that pregnancy in itself worsens a psychosis, either intensifying it or rendering prognosis for full recovery less likely." (69 at p. 121).

he must not consider the unborn as "mere tissue of the mother" or he will certainly weigh it no more in the balance than any other replaceable tissue of the mother.

III.

MEDICAL HAZARDS OF LEGALLY INDUCED ABORTION.

The medical hazards of legally induced abortion are all too often compared to the safety of a tonsillectomy or the "proverbial tooth extraction". (See Texas Appellant's brief p. 33.) Data presented from Eastern European mortality statistics have often been used to produce such claims as "it is X-times safer to have an abortion than to carry the child to term". These claims have been widely published in newspapers and lay periodicals; when made by the non-professional, they are forgivable; when made by "medical experts", one can only assume that these "experts" have allowed a desire for "social change" to fog their ability to distinguish first-rate from second-rate medical care.

The world's medical literature does not support such claims. The medical hazards of legal abortion should be presented to the Court in their total perspective through an analysis of this literature. It is imperative to note that when one focuses only on the legal abortion mortality rates from selected countries around the world, one can only see the risks of legal abortion through tunnel vision. The total medical picture cannot be understood without a look at the early and late physical and psychological complications. Indeed, these are the complications which affect the greater number of people and result in what a World Health Organization scientific group said was "a great amount of human suffering" (70).

A. Professional Organizations Speak on Medical Hazards.

The Executive Board of the American College of Obstetrics and Gynecology (ACOG) and a majority of its fellows approved the following official statement in May, 1968:

> "It is emphasized that the inherent risk of such an abortion is not fully appreciated both by many in the profession and certainly not by the public. . . . The public should realize that in countries or societies that permit abortion on demand, many, if not the majority, are performed in physicians' offices. Under these circumstances it is reasonable to conclude that *the mortality from this operation may exceed the maternal mortality of the United States* (emphasis ours) and Canada while the incidence of serious complications is substantial." (71)

The minority report was prepared by Sprague H. Gardiner, M.D., Bernard J. Pisani, M.D. and Richard Mattingly, M.D., and was issued in May, 1969. It stated:

> "The inherent risks of a therapeutic abortion are serious and may be life-threatening; this fact should be fully appreciated by both the medical profession and the public. In nations where abortion may be obtained on demand, a considerable morbidity and mortality have reported." (71)

On March 26, 1966, the Council of the Royal College of Obstetricians and Gynaecologists unanimously approved the following statement which supports the ACOG statement:

> "Those without specialists' knowledge and these include members of the medical profession, are influenced in adopting what they regard as a humanitarian attitude to the induction of abortion by a failure to appreciate what is involved. They tend to regard induction of abortion as a trivial operation, free from risk. In fact, even to the expert working in the best conditions, the removal of an early pregnancy after dilating the

cervix can be difficult, and is not infrequently accompanied by serious complications. This is particularly true in the case of the woman pregnant for the first time. For women who have a serious medical indication for termination of pregnancy, induction of abortion is extremely hazardous and its risks need to be weighed carefully against those involved in leaving the pregnancy undisturbed. Even for the relatively healthy woman, however, the dangers are considerable." (72)

In 1970, the Royal College of Obstetricians and Gynaecologists re-emphasized:

"The risks of any of the currently available methods of terminating pregnancy, which involve general anaesthesia, have always been recognized by gynaecologists but have been dismissed by others as non-existent and imaginary. The long-term hazards to physical well-being require follow-up studies which so far have not been undertaken in this country. Nevertheless, reports from other countries where abortion on demand has been the rule for several years show that late physical ill-effects are not uncommon." (73)

On March 26, 1970, the Medical Society of the State of New York issued a set of "abortion guidelines" in which they wrote:

"The Medical Society of the State of New York would like to caution all physicians that an abortion performed after the twelfth week of gestation is fraught with tremendous danger." (74)

In the Consultants Report on Abortion from the survey done by the Royal College of Obstetricians and Gynaecologists in Great Britain, it was said:

"Eight maternal deaths occurred in relation to 27,331 terminations of pregnancy during the year 1968-69. This gives a mortality rate of 0.3 per thousand (30/100,000), which is higher than the maternal mortality rate (including abortion, criminal or otherwise)

for all the pregnancies in England and Wales at the comparable time. A statement issued by the Secretary of State to Parliament on 4 February, 1970 reveals a similar state of affairs in respect of about 54,000 induced abortions notified from all sources during 1969; among these there were 15 maternal deaths." (75)

B. New York City Abortion Data Unreliable.

On June 29, 1971, Mr. Gordon Chase, the administrator of The Health Services Administration for the City of New York (and a strong advocate of abortion) announced that "we have a remarkable record of safety" when New York's mortality rate is compared to other countries like Great Britain and Scandinavia (76). He announced this rate to be 5.3 deaths/100,000 abortions (77). This mortality rate, quite honestly, cannot be taken seriously.

It should first be pointed out that 55.5% of all the 150,629 abortions legally performed in New York City between July 1, 1970 and May 31, 1971 were performed on *out-of-state residents*, and another 3.3% were done on residents of New York State who were not residents of New York City (78). Thus, 58.8% of the legal abortions were inherently difficult to follow up. This is reflected in a report from the New York Hospital-Cornell Medical Center, which showed that 53.5% of their patients were lost to follow up (79). Many physicians are currently treating women who are suffering severe complications from New York abortions and these cases will never appear in Mr. Chase's statistics. In fact, hair-raising anecdotes of "fall-out" from New York City abortions are related everywhere (80).

Robert E. Hall, M.D., a leading proponent of legal abortion, addressing the 27th Midwest Clinical Conference of the Chicago Medical Society, said that one abortion clinic in New York City has been performing 700 each

week, with no after-care (81). He also said that because the caseload is five times greater than hospitals can handle, unaffiliated clinics have mushroomed. Facilities are being bought or built, one of them close to Kennedy Airport, to accommodate out-of-state women who fly in, have the abortion, and fly out the same day (82).

Joseph J. Rovinsky, M.D. reported that "it is noteworthy that the medical services at all three New York City area airports have since July 1, 1970 experienced a vast increase in the number of women requiring assistance for sequelae of induced abortion or actually aborting at the airport!" (83) Dr. Hall concludes that this situation leads to the neglect of complications when they arise, the rate of which has been high (84).

The 5.3 rate in New York City was arrived at by disregarding 7 abortion deaths in New York City on the unsubstantiated theory that these 7 were not performed ". . . under legal auspices" (85). At an earlier time Rovinsky concluded that ". . . the estimated maternal mortality rate is 38 Per 100,000!" (86) He also says that we cannot be certain that even these figures are complete (87):

> "There is at least one apocryphal story circulating about an abortion death in a physician's office from air embolisation when an aspiration pump acted as a pressure rather than a suction device; following which the woman's corpse was transported back to her home state and the true cause of death there was not recorded". (88)

Just how many women have died as the result of a New York City abortion will never be known. However, deaths resulting from legal abortion in New York City which do not appear in the Health Services Administration's statistics have been reported in Indiana (89), and Boston (91). How many others have followed a similar, but unregistered, course will forever be unknown.

C. Eastern European Abortion Mortality Rates Complex and Often Incomplete.

The proponents of abortion are, however, quick to point out the incredibly low abortion mortality rates from countries in Eastern Europe. While focusing *only* on data from Eastern Europe, they make the claim that "induced abortion is potentially X-times as safe as the process of going through ordinary childbirth". Whether this claim is fabricated or based on facts needs further close scrutiny.

In Table One, a number of countries with vast experience in performing legal abortions are compared.

TABLE ONE: ABORTION MORTALITY vs. MATERNAL MORTALITY.

Country/State	Year	Legal Abortions	Deaths	Abortion Mortality/ 100,000 Abortions	Maternal Mortality/ 100,000 Live Births
Denmark (92)	1961-66	27,435	9	30	10-20
England and Wales (93)	1968-69	27,331	8	30	Abortion mortality higher than maternal mortality
Sweden (94)	1960-66	30,600	12	39	14.0 (95)
Yugoslavia (Skopje Univ.) (96) (106)	1965-68	18,758	2	10.6	96.5 (97)
Hungary (98)	1964-68	939,800	11	1.2	49.7 (99)
Oregon (100)	1970	7,196	1	13.9	8.4
Maryland (101)	1968-70	7,664	3	40.5	23.1 (102)

The first thing to note is that in Denmark, England, Wales, Sweden, Oregon and Maryland, the mortality resulting from legal abortion exceeds the mortality from childbirth. Secondly, it seems that *only* Eastern European countries have legal abortion mortality rates which are less than the corresponding maternal mortality rates. To see this in perspective, one must recognize that Denmark and Sweden have been legally inducing abortion 10-15 years longer than any Eastern European country, and thus have a much greater experience (103).

Finally, one cannot ignore the extraordinarily large maternal mortality rates which exist in Yugoslavia and Hungary—mortality rates which are 2-4 times higher than the maternal mortality in the United States (104). The maternal mortality rate is an excellent indication of the quality of medical care given to the whole population of women in each country. Indeed, in Eastern European countries that are considered ". . . not as sophisticated, medically developed or experienced" (105), one would expect the high maternal mortality rate, but hardly the declared expertise in performing legal abortions.

Indeed, some Eastern European investigators have admitted that complications are almost certainly underreported because patients treated outside of hospitals are seldom included in hospital statistics (106). It has been said, however, that the mortality rates in Eastern Europe are so incredibly low largely because 95-100% of their abortions are done in the first trimester of pregnancy. It is certainly recognized that abortion in the later stages of pregnancy will result in a higher abortion mortality rate (107), and that this may account for some of the increased abortion mortality in Western and Northern Europe. However, one cannot make all of these claims until one examines the data more carefully.

Table Two examines the legal abortion mortality rates of various countries in which the deaths resulted from legal abortions performed *only in the first trimester of pregnancy.*

TABLE TWO: LEGAL ABORTION MORTALITY—FIRST TRIMESTER ONLY.*

Country/State	Year	Abortions 1st Trimester	Deaths	Abortion Mortality/ 100,000 Abortions	Maternal Mortality/ 100,000 Live Births
Denmark (92)	1961-66	8,684	2	23.0	10-20
Yugoslavia (Skopje Univ.) (96) (106)	1965-68	7,833	2	25.5	96.5 (97)
Hungary (98)	1964-68	939,800	11	1.2	49.7 (99)
Oregon (100)	1970	5,351	1	18.6	8.4

*Breakdown data for England and Wales and Sweden are not available. There were no early abortion deaths in Maryland 1968-70, but a relatively small number (3,900) were performed early (101).

Here it can again be adequately shown that while most countries find legal abortion safer in the first trimester, the mortality from abortion continues to exceed that of childbirth; Eastern European countries continue to be noteworthy exceptions. The Hungarian data, however, is not in line with what is seen in Denmark, Oregon, or even its Eastern European ally, Yugoslavia.

Finally, let us look at one other method of examining abortion mortality data—a method which has not been overlooked by the proponents of abortion (108), but, nonetheless, a method which is seldom openly discussed. In Table Three the total number of abortion deaths (from all causes—spontaneous, criminal and legally induced) are compared for Hungary and the United States.

TABLE THREE: ABORTION DEATHS (ALL CAUSES) PER UNIT POPULATION.*

Country	Abortion Deaths 1967 (All Causes)	Est. 1967 Population	Abortion Deaths 1,000,000 Population
Hungary	21 (98)	10,255,000	2.06
United States	160 (109)	197,576,952	0.80

*All population figures are from Encyclopedia Americana.

While 1967 has been selected for comparison, there is little differences in whatever year one would like to consider. There were 21 abortion deaths in Hungary, and 160 abortion deaths in the United States in 1967. The figure for the United States is larger, however, one must remember that the population of the United States is considerably larger so that in order to compare the risks of abortion in the two countries, one must compare the abortion deaths per unit population (obviously, the United States with a larger population would be expected to have a larger number of deaths due to any cause, including abortions). When this comparison is made, one can see that for *any individual woman,* the risk of dying from abortion (all causes) is 2.6 times as great in Hungary than it is in the United States.

In summary, the Eastern European abortion mortality statistics are noteworthy in the following areas:

A) Their abortion mortality rates are incredibly low when compared to countries who have a greater experience.

B) The maternal mortality in Eastern Europe is astoundingly high, and this is an excellent indication of the quality of medical care delivered to the total population of women.

C) Hungarian women are 2.6 times more likely to die from abortion than American women.

Some very important observations can be made from this total perspective analysis:

1. Where the maternal mortality rate is so large (in Hungary) and where the loss from abortion of all causes is so great (also Hungary), one would not expect to see one area of such great perfection as the figures for their legal abortion mortality would claim. As a result, one can seriously question if all the induced abortion deaths are being reported, or

if, perhaps, some of them are hidden in the maternal mortality and abortion (all causes) mortality rates.

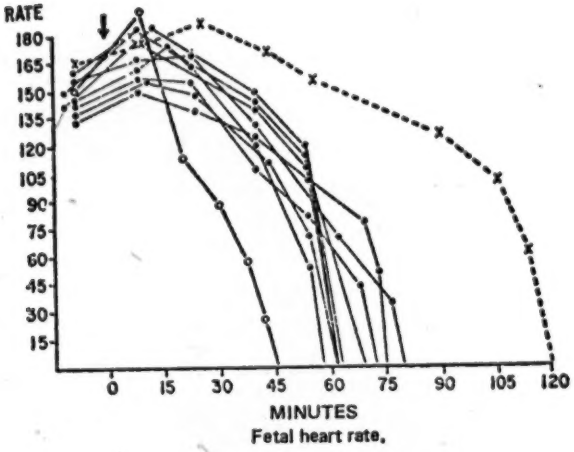
2. If, on the other hand, we assume that the number of legal abortion deaths is correct, then one of the following must be true:
   a) Hungarian physicians are not as capable at treating spontaneous abortions as physicians in the United States. However, with their claimed expertise at performing legal abortions, one would not expect this to be true.
   b) The number of criminal abortions in Hungary is still amazingly high, and this accounts for the large number of "other" abortion deaths—all of this in spite of a phenomenal number of legal abortions (126 legal abortions/100 live births in 1967). (98)
3. The individual Hungarian woman is 2.6 times more likely to die from abortion, and 2.0 times more likely to die from childbirth than the individual woman in the United States. This *very real* difference in health care to women in these two countries is an express manifestation of the total respect for human life which has been the challenging force through which the medical profession in the United States has built its fantastic progress.

It can readily be seen from this analysis that the interpretation of abortion mortality rates can be very complex. To make exorbitant claims regarding the safety of legal abortion from these statistics is simply not justified. The claim that abortion is X-times as safe as childbirth is a fabrication invented to sell abortion. Furthermore, when one focuses only on mortality rates and disregards all other complications which may arise from legal abortion, then advocacy has replaced medical scholarship.

D. Child Mortality.

The obstetrician has two patients: mother *and* child. It is deplorable to think that discussions of mortality can so easily exclude the child. The court should recognize that the mortality to the child is nearly 100%. Only an occassional child has the strength to survive. (81) (110). Let us not forget that abortion kills children of varying ages and stages in development. The unheard voices of these little ones are our concern, and we deplore this violent trend which is turning the healing art of medicine into a source of efficient swift and sure destruction of human life. A trend which will yield a "body count" unlike any we have seen in our nation's history. We deplore the condition of a society which calls physicians to exercise their art as a tool of death for those yet unborn, and which turns our learned journals into horrible examples of humans reporting the exact and scientific countdown and another human heart from 180 beats per minute to zero and death (110 at p. 37):

> "In midtrimester 'salting out' cases, however, I am aware of only two such incidents. [Live born fetus] Both occurred between 24-26 weeks' gestation and otherwise were uncomplicated cases with 56 and 73 hour total instillation-abortion time. *The infants lived only for a few minutes.* Other known cases with fetal survival were admittedly early third trimester (26 weeks) cases. Fifteen consecutive cases monitored for fetal heart rate are illustrated in Fig. 3. The majority of the fetal hearts are undetectable one hour following the deposition of the hypertonic solution in the amniotic sac."



Fetal heart rate.

E. Other Complications.

"Abortion may impair a woman's health through a variety of complications. These may occur at the time of or soon after the abortion, or be discovered much later, perhaps in connection with another pregnancy or with efforts to become pregnant again. The complications may result in the death of the woman." (111)

F. Early Physical Complications.

The most common early complication of legally induced abortion are infection, hemorrhage, perforation of the uterus and laceration of the cervix. *Table Four* lists a representative sample of studies which have been done around the world and in the United States to define the incidence of early physical complications.

Olsen, et al. have stated:

> "It is clearly apparent that all methods involve a risk of more or less serious complications, ranging in the present material from 3-10% with the various methods, the incidence of complications increasing with the stage of pregnancy". (92)

TABLE FOUR: % EARLY PHYSICAL COMPLICATIONS IN 1st AND 2nd TRIMESTER ABORTION.

Country/Investigator	1st Trimester	2nd Trimester
Denmark (92) (Olsen, Nielsen, Ostergaard)	5.4%	2.5 – 9.1%
California (112) (Banner, et al.)	11.0%	17.0%
New York City (113) (Kaye—NY Lying-In)	2.5%	12.7%
Elmhurst, N. Y. (80) (Rovinsky—City Hospital Center)	5.0%	15.6%
Rochester, N. Y. (114) (Choate—Strong Memorial Hosp.)	8.2%	12.6%
Poland (115) (Midak)	4.4%	—
Czechoslovakia (116) (Kotasek)	5.0%	—
Sweden (117) (Bengtsson)	—	9.4 –10.1%
Great Britain (118) (Menzies)	—	30.8%
Japan (119) (Wagatsuma)	—	14.0%

There is evidence to suggest that these complications are far more frequent in the young woman pregnant for the first time, presumably because the mouth of her womb is much more rigid and thus more difficult to dilate than in a woman who has had at least one child (116) (120). Note that 57.3% of abortions performed in New York City from July 1, 1970 to May 31, 1971 were performed on women pregnant for the first time (121).

Infection may be localized to the lining of the womb, the Fallopian tubes, or the structures immediately adjacent to the uterus (endometritis, sal pingitis or parametritis). It may be more regionally located resulting in pelvic thrombophlebitis, pelvic cellulitis or pelvic peritonitis. It may be distant as infection in pneumonia, endocarditis, or septic emboli to the lungs or brain. Or, the infection may be generalized as in septicemia (122). The infection is usually the direct result of the instrumentation involved in the abortive techniques, and is the usual cause of any subsequent sterility because the infection scars the tubes to a point where they no longer function properly.

Hemorrhage is not uncommon following induced abortion even in early pregnancy. The uterus is a highly vascular organ during pregnancy because of its natural response to the life support of the child. Hemorrhage usually results when this vascular organ is lacerated, perforated, ruptured, fails to contract after the abortion (uterine atony), or there is a failure to remove all of the parts of the child and his placenta (122). In the first year of the Colorado abortion law, 8.0% of women undergoing the operation needed a blood transfusion (the majority of these abortions were done in the first trimester). (123) (For a discussion of the inherent dangers of blood transfusions—allergic reactions, serum hepatitis, etc., see Merritt, J. A., et al., MANAGEMENT OF EMERGENCIES: UNTOWARD REACTIONS TO BLOOD TRANSFUSION. N. E. J. M. 274: 1426, 1966.) In a series of 100

early suction abortions performed by Robert E. Hall, M.D., at least 5% had "excessive blood loss" (greater than 350 cc). (124) Of course, not all women will require blood transfusion, but Carlton, et al., noted that 30% of his series were anemic following abortion (hemoglobin less than 9.0 gms.) and of those done in the first trimester 9% were anemic (125).

Perforation of the uterus occurs in about 1.0% of legally induced abortions, and may occur with the traditional D&C or the newer method of suction curettage (92, 112, 113). Perforation occurs primarily because the surgeon operates by "touch" alone, and not under direct vision. Secondly, the pregnant uterus is much softer than the non-pregnant uterus, lending itself to easy perforation. If in the process of perforation the bowel or a blood vessel is torn, overwhelming infection and/or hemorrhage may occur necessitating exploratory abdominal surgery. (It has been reported that 30-65% with such a perforation will require this type of exploratory surgery.) (126, 127).

Early physical complications that are very significant when they occur, but are less frequent, include the following:

a) Coma and/or convulsions because of the effects on the central nervous system and/or kidneys of hypertonic salt solution entering the bloodstream directly or via the peritoneal cavity (128).

b) Embolisation of air, most commonly, or by particulate matter (fat, placental products, amniotic fluid) in the heart, pulmonary artery, brain and other organs (128).

c) Anesthetic accidents resulting in cardiac arrest or aspiration pneumonia (128).

d) Disturbances in the coagulability of the mother's blood (129, 130, 131, 132).

e) The abortion of only one twin while the other survives and delivers normally several months later

(125, 133). The psychological effects on the mother and the surviving twin in such cases has not been investigated.

f) It is now becoming apparent that, contrary to wishful thinking, abortion can be a relatively uncomfortable procedure. For early abortion many patients can be managed adequately with mild sedation and paracervical local anesthesia, but for a "considerable" number this is not sufficient to provide satisfactory analgesia, nor to prevent agitated and abrupt pelvic movements which can only contribute to increasing the complication rate (134).

G. The Late Physical Complications of Legally Induced Abortion.

The late physical complications of legally induced abortion have as yet been incompletely evaluated, and there is literally nothing from the American Medical literature which would be of help. Nonetheless, there is a copious amount of information available from the experience of other countries, and this is now presenting substantial evidence to suggest that it is in this category that the most significant medical and ultimate sociological sequelae exist.

Through increased knowledge and experience, we are now beginning to see and understand how our careless use of natural resources and destruction of, or interruption of, natural life cycles in land, water and air is having a disastrous impact on environment. Nobody really knows for certain what results we might see in a few years in women and those dependent upon them if the natural human life cycle within them is radically interferred with. However, some insight into the ultimate ecological disaster may be gathered by a close look at the late physical and psychological complications.

1. Premature Labor and Delivery.

The prematurity rate in Hungary in 1954 (before legalized abortion) was 7%. However, in 1968 (14 years after legalization) it had increased to 12% (135). The incidence of prematurity developing in any one individual has been shown to be well correlated with the number of abortions a woman has. Hungarian studies revealed that the likelihood of premature labor and delivery following one previous abortion increased to *14%;* after two abortions, to *18%;* and after three abortions, to *24%* (135). In Czechoslovakia a comparison of women who have never had a previous legal abortion with women who had such a history revealed the prematurity rate in the former group to be 5%, while in the latter group it had increased to 14% (136). Similar experience has also been seen in Japan (137). The increase in prematurity is a direct result of the instrumentation required in early abortion; dilating the cervix (the mouth of the womb) may leave the cervix incompetent to retain the child for the full nine months (137).

The significance of this trend lies in the fact that premature birth is the leading cause of infant death, and one of the leading causes of mental and motor retardation (138). This is reflected in the extraordinarily high infant mortality rate in Hungary due to birth injury, post-natal asphyxia and atalectasis (the leading causes of death in the premature infant)—1,278.2 per 100,000 live births (95), compared to a similar death rate in the United States of 549.4 per 100,000 live births (95). Indeed, there "has been a doubling of the perinatal mortality rate in Hungary following the introduction of 'abortion on request' (106)". Thus, Klinger concludes:

> "Induced abortion plays an important role in the development of a subsequent child" and that "the im-

pact of premature birth on infant mortality and of the mental and physical development of the child is connected with the frequency of abortions" (135).

2. Ectopic Pregnancies.

A number of countries have reported a significant increase in the incidence of ectopic pregnancy (pregnancies which occur someplace other than in the womb, usually in the Fallopian tube). (139, 140) One Japanese study revealed that 3.9% of women with previous history of legal abortion had a subsequent ectopic pregnancy (141). This is eight times the incidence of ectopic pregnancy in the United States. (The incidence of ectopic pregnancy in the United States in 1967 was about 0.5%.) (142) An ectopic pregnancy is not infrequently life-threatening because of rupture and hemorrhage. This, therefore, subjects an individual woman to a very substantial future risk. The risk of dying from an ectopic pregnancy in the United States is approximately 300 per 100,000 (142). Again, tubal malfunction, usually secondary to post-abortal infection, seems to be the prime cause.

3. Complications with Subsequent Pregnancies (Pathologic Sequelae).

The incidence of spontaneous abortion (miscarriage) in women with a history of legal abortion is reported to be 30-40% higher than in those without such a history (116, 137, 143), and the incidence of fetal death during pregnancy is twice as great (143). Complicated labors (prolonged labor, placenta, previa, adherent placenta) (106, 116, 136, 143, 144) and excessive bleeding at the time of delivery (136) have also been noted to occur more commonly in subsequent pregnancies to women with a previous history of legal abortion. These all result in increased obstetrical intervention.

4. Sterility.

Several studies "prove that repeated abortions can cause secondary sterility" (98). One report from Poland showed that 6.9% of women were sterile on a 4-5 year follow-up (115) and in Japan 9.7% were subsequently sterile on a 3 year follow-up (141). Other countries have had a similar experience (116, 145, 146). Sterility results primarily as an after-effect of post-abortal infections resulting in tubal obstruction and or malfunction. Eminent British gynecologist, T. N. A. Jeffecoate's comment is particularly pertinent here:

> "If this happens when a first pregnancy is interrupted for a non-recurrent indication, such as rubella or a fleeting psychological upset, the situation is tragic." (147)

5. Transplacental Hemorrhage.

It has long been known that a woman who is Rh negative is very susceptible to a special kind of problem if her consort is Rh positive. Any given pregnancy may be a stimulus for the mother to develop antibodies against the baby's red blood cells (i.e. she becomes sensitized) so that in a subsequent pregnancy these antibodies may destroy the baby's red blood cells resulting in an anemia in the preborn child which may be life-threatening in utero, or subject him to the threat of mental and motor retardation after he is born. This sensitization occurs through the leakage of the baby's red blood cells into the mother's circulation (transplacental hemorrhage) usually at the time of delivery. Therefore, first-born children are rarely affected. However, with *all* methods of legally induced abortion, sensitization has been reported to occur in 3-10% of Rh-negative women (148, 149, 150, 151, 152, 153, 154). This can now be effectively treated with the recent development of anti-Rh-negative gammaglobulin (Rho Gam)

and its routine use in the abortion of Rh-negative women has been frequently recommended (154, 155). However, because certain tests on the fetus cannot be performed, many women will be needlessly exposed to therapy. And, in spite of the existence of this effective therapy, there is good evidence to suggest that it is being grossly neglected. In a study conducted by the New York State Department of Health on women having abortions in *all* of New York State, *48.7%* of women known to be Rh-negative were left untreated, and thus unprotected from the possibility of sensitization and its inherent risks in subsequent pregnancies (156).

6. Other Late Physical Complications.

a. A woman's sexual libido is reported to be decreased in 14-33% of women with a previous legal abortion. This is theoretically related to the psychotraumatic experience of the interruption and the emotional weakness that follows (115, 157).

b. Endometriosis is a common sequel to hysterotomy (158).

c. Many pregnancies which are subsequent to an abortion performed by hysterotomy will need delivery by Caesarian section to eliminate the possibility of rupture of the hysterotomy scar (133).

d. Gross irregularity in the appearance of the menstrual period, heavy bleeding with the menses or complete absence of menstruation has been reported in 1-12% of patients who have had legal abortions (115, 143, 159).

H. Psychiatric Sequelae.

A World Health Organization scientific group concluded that "There is no doubt that the termination of pregnancy may precipitate a serious psychoneurotic or even psychotic reaction in a susceptible individual" (160). Some in-

vestigators have indeed noted lasting psychiatric reactions (161). However, there has been much variation in the medical literature regarding the incidence of psychological sequelae to induced abortion.

The Swedish experience with therapeutic abortion has been well documented with several well planned studies. The best of these studies is Dr. Martin Ekblad's. He studied 479 women at the time of the abortion and again 2-3½ years later. At follow-up he found that 10% continued to feel the operation unpleasant; 14% had mild self-reproach; 11% had serious self-reproach and self-regret; and 1% had gross psychiatric breakdowns (162).

Siegfried, in 1951, reported on 61 women followed for 2 years after abortion, and found 13% to have serious self-reproach (163). Niswander and Patterson, in 1967, studied 90 women aborted for psychogenic reasons, and found that 21 had an immediate negative effect, and 11 had a negative long-term effect (at least 8 months). Eleven of 17 aborted for rubella had an immediate negative reaction, and 8 of those 17 continued to have a long-term negative reaction (164).

Recent studies have shown "that serious mental disorders arise more often in women with previous emotional problems; thus the very women for whom legal abortion is considered to be justified on psychiatric grounds are the ones who have the highest risk of post-abortal psychiatric disorders" (165).

The interpretation of the results of psychiatric studies is always made difficult by the lack of uniform standards for the assessment of psychological impairment and of suitable control groups (165). Unfortunately, over the last few years several unscientific papers have appeared in the medical literature, written by advocates of abortion, blindly stating that psychiatric sequelae of abortion are a

myth (166, 167). For this reason, the court is invited to read Simon and Senturia's excellent review and critical analysis of the available psychological literature in this area (168), and Heath's excellent review (169).

Most abortion proponents not involved in public efforts to promote their cause, admit that elective removal of the fetus is without psychiatric or medical justification. The fetus has not been shown to be a direct cause of any emotional disorder, and present medical capabilities make pregnancies safe. Almost always, other means than abortion are available to handle any medical or psychiatric complications of pregnancy. Indeed, if a woman wants her child, there are no medical or psychiatric indications that ever make an abortion necessary.

Sloane has candidly clarified the question of "indications" for abortion: (170)

> "There are no clear-cut psychiatric indications for therapeutic abortion. The risk of precipitation or exaccerbation of an existing psychosis is small and unpredictabe, and suicide is rare."

He goes further, relying on experiences in Sweden:

> "There is no medical indication for a termination of a new pregnancy, for they are not ill, or it is, at all events, not possible to point to any illness that might constitute a serious threat to life or health and thus indicate an induced abortion."

Since Sloane is a proponent of abortion, his forthrightness about the lack of genuine indications is laudable. Recognizing that there is no scientific basis for abortion on psychiatric or medical grounds, he, like many others, would justify abortion on the basis of what he calls "a key issue" of "unwillingness" to continue the pregnancy, which is scientifically neither a diagnosis nor an easily measured variable.

Barno (171) has found that the fear of suicide in pregnant women has been greatly exaggerated. In fact, his study reveals that the chances of a suicide in pregnancy, even amongst women who threaten suicide, is substantially less than the chances of suicide amongst women as a whole.

I. Conclusion.

The medical hazards of legally induced abortion are significant and must be recognized. When one focuses only on selected abortion mortality rates from Eastern Europe to make claims regarding the safety of legally induced abortion, one is looking for a motive to sell abortion. While the mortality rates alone do not present a total perspective analysis, they should not, on the other hand, be isolated from the 100% mortality, numbering already in the hundreds of thousands, of innocent unborn children. Indeed, one must recognize that the performance of legally induced abortion upon healthy women is not the practice of medicine at all, but rather another example of the violence of our times; the use of one more technological skill to destroy human life.

IV.

THE UNBORN OFFSPRING OF HUMAN PARENTS IS A PERSON WITHIN THE MEANING OF THE 5TH AND 14TH AMENDMENTS OF THE U. S. CONSTITUTION.

A. The Standard for Decision.

This Court has considered the constitutionality of legal classifications numerous times. Under the due process clause of the 5th Amendment, and the "equal protection" clause of the 14th Amendment, the strictness of the standard for decision in cases involving classifications made by legislative bodies varies according to the nature of the right

placed in jeopardy; the more fundamental the right involved, the greater the judicial requirement to "carefully and meticulously scrutinize"[1] the classification in light of the following principles.

a. As the right in jeopardy becomes more fundamental, the more perfect must be the relationship between the classification excluding a human group from the enjoyment of the right and the purpose for which the classification is made.[2]

b. As the right involved becomes more fundamental, the more "compelling" the state or governmental interest must be in making a classification excluding certain human groups from the enjoyment of the right.[3]

In addition, classifications affecting fundamental rights are said to be "especially suspect"[4] or, to use Mr. Justice White's expression, such classifications are "constitutionally suspect".[5]

---

1. *Reynolds* v. *Sims*, 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) at 1303; See also *Harper* v. *Virginia State Board of Elections*, 383 U. S. 663, 86 S. Ct. 1079 (1966).

2. See *Railway Express Agency* v. *New York*, 336 U. S. 106, 93 L. Ed. 533, 96 S. Ct. 463 (1949); *Skinner* v. *Oklahoma*, 316 U. S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942); *Loving* v. *Commonwealth of Virginia*, 388 U. S. 1, 87 S. Ct. 1817 (1967); *Shapiro* v. *Thompson*, 394 U. S. 618, 89 S. Ct. 1322 (1969); see also Tussman & Tenbrock, 37 Calif. L. Rev. 341 (1949), Selected Essays on Constitutional Law 789 (1969).

3. The "compelling governmental interest" doctrine has developed in several recent cases. See *Shapiro* v. *Thompson*, 394 U. S. 618, 89 S. Ct. 1322 (1969), particularly Mr. Justice Harlan's dissent; see also Mr. Justice White's concurring opinion in *Griswold* v. *Connecticut*, 381 U. S. 479, 85 S. Ct. 1628 (1965).

4. *Loving* v. *Virginia*, 388 U. S. 1, 87 S. Ct. 1817 (1967).

5. *McLaughlin* v. *Florida*, 379 U. S. 184, 85 S. Ct. 282 (1964).

B. The Court Must Apply This Same Standard to Itself.

The Court, in interpreting laws, performs a quasi-legislative or a subordinate legislative function.[6] It performs this interstitial legislative function by supplementing the written law by supplying definitions.[7]

In these cases the Court must construe, interpret and define the expression "person" in the 5th and 14th Amendments. In fixing the limits of the word "person" in the 5th and 14th Amendments, the Court will, in essence, perform a classificatory function; in other words, the Court must decide, on the basis of some established criteria whether, for the cases at bar, the unborn person belongs to the class of persons encompassed, and therefore protected, by the term "person" as used in the "due process" clause of the 5th Amendment and "equal protection" and "due process" clauses of the 14th Amendment.

The "due process" clause of the 5th Amendment and the "equal protection" clause of the 14th Amendment to the U. S. Constitution require that "Cities, States and the Federal Government . . . exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of the regulation".[8] Expressed differently, the Constitution prohibits "invidious discrimination" by the State.

The concepts of "State" and "Federal Government", as used above, refer to the different agencies through which

6. See Cohen, M. R., "The Process of Judicial Legislation", in Law and the Social Order (1933); also collected in Cohen, Readings in Jurisprudence and Legal Philosophy; Pound, An Introduction to the Philosophy of Law, Yale University Press, page 53; Grey, The Nature and Sources of the Law (2 ed. 1921) pp. 172-173; Fuller, The Morality of Law, Yale University Press, p. 81H.

7. See Cohen, *supra*.

8. *Railway Express Agency* v. *New York*, 336 U. S. 106, 93 L. Ed. 533, 69 S. Ct. 463 (1949), con. opinion by Mr. Justice Jackson.

the "State or Federal Government" may act. And this includes judicial authorities[9] as well as legislative and executive authorities. The Courts have, therefore, a constitutional duty equal to that of Congress and the various State legislatures to avoid "invidious discriminations" in the course of making classifications in the exercise of their interpretive and quasi-legislative functions.

C. Application of the Standard for Decision to the Case at Bar—The Rules of Construction Applied.

By attempting to strike down the criminal abortion statutes of Texas and Georgia, the Court is implicitly deciding whether unborn offspring of human parents are "persons" within the meaning of the 5th and 14th Amendments, and thereby classifying such offspring as to whether they may be "deprived of life". Since this is the most fundamental of all rights[10] the Court is bound by its own teachings to apply the most strict of standards.

Likewise because of the fundamental nature of life, the most compelling of all interests would have to be shown on the part of the Court in order to carve out such a classification, which would exclude the lives of unborn humans from the protection of the law.

Appellants argue that a "compelling state interest" must be shown to justify the restrictions imposed by these

9. See, *e.g.*, *Virginia* v. *Rives*, 100 U. S. 313, 25 L. Ed. 667, where the Court said: "It is doubtless true that a State may act through different agencies, either by its legislative, its executive, or its judicial authorities; and prohibitions of the amendments extend to *all action* of the State denying equal protection of the laws, whether it be action *by one of those agencies or by another*", 100 U. S. at 318. (emphasis added) see, more recently, *Shelley* v. *Kraemer*, 334 U. S. 1, 92 L. Ed. 161, 68 S. Ct. 836 (1948), and *Barrows* v. *Jackson*, 346 U. S. 249, 97 L. Ed. 1586, 93 S. Ct. 1031 (1953).

10. *Raleigh Fitkin—Paul Memorial Hospital* v. *Anderson*, 42 N. J. 421, 201 A. 2d 537 cert. denied 377 U. S. 985, (1964).

criminal abortion statutes on their freedom to have the unborn killed, or their freedom as physicians to perform the abortions. We argue that the "compelling" state interest doctrine instead limits the right of either State or Federal government to classify the unborn as "non-person" and thereby permit the deprivation of their lives.

Consequently, in interpreting and construing the word "person" as used in the 5th and 14th Amendments, the Court must be constantly aware (1) that the right in jeopardy is the most fundamental of all legal rights, being necessary and basic to the enjoyment of all other legal rights; (2) that no compelling governmental interest in excluding the unborn from constitutional protection under the 5th and 14th Amendments has ever been shown, and that classifications affecting fundamental human rights are "especially" or "constitutionally suspect". Based on these rules of construction, the unborn offspring of human parents are to be given every benefit of doubt, to be afforded every advantage.

These standards for decision considered in light of the *scientific fact* that the unborn offspring of human parents is an autonomous human being,[11] and in light of the *legal fact* that the unborn is a legal person in numerous other areas of the laws,[12] compel the conclusion that the word "person" as used in the 5th and 14th Amendments includes unborn persons.

The 5th Amendment protects all persons against arbitrary action by the State. "No person shall be deprived of life, liberty or property without due process of law". If the word "person" in the 5th Amendment is construed to mean

11. See this Brief, *supra*.

12. For a survey of the rights which have been granted the unborn by the Courts, see 3 S. L. R. 225, "Abortion, the Law and Defective Children: A Legal-Medical Study", Suffolk University Law Review (Vol. III, Spring 1969, pp. 225-276).

only born "persons", then all unborn persons who have vested property rights (subject to divestiture if they are not born alive)[13] would have no protection against an arbitrary taking of such property rights by the Federal Government. This would leave an absurd gap in the scope of constitutional protection of individual rights. The unborn person would have legal protection against everyone except the State.

If the unborn offspring of human parents is a "person" within the meaning of the 5th Amendment for the purpose of protecting its property interests against arbitrary action by the government, it must follow that the life of that "person" is also protected against arbitrary interference by the State.

13. In many states the unborn's intestate rights of succession to property *vest* immediately upon the death of the decedent subject to divestment if the child is not born alive. *e.g.*, See *Tomlin* v. *Laws*, 301 Ill. 616, 134 N. E. 24 (1922); *Deal* v. *Septon*, 144 N. C. 110, 56 S. E. 691 (1907).

CONCLUSION.

It is respectfully submitted that the unborn is a "person" within the meaning of the 5th and 14th Amendments. Consequently, the unborn's life can be taken only with due process of law, and its life is entitled, like all other persons' lives, to equal protection under the law.

The voidance of state abortion statutes by court or legislature is governmental action which deprives the innocent unborn of the right to life, and therefore deprives them of equal protection and due process. This Court should therefore protect the unborn's constitutional rights in any decision it renders.

Respectfully submitted,

DENNIS J. HORAN,
JEROME A. FRAZEL, JR.,
THOMAS M. CRISHAM,
DOLORES B. HORAN,
JOHN D. GORBY,
One North LaSalle St.,
Chicago, Illinois 60602
312-346-5800.

October 15, 1971.

MEDICAL BIBLIOGRAPHY.

1. Short, R. V.: Implantation and the Maternal Recognition of Pregnancy, in Foetal Autonomy: A Ciba Foundation Symposium, ed. by G. E. W. Wolstenholme and Maeve O'Connor, J. & A. Churchill Ltd., 104 Gloucester Place, London, England, 1969.

2. Currie, G. A.: The Foetus as an Allograft: The Role of Maternal "Unresponsiveness" to Paternally Derived Foetal Antigens, Op. cit. supra note 1.

3. Rutter, W. J.: Independently Regulated Synthetic Transitions in Foetal Tissues, Op. Cit. supra note 1.

4. Jost, A.: The Extent of Foetal Endocrine Autonomy, Op. cit. supra note 1.

5. Liley, H. M. I.: Modern Motherhood, Random House, Rev. Ed. 1969.

6. Ingelman-Sundberg, Axel, and Wirsen, Cloes: A Child Is Born: The Drama of Life Before Birth, photos by Lennart Nilsson, Dell Publishing Co., New York, 1965.

7. 282 App. Div. 542, 125 N. Y. S. 2d 696 (.....).

8. Arey, Leslie B.: Developmental Anatomy, 6th Ed. Philadelphia W. B. Saunders Co. 1954 Chap. II VI.

9. Patten, Bradley M.: Human Embryology, 3rd Ed. McGraw-Hill Book Co. New York, 1968 Chap. VII.

10. Rugh, Robert and Shettles, Landrum B., with Richard N. Einhorn: From Conception to Birth: The Drama of Life's Beginnings, Harper and Row, New York 1971.

11. Straus, Reuben, et al.: Direct Electrocardiographic Recording of a Twenty-Three Millimeter Human Embryo, The American Journal of Cardiology, September 1961, pp. 443-447.

12. Marcel, M. P., and Exchaquet, J. P.: L'Electrocardiogramme du Foetus Human Avec un Cas de Double Rythme Auriculaire Verifie, Arch. Mal. Couer, Paris 31: 504, 1938.

13. Flannagan, G. L.: The First Nine Months of Life, Simon and Schuster, 1962.

14. Still, J. W.: J. Washington Acad. Sci. 59:46, 1969.

15. Hooker, Davenport: The Prenatal Origin of Behavior, Univ. of Kansas Press, 1952.

16. Streeter, Geo. L.: Development of the Auricle in the Human Embryo, Contributions to Embryology, Vol. XIII No. 61, 1921.

17. Hooker, Davenport: Early Human Fetal Behavior with a Preliminary Note on Double Simultaneous Fetal Stimulation, Proceedings of the Association for Research in Nervous and Mental Disease, Baltimore, The Williams & Wilkins Co., 1954.

18. Gesell, Arnold, M.D., Amatruda, C. S., M.D.: Developmental Diagnosis, P. S. Hoeber, 1958 pp. 8-9.

19. Wood, Carl: Weightlessness: Its Implications for the Human Fetus, J. Obstetrics & Gynecology of the British Commonwealth, 1970 Vol. 77, pp. 333-336.

20. Liley, Albert W.: Auckland MD to Measure Light and Sound Inside Uterus, Medical Tribune Report, May 26, 1969.

21. Fetology: The Smallest Patients. The Sciences, published by The New York Academy of Sciences, Vol. 8 No. 10, Oct. 1968, pp. 11-15.

22. de Smoler, Dr. Paulina Eisenberg: Fetal Heart Activity Is Recorded Routinely by 10th Week of Life, Medical Tribule, Feb. 2, 1970.

23. Neuman, M. R.: An Intravaginal Fetal Egg Telemetry System, Obstetrics and Gynecology, Vol. 35, No. 1, Jan. 1970, pp. 96-103.

24. Curran, J. T.: A Practical System of Fetal Egg Analysis by Computer, J. Physiology, 303, July 1969.

25. Massorrio, M.: PHONOCARDIOGRAPHY IN THE DIAGNOSIS OF FETAL DISTRESS, Archivio Per Le Scienze Mediche U 125, Dec. 1968, pp. 860-865.

26. Henry, G. R.: THE ROLE OF AMNIOSCOPY IN THE PREVENTION OF ANTE PARTUM HYPOXIA OF THE FETUS, J. Obstet. Gynec. British Commonwealth, 76:790-794, Sept. 1969.

27. Rieppi, G., Cargnello, U.: AMNIOSCOPY IN THE DIAGNOSIS OF FETAL DISTRESS, Friuli Medico (Udine) V 23, Nov.-Dec. 1968.

28. INTRAUTERINE TRANSFUSION AND ERYTHRO BLASTOSIS FETALIS, Report of 53rd Ross Conference on Pediatric Research, Sept. 1966.

29. Kimura, C., Yamaguchi, R.: CLINICAL SIGNIFICANCE OF THE FETAL DSP TEST, Tohoku J. Exp. Med. 1969, 99: 165-170.

30. Sevilla, Rafael M.: ORAL FEEDING OF HUMAN FETUS: A POSSIBILITY, JAMA, May 4, 1970, pp. 713-717.

31. Horger, E. O. III, Hutchinson, D. L. M.D.: DIAGNOSTIC USE OF AMNIOTIC FLUID, J. of Pediatrics Vol. 75, No. 3, pp. 503-508, Sept. 1969.

32. Floyd, Wm. S., M.D., Goodman, Paul A., Wilson, A. CT: AMNIOTIC FLUID FILTRATION AND CYTOLOGY, Obstetrics and Gynecology, Vol. 34, No. 4, Oct. 1969.

33. Szijarto, di Antonino: MODERN DIAGNOSTIC CRITERIA OF FETAL SUFFERING, Fracestoro Vol. 61, pp. 914-930, Nov.-Dec. 1968.

34. Parmley, Tim, Miller, Eugenia: FETAL MATURITY AND AMNIOTIC FLUID ANALYSIS, Am. J. Obstet. and Gynec. Vol. 105, No. 3, pp. 354-362.

35. Berman, Peter, M.D., Balis, M. E. Ph. D., Dancis, J., M.D.: A METHOD FOR THE PRENATAL DIAGNOSIS OF CONGENITAL HYPERURICEMIA, J. of Pediatrics Vol. 75, No. 3, Sept. 1969.

36 O'Doherty, N.: THE PRENATAL TREATMENT OF ADRENAL INSUFFICIENCY, the Lancet, No. 29, 1969, 2:1194-1195.

37. Nadler, H. L., M.D.: Prenatal Detection of Genetic Defects, J. of Pediatrics, Jan. 1969, Vol. 74, No. 1, pp. 132-143.

38. Wood, Carl; Newman, Warwick; Lumley, Judith; Hammond, Judith: Classification of Fetal Heart Rate in Relation to the Fetal Scalp Blood Measurements and Apgar Score, Am. J. Obstet. and Gynec. Vol. 105, No. 6, Nov. 1969, pp. 942-948.

39. Kibli, F. W., et al.: Observations on Heart Rate and PH in the Human Fetus During Labor, Am. J. Obstet. and Gynec. Vol. 104, No. 8, Aug. 15, 1969, pp. 1190-1206.

40. Abramovich, D. R.: The Importance of Fetal Physiology and Endocrinology in Obstetrics, The Med. Journal of Australia, 2:408-411, 23 Aug. 1969.

41. Jackson, Ben J.: Approach to Fetal Research—Present and Future, Am. J. Diseases of Children, Vol. 118, Dec. 1969, pp. 812-816.

42. Hodari, A. A., Thomas Lorna: Experimental Surgical Procedures Upon the Fetus in Obstetric Research, Obstet. and Gynec. Vol. 34, No. 2, Aug. 1969, pp. 204-211.

43. Zapol, Warren, and Kolobow, Theodore: Medical World News, May 30, 1969.

44. (a) Monroe, Canadian Medical Association's Journal, 1939.

    (b) Hellegers, Andre, M.D.: National Symposium on Abortion, May 15, 1970, Prudential Plaza, Chicago, Illinois.

45. Miller, James R.: Dermal Ridge Patterns: Technique for Their Study in Human Fetuses, J. Pediatric, Vol. 73, No. 4, Oct. 1969, pp. 614-616.

46. Potter, Edith: Pathology of the Fetus and Infant, Year Book Publishers Inc., Chicago, 1961.

47. Ian, Donald: Sonar as a Method of Studying Prenatal Development, J. of Pediatrics, Vol. 75, No. 2, Aug. 1969, pp. 326-333.

48. Alexander, D. P.; Britton, H. G.; Nixon, D. A.: Maintenance of Sheep Fetuses by an Extra Corporeal Circuit for Periods up to 24 Hours, Am. J. Obstet. and Gynec. Vol. 102, No. 7, Dec. 1968, pp. 969-975.

49. Gesell, Arnold, The Embryology of Behavior, Harper & Bros. Publishers, 1945, Chap. IV, V, VI, X.

50. Hellman, L. M., et al.: Growth and Development of the Human Fetus Prior to the 20th Week of Gestation, Am. J. Obstet. and Gynec. Vol. 103, No. 6, March 15, 1969, pp. 789-800.

51. Shepard, Thomas: Onset of Function in the Fetal Thyroid: Biochemical and Autoradiographic Studies from Organ Culture, J. Clin. Endocrinology, 27: 945-958, July 1967.

52. Pritchard, Jack A.: Fetal Swallowing and Amniotic fluid Volume, Obstet. and Gynec. Vol. 28, No. 5, Nov. 1966.

53. Huntingford, P. J., and Pendleton, H. J.: The Clinical Application of Cardiotocography, J. Obstet. and Gynec. Brit. Commonwealth, Vol. 76, pp. 586-595, July, 1969.

54. Barton, John J.: Evaluation of the Doppler Shift Principle as a Diagnostic Aid in Obstetrics, Am. J. Obstet. and Gynec. Vol. 102, No. 4, pp. 563-570, Oct. 1968.

55. Mori, et al.: The Original Production of the Glass Fiber Hyteroscope and a Study of Intrauterine Observation of the Human Fetus and the Inner Things Attached to the Fetus and Inner Side of the Uterus Wall in Late Pregnancy and the Beginning of Delivery by Means of Hysteroscopy and Its Recording on Film, J. Jap. Obstet. and Gynec. Society (Eng.) 15:87-95, Apr. 1968.

56. Gairdner, Douglas: Fetal Medicine: Who Is to Practice It, J. Obstet. and Gynec. Brit. Commonwealth, 75:1123-1124, Dec. 1968.

57. Silber, David L., Durnin, Robert E.: Intrauterine Atrial Tachycardis, Am. J. Diseases of Children, Col. 117, pp. 722-726, June 1969.

58. Blumenthal, S., et al.: Congenital Atrial Flutter: A Report of a Case Documented by Intrauterine Electrocardiogram, Pediatrics, 41: 659-661, Mar. 1968.

59. Nielsen, J. S., et al.: Foetal Electrocardiographic Studies of Cardiac Arrhythmias and the Heart Rate, Acta. Obstet. and Gynec. Scan 47: 246-256, 1968.

60. Inserted Intrauterine Transmitter for Measurement of Fetal Heart Rate, Med. Brol. Engr. 6:549-551, Sept. 1968.

61. Rosen, Mortimer G.,: Fetal Electroencephalographic Studies of the Placental Transfer of Thiopental and ether, Obstet. and Gynec. Vol. 30, No. 4, Oct. 1967.

62. Cameron: Fetal Electrocardiography: A Study of the Literature, Developmental Medicine and Child Neurology, 9:329-337, June 1967, (61 references).

63. Petre-Quadens, O., et al.: Sleep in Pregnancy: Evidence of Fetal Sleep Characteristics, J. Neurologic Science, 4:600-605, May, June, 1967.

64. Hooker, Davenport: The Origin of Overt Behavior, Ann Arbor, Univ. of Michigan Press, 1944.

65. Turnbull, A. C., Anderson, Anne B.: Postgraduate Medical Journal, Jan. 1969, Vol. 45, pp. 65-67.

66. Guttmacher, Alan F.: The Shrinking Indications for Therapeutic Abortion, Harold Rosen (ed) Therapeutic Abortion New York, The Julian Press, 1954.

67. Moore, J. G., and Randall, J. H.: Trends in Therapeutic Abortions: A Review of 137 Cases, Am. J. Obstet. and Gynec. 63, Jan. 1952, pp. 28-40.

68. Guttmacher, Alan F.: Abortion—Yesterday, Today and Tomorrow, Alan F. Guttmacher (ed) The Cases for Legalized Abortion Now, Berkeley: Diablo Press, 1967.

69. Guttmacher, Alan F.: Therapeutic Abortions: The Doctor's Dilemma, J. of the Mt. Sinai Hospital, 21, 1954-1955.

70. Spontaneous and Induced Abortion, report of a World Health Organization scientific group, World Health Organization Technical Report Series, No. 461, p. 40, 1970.

71. College Statement and Minority Report on therapeutic Abortion, issued by the American College of Obstetricians and Gynecologists, Chicago, Illinois, May 1, 1969.

72. Legalized Abortion, Report by the Council of the Royal College of Obstetricians and Gynecologists, British Medical Journal, 1:850-854, April 12, 1966.

73. The Abortion Act (1967), Findings of an inquiry into the first year's working of the *Act* conducted by the Royal College of Obstet. and Gynec., Br. Med. J., 2:529-535, May 30, 1970.

74. Klemfuss, R.: State M. D. S. Clarify Abortion Stand, news release, Med. Soc. of the State of N. Y., March 26, 1970

75. Id., No. 73 at p. 533.

76. Chase, Gordon: Gordon Chase Cites Success of First Year of New York's Abortion Law In Twelve Month Report on 165,000 Abortions, news release, Health Services Admin., The City of N. Y., June 29, 1971, p. 1.

77. Ibid.

78. Id., Appendix C—Place of Residence (%).

79. Seiner, C. H., Mahoney, E.: Coordination of Outpatient Services From Patients Seeking Elective Abortion, Clin. Obstet. and Gynec. 14:48-59, March, 1971.

80. Rovinsky, J. J.: Abortion in New York City, Preliminary Experience with a Permissive Abortion Statute, Obstet. and Gynec., 38:333-342, Sept. 1971.

81. Gaps in N. Y. Law Blamed for "Gross" Abortion Abuses, Ob. Gyn. News, Physicians International Press, p. 1, April 1, 1971.

82. Ibid.

83. Id., No. 80 at p. 337.

84. Id., No. 81.

85. Id., No. 76.

86. Id., No. 80 at p. 336.

87. Id.

88. Rovinsky, J. J.: Abortion in New York City, a paper presented to the meeting of the Am. Assn. of Planned Parenthood Physicians, President Hotel, KC, Mo., April 5-6, 1971.

89. Morbidity and Mortality, U. S. Dept. of H. E. W., Center for Disease Control. Weekly Report for week ending June 12, 1971, Abortion Mortality, N. Y. C., 20:208-209.

91. Boston Woman, 23, Dies After Abortion Performed in Office of Physician Here, The N. Y. Times, Sat., Oct. 17, 1970.

92. Olsen, C. E.; Nielsen, H. B.; and Ostergaard, E.: Complications to Therapeutic Abortion, Int. J. Gyn. Obstet. 8:823-829, Nov. 1970.

93. Id. No. 73.

94. Tietze, C.: Abortion Laws and Abortion Practices in Europe, from Excerpta Medica International Congress Series, No. 207. Advances in Planned Parenthood—V. Proceedings of the Seventh Annual Meeting of the A. A. P. P. P. San Francisco, 1969, p. 198.

95. World Health Statistics Report, Vol. 23, No. 7, pp. 546-549, published by the W. H. O. 1967 is the latest year for which world statistics on maternal mortality are available. Denmark's maternal mortality rate was 19.2 and 20.9/100,000 live births for 1966 and

1967 respectively. Sweden's maternal mortality in 1966 was 11.3/100,000. Yugoslavia's 1966 rate was 105.3/100,000, and Hungary's was 48.4/100,000. In comparison, the U. S. maternal mortality in 1966 was 21.9/100,000 and 28.0/100,000 in 1967.

96. Jurukovski, J.: Complications Following Legal Abortion, Proc. Roy. Soc. Med., 62:830-831, Aug. 1969.

97. Id., No. 95.

98. Klinger, A.: Demographic Consequences of the Legalization of Induced Abortion in Eastern Europe, Int. J. Gynec. and Obst. 8:680-691, Sept. 1970.

99. Id., No. 95.

100. Therapeutic Abortions in Oregon—January-December, 1970, a report issued by the Oregon St. Bd. of Health. Oregon was selected because abortion is limited to state residents, a high volume of abortions are being performed (200.8/1,000 live births) and it is recognized that their reporting system is "complete or nearly complete". (See Abortion Surveillance Report—Hospital Abortions, Jan.-June, 1970. Distributed by the U. S. Dept. of H. E. W., Center for Disease Control, Atlanta, Georgia, 30333.)

101. Cushner, I. M.: Pregnancy Termination: The Impact of New Laws, an Invitational Symposium, J. Reprod. Med. 6:62-63, June, 1971.

102. Vital Statistics of the U. S., Vol. 1—Natality and Vol. II, Part B—Mortality. U. S. Dept. of H. E. W., U. S. Public Health Serv., 1967.

103. Id., No. 94.

104. Id., No. 95.

105. Tovell, H.: Symposium on Legal Abortion, panel discussion, Am. Col. Obstet. and Gynec. Annual Meeting Dist. II, Oct. 28-Nov. 1, 1970. Paradise Island, Nassau, Bahamas. In Clin. Obstet. and Gynec. 14:303, March, 1971.

106. Jurokovski, J.; Sukarov, L.: A CRITICAL REVIEW OF LEGAL ABORTION, Int. J. Gynec. and Obstet. 9:111-117, May, 1971.

107. Id., No. 70 at pp. 38-39.

108. Id., No. 94 at pp. 205-206.

109. VITAL STATISTICS OF THE UNITED STATES, Part II—Mortality, pub. by the U. S. Public Health Serv. of H. E. W. The Official Vital Statistics list 160 maternal deaths from abortions of all causes. This is a figure hotly disputed by pro-abortionists who at times have placed the number of annual maternal deaths from illegal abortions at anywhere from 500 to 10,000 depending upon their audience. It is this kind of exaggeration that has helped the pro-abortionists create an hysteria for change in the abortion debate. However, it is interesting to note that one of the proponents of induced abortion, when discussing the same statistics at a recent pro-abortion conference, had this to say:

> "I might say we have a fairly high rate of discovery in New York City. The opportunity of obscuring an abortion death is very unlikely. We have a very effective Health Department, which screens all the death certificates, and anything unusual would be referred to us, particularly in a woman of childbearing age." ABORTION IN A CHANGING WORLD, Vol. II, Columbia U. Press, at p. 52, 1970.

110. Kerenyi, T. D.: OUTPATIENT INTRA-AMNIOTIC INJECTION OF HYPERTONIC SALINE, Clin. Obstet. and Gynec., 14:137, March, 1971.

111. Id., No. 70, at p. 37.

112. Banner, P. H.; Kirshen, E. J.; Didio, J. M.: THERAPEUTIC ABORTION: A REVIEW OF 567 CASES, Cal. Med., 115:20-28, July, 1971.

113. Kaye, R. E.: PROCEDURES FOR ABORTIONS AT THE N. Y. LYING-IN HOSPITAL, Clin. Obstet. and Gynec., 14:153-165, March, 1971.

POOR COPY

114. Choate, J. W.: Pregnancy Termination: The Impact of New Laws, an Invitational Symposium, J. Reprod. Med., 6:45-72 at p. 62, June, 1971.

115. Midak, E.: Early and Late Sequelae of Abortion, Pol. Tyg. Lek., 21:1063, 1966.

116. Kotasek, A.: Artificial Termination of Pregnancy in Czechoslovakia, Int. J. Gynaec. and Obstet., 9:118-119, May, 1971.

117. Bengtsson, L. P.: Legal Abortion Induced by Intra-Amniotic Injection, (1): Technique, Effect, Risks and Mode of Action. Lakartidninger, 64:5037, 1967.

118. Menzies, D. N., et al.: Therapeutic Abortion Using Intra-Amniotic Hypertonic Solutions, J. Obstet. and Gynaec. Brit. Comm., 75:215, 1968.

119. Wagatsuma, T., Intra-Amniotic Injection of Saline for Therapeutic Abortion, Am. J. Obstet. and Gynec., 93: 743-745, 1965.

120. Trca, S., et al.: Relationship Between Development of Inflammation After Induced Abortion and the Duration of Pregnancy, Cesk. Gynaek. 29:613, 1964.

121. Id., No. 7, Appendix D. Pregnancy Order (%).

122. Sandberg, E. C.: Surgical Complications of Therapeutic Abortion (Highlights from 1971 A. M. A. Meeting), Audio-Digest Obstet. Gynec., Vol. 18, No. 15, Aug. 3, 1971.

123. Droegemueller, W., et al.: The First Year of Experience in Colorado With the New Abortion Law, Am. J. Obstet. and Gynec., 103:694-698, 1969.

124. Hall, R. E.: Induced Abortion in New York City, a report of six separate studies, Am. J. Obstet. and Gynec., 110:601-611, July 1, 1971.

125. Carlton, M. A.; Hegarty, R.: The Immediate Morbidity of Therapeutic Abortion, Med. J. Aust., pp. 1071-1074, Dec. 5, 1970.

126. Poradorsky, K.: Lacerations of Cervic and Perforation of Uterus in Artificial Interruption of Pregnancy, Cesk. Gynek., 25:682, 1960.

127. Vasiliad, M., et al.: On Uterine Perforation, Obstet. and Gynec., 10:247, 1965.

128. Id., No. 70, p. 38.

129. Skipetrov, V. P.: Changes in the Blood Coagulation in Artificial Abortion, Vop. Okhr. Materin. Det., 11:69, 1966.

130. Wroblewski, M., et al.: Evaluation of Blood Clotting and Fibrinolysis in Early Pregnancy and After Its Interruption, Ginek. Pol., 36:141, 1965.

131. Zwarik, E.: Afibrinogenemia After Artificial Interruption of Pregnancy, Zbl. Gynaek., 86:1097, 1964.

132. Zwarik, E., Study of Blood Coagulation and Fibrinolysis in Connection With Artificial Interruption of Pregnancy, Gynaec., 162:197, 1966.

133. Sood, S. V., Complications of Hysterotomy, Br. Med. J., 4:495-496, Nov. 21, 1970.

134. Id., No. 80, p. 338.

135. Id., No. 98, p. 691. The prematurity rate in the United States is about 7%.

136. Slumsky, R.: Course of Delivery of Women Following Interruption of Pregnancy, Cesk. Gynek., 29:97, 1964.

137. Harmful Effects of Induced Abortion, n.p. Family Planning Federation of Japan, 1966.

138. Schaeffer, A. J.: Diseases of the Newborn, Sec. Ed., Philadelphia, W. B. Saunders Co., 1966.

139. Ozsvath, I.; Rado, S.: Experience With Interruption of Pregnancy, Nepegeszsegugy, 42:121, 1961.

140. Sawazaki, C.; Tanaka, S.: Harmful Effects of Induced Abortion (Reports of Studies Conducted by the Subcommittee on the Study of Induced Abortion),

p. 49, Family Planning Federation of Japan, Tokyo, 1966.

141. Hayasaka, Y., et al.: Japan's 22-Year Experience With a Liberal Abortion Law, XIIth International Congress of FIAMC, Washington, D. C., October 11-14, 1970.

142. Id., No. 70, pp. 27-28.

143. Kuck, M.: Abortion in Czechoslovakia, Pro. Roy. Soc. Med., 62:831-832, 1969.

144. Hofman, D.: Statistical Studies on Some Obstetric Relations, Especially the Relation of Abortion to Late Post Partum Complications, Zbl. Gynaek, 87: 1537, 1964.

145. Mehlan, K-H.: The Effects of Legalization of Abortion of the Health of the Mothers in Eastern Europe, Proceedings of the 7th Conference of the IPPE, Singapore, 1963; New York, Excerpta Medica Foundation, 1964.

146. Milosevic, B., et al.: Sterility With Special Reference to Induced Abortion, Srpski. Arh. Celukupno. Ledarstvo., 94:1, 1966.

147. Jeffecoate, T. N. A.: Indications for Therapeutic Abortion, Brit. Med. J., 1:581, 1960.

148. Gellen, J., et al.: Maternal-Fetal Microhemotransfusion as a Result of Induced Abortion, Orr. Hetil., 107:732, 1966.

149. Gellen, J., et al.: Surgical Termination of Pregnancy as a Cause of Rhesus Sensitization, Brit. Med. J., 2:1471, 1965.

150. Jorgensen, J.: Rhesus Antibody Development After Abortion, Lancet, 2:1253-1254, 1969.

151. Mathews, C. D.; Mathews, A. E. B.: Transplacental Hemorrhage in Spontaneous and Induced Abortion, Lancet, 1:694-695, 1969.

152. Parmley, T. H., et al.: Transplacental Hemorrhage in Patients Subjected to Therapeutic Abortion, Am. J. Obstet. and Gynec., 106:540-542, 1970.

153. Voight, J. C., et al.: Feto-Maternal Hemorrhage in Therapeutic Abortion, Brit. Med. J., 4:395-396, 1969.

154. Lakoff, K. M.; Klein, J.; Bologuese, R. J.; and Corson, S. L.: Transplacental Hemorrhage During Voluntary Interruption of Pregnancy, J. Reprod. Med. 6:19-20, June, 1971.

155. Sprague, C.: The Role of Rhogam in Therapeutic and Spontaneous Abortion, Hawaii Med. J., 29:450-451, July-August, 1970.

156. Ingraham, H. S.; Longwood, R. J.: Abortion in New York State Since July, 1970, Clin. Obstet. and Gynec., 14:5-24, March, 1971.

157. Cepelak, J., et al.: Influence of Interruption of Pregnancy on the Sexual Life of the Woman, Cesk. Gynek., 25:609, 1960.

158. Potts, D.: Termination of Pregnancy, Brit. Med. Bull., 26:65-71, 1970.

159. Osadchaia, O. V.: Immediate and Remote Results in Induced Abortion, Zdravoorkhr Belorussii, 9:59, 1963.

160. Id., No. 70, p. 41.

161. Ebaugh, F.; Heuser, K.: Psychiatric Aspects of Therapeutic Abortion, Post Graduate Medicine, 2: 325, 1947.

162. Ekblad, M.: Induced Abortion on Psychiatric Grounds, a Follow-Up Study of 479 Women, Acta. Psychiat. Neurol. Scand. Suppl., 99:238, 1955.

163. Seigfried, S.: Psychiatric Investigation of the Sequelae of Interruption of Pregnancy, Schweiz. Arch. Neurol. Psychiat., 67:365, 1951.

164. Niswander, K. R.; Patterson, R. J.: Psychologic Reaction to Therapeutic Abortion, Obstet. Gynec. 29:702-706, May, 1967.

165. Id., No. 70, p. 42.

166. Fleck, S.: Some Psychiatric Aspects of Abortion, J. Nerve. Ment. Dis., 151:42-50, 1970.

167. Kummer, J. M.: Post-Abortion Psychiatric Illness —A Myth?, Am. J. Psychiat., 119:980-983, 1963.

168. Simon, N. M.; Senturia, A. G.: Psychiatric Sequelae of Abortion, Arch. Gen. Psychiat., 15:378-389, Oct. 1966.

169. Heath, D. S.: Psychiatry and Abortion, Canad. Psychiat. Ass. J., 16:55-63, Feb. 1971.

170. Sloane, R. B., New England Journal of Medicine, 280, 1206 (1969).

171. Barno, Alex. Criminal Abortion Deaths, Illegitimate Pregnancy Deaths, and Suicides in Pregnancy, in Minnesota, 1950-1965. American Journal of Obstetrics and Gynecology, 1969, pp. 356-367.

172. Okomoto, Y. and Kirikae, T.: Electroencephalogic Studies on Brains of Foetus, of Children of Premature Births and Newborns Together with Notes on Foetal Brainwaves, Folia Psychiatrica Neurol. Jap. 5:135 (1951).

173. Hamlin, Hannibal: Life or Death by EEG, J. Am. Med. Assn., 190:112-114 (1964).

FILE COPY

FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 70-40

MARY DOE; Rose G. Bonner; Robert Bledsoe; Lillian L. Jones; Janet Weiser; Colbert Turner; Newton Long; Howard Lockhart; William H. Bippen; George Vinke; Pauline B. Smith; Jacob Wilmer; Judith Bonner; Bonnie Dunaway; Joyce Parks; Lee Ann Irion; Mary Long; J. Bennett Hamilton; Samuel L. Williams; Eugene Pickett; Richard Dever; Donald Daughtry; Judith Zanolli and Karen Weaver; residents of the State of Georgia; Planned Parenthood Association of Atlanta, Inc., a Georgia corporation; and Georgia Citizens for Hospital Abortion, Inc., a Georgia corporation, for and on behalf of all persons and organizations similarly situated,

Appellants,

VS.

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; Lewis R. Slaton, as District Attorney of Fulton County, Georgia; and Herbert T. Jenkins, as Chief of Police of the City of Atlanta,

Appellees.

On Appeal from the United States District Court
For the Northern District of Georgia

BRIEF FOR APPELLEES

P. O. ADDRESSES:

132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334

Fulton County Courthouse
Atlanta, Georgia 30303

2614 First National
Bank Building
Atlanta, Georgia 30303

ARTHUR K. BOLTON
HAROLD N. HILL, JR.
COURTNEY WILDER STANTON
DOROTHY T. BRADLEY
Attorneys for Arthur K. Bolton

JOEL FELDMAN
Attorney for Lewis R. Slaton

HENRY L. BOWDEN
RALPH H. WITT
Attorneys for Herbert T. Jenkins

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
JURISDICTION	15
A. A SUBSTANTIAL FEDERAL QUESTION HAS BEEN PRESENTED	15
B. THIS CASE IS NOT A "CASE" OR "CONTROVERSY" WITHIN THE MEANING OF ARTICLE III OF THE UNITED STATES CONSTITUTION	18
1. The refusal of the trial court to allow Appellees' inquiries into the identity of "Mary Doe" negates its jurisdiction to consider the case.	18
2. The remaining Appellees lack standing to challenge the statute.	19
C. A THREE-JUDGE DISTRICT COURT WAS NOT PROPERLY CONVENED	22
D. CONCLUSION AS TO JURISDICTION	28
ARGUMENT	29
A. THE CASE MAY NOT PROPERLY PROCEED AS A CLASS ACTION . .	29

Page

B. APPELLANTS' ARGUMENT IS STRUCTURED ON A PREMISE WHICH THE LOWER COURT REFUSED TO ACCEPT AND WHICH IS UNTENABLE HERE 33

C. GEORGIA HAS LONG MAINTAINED A PUBLIC POLICY OF RECOGNIZING THAT AN UNBORN CHILD HAS PROTECTIBLE INTERESTS 41

1. The real meaning of the criminal abortion law invalidates both the premise of the court below and Appellants' premise. 41

2. The origin and history of Georgia's abortion laws signify their fetal-life-directed purpose. 43

3. Other manifestations of state concern for the unborn child . . . 63

D. THE ABORTION LAW MANIFESTS A LEGITIMATE BALANCING OF COMPETING RIGHTS AND INTERESTS 66

Page

E. APPELLANTS' CLAIMS IN THIS COURT SHOULD BE DISMISSED. 69

1. The standard remaining is not vague 71

2. On the face of the statute, due process is not denied the abortion-seeking woman. . . . 73

3. The residency requirement is not an unconstitutional limitation 75

4. None of the claims asserted are here cognizable. 76

CONCLUSION 78

APPENDICES:

APPENDIX "A" - FOREWARD, Opinions of the Attorney General 1a

APPENDIX "B" - GA. LAWS 1876, p. 113 . . . . . 1b

TABLE OF CASES

Page

Abbate v. United States, 359 U.S. 187 (1959) 78

Alabama Public Service Commission v. Southern Railway, 341 U.S. 363 (1951) 77

Allen v. Board of Education, 393 U.S. 544 (1969) 22

Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wisc. 1970) 16,17

Bailey v. Patterson, 369 U.S. 31 (1962) 19

Barrow v. State, 121 Ga. 187 (1904) 55,56

Bolton, etc., et al. v. Doe, 402 U.S. 936 (1971) 42

Bonbrest v. Kotz, 65 F. Supp. 138 (D. D.C. 1946) 62

Bouie v. City of Columbia, 378 U.S. 347 (1964) 74

Page

Bourazak v. North River Insurance Company, 379 F.2d 530 (7th Cir. 1967) 25

Boyle v. Landry, 401 U.S. 77(1971). 20

Brooks v. Briley, 274 F.Supp. 538 (M. D. Tenn. 1967) affirmed per curiam 391 U.S. 361 (1968) 20

Bull v. State, 80 Ga. 704 (1888). . 64

Burford v. Sun Oil Co., 319 U.S. 315 (1943) 75

Burns v. Lovett, 202 F.2d 335, affirmed Burns v. Wilson, 346 U.S. 137 (1953) 62

California v. Belous, 71 Cal.2d 954, 458 P.2d 194 (1969) cert. den. 397 U.S. 915 (1970) 16

Carpenters and Joiners Union of America v. Ritter's Cafe, 315 U.S. 722, reh. den. 316 U.S. 708 (1942) 70

Corkey v. Edwards, 322 F.Supp. 1248 (W.D. N.C. 1971) 17

Page

Dandridge v. Williams, 397 U.S. 471 (1970) 69

Doe v. Scott, 321 F.Supp. 1385 (N.D. Ill. 1971) 16

Driscoll v. Edison Light and Power Co., 307 U.S. 104, reh. den. 307 U.S. 650 (1939) 74

Epperson v. Arkansas, 393 U.S. 97 (1968) 20

Evans v. Abney, 396 U.S. 435(1970). 68

Everson v. Board of Education of Ewing Township, 330 U.S. 1, reh. den. 330 U.S. 855(1947) . . 74

Ex parte Collins, 277 U.S. 565 (1928) 22

Ex parte Reggel, 114 U.S. 642 (1885) 78

Ex parte Young, 209 U.S. 123(1908) . 25

Fallow v. Hobbs, 113 Ga. App. 181 (1926) 64

Ferguson v. Skrupa, 372 U.S. 726 (1963) 69

Page

Flast v. Cohen, 392 U.S. 83 (1968) 75

Florida Lime and Avocado Growers, v. Jacobsen, 362 U.S. 73(1960) . 27

Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) 62

Golden v. Zwickler, 294 U.S. 108 (1969) 19

Griswold v. Connecticut, 381 U.S. 479 (1965) 15,66

Gunn v. State, 227 Ga. 786 (1971) . 60

Hornbuckle v. Plantation Pipeline Co., 212 Ga. 504 (1956). 63,64

Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713(1962) . 27

International Longshoreman's & Warehouseman's Union v. Boyd, 347 U.S. 222 (1957). 78

Leiter Mineral, Inc. v. United States, 352 U.S. 220, reh. den. 352 U.S. 1019 (1957) . . . 73

Page

Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959) 76

Maryland Casualty Co. v. Pacific Coal and Oil Co., 312 U.S. 270 (1941) 21

Mitchell v. Commonwealth, 39 Am. Rep. 227 (Ky. Ct. App. 1879) . . 62

Mitchell v. Donovan, 398 U.S. 427 (1970) 28

Moody v. Flowers, 387 U.S. 97(1967) 27

Muskrat v. United States, 219 U.S. 346 (1910) 21

New v. Fennell, 222 Ga. 630(1966) . 64

Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., 292 U.S. 386 (1934) 22

Passley v. State, 194 Ga. 327 (1942) 56

Perez v. Ledesma, 401 U.S. 82 (1971) 21

Phillips v. United States, 312 U.S. 246 (1940) 21

Page

Poe v. Ullman, 367 U.S. 497 (1961) 19

Powell v. McCormack, 346 U.S. 486 (1969) 21,26

Prichard v. State, 160 Ga. 527 (1925) 45

Railroad Commission of Texas v. Pullman Co., 312 U.S. 496(1941). 76

Reetz v. Bozanich, 397 U.S. 82 (1970) 71

Roe v. Wade, 314 F.Supp. 1217 (N.D. Tex. 1970) juris. postponed 402 U.S. 936 (1971) 16

Rorick v. Board of Commissioners, 307 U.S. 208 (1939) 22

Rosen v. Louisiana, 318 F.Supp. 1217 (E.D. La. 1970) 17

Rowan v. Post Office Department, 397 U.S. 728 (1970) 68

Sniadich v. Family Finance Corp., 395 U.S. 337 (1969) 68

Spector Motor Service v. McLaughlin, 323 U.S. 101(1944) . . 73

Page

Stanley v. Avery, 387 F.2d 637 (6th Cir. 1968), cert. den. 390 U.S. 1044 25

State v. Jamieson, 480 P.2d 87 (Kan. 1971) 16

Steinberg v. Brown, 321 F.Supp. 741 (N.D. Ohio 1970) 17

Strauder v. West Virginia, 100 U.S. 303 (1880) 63

Sullivan v. State, 121 Ga. 183 (1904) 55

Summerlin v. State, 150 Ga. 173 (1920) 54

Swift & Co. v. Wickham, 382 U.S. 111 (1965) 22

Thorpe v. Housing Authority of City of Durham, 393 U.S. 268 (1969) 78

Tucker v. Carmichael, 208 Ga. 201 (1951) 62

United Public Workers v. Mitchell, 330 U.S. 75 (1947) 19

Page

United States v. Five Gambling Devices, etc., 346 U.S. 441 (1954) 74

United States v. O'Brien, 391 U.S. 367 (1968) 70

United States v. Raines, 362 U.S. 17 (1960) 78

United States v. Vuitch, 305 F.Supp. 1032, at 1034 (D. D.C. 1971). . 17

United States v. Vuitch, 402 U.S. 62 (1971) 17,72

United States v. Witkovitch, 353 U.S. 194 (1957) 74

Wade v. Buchannan, 308 F.Supp. 729 (1970) judgment vacated, 401 U.S. 989 (1971) 17

Western Casualty and Surety Co. v. Herman, 405 F.2d 121 (8th Cir. 1968) 25

Wright v. Georgia, 373 U.S. 284 (1963) 74

Younger v. Harris, 401 U.S. 37(1971)20

Zwickler v. Koota, 389 U.S. 241(1967) 26

STATUTORY AUTHORITIES

Page

Constitution of the State of Georgia, 1865, Art. V, Sec. I 45

Constitution of the State of Georgia, 1945, Sec. 2-3015 . . . 59

Federal Rules of Civil Procedure Rule 23 . . . . . 29,30, 31

Federal Rules of Civil Procedure, Rule 65(d) 23,24

Ga. Code of 1873. 47

Ga. Code Ann. § 26-1106 66

Ga. Code Ann. § 26-9925(c) 59,60

Ga. Code Ann. §§ 27-2519, 27-2520 65

Ga. Code Ann. § 36-310 66

Ga. Code Ann. § 38-418 8

Ga. Code Ann. § 38-419.1 9

Ga. Code Ann. § 40-1614 12

Ga. Code Ann. § 74-301, et seq . . 65

Page

Ga. Code Ann. § 74-401 et seq . . . 64

Ga. Code Ann. § 74-9901 64

Ga. Code Ann. § 88-2301, et seq . . 65

Ga. Code Ann. §§ 99-142 through 146 65

Ga. Code Ann. § 99-201 et seq. . . 65

Ga. Code Ann. § 113-904 64

Ga. Laws 1860, p. 24 44

Ga. Laws 1874, p. 404 43

Ga. Laws 1876, p. 113 43,54

43 Geo. III, ch. 58 52

Hotchkiss "Codification of the Statute Laws of Georgia, Including English Statutes of Force: In Four Parts", 1845, pp. 93-94 43

OTHER AUTHORITIES

Page

Bishop, New Criminal Law, Vol. I (8th Ed. 1892) 52

Blackstone, Wm., Commentaries . . . 47,48, 49,50, 51

Declaration of Rights of the Child, General Assembly of the United Nationa, Nov. 20, 1959 72

14 Encyclopedia Americana, p. 201 . 72

"In Defense of the Right to Live: The Constitutionality of Therapeutic Abortions," 1 Ga. L. Rev. 693 (1967) 63

Jenkins, W.S., "The Common Law in Georgia and its First Codification by Thomas R. R. Cobb", 16 Ga. Bar Journal, No. 1, 137 . . 44

Quay, "Constitutionality of Abortion Laws: Rights of the Fetus". 8 Child and Family Quarterly, No. 2, 169 63

Reed, A Handbook of Georgia Criminal Law and Procedure, 1873 45,46

Page

1 R.C.L. pp. 69-88 53

Storer and Heard, Criminal Abortion: Its Nature, Its Evidence and Its Law, 1868 . . . 50,51

Stubbs, R. Georgia Law of Children, 1969, §§ 167-170 57

IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1971
NO. 70-40

MARY DOE, et al.,

Appellants,

v.

ARTHUR K. BOLTON, etc., et al.,

Appellees.

On Appeal from the
United States District Court
For the Northern District of Georgia
Atlanta Division

BRIEF FOR APPELLEES

STATEMENT OF THE CASE [1]

---

[1] The statement is placed out of order because the discussion of jurisdiction, which next follows, is dependent in part upon its content.

Suit challenging the entire criminal abortion law of Georgia (Criminal Code of Georgia, Title 26, Chapter 12), was brought in federal district court by twenty-six entities. No facts were established in the proceedings as to any of them. The group included "Mary Doe", purportedly a pregnant woman who had sought and been refused an abortion, nine persons described as physicians, seven as nurses, five as ministers, two as social workers, and two corporations. (A. 7-10).

"Mary Doe's" identity remains unknown except apparently to her attorney and possibly to plaintiff Bourne. (A. 63, 65). If the facts which she alleged had been proved, and assuming that no other significant but absent fact would alter the picture, her situation, by her own assertion, would be as follows:

At the time suit was instituted on April 16, 1970, (A. 1), "Mary Doe" was nine weeks pregnant with her fourth child. (A. 7-18). This was later thought instead to be thirteen to fourteen weeks, (A. 48), but the statement in this Court is that she was approximately eleven weeks pregnant at the time. (Appellant's Brief, p. 8).

She applied to Grady Memorial Hospital's abortion committee for

approval of an abortion on March 25, 1970 (A. 8), that is, when she was by her calculations between six and eight weeks pregnant (measured from January 29 or February 12). She had first gone to Grady on about March 15 or 16, when she was thus four-and-one-half to six-and-one-half weeks pregnant, and had seen two doctors, White and Butler. Their conclusions concerning abortion for "Mary Doe" are unknown, and they are not parties to this suit. (A. 63). Whether a third doctor was seen or consulted before application to the abortion committee was made, as required by Section 26-1202(3), does not appear; "Mary Doe" thought three certifications were filed. (A. 56, Interrogatory 9, and A. 64, answer to Interrogatory No. 9).

The application was denied by the committee on April 10, 1970, sixteen days later. (A. 8, 64). 2/ The basis

---

2/ Her Brief erroneously states it as twenty-five days (p. 8), which fact is notable because the "delay" is given as a basis for the complaint that the statutory procedure is time-consuming. (p. 36).

given for the denial, she claims, was that she did not come within the exception of Section 26-1202(a)(1), i.e., where an abortion is necessary because "a continuation of the pregnancy would endanger [her] life . . . or would seriously and permanently injure her health. . . ." (A. 8, 18, 2). Six days thereafter, suit was filed, claiming the hospital abortion committee's denial of her application deprived her of constitutionally protected rights. (A. 1, 8).

Apparently after suit was brought, but before the hearing below on June 15, 1970, (A. 125), "Mary Doe" was examined by two other doctors, Block and Bourn, and she applied to Georgia Baptist Hospital, which presumably by its abortion committee, approved the application on May 5, 1970. (A. 63-64). 3/ Whether "Mary Doe's" baby

---

3/ Thus the statement in Appellants' Brief that Dr. Bourne, one of the Appellants, was one of the doctors who proposed the abortion denied by Grady, appears to be mistaken. He is the only Appellee who is asserted to have any connection whatsoever with "Mary Doe".

was subsequently aborted pursuant to this approval, or whether instead it was born in October 1970, because of the financial barrier at Georgia Baptist Hospital (A. 64), is not known to Appellees. Appellants indicate that an abortion was not done at the private hospital or outside of Georgia. (Appellants' Brief, p. 9).

"Mary Doe" was separated from her husband at the time of her application to Grady Hospital in March, 1970, (A. 64), 4/ as reconciled in April when suit was filed (A. 7), but as separated again in mid-June at the time of the court hearing. (A. 63). Whether the mental health problem she asserted (A. 7) was related in any way to the denial of her application, particularly since there was apparently no consent from her husband (A. 56, Interrogatory 8, and A. 64, answer to Interrogatory No. 8), is not

---

4/ Although she claimed she was "abandoned" then (A. 7) and during pendency of the suit. (Appellants' Brief, p. 8).

in the record.

She alleged in addition that she was a young indigent resident of Georgia 5/, was unable to care for her other three children, who were in foster or adopted homes, would be unable to care for the product of her pregnancy (A. 7), and according to her Brief in this Court, she was unemployed. (Appellants' Brief, p. 8). Nowhere is it stated in the complaint that she personally desired an abortion of the baby 6/; the facts asserted allow the conclusion that she thought she ought to submit to an abortion procedure.

"Mary Doe" brought the suit additionally as a class action (A. 6). The class which she volunteered to represent was variously described for her as: "women desiring abortions" (A. 6, line 2), "all others similarly

---

5/ To qualify for aid at Grady Hospital, she would have to be a resident of either Fulton or DeKalb Counties.

6/ But see A. 18(b).

situated" to her (A. 8 ¶ 9); by the court below as "pregnant women, single or married, wishing legal abortions" (A. 71), and "pregnant women denied abortions because of the Georgia statute attacked" (A. 162).

The remaining Appellants, who were dismissed below because of lack of a justiciable controversy between them and Appellees (A. 80), here challenge that ruling. (Appellants' Brief, p. 7). As indicated earlier, none of them are related in any way to "Mary Doe" except perhaps Dr. Bourne, whose conclusion regarding abortion was apparently affirmative and was approved by the private hospital's committee. (A. 63-64). None of them present any concrete, actual situation in which their "rights", differing as they are (since the group contains both individuals and corporations, medical, social and religious personages), were or will be denied. Their attack is a general attack on the statute in all of its aspects.

Neither as a group nor as individuals do they allege any prosecution or threat thereof or arrest or harassment or collision or conflict with anyone involved in enforcement or application of the statute.

None of the physicians allege a single instance in which any of them desire to perform an abortion or counsel a woman in connection therewith, or were prohibited in any way from doing so, even by the mere existence of the law. Three of the physicians (Hatcher, Waters, and Long) are on the medical staff at Grady Hospital, in at least abortion-related services. Whether they or any of them were involved in any way in "Mary Doe's" case at that hospital is not known.

None of the psychiatrists (Bourne, Turner, Leader, and Biggers) allege a single instance in which their statutory privileged communication was or might be encroached. 7/ Whether those

---

7/ Ga. Code Ann. § 38-418. "There are certain admissions and communications excluded from considerations of public policy. Among these are - . . . 5. psychiatrist and patient." Ga. Laws 1959, p. 190.

listed as psychiatrists are eligible to perform abortion procedures is at the least doubtful, and in this regard, none of the physicians are allegedly licensed to perform abortive procedures. Other than the psychiatrists and various medical program directors, only two (James and Violin) are listed as "physicians".

None of the nurses allege a single instance of abortion which they were prohibited from assisting in or a single instance in which any of them were prohibited or dissuaded from counseling pregnant women about abortion.

None of the five ministers cites a single case in which they received or expected criminal action, nor do they explain why they might not be protected by the privileged communication statute.8/

8/ Ga. Code Ann. § 38-419.1. "Every communication made by any person professing religious faith, or seeking spiritual comfort, to any . . . minister, . . . priest, . . . or rabbi, . . . by whatever name called, shall be deemed privileged. No such minister, priest, or rabbi shall disclose any communications made to him by

(continued on next page)

The social workers, too, state no positive case. The corporations advance no adversary claim whatsoever.

Moving to Appellees, it is obvious that "Mary Doe"'s real complaint was against the Grady Hospital abortion committee, which did not approve her application. She thought her case came within the exception provided in Section 26-1202(1)(a) and so, apparently, did her physician and two consultants, and those involved in the approved Georgia Baptist Hospital application. The details and explanations of the action by the Grady committee, not being party to the suit, is not illumined in the record. It may have misinterpreted the statutory exception or been completely unaware of the total health picture of "Mary Doe" in terms of her mental and physical and medical factors, even to the extent set out in her complaint below. Thus, as portrayed by the com-

---

(8/ continued)
any such person professing religious faith, or seeking spiritual guidance, or be competent or compellable to testify with reference to any such communication in any court."
Ga. Laws 1951, p. 468.

plaint, the denial of approval may well have been contrary to the statute's direction.

The suit instead was directed at the Attorney General of Georgia, the District Attorney of Fulton County (in which Grady Hospital is located), and the Chief of Police of Atlanta. No factual collision appeared between any of Appellants and any of Appellees. No suits, threats, harassments, or arrests were indicated.

Despite the Attorney General's advice that he was not a proper party (A. 41-46), the court below "sufficiently connected" him with the complaint by referring to his general duties, although none of them would involve him directly in enforcing the statute attacked. The remote possibility that the Governor would call on him to prosecute an abortion case is highly theoretical. (A. 73).

Appellants erroneously "link" the Attorney General with the Grady Hospital abortion committee. (Appellants' Brief, pp. 11, 21). No such control exists. The statute relied on by Appellants as the basis for the "link" provides that the authority of the Department of Law, of which the Attorney

General is head, shall extend to "the executive branch of the Government and every department, office, institution, commission, committee, board or other agency thereof."[9] This authority does not extend to any committee or employee of Grady Hospital, which is locally controlled and funded and in no way operated by the State. The hospital, like other non-State hospitals, is not represented by the Attorney General in legal affairs.[10]

The court below referred to the Attorney General's opinions, in finding a "sufficient connection", and presumably a collision of interests. Even the published opinions, however, have no effect as law. An explanation of "opinions" is set out in Appendix A hereto. No official opinion on the currently attacked abortion law has

---

9/ Ga. Laws 1943, pp. 284, 285; Ga. Laws 1966, pp. 43, 45; Ga. Code Ann. § 40-1614.

10/ See also the discussion in the Attorney General's Brief in Support of Motion to Dismiss (A. 43-46).

been requested, as to any of its aspects.

The "collision" is therefore illusory, not only with respect to the local district attorney and the local chief of police, but also as to the State attorney general.

Thus the case stands. The facts are all hypothetical. The court below assumed jurisdiction without first ascertaining that a justiciable controversy existed in fact between any of Appellants and any of Appellees. The "controversy" was tenuous and remote at best. Having assumed that a controversy would exist between some of the present parties, or other parties, at some time, the court went on with no development of clear facts and simply seized the opportunity to look at the cold statute in a two-dimemsional manner. It was unenlightened by any involvement of the statute in a specific case or by the facts which investigation and cross-examination of witnesses, as well as scrutiny of legislative history, would bring to bear.

Looking at the statute at first blush, then, the court declared those parts of it which it could not justify, in its limited inquiry, to be unmaintainable. The statute was viewed not

in context but standing alone, apart from its place in the body of the criminal law and its place in time, apart from any tested application. Then, having ignored an inquiry into its purposes and intents, the court fashioned its own explanation and superimposed it on the statute. The result was a rewritten statute with the court's goals, assumed to be the legislature's goals, aimed at.

The case stands no more concretely now than if Appellants' counsel had been permitted to draw a contrived, imagined situation, and then to litigate it. It is submitted that even a facial attack on State legislation may not thus proceed in our adversary system.

JURISDICTION

If a three-judge federal district court were properly convened, this Court's jurisdiction to review its decision is unquestioned. The jurisdictional issues raised relate first to the question of whether or not a district court had jurisdiction to consider the matter, and secondly, whether or not a three-judge court was properly convened.

A. A SUBSTANTIAL FEDERAL QUESTION HAS BEEN PRESENTED.

The fundamental issue raised in a recent rash of challenges to state abortion laws is whether or not the State, through its police power, has a legitimate interest in restricting the availability of abortions. Corrolary questions are whether or not a distinction should be made between married or unmarried females; whether or not the fetus is quick; and whether or not the State has an assertible interest in the quality of the abortion to be performed.

Based on their interpretations of Griswold v. Connecticut, 381 U.S. 479 (1956), a number of courts,

including the one below in the case sub judice, have determined that a woman's constitutional "right to privacy", encompasses a "right" to terminate a pregnancy by having the fetal development medically aborted, at least where the fetus is not yet quick. California v. Belous, 71 Cal.2d 954, 458 P.2d 194 (1969), cert. den. 397 U.S. 915 (1970); Roe v. Wade, 314 F.Supp. 1217 (N.D. Tex., 1970), jurisdiction postponed, 402 U.S.941(No. 70-18, 1971 Term); State v. Jamieson, 480 P.2d 87 (Kan. 1971); Doe v. Scott, 321 F.Supp. 1385 (N.D. Ill. 1971); Babbitz v. McCann, 310 F.Supp. 293 (E.D. Wisc. 1970), appeal dismissed 400 U.S. 1 (1970).

In brief, these decisions have been bottomed on a determination that either the state had no legally protectible interest in perpetuating the life of the unquick (or quick) fetus, or that such interest, if it existed, was inferior to that of the pregnant woman's right to terminate her pregnancy by a medical abortion. Thus, these cases provide that, insofar as a State statute attempts to regulate the reasons for which an abortion may be had, it is void for overbreadth.

These decisions do recognize that the State does have a legally

protectible interest in the quality of the abortion to be performed. See the opinion below, Doe v. Bolton, 319 F.Supp. 1048, 1055-56 (1970); United States v. Vuitch, 305 F.Supp. 1032 at 1034 (D. D.C. 1971), reversed on other grounds, 402 U.S. 62 (1971); Babbitz v. McCann, supra, 310 F.Supp. at 302.

Contrary to the above decisions, other courts have determined that the State has a legally protected interest in perpetuating a fetus' life. See Corkey v. Edwards, 322 F.Supp. 1248 (W.D. N.C. 1971); Steinberg v. Brown, 321 F.Supp. 741 (N.D. Ohio 1970); Rosen v. Louisiana, 318 F.Supp. 1217 (E.D. La. 1970). Additionally, although a federal district court determined that the federal statute of local application in the District of Columbia was void for vagueness insofar as it limited a physician's right to perform an abortion only where such action was necessary for the preservation of the woman's life or health, this Court reversed, but the decision appears to be limited to the question of whether or not the statute was void for vagueness, as it related to a married couple. United States v. Vuitch, supra, 402 U.S. 62, 70-71 (1971). Compare this with Wade v. Buchanan, 308 F.Supp. 729 (1970) judgment vacated, 401 U.S. 989 (1971).

In view of the foregoing, it seems that a substantial federal question has been presented.

B. THIS CASE IS NOT A "CASE" OR "CONTROVERSY" WITHIN THE MEANING OF ARTICLE III OF THE UNITED STATES CONSTITUTION.

Notwithstanding the existence of a federal question, a United States court cannot render advisory opinions. There must be an actual "case" or "controversy" between the parties. In determining this issue, consideration is to be given to such questions as "standing" and "ripeness".

1. The refusal of the trial court to allow Appellees' inquiries into the identity of "Mary Doe" negates its jurisdiction to consider the case.

While a pregnant female may have "standing" to challenge the constitutionality of the Georgia criminal abortion statute, when she has been denied an abortion because of it, there existed below, and there still exists, a real issue as to the actual existence of "Mary Doe." Whether she

was actually pregnant, and whether she had been refused a medical abortion because of a proper application of the statute, were among the crucial factors never determined. Appellees' attempts to discover the same were disallowed by the trial court, although Rule 26, F.R.C.P. specifically grant to respondents the right to discover such information.

In the present posture of the record, therefore, "Mary Doe" is merely a fictitious person. Thus, at the threshhold of this litigation, there is no actual controversy between Appellees and "Mary Doe". Golden v. Zwickler, 394 U.S. 108 (1969); Poe v. Ullman, 367 U.S. 497 (1961); United Public Workers of America v. Mitchell, 330 U.S. 75 (1947); Bailey v. Patterson, 369 U.S. 31 (1962).

2. The remaining Appellees lack standing to challenge the statute.

The trial court recognized that in Poe v. Ullman, supra, this Court held that the mere existence of a State penal statute would constitute insufficient grounds to support federal jurisdiction, and that, absent a pending or threatened prosecution, no federal jurisdiction exists sufficient to support a federal declaratory judgment on the constitution-

ality of a state statute. However, the court further stated that this rule of jurisdiction was altered by Epperson v. Arkansas, 393 U.S. 97 (1968). But in that case, there were at least definable facts and a real conflict between what the teacher was prohibited from teaching and the content of the book she was instructed to use. Moreover, the school officials who created the conflict were parties to the suit and the State admitted that teaching the existence of the condemned theory would itself be grounds for dismissal and prosecution under the statute. Such a palpable clash does not exist here.

In spite of this, the court below held that because "Mary Doe" had been refused an abortion under the statute, an actual controversy between her and Appellees existed, but that since no action had been taken or even threatened against the remaining appellants, no actual controversy existed between them and Appellees. Insofar as this determination relates to Appellants other than "Mary Doe", the result reached by the court was correct. Brooks v. Briley, 274 F.Supp. 538 (M.D. Tenn. 1967), affirmed per curiam 391 U.S. 361 (1968). See Younger v. Harris, 401 U.S. 37 (1971); Boyle v. Landry, 401 U.S. 77 (1971).

Where the only plaintiff allegedly having standing by virtue of an actual controversy with defendants was not shown to exist in fact, no jurisdiction to consider the complaint lies. Muskrat v. United States, 219 U.S. 346 (1910).

Summarizing, there was no "live dispute between [any of] the [adversary] parties." Powell v. McCormack, 395 U.S. 486, 517-518 (1969). There was missing the necessary ingredient of "a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Casualty Co. v. Pacific Coal and Oil Co., 312 U.S. 270, 273 (1941).

Thus, there being no pending prosecutions at the time of the three-judge hearing (or at any time throughout these proceedings, for that matter), a declaratory judgment was improper. See Perez v. Ledesma, 401 U.S. 82, 86n.2(1971).

C. A THREE JUDGE DISTRICT COURT WAS NOT PROPERLY CONVENED.

The three-judge court took a broad and expansive view of its jurisdiction, which is in apparent conflict with the constrictive view this Court has repeatedly taken. Swift & Co. v. Wickham, 382 U.S. 111 (1965); Ex parte Collins, 277 U.S. 565 (1928); Oklahoma Gas & Electric Co. v. Oklahoma Packing Company, 292 U.S. 386 (1934); Rorick v. Board of Commissioners, 307 U.S. 208 (1939); Phillips v. U. S., 312 U.S. 246 (1940). The Court has been reluctant to extend the range of cases necessitating the convening of three-judge courts. Allen v. Board of Education, 393 U.S. 544, 562 (1969).

Several of the prerequisites for a three-judge court's proper convention were not present in this case. One of the jurisdictional prerequisites to the applicability of Section 2281 is a request for injunctive relief against the enforcement of a state statute. The request in this case was mere verbiage, and as has been shown, the fact of the complaint is devoid of any allegation of prosecution or threatened prosecution under the challenged statute by any Appellee against anyone. There was, simply, nothing to enjoin. "Mary Doe"

had purportedly been denied an abortion by a hospital committee because of the existence of the law. The hospital was not a party to the suit. The committee members were not parties to the suit. Neither the Attorney General, the District Attorney, nor the Chief of Police had in any way restricted, or threatened any action against any of the Appellants. No enforcement or execution of the criminal statute had been instigated or intimated by any of the Appellees, nor was there any allegation suggesting that this was so. As far as permanent injunctive relief was concerned, only a general request for an injunction against enforcing, threatening to enforce, or applying the statute, was sought. But the complaint was devoid of any alleged action or activity which, if proved existent, would be subject to injunction. An injunction must enjoin someone from doing something he is doing or is about to do. That prerequisite was entirely absent here and the plaintiff's prayer for injunctive relief was only nominally asserted in an effort to invoke three-judge jurisdiction.

The validity of this analysis is further reinforced by an examination, in the context of this case, of the directions for the form and scope of a federal injunction. In Rule 65(d),

Federal Rules of Civil Procedure, it is specifically delineated that:

> "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or association with them who receive actual notice of the order by personal service or otherwise."

The complaint asks that the Attorney General, the District Attorney of Fulton County, the Chief of Police of the City of Atlanta, and "their agents and successors" be enjoined and restrained "from enforcing, threatening to enforce, or otherwise applying the challenged statute in derogation of the rights of plaintiffs".(A. 15). But what act or acts of any of these defendants are sought to be restrained? No act or impending act by any Appellee is even alleged in the complaint. What "specific terms" could possibly be framed which would not

refer totally to only presumed future conduct of any of the Appellees? An unsupported forecast could be the only source of such an injunction. In short, the prima facie basis for the extraordinary equitable remedy of injunction against enforcement of a state statute was missing. See Ex parte Young, 209 U. S. 123, 155-156 (1908).

The gist of the complaint was an attack on the constitutionality of the statute adopted in 1968 and which has not yet been construed or considered by the State courts. Although declaratory judgment may be granted as an additional remedy in three-judge injunction suits, the authorizing statute does not give any new or wider jurisdiction with it. Western Casualty and Surety Company v. Herman, 405 F.2d 121 (8th Cir. 1968); Stanley v. Avery, 387 F.2d 637 (6th Cir. 1968); cert. den. 390 U.S. 1044; Bourazak v. North River Insurance Company, 379 F.2d 530 (7th Cir. 1967). Consequently, if a complaint fails to state a claim for injunction, as here, a three-judge court would have no other jurisdiction upon which to base a declaratory judgment. The court in this case recognized, from the pleadings and without any evidence, that no injunction could lie. It summarily dismissed the request, stating that "the instant case

does not involve granting injunctive relief." (A. 80, emphasis added). Where it has been held that declaratory judgment could be granted and an injunction withheld, it is submitted that this is only when the complaint states a cause for injunction but for some reason within the court's discretion, such as for the sake of federal abstention, relief is denied. Powell v. McCormack, 346 U.S. 486 (1969); Zwickler v. Koota, 389 U.S. 241 (1967).

Here, the underlying basis for three-judge jurisdiction, that is, a bona fide request for injunction, is lacking. Therefore, the ancillary relief cannot properly be granted because the foundation is missing. The mere recitation of a jurisdictional prerequisite does not supply it, particularly when couched in such broad and general terms as are evident in the complaint in this case. The lip-service given the injunctive aspects of the case clearly indicate that it was no more than a vehicle to justify a three-judge court. The court itself gave short shrift to that aspect of the case, denying the injunction summarily. A three-judge court is only necessary where an injunctive decree "may issue" on the ground of federal unconstitutionality of the state statute. Florida

BLEED THROUGH POOR COPY

Lime and Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960). The complaint must at least formally allege a basis for the equitable relief of injunction. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962). That criteria was not present in this case.

Thus, the question is whether, in the absence of a request of some substance for injunctive relief, a three-judge court is properly convened:

> ". . . the requirement that the action seek to enjoin a state officer cannot be circumvented by joining, as nominal parties defendant, state officers whose action is not the effective means of the enforcement or execution of the challenged statute.' Wilentz v. Sovereign Camp, 306 U.S. 573, 579-580, . . ." Moody v. Flowers, 387 U.S. 97, 102 (1967).

It therefore follows that a nominal request for injunction against three defendants whose action was not the effective means of enforcement of the statute, cannot provide the prerequisite base for a three-judge court to examine the constitutionality of a state statute.

Likewise, the absence of any real involvement of the grant or denial of injunctive relief below adversely affects the jurisdiction of this Court in the attempted direct appeal. Mitchell v. Donovan, 398 U.S. 427 (1970).

CONCLUSION AS TO JURISDICTION

The case below did not present a situation over which federal jurisdiction might vest in order to authorize the court to hear and determine the case. Secondly, a three-judge court was not properly convened. Accordingly, the case at this juncture requires only reversal of the opinion and judgment below, or remand for dismissal of the complaint.

ARGUMENT

A. THE CASE MAY NOT PROPERLY PROCEED AS A CLASS ACTION.

Before proceeding further with the merits of the substantive issues sought to be litigated, the outline of the case must be further defined so that its context is clear.

The suit was brought as a class action under Rule 23 of the Federal Rules of Civil Procedure (A. 6), with the plaintiffs claiming to represent at least six sub-classes: women represented by "Mary Doe", physicians, psychiatrists, nurses, ministers and social workers. (A. 13). The use of this unwieldy group of plaintiffs for important constitutional litigation was never justified by the plaintiffs or discussed by the court below. In the complaint (A. 6, paragraph 5), plaintiffs alleged that a class action is proper without even specifying which form of class action was appropriate to the circumstances. Rule 23 provides three clearly delineated alternatives. Rule 23(b)(1), (2), and (3). Nor did plaintiffs state facts to meet the prerequisites set forth in Rule 23(a).

The most serious defect resulting from this approach is that the class which "Mary Doe" claimed to represent was described in ambulatory terms which changed its complexion at various times.[11] Different issues arise according to the limits of the definition of the class. For example, "Mary Doe" claims to be married (A. 7). Does she therefore represent married women only? What effect, then, does the declaratory judgment have on unmarried women? Further, "Mary Doe" alleges she is poor (A. 7) Does her class contain only those who cannot afford an abortion at a private hospital? "Mary Doe" is allegedly a resident of Georgia (A. 7). Could she represent non-residents wanting an abortion in Georgia? The court made no findings on these important questions.

Rule 23(c)(3) requires the court to ". . . describe those whom the court finds to be members of the class." There was no such description in either the opinion or judgment of the district court even though that court considered it

---

[11] Infra, pp. 6-7.

proper to examine the entire Georgia abortion statute. The class action is a method for adjudication, not a procedure allowing advisory opinions. Without a limitation and description of the class, the case is necessarily filled with numerous issues which are merely amorphous and hypothetical. A description of the class is absolutely necessary because a judgment is effective only on those found to be members. (Rule 23[c] [3], F.R.C.P.) The effect of the judgment is unpredictable and incalculable unless the court has specified those whose rights have been adjudicated.

The use of the class action mechanism for the five groups of professionals raises less serious problems since the trial court correctly dismissed them for lack of a justiciable controversy. However, the propriety of a class representation is again questionable. These groups sued on behalf of themselves and others similarly situated (A. 7-9), again without stating who such people would be. Certainly they could not represent all members of their respective professions because not all would share their views and interests. Contrary to Rule 23(a), the class action would be improper because (a) there are not

common questions of law or fact; (b) the claims are not representative; and (c) a representative party may not adequately represent the interests of the class.

If they wish to represent smaller groups within the ranks of their professions, such groups must be described. The claims of the doctors, nurses, ministers, and social workers, then, are doubly hypothetical. Not only is there no justiciable issue involving them, there is no identifiable group whose rights could be determined in the context of this litigation.

These additional Appellants, who were dismissed and now seek relief therefrom, are in no different position than any other persons in the same professions who might assert a generally described disagreement with the statute in a blanket claim that it infringes on their rights. Such a superficial antagonism does not make a case for the determination of constitutional issues. Hard fact gives way to surmise and conjecture in such circumstances. Precision is totally lacking.

Having thus arrived in this Court, Appellants seek a further condemnation of the entire statutory scheme, claiming facial

unconstitutionality with respect to every aspect of the criminal abortion law. Not only is its application to "Mary Doe" challenged, but also its application to her undefined class, and to the tag-along Appellants and the "classes" they represent. On top of this, Appellants again seek injunctive relief.

Putting aside for the moment the gateway jurisdictional issue and the roads-end injunction issue, the merits of the case simply call for a determination of whether the Georgia criminal abortion statute, part and parcel, is contrary on its face to the mandates of the federal constitution.

B. APPELLANTS' ARGUMENT IS STRUCTURED ON A PREMISE WHICH THE LOWER COURT REFUSED TO ACCEPT AND WHICH IS UNTENABLE HERE.

The propositions of the appeal are all moored to a single claim. Though variously expressed, and divergently relief on in attacking the parts of the statutory scheme, the mooring of the challenge is the belief that any woman has a fundamental right, constitutionally protected, to independently determine that

a child which she has conceived shall not be brought to birth, and to procure an abortion of its development. (A. 12-13). Although Appellants seem to agree with the court's bounded recognition of such a right (Appellants' Brief, p. 22) and purport to go on from there (i.e., Arguments "B" through "F") 12/ this is not really the case. Appellants dispute the limitations on the right which the court pronounced, both expressly and by the whole tenor of their argument.

The specific expressions are illustrated by the repeated references to "the right to terminate an unwanted pregnancy". (Appellants' Brief, e.g., pp. 12, 23, 24, 27, 42). This is far different from what the court formulated as a right to a "necessary" abortion. (A. 84-85, see statute as revised by court, Appellants' Brief, pp. 3-7). Mere desire or con-

---

12/ Outlined in Appellants' Brief, Index pages "i" through "iii".

venience was specifically rejected by the court as a parameter of the right (A. 81), but Appellants speak assumingly of the "right to abortion". (Appellants' Brief, pp. 14, 16).

Secondly, Appellants seek the invalidation or the total annihilation of the statute, the result of which would be to cast abortion into the pot with any other medical procedure, whether it be the removal of a tooth or appendix or any other part of a person's body. Appellants admit of no distinction and indeed tout the availability of simple, safe abortion techniques which purportedly need not even be done in a hospital. (Appellants' Brief, pp. 38-40). The procedural controls on abortion, Appellants say,". . . remain as a barrier to the constitutional rights asserted and will obstruct and interfere with such rights. . . ." (Appellants' Brief, p. 10).

Though the proffered basis for challenging the court below's standard of "necessary in the best clinical judgment" of the physician involved, is that such a standard is vague, a reading of the entire brief reveals that Appellants' simple aim is the removal of <u>all</u> state-imposed standards and controls on abortions, vague or not. In pursuit of this end, Appellants argue that there is no legitimate compelling state

interest which might justify a limitation on this "right". (Appellants' Brief, p. 24-27). They argue further that the urgencies of time and economic poverty and the panoply of modern methods, all pragmatically speak against control. (Appellants' Brief, pp. 35-42). Finally they argue as to the medical personnel represented, that their right to practice their professions are curtailed because they are not permitted to recommend or perform an abortion which they determine is "the correct [not even "necessary"] medical treatment." (Appellants' Brief, pp. 44-45). Cast in that light, it is beyond doubt that the mooring which Appellants urge the Court to catch onto is an unrestricted right to abortion in every case where a woman "wants" one and her physician considers it "advisable".

Pains have been taken to point out this underlying thread not only because of its obscurity, particularly initially, but also because of the weakness it lends the arguments advanced. Remove it as a premise, and the individual claims become a house of cards.

Hypothesize for a moment a real acceptance of the core of the holding below insofar as it related to the fashioning of a right, keeping in mind

that Appellants outwardly profess agreement. (Appellants' Brief, p. 22). The court established that the formation of an embryo, "a potential human life", as it called it, granted the State a legitimate area of control over the termination of that life before its birth. (A. 82). With that as a premise, the court measured the State's controls and found them maintainable insofar as they reasonably restricted the quality of the decision to terminate that life and the manner of execution of that decision. (A. 84).

If Appellants truly agreed with the court's premise, they would not be able to argue that the State has no interest in the fetus, because the argument thereby denies the premise. Nor would they be able to argue that the procedure requiring consultants and hospital committee approval is unconstitutionally "cumbersome, time-consuming, and restrictive". (Appellants' Brief, pp. 31-42). They see it simply as an irrational restraint on a desired medical service, completely ignoring and discounting the potential human life whose existence must be weighed in the balance. Nor would they be able to argue that physicians are, by the court-revised statute, denied the right to practice medicine "in accordance with their best professional judgment." (Appellants' Brief,

p. 44). What this means, they say, is that they should be loosed from the statute's restraints so that they could recommend or perform fetal abortions whenever they felt it is "a correct medical treatment" or "medically advisable." (Appellants' Brief, pp. 44-46). They say they should be as free to make this judgment as they are to make any other decision regarding a medical procedure. (Appellants' Brief, p. 46).

This latter position perhaps most graphically portrays the departure of Appellants from the premise established below. If that premise were truly accepted as "correct" (Appellants' Brief, p. 22), Appellant physicians would not totally ignore in their argument the fetus' presence as an additional factor to consider in making "their best professional judgment". The sanctions of the statute "deny the individual physician the right to give medical advice and to perform medical procedures based only on his concern for the health and life of his patient" they assert indignantly. (Appellants' Brief, p. 45). Such a statement is patently unconcerned with "the potential human life" and instead displays in bold relief the uncompromising assertion that the removal of an unwanted fetus is just

as much a right as the removal of an unwanted mole.

Thus, we cannot be led into believing that the invalidation of the procedures, which Appellants urge this Court to pronounce, will leave intact the "correct" portion of the decision below. The profession of agreement deflects from the underlying thread and distorts the results which would materialize from acceptance of Appellants' arguments. Remove the procedures and restrictions on abortions set up carefully by the State, and the safeguards built to protect the "potential human life", which is already maturing, dissolve.

Thus, the issue which the Court has before it is extraordinarily fundamental. In order for Appellants to prevail in their request, their premise must be tested. The Court should not simply move from an acceptance of the lower court's premise to the assertions of the Appellants purportedly stemming from it, because Appellants' assertions grow out of a different and antagonistic root. Appellants' attack cannot be grafted onto the curtailable right established by the court below. It demands the proclamation of stronger, and even absolute, right in order to survive.

The pivotal question is whether whether a woman has a constitutionally protected right to procure a termination of fetal life developing within her with no more restriction by the State than is justifiable for other medical procedures. This question may be addressed despite the bareness of the record and the absence of particularized facts. It does not need a fully developed case involving an actual application or attempted enforcement of the criminal abortion law of Georgia. The scope of the issues reaches much beyond any individual case.

C. GEORGIA HAS LONG MAINTAINED A PUBLIC POLICY OF RECOGNIZING THAT AN UNBORN CHILD HAS PROTECTIBLE INTERESTS.

1. The real meaning of the criminal abortion law invalidates both the premise of the court below and Appellants' premise.

Appellants' multitudinous assertions in this Court must fail at the outset for the fundamental reason that they are based on the erroneous presumption that a woman has an unfettered constitutional right to an abortion if she desires one. This view denies and obliterates any interest or right which an unborn child may have, and which is protectible by the State as an exercise of its police power impelled by a justifiable public policy.

An understanding of their position reveals in bold relief the absolutism of their premise. The extremeness of their espousal denotes not only that Appellants disagree with the entire substantive holding below, even including the seemingly favorable ruling with regard to the woman's rights, but also that they must go far beyond the ruling below to launch an attack on the

remainder of the statute.

The State does not agree with the seemingly moderate view taken by the lower court, and indeed sought an appeal therefrom in this Court. Bolton, etc., et al. v. Mary Doe, October Term, 1970, No. 973, dismissed for lack of jurisdiction, 402 U.S. 936 (1971); intermediate appeal pending in the United States Court of Appeals for the Fifth Circuit, No. 71-1932. With that in mind, the gap between Appellants' far more absolute position and that maintained by the Appellees is recognizably wider.

But even if Appellants had accepted the holding of the lower court in this regard, the argument herein undermines the underlying premise and is applicable to a reconsideration of it. Thus, the claimed "right", whether considered curtailable, as the court below regarded it, or whether considered absolute, as claimed by Appellants, requires scrutiny by this Court in considering the appeal. This is so particularly because the claimed "right" is not an established, universally recognized one but has rather been newly enunciated by the decisions of some, but not all, of the lower courts which have had occasion to rule on the matter. (See lists of illustrative cases, collected in Appellants' Brief, pp. 23-24, footnote 2).

2. The origin and history of Georgia's abortion laws signify their fetal-life-directed purpose.

The State's concern for the entity known as the unborn human child is demonstrated not only by the abortions laws, but also throughout its history in other ways. These ways will be discussed in the next subsection. As to abortion, however, the prohibition did not begin with the statute of 1865-66, or 1876, as Appellants contend. (Appellants' Brief, pp. 24-25).

By the laws of Georgia of 1876, the legislature simply made abortion and feticide specific crimes under the Penal Code. Ga. Laws 1876, p. 113, Appendix "B" herein. Prior to that time, it is apparent that such crimes were prohibited in Georgia by virtue of the common law's incorporation into the body of Georgia's criminal law by statute. An Act passed on February 25, 1784, incorporated into Georgia law all the common laws and statutes of England which were in force and binding on the inhabitants of Georgia on May 14, 1776, except as otherwise altered by the Georgia legislature. Ga. Laws 1874, p. 404, reprinted at Prince's Digest, 310-311.

The comprehensive Code of Georgia of 1861 specifically carried forward this provision in its very first section. Ga. Laws 1860, p. 24; Code of Georgia of 1861, pp. 1-2.13/

13/ In 1953, former Chief Justice of the Supreme Court of Georgia William S. Jenkins, then Chief Justice Emeritus, spoke on "The Common Law [in Georgia] and Its First Codification by Thomas R. R. Cobb", and the speech appears at 16 Ga. Bar Journal, No. 1, pp. 137-147. Therein he commented: "It is doubtful if the average educated citizen fully realizes that the common law of England together with the act of Parliament supplementing of modifying it, as it existed in 1776, is of force in Georgia today. It is the backlog of our jurisprudence, its most important part. It is in fact all the law we have as it may have been supplemented or modified by our Constitutions and statutes. But even then the courts always construe with great strictness, and in favor of the Common Law, any statute which it is claimed has modified it." Id. at 138.

The Constitution of the State of Georgia of 1865 also expressly adopted the common and statute law of England, of force in Georgia in 1860. Constitution of the State of Georgia, 1865, Art. V, Sec. I, Par. 5; Code of Georgia of 1867, p. 982-983. 14/

See also the general catchall provisions in the Code of 1873, Sections 4509 and 4529, pp. 814 and 181, regarding offenses against the public peace and tranquility and against public justice. These sections were discussed by the Supreme Court of Georgia in Prichard v. State, 160 Ga. 527 (1925), when they were, as misdemeanors, a part of the Penal Code of 1910, §§ 339 and 366:

> "These sections did not create new offenses unknown to the common law. They only adopted common-law crimes, and made

---

14/ A discussion of the existence and force of the common law and statutes of England is contained in Reed, A Handbook of Georgia Criminal Law and Procedure, Macon, 1873, pp. 64-66.

> them Georgia crimes. So in Ormond v. Ball, 120 Ga. 916 (48 S.E. 383), this court held the first of these sections was sufficiently broad in its terms to authorize the punishment of any offense which at common law was an offense against public justice. These sections punished persons only for things which were offenses against public justice or against the public peace by the common law." Id. at 528-529.

Thus, there can be no doubt that if abortion was a crime in England in 1776, it was also a crime in Georgia, by incorporation, in that period prior to the particularation by statute enacted in 1876. 15/

15/ Reed presaged the adoption of the statute. In discussing murder and infanticide, supra, footnote 14/, at 178, he noted in 1873 that "our law should punish criminal abortion." This reference was to the need for a specific Georgia statute, because he also wrote: "In most of the cases, if not in all, the Courts would apply the rules of the common law to define

(Continued on next page)

Now, what of the law of England with respect to abortion, upon which Georgia law depended prior to the statutes passed in 1876. Keeping in mind that the law in this respect which existed in England in 1776, was extant in Georgia, Blackstone's Commentaries, first published in 1765-1768, provide the key.

The subject of abortion is discussed by Blackstone in the context of the right of personal security. This is described as one of the three principal rights of mankind, protected to the people of England. 16 / The right of personal security was regarded by Blackstone as an absolute right, vested by the immutable laws of nature, and in that context, abortion was recognized by Blackstone thusly:

(15 / Continued)
any such unenumerated offense. The old authorities, Coke, Hale, Hawkins, and expecially Blackstone - who is followed more than any other by the Penal Code - would be especially useful." Supra, footnote 14 /, p. 66.

16 / Blackstone's Commentaries, p. 129.

"I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation.

"1. Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise, killeth it in her womb; or if anyone beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter.[17] But the modern law doth not look upon this offence in quite so atrocious a light, but merely as a heinous misdemeanor[citing 3 Inst. 50].

17/ The footnoted authority is Bracton 1.3, c.21, translated from Latin in Cooley's Blackstone, Volume I, p. 119: "If anyone (continued on next page)

"An infant in ventre sa mere, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. 18/ And in this point the civil law agrees with ours." 19/ Blackstone's Commentaries, Volume I, Book I, pp. 129-130.

(17/ Continued)
strikes a woman when pregnant, or administer poison to her by which abortion shall ensue, if a child shall be already formed, and particularly if it be alive, that person is guilty of manslaughter."

18/ Here Blackstone footnotes that "Every legitimate infant in ventre de sa mere is considered as born for all beneficial purposes. C9, Litt. 36, 1 P.Wm. 329.

19/ The Latin authority footnoted by Blackstone is translated in Cooley's
(continued on next page)

Thus, the right to life was recognized in the law of England as being one of the most fundamental and natural rights which existed even without government, and the right extended at least to some extent to an unborn child.

Theearly English statutes, which made certain attempts to procure the miscarriage of any woman highly penal, and the acts up to 1868, are collected and discussed in Storer and Heard, Criminal Abortion: Its Nature, Its Evidence, and Its Law, Boston: Little Brown & Co., 1868, Book II, Chapter II. The earliest English statute cited is 43 Geo. III, ch. 58, which was passed in 1803. Known as Lord Ellenborough's Act, abortion of a quick child was punishable by death, and that of an

---

(19 / Continued)
Blackstone as "those who are in the womb, are considered by the civil law to be in the nature of things, as they are capable of being benefited." Blackstone's footnote "(s)", Cooley's Blackstone (4th Ed.) Vol. I, p. 119.

unquick child was also a felony, and variously punishable, including transportation of up to fourteen years. Id. at 165-166. Thus, the highly penal regard given to abortion, which was evident at the time of Bracton, was reinstated. The common law of England in 1776 was thus at a point between Blackstone's description and the statute of 1803. 20/

Whatever may have been the English law in force in 1776, which the Georgia legislatures repeatedly incorporated into the State's body of criminal law, two things are clear. It cannot be doubted that criminal abortion was a part of the law of Georgia from its inception long before the statute of 1876, and secondly, the prohibition was based at least in part on a recognition

---

20/ Storer and Heard, supra, also discussed many English cases involving various aspects of abortion, both at common law and under statute.

of, and concern for, the life of the fetus. The proposition advanced by Appellants (Appellants' Brief, pp. 24-27), that the sole purpose of early abortion laws was the protection of the pregnant woman's life and health, is therefore unsound. The facts of history show a deeper and more fundamental concern with the rights of a protectible entity other than that of the mother.

The accuracy of this position is further enhanced by reference to Bishop's New Criminal Law, wherein he described abortion as "one of the leading offenses against population, and therefore . . . indictable at the common law." Bishop's New Criminal Law, Vol. I (8th Edition, 1892), p. 312, citing Stat. Crimes, 6 744. See also the discussions concerning abortion at pp. 446-447, 195-196, 465-466, and 357-358.

The law's protection of human life by way of criminal sanction of varying degrees as respects particular points on the continuum of life is described by Bishop in the chapter on Feloneous Homicide, Specific Offenses. Abortion is listed as one of the "Dangerous misdemeanors":

> "If one to commit on a pregnant woman the dangerous misdemeanor of abortion, administers to her a drug or employs instruments in consequence whereof she dies, or the child is prematurely born and dies from the too early exposure to the external world, the homicide is murder." Id. at 394.

The underlying concern for the unborn child, rather than solely the life and health of the mother (if that were a concern at all) is further illustrated in the lengthy discussion on "abortion" in 1 Ruling Case Law, pp. 69-88.

It is with that background that the legislature enacted the first specific abortion statute in 1876. 21/, which statute the Georgia Supreme Court in 1920 noted "removed from the operation of the then existing penal laws of the State only such offenses as were clearly included within its own provisions." Summerlin v. State, 150 Ga. 173, 176 (1920). 22/

The law which provided the punishment of death or life imprisonment for foeticide and declared abortion of a quick child as assault with intent to murder, and provided misdemeanor punishment for abortion of an unquick fetus, demonstrates the State's recognition of the unborn fetus as a protectible human child.

21/ Ga. Laws 1876, p. 113, reproduced as Appendix "B" herein.

22/ The court went on to say in this case involving manslaughter of the mother: "It is unnecessary to discuss the common law on the subject of criminal abortion. This is a prosecution for the killing of a human being, [the mother], not the unborn, unquickened fetus." Id. at 176.

This is also clearly demonstrated
y the decisions applying and construing the 1876 statute. Under an indictent for assault with intent to murder rought pursuant to Section 2 of the Act, he Supreme Court of Georgia held:

> "The word 'child' as used in section 81 of the Penal Code means a 'living child,' that is to say 'an unborn child so far developed as to be ordinarily called "quick"' and which is still alive when the alleged unlawful means are employed to produce the miscarriage or abortion." Taylor v. State, 105 Ga. 846 (1898).

"Quick" was subsequently defined o mean "so far developed as to move r stir in the mother's womb." Sullivan . State, 121 Ga. 183, 187 (1904). he recognition of the unborn fetus as human child was unmistakably clear hen the court said in the companion ase of Barrow v. State, 121 Ga. 187, 88 (1904):

> "An intent to destroy an unborn child so far developed as to be ordinarily called 'quick' may exist without absolute knowledge

> that such child is 'quick'. If defendant's purpose was to destroy the foetus, and in so doing he killed a child which was 'quick,' the criminal intent would extend to the consequences of his act. Powe v. State,(N.J.), 2 Atl. 662."

The purpose of the statute was primarily the protection of the fetus and its life, rather than the mother's interest, is drastically pointed out by the Barrow Court:

> "Neither the consent of the female to the abortion, nor a purpose to conceal her shame by an operation, will excuse the criminal act, and an instruction to this effect was not erroneous." Id. at 188.

The failure of the law to reach back to protect a child not yet "quick" may have been due more to a lack of understanding of embryology than to a callous denial that such a being was "a child". To sum it all up, the statement of the Supreme Court of Georgia in Passley v. State, 194 Ga. 327 (1942) is appropriate:

"It is evident that in enacting this statute [Ga. Laws 1876, p. 113], the legislature was undertaking to provide by penal law appropriate penalties for the destruction of an unborn child." Id. at 329. 23/

23/ For a further discussion of this first statute, see also Stubbs, Georgia Law of Children, 1969, §§ 167 - 170.

In 1968, the Georgia legislature modernized the nearly 100-year-old abortion statute, and it is that statute against which the broadside attack is launched by Appellants. There is no question that the legislature intended to retain it as a part of the criminal law in the State and did not intend to destroy its historical meaning and purposes by treating the termination of life of an unborn child as merely an effort "to treat the problem as a medical one", as the court below erroneously concluded. (A. 82). If that had been the intent, it undoubtedly would have been taken out of the criminal law and inserted instead into the public health portions of the statute. (Title 88). Moreover, and more substantively, the stringent safeguards and portions surrounding the taking of such life would probably not have been necessary.

The court below alluded to a peculiarity of consequence which may affect whatever law is actually in effect in Georgia when it footnoted in its judgment that:

> "It is the intention of this Court that our decision reach the codification of identical provisions of Georgia

> Code Ann. § 26-9925a and corresponding provisions enumerated above if such codification has any force as law." (A. 88, fn. 1).

The underlying confusion has resulted because of a unique sequence of events. The 1876 Act was amended by an Act specifically and exclusively relating to the crimes of abortion, foeticide, and infanticide. (Ga. Laws 1968, p. 1432). The bill upon which that Act was based was first introduced in 1967. (1967 House Journal 338, House Bill No. 281). After much debate and consideration, including public hearings, the bill as altered was passed and sent to the Governor on March 6, 1968. The Governor did not attach his signature of approval, so that, by virtue of the Constitution of Georgia of 1945, Sec. 2-3015, the Act presumably became law 30 days after adjournment on March 8.

In the meantime, however, the Criminal Code Commission's proposed Code was sent to the legislature and, in the course of its deliberations, the latter revised the Commission's proposed sections on abortion so that they conformed substantially with House Bill No. 281, the independently proposed revision, as passed.

The Criminal Code of Georgia was approved by the Governor on April 10, 1968, but its effective date was July 1, 1969. (Ga. Laws 1968, pp. 1249, 1351). A comparison of the Criminal Code provisions (§§ 26-1201 - 26-1203) with the Act based on House Bill 281, (Ga. Laws 1968, p. 1432), reveals that they are not entirely identical. 24/

Thus, the desirability of requiring repair to the State courts first, for a ruling on what law is effective (or was effective when suit was brought below), before constitutional issues are debated, would be particularly in order in regard to this statute. The recent case of Gunn v. State, 227 Ga. 786 (1971) mentions but does not decide the question of effectiveness. That same question is now pending in State habeas corpus pro-

---

24/ See in addition the Editorial Note following the unofficially codified section 26-9920(a) which appears at the end of the official Criminal Code of Georgia.

ceedings brought in Habersham County Superior Court, Georgia: Gunn v. Ballkcom, Civil Action No. 4022.

A study of legislative history is unfortunately not published in public records citable to this Court. It would require evidentiary development, or construction by a State court, to develop in detail the intentions of the legislature with respect to each aspect of the statute. That the overall intention was protection of the unborn child is manifested, however, by the history of the abortion laws in Georgia, which has been outlined above, and by an examination of the entire statutory scheme.

One exceedingly clear illustration of this is the unique feature providing for expeditious judicial determination of the constitutional or legal rights of a fetus sought to be destroyed. (Criminal Code of Georgia § 26-1202(c); Appellants' Brief, pp. 5-6. The court below, without explaining how such a guardian provision would impermissibly infringe the mother's rights, struck it in its entirety. (A. 85, 88). It is inconsistent with the court's recognition of "a potential human life" over which the State has "a legitimate area of control" (A. 82), to deprive the entity in which that life is reposed of the

legal process to determine its protectibility. Whether or not that unborn child has a constitutional right to reach birth, the State's attempt to leave that question as well as others respecting the rights of a living fetus, open for judicial review, demonstrates its vital interest in fetal life.

The unsettled legal issue, for example, of whether an unborn child, at any age, is entitled to Fourteenth Amendment due process of law, before it is deprived of life, is embraced in the statutory scheme. It has been held that a human being has an inherent right to due process of law. Burns v. Lovett, 202 F.2d 335, 91 U.S. App. D.C. 208, aff'd, Burns v. Wilson, 346 U.S. 137, reh. den. 346 U.S. 844 (1953). That a child en ventre sa mere is regarded in law as a human being from the moment of conception, or from the time it can "stir", for at least some purposes, has been repeatedly stated. See, for example: Bonbrest v. Kotz, 65 F.Supp. 138 (D. D.C. 1946); Tucker v. Carmichael, 208 Ga. 201 (1951); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Mitchell v. Common wealth, 39 Am.Rep. 227 (Ky. Ct. App. 1879); "In Defense of the Right to Live: The Constitutionality of Thera-

peutic Abortions," 1 Ga. Law Review 693 (Summer 1967); Quay, "Constitutionality of Abortion Laws: Rights of the Fetus," 8 Child and Family Quarterly, No. 2, p. 169. The purposes of the Fourteenth Amendment are not inapplicable. With respect thereto, this Court said in Strauder v. West Virginia, 100 U.S. 303 (1880):

> "[The Negro race's] training had left them mere children, and as such they needed the protection which a wise government extents to those who are unable to protect themselves." Id. at 306.

The analogy is complete when the words of the Supreme Court of Georgia are considered:

> "In . . . general, a child is to be considered as in being from the time of the conception, where it will be for the benefit of such child to be so considered." Morrow v. Scott, 7 Ga. 525, 537 (1849), quoted in Hornbuckle v. Plantation Pipeline Co., 212 Ga. 504, (1956).

3. Other manifestations of state concern for the unborn child.

That the State seeks to afford security to the fetus is also demonstrable in other ways. The criminal abortion law is only one of the public policy manifestations. A putative father is obligated to provide not only for the maintenance and education of his illegitimate child, but also for the pre-birth expenses incurred with respect to such child. Ga. Code of 1933, § 74-9901. Since at least 1793, the posting of security for the support and education of an illegitimate child has been required even before its birth. Ga. Code of 1933, § 74-301 et seq. The concealment by a woman of the death of her unborn child which, if it were born alive would be a bastard, was a misdemeanor. Ga. Code of 1933, § 26-1106. In Bull v. State, 80 Ga. 704 (1888), a father who abandoned his child before it was born and persisted after its birth, was declared guilty of a misdemeanor. Hornbuckle v. Plantation Pipeline Co., supra, and Fallow v. Hobbs, 113 Ga. App. 181 (1926), illustrate legal protection to unborn children in the area of torts. In property law also, legal rights are established. Ga. Code of 1933, § 113-904, as amended Ga. Laws 1968, p. 1093, provides the rules of inheritance, and Ga. Code of 1933, § 36-310 protects unborn remaindermen. See also New v. Fennell, 222 Ga. 630 (1966). Contrary to Appellants' statement (Appellants' Brief, p. 24,

fn. 3), a convicted female who was quick with child may not be executed until after delivery of the child when she is no longer quick. Ga. Code of 1933, §§ 27-2519, 27-2520. This list is by no means exhaustive but leaves no doubt as to the State's broad protective policy towards unborn children. 25/

25/ Nor does the State abandon them after the event of birth. See provisions for adoption, Ga. Code Ann. Chapter 74-4; Bastardy Proceedings, provided in Chapter 74-3; Children and Youth Act, authorizing a wide range of services under the State Division of Children and Youth, Chapter 99-2; Medical and Welfare Assistance Programs pursuant to Ga. Code Ann. §§ 99-142 through 99-146; "Hospital Care for the Indigent" Program, Ga. Code Ann. Chapter 88-23.

D. THE ABORTION LAW MANIFESTS A LEGITIMATE BALANCING OF COMPETING RIGHTS AND INTERESTS.

Now that the interest of the State in protecting from unchecked slaughter the unborn but alive children over which it exerts jurisdiction has been documented, it remains to examine the exertion of that interest in connection with the competing interest of some pregnant women to free themselves from the responsibilities of providing the harbors for those unborns. The introduction of the conceived and developing life into the picture gives it an unavoidable new dimension and makes it inapposite to that which exists in the right to privacy and marital relationship cases. In circumstances such as that litigated in Griswold v. Connecticut, supra, the State had no legitimate objective which justified its interference with the rights that transcended even the specific enumerations of the Constitution. Here, however, the entity of the living embryo or fetus becomes a factor which may not be overlooked. It has entered the continuum of the life cycle, and the fact that it needs the environment of the mother's womb to survive and develop to maturity for birth removes control of its existence from the mother's uncensured desires. Though she

may wish to be "let alone", she has already altered the possibility of such an independent status.

The State, however, recognizing its own limitations and the shortcomings of the world in which it must operate today and recognizing also the need to secure the happiness and health and well-being of women who become pregnant, has sought to strike a balance between the competing interests of the woman and the unborn child. It has therefore afforded to the developing fetus not an absolute legal right but rather a right circumscribed by limitations which are reasonably related to other legitimate state goals.

Hence, the 1968 extension of the exceptions to the general rule forbidding all abortions except to preserve the mother's life. The effort to grasp the weighty issues involved in the complex aspects of the relationship between the unborn child and the unwanting pregnant woman is fraught with questions that reach every area of human knowledge and judgment, including the medical, the scientific, the legal, the economic, the moral, and so on. The State has always recognized in this matter of abortion that there are competing protectible rights. Consequently, its attempt to balance these rights throughout its history demonstrates its

acknowledgement of its duty to do so. "(T)he right of every person 'to be let alone' must be placed in the scales with the right of others . . .", said this Court in the context of communications in Rowan v. Post Office Department, 397 U.S. 728, at 736 (1970).

Here, the State has struck a balance which it believes is in keeping with the times, and this balance is surrounded with the safeguards of careful decision-making by those best qualified to make what remains in the final analysis a medical decision, checked by the availability of judicial review. Such an effort cannot, on its face, be regarded as contrary to constitutional principles. The resolution of the intertwined interests, rights, responsibilities, and duties is primarily a state function. The responsibility of this Court, on the other hand, as it has clearly recognized, is rather to construe and enforce the Constitution and laws of the land as they are, and not to legislate social policy. Evans v. Abney, 396 U.S. 435 (1970). Nor does it sit as a superlegislative body and become concerned with what philosophy a state should or should not embrace. Sniadach v. Family Finance Corporation of Bayview, 395 U.S. 337 (1969)

And yet this is precisely what Appellants urge this Court to do here. The economic, social and even philosophical problems presented should more appropriately be taken up with the state legislature and should not be foisted onto the Court, as these matters are not its business. Dandridge v. Williams, 397 U.S. 471 (1970). The State has clearly demonstrated that it has a valid state objective in the criminal abortion laws, an objective continually existent in Georgia for almost 200 years, and the adoption of a new scheme which was patterned after a widely extoled "model" statute does not contravene constitutional requisites but rather is within that broad scope which legislative bodies have to experiment with social problems. Ferguson v. Skrupa, 372 U.S. 726 (1963).

E. APPELLANTS' CLAIMS IN THIS COURT SHOULD BE DISMISSED.

In considering the merits of Appellants' substantive claims, the Court need not assess the wisdom or providence of the policy underlying the state law. As has been enunciated, its duty is at an end when it finds that the federal constitution does not deny the state the power to enact such policy into law.

Carpenters and Joiners Union of America v. Ritter's Cafe, 315 U.S. 722, reh. den. 316 U.S. 708 (1942). Let it not be surmised for a moment, however, that doubts should arise as to the wisdom of the policy here. It is widely accepted as basic. As succinctly put:

> ". . . the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection before as well as after birth." Declaration of the Rights of the Child, General Assembly of the United Nations, November 20, 1959, Official Records of the General Assembly, 14th Session, pp. 19-20.

And here, where Appellants would try to give a myriad of unconstitutional constructions to the statute which has yet to be tested or construed in the state courts, the failure of Appellants to show that it is scarred with an inevitable unconstitutional effect, should lead to its current reinstatement. United States v. O'Brien, 391 U.S. 367 (1968). The unconstitutional interpretations affixed by Appellants to the provisions of the criminal abortion law are products of only one approach. They are not authoritative interpretations and

indeed such interpretation by the courts of the state could well lead to an avoidance of the constitutional issues sought to be engendered by Appellants. Reetz v. Bozanich, 397 U.S. 82 (1970).

Attention is briefly directed to some of the remaining sections attacked by Appellants.

1. The standard remaining is not vague.

The claim is that the court-revised standard is unconstitutionally vague. By striking certain portions of the statute, the court below obtained in effect a prohibition against abortions other than those that were "necessary in the best clinical judgment" of the physicians charged with making the determination. (A. 88; Appellants' Brief, pp. 3-4). The judgment was to have a broad medical basis, i.e., the totality of circumstances surrounding each patient. (A. 163).

The standard enunciated below clearly departs from the intent of the legislature to more strictly curtail destruction of fetal life, and the State disputes the validity of the court's adopting such a standard while at the same time we assert that the standards enumerated by the legis-

lature pass constitutional muster.

Without taking the side of the court-constructed standard, Appellees dispute the proposition that it is void for vagueness. It is, on its face, not unlike the judgment which physicians daily apply in determining whether a myriad of other medical procedures should be undertaken. The Oath of Hippocrates, as a matter of fact, provides in part:

> "I will follow that system of regimen which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous." 14 Encyclopedia Americana, p. 201.

If the State law as adopted by the legislature is not ultimately reinstated, it is submitted that the experience of physicians in applying the court-enunciated standard since mid-1970 would be most pertinent to a determination as to whether it was impermissibly vague.

Finally, viewed in the context of the Court's opinion in United States v. Vuitch, 400 U.S. 813 (1971), the medically-weighted standard should not be

BLEED THROUGH POOR COPY

regarded as unconstitutionally vague at this juncture.

2. On the face of the statute, due process is not denied the abortion-seeking woman.

Appellants suggest that due process is not provided by the procedural aspects of the statute. However, it is obvious that the procedure delineated is a workable outline. The approval requirements may well be construed to include personal confrontation with an abortion committee, mechanics for the apprisal of the applicant of the reason for denial, or a review procedure when the initial decision is adverse. Only the bare requisites of the procedure are outlined in the statute, which is broad enough to embrace whatever constitutional requirements are applicable. The many constitutional issues broached by Appellants in their wholesale and many-faceted attack are thus premature. The preliminary guesses regarding local law and the mere possibility of unconstitutionality upon which Appellants' postulate rests, make their claims inappropriate for further consideration at this stage. Spector Motor Service v. McLaughlin, 323 U.S. 101 (1944); Leiter Mineral, Inc. v. United States, 352 U.S. 220, reh. den. 352 U.S. 1019

(1957); Everson v. Board of Education of Ewing Township, 330 U.S. 1, reh. den. 330 U.S. 855 (1947).

Since there is no evidence that due process cannot be afforded pursuant to the statute, facial constitutionality in this regard is not obviated. As the Court noted in United States v. Five Gambling Devices, etc., 346 U.S. 441 (1954), a statute should be construed in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative. See also United States v. Witkovitch, 353 U.S. 194 (1957); Driscoll v. Edison Light and Power Co., 307 U.S. 104, reh. den. 307 U.S. 650 (1939).

It is submitted that even the court-announced standard considered in the context of the criminal statute, gives adequate notice and fair warning of the conduct which it prohibits. Cf Bouie v. City of Columbia, 378 U.S. 347 (1964); Wright v. Georgia, 373 U.S. 284 (1963); conformed to, 219 Ga. 125.

3. The residency requirement is not an unconstitutional limitation.

None of the Appellants reside outside of Georgia and thus they have no standing to challenge this portion of the statute. Flast v. Cohen, 392 U.S. 83 (1968). In addition, they fail to show that it is not reasonably related to a legitimate State interest. A restriction in whether a non-resident may obtain an abortion in Georgia is related, first of all, to their own health and safety. Complications arising after the procedure is accomplished and she returns to her home out-of-state are out of the reach of medical treatment by the physician who performed the procedure. Secondly, the State is vitally interested in containing and controlling the number and quality of abortions performed in the hospital which must provide care for enumerable other residents who need it.

The right of a pregnant woman to travel is not thereby infringed in any way. Her movement is not burdened or restricted one iota by this requirement, and she is as free to come and go throughout Georgia as though she were not seeking a termination of pregnancy. Moreover, more is involved here than merely a "medical service". The destruction of another entity casts abortion in an entirely different light.

4. None of the claims asserted are here cognizable.

As to the remaining complaints regarding the procedure, equal protection, and the "right" of physicians, it is submitted that Appellants have advanced nothing which might render the statute unconstitutional on its face. Whether the statute might operate to deprive anyone of a constitutional right or be applied in an unconstitutional manner, is not here at issue. Nor do any of the Appellants present a situation which gives them standing to advance these blanket complaints. Therefore, there is no justiciable controversy or cognizable complaint in these regards.

Moreover, it is submitted that even if the issues had been properly raised, abstnetion would be appropriate in this case involving the construction of a state criminal statute. Appellants have, and had, available to them the state court forum, and determination of the many issues here raised in that arena may very well avoid any necessity for a consideration of serious constitutional proportions. Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941); Burford v. Sun Oil Co., 319 U.S. 315 (1943); Louisiana Power & Light Co.

v. City of Thibodaux, 360 U.S. 25 (1959); Alabama Public Service Commission v. Southern Railway, 341 U.S. 363 (1951).

CONCLUSION

The General Assembly of Georgia has enacted and updated the criminal abortion statute. The declaration of what shall be offenses against the State's laws is peculiarly within the power of each state of the union, except only as its authority is limited by the Constitution of the United States. Ex parte Reggel, 114 U.S. 642 (1885). The responsibility for defining and prosecuting crimes is the principle responsibility of the states. Abbate v. United States, 359 U.S. 187 (1959). Appellants have not shown here, nor in the court below, that the statute or any of its parts must be declared unconstitutional facially.

Moreover, the questions put by Appellants are not ripe for determination. As clearly put by this Court in Thorpe v. Housing Authority of City of Durham, 393 U.S. 268 (1969), it will not decide abstract, hypothetical, or contingent questions or any constitutional question in advance of the necessity for its decision. See also, United States v. Raines, 362 U.S. 17 (1960); International Longshoreman's & Warehouseman's Union v. Boyd, 347 U.S. 222, 224 (1954).

Consequently, Appellees respectfully submit that the decision and judgment below should be reversed and remanded for dismissal, for lack of jurisdiction below, or alternatively, that the underlying right of the state to restrict abortions as Georgia has done by the laws of 1968, be established.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

HAROLD N. HILL, JR.
Executive Assistant
Attorney General

COURTNEY WILDER STANTON
Assistant Attorney General

DOROTHY T. BEASLEY
Assistant Attorney General

JOEL FELDMAN, Attorney
for Lewis R. Slaton

HENRY L. BOWDEN
RALPH H. WITT,
Attorneys for Herbert T.
Jenkins

CERTIFICATE OF SERVICE

I, Dorothy T. Beasley, Attorney of Record for the Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I served the foregoing Brief for Appellees on the Appellants by depositing copies of the same in a United States mailbox, with first class postage prepaid, addressed to counsel of record at their post office addresses:

MARGIE PITTS HAMES
Suite 822, 15 Peachtree Street, N.E.
Atlanta, Georgia 30303

REBER F. BOULT, JR.
CHARLES MORGAN, JR.
American Civil Liberties
Union Foundation, Inc.
5 Forsyth Street, N. W.
Atlanta, Georgia 30303

ELIZABETH ROEDIGER RINDSKOPF
GALE M. SIEGEL
185 Central Avenue, S. W.
Atlanta, Georgia 30303

TOBIANE SCHWARTZ
153 Pryor Street, S. W.
Atlanta, Georgia 30303

his _____ day of October, 1971.

DOROTHY T. BEASLEY

APPENDIX "A"
FOREWORD
OPINIONS OF THE ATTORNEY GENERAL, 1970

"It is the duty of the Attorney General, when required to do so by the Governor, to give his opinion in writing on any question of law connected with the interest of the State or with the duties of any of its departments. Ga. Code Ann. § 40-1602 Par. 1.

To avoid requiring the Governor to endorse requests for opinions originating with the departments of the State, the Attorney General receives such requests directly from the department heads.

Opinions rendered to the Governor and to the heads of departments are classified as 'official opinions.'

In addition to 'official opinions,' the office of the Attorney General renders 'unofficial opinions' to other state officers (e.g. legislators, district attorneys) and to county and municipal attorneys on questions involving the general laws of the State.

Each 'unofficial opinion' bears the following notation: 'The views expressed herein are the completely unofficial views of the writer only, and should be considered as information only.'"

APPENDIX "B"
GA. LAWS 1876, p. 113

An Act to prevent and punish fœticide or criminal abortion in the State of Georgia.

Section I. Be it enacted, etc., That from and after the passage of this Act, the wilful killing of an unborn child, so far developed as to be ordinarily called "quick," by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be guilty of a felony, and punishable by death or imprisonment for life, as the jury trying the case may recommend.

Sec. II. Be it further enacted, That every person who shall administer to any woman pregnant with a child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or mother be thereby produced, be declared guilty of an assault with intent to murder.

Sec. III. Be it further enacted, That any person who shall wilfully administer to any pregnant woman any medicine, drug or substance, or anything whatever, or shall employ any instrument or means whatever, with intent thereby to procure the miscarriage or abortion of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished as prescribed in section 4310 of the Revised Code of Georgia.

Sec. IV. Repeals conflicting laws.

Approved February 25, 1876.

FILE COPY

Supreme Court, U.S.
FILED
OCT 18 1971
E. ROBERT SEAVER, CLERK

NO. 70-18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

JANE ROE, et al.,

Appellants

vs.

HENRY WADE,

Appellee

On Appeal from the United States District Court
for the Northern District of Texas

BRIEF AMICUS CURIAE ON BEHALF OF ASSOCIATION OF TEXAS DIOCESAN ATTORNEYS, IN SUPPORT OF APPELLEE

JOSEPH P. WITHERSPOON, JR.
TOWNES HALL
2500 Red River Street
Austin, Texas 78705

Attorney for Amicus Curiae

October 15, 1971

INDEX

	Page
INTEREST OF AMICUS CURIAE ----------	1
STATEMENT OF THE CASE ----------	2
QUESTIONS PRESENTED ----------	2
SUMMARY OF ARGUMENT ----------	3
I. THE UNBORN CHILD OR FOETUS IS OR MAY BE REASONABLY TREATED BY THE STATE AS A PERSON WITHIN THE MEANING OF THE CONSTITUTIONAL SAFEGUARDS OF THE PERSON CONTAINED IN THE CONSTITUTION OF THE UNITED STATES, AND ESPECIALLY IN THE FOURTH, FIFTH, NINTH, AND FOURTEENTH AMENDMENTS ----------	4
A. The Stance From Which The Court Should Approach This Constitutional Issue -----	5
B. The Concept Of The Person Utilized In The Constitution of the United States And In Its First Ten Amendments Had A Well-defined Meaning For Those Who Framed And Adopted Their Provisions That Clearly Included The Unborn Child Who Was Deemed By Them To Be A Subject Of Rights, Including The Right To Life -	8
C. Regard For The Context Of The Constitution, In The Sense Of Its Whole Framework In Relation To Its Various Parts And Especially Those Provisions Providing Safeguards For The Person, Such As The Fourth, Fifth, Ninth, and Fourteenth Amendments, Argues Strongly For Holding That An Unborn Child Or Foetus Is A Person Within The Meaning Of Those Safeguards -	28
1. The Concept Of Context In Constitutional Interpretation -------	28

Page

2. The Unborn Child Has Constitutional Right To Application of State Common Law In Diversity of Citizenship Actions At Common Law Under Article III And To A Jury Trial Under The Seventh Amendment ----- 29

3. The Citizenship Clause Of The Fourteenth Amendment Recognizes The Unborn Child As A Person, Who, When Born, Obtains The Further Status Of A Citizen ---------- 33

4. The Concept Of Property Utilized In The Due Process Clauses Of The Fifth And Fourteenth Amendments Has Reference Primarily To The Concept Of Property In State Law. Thus, To The Extent That State Law Of Property Recognizes That The Unborn Child Has Property Rights, The Due Process Clauses Of These Amendments Protects The Unborn Child As A Person ---------- 38

D. The Concept Of Person Must Be Held As Much Beyond The Power Of The State Or Nation To Define, In The Sense Of Determining Whether Or Not Some Child Of Human Beings Is Entitled To Be Treated Before The Law As A Person, As It Is Beyond The Power Of The State Or Nation To Define The Concept Of Religion, In The Sense Of Determining Whether Or Not Some Group Is Pursuing A Religious Cause And Entitled To Solicit Support For It, And For The Same Reasons. ---------- 46

E. The Long Continued Construction Of The Constitution By The Congress And By The Chief Executive As Comprehending The Unborn Child Within Its Concept Of The Person Bind This Court In Administering The Constitutional Safeguards Of The Person ---------- 49

Page

F. Judged From The Standpoint Of What It Is In Itself, The Unborn Child Is A Person And Justice Demands That Government Recognize This Fact And Treat The Unborn Child For What It Is --- 63

II. THE UNBORN CHILD BEING A PERSON AND HAVING THE RIGHT TO LIFE WITHIN THE MEANING OF THE CONSTITUTIONAL SAFEGUARDS OF THE PERSON, THE STATE HAS THE DUTY OR THE RIGHT UNDER THE CONSTITUTION TO PROTECT THE LIFE OF THAT CHILD REASONABLY VIS-A-VIS ITS SINGLE MOTHER OR MARRIED PARENTS WHO DESIRE TO TERMINATE ITS LIFE WITHOUT UNREASONABLY AFFECTING THE RIGHTS OF THE LATTER ---------- 76

A. The State Is Faced With A Difficult Decision-Making Problem In Resolving The Correlative Rights Of The Unborn Child As A Person And Of Its Single Mother Or Married Parents And Its Decision To Protect The Life Of The Unborn Child Through An Abortion Statute Should Be Allowed To Stand If It Is A Reasonable Decision ---------- 76

B. The State Cannot Reasonably Leave The Fate Of The Unborn Child To Be Decided By Private Persons Such As The Appellants In This Case Either With Respect To Whether An Abortion Should Be Performed Or With Respect To The Appropriate Reason For An Abortion. To Do So Would Be An Unconstitutional Delegation Of Authority And A Denial Of Equal Protection Of The Laws ---------- 89

C. The Affirmative, Particular Reasons That Can Be Adduced In Behalf Of The Texas Law Of Abortion Demonstrate The Reasonableness Of The State Legislative Judgment To Enact And

Page

Maintain That Law And They Counsel Extreme Caution On The Part Of Federal Courts In Declaring That State Legislative Judgment To Be Unconstitutional ---------- 100

III. SINCE THE UNBORN CHILD IS A PERSON AND HAS A RIGHT TO LIFE PROTECTED BY THE FOURTH, FIFTH, NINTH, AND FOURTEENTH AMENDMENTS, IF THIS COURT SUSTAINS THE LOWER COURT DECISION THAT ARTICLES 1191-1194 AND 1196 OF THE TEXAS PENAL CODE ARE UNCONSTITUTIONAL AND TO BE GIVEN NO FURTHER OPERATION, THIS COURT MUST ALSO RENDER A DECISION STATING THE GROUNDS UPON WHICH ABORTIONS MAY CONSTITUTIONALLY BE SECURED OR PERFORMED AND PROVIDE OR DESIGNATE THE TRIBUNALS FOR ADMINISTRATION OF THOSE STANDARDS IN ACCORDANCE WITH THE REQUIREMENTS OF BOTH SUBSTANTIVE AND PROCEDURAL DUE PROCESS AND EQUAL PROTECTIONSOF THE LAWS UNDER THE FOURTEENTH AMENDMENT AND, SINCE IT IS FEDERAL ACTION THAT CREATES THE HAZARD FOR UNBORN CHILDREN, OF THE FOURTH, FIFTH, AND NINTH AMENDMENTS ---------- 118

CONCLUSION ---------- 132

CASES CITED

	Page
Afroyim v. Rusk, 387 U.S. 253 (1967)--	129
Air Terminal Services, Inc. v. Rentzel 81 F. Supp. 611 ----------	63
Babbitz v. McCann, 310 F. Supp 293, 301 (E.D. Wis. 1970), appeal dismissed for want of jurisd., 400 U.S. 1 (1970) (per curiam) ----------	84
Baker v. Carr, 369 U.S. 188 (1962) ---	119
Board of Governors of Federal Reserve System v. Transamerica Corp., 184 F.2d 311 (C.A. 9, 1950) cert. denied, 340 U.S. 883 (1950) ----------	37
Bolling V. Sharpe, 347 U.S. 497 (1954)	119
Bonbrest v. Kotz, 65 F. Supp 138 (D.D.C. 1946) ----------	42
Bours v. United States, 22 Fed. 960 (C.A. 7, 1915) ----------	60
Boyd v. United States, 116 U.S. 616, 635 ----------	12, 13, 27, 86
Brandenburg v. Ohio, 395 U.S. 444, 452, 454 (1969) Black & Douglas dissent.	131
Brewer V. Hoxie School District No. 46, 238 F.2d 91 (8th Cir. 1956) ---------	9
Cantwell v. State of Connecticut, 310 U.S. 296 (1940) ----------	46, 47 48
Davis v. Beason, 133 U.S. 333 -------	78
De Jonge v. Oregon, 299 U.S. 353, 365, (1937) ----------	130
Delgado v. Yandell, Tex. ,(1971)	43

CASES CITED

	Page
Doe v. Bolton, 319 F. Supp. 1048, 1055 (N.D. Ga. 1970)	83, 84, 87, 94, 114
Doe v. Clarke, 2 H.Bl. 399, 126 Engl Rep. 617 (1795)	39
Doe v. Rampton, No. C-234-70 (D. Utah. (1970)	84
Doe v. Scott, 321 F. Supp. 1385, 1389, (N.D. Ill. 1971)(appeal docketed sub nom. Hanrahan v. Doe, 39 U.S. L.W. 3438 (U.S. Mar. 29, 1971)(No. 1522, 1970 Term; renumbered No. 70-105, 1971 Term), stay issued (Marshall, J. Sup. Ct. Feb.10, 1971)	84
Duncan v. State of Louisiana, 391 U.S. 145 (1968)	29, 31, 32
Eli Lilly & Co. v. Schwegmann Bros. Giant Super Markets, 109 F. Supp. 269 (D.C. La. 1953) affirmed 205 F.2d 788 (C.A. 5, 1953), cert. denied 346 U.S. 856 (1953)	121
Entick v. Carrington, 19 Howell, St. Tr., 1029	13
Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)	29, 31, 32, 42
Application of the President and Directors of Georgetown College, Inc., 331 F.2d 1000 (C.A. D.C., 1964), cert. den., 377 U.S. 978 (1964)	44, 45
Gibbons v. Ogden, 9 Wheat. 1, 188-189	11
Goldberg v. Kelly, 397 U.S. 254, 264-265 (1970)	109, 116, 122, 123, 124

CASES CITED

	Page
Green v. McElroy, 360 U.S. 474 (1959)	93
Griswold v. Connecticut, 381 U.S. 479 (1965)	83, 84, 85, 86, 87, 88, 89
Hall v. Hancock, 15 Pick, 255 (Mass., 1834)	39
Paul B. Haring v. Commander Willford Hall Air Force Base, No. SA 71 CA 11	57, 58
Hurd v. Hodge, 334 U.S. 24 (1948)----	119
James v. James, 174 S.W. 47 (Tex. Civ. App., 1914)	39
Johnson v. Yellow Cab., 321 U.S. 383	63
Kelly v. Wyman, 294 F. Supp. 893, 899, 900 (1968)	123
Kent v. Dulles, 357 U.S. 116 (1958)	93
Kyne v. Kyne, 38 Cal. App2d 122, 100 P.2d 806 (1940)	43
La Blue v. Specker, 358 Mich. 558, 100 N.W. 2d 445 (1960)	39
Leal v. C.C. Pitts Sand and Gravel, Inc. Tex. , 419 S.W. 2d 820 (1967)	43
Levy v. Louisiana, 391 U.S. 68 (1968)	95, 96
Lochner v. New York, 198 U.S. 45(1905) at 76 (dissent per Holmes, J.)	82
Marbury v. Madison, 1 Cranch 137, 179-180	8, 9-10, 27
McCulloch v. Maryland, 4 Wheat 316 --	28, 31

Myers v. United States, 272 U.S. 52, 175 (1926) ---------- 49

New York Times v. Sullivan, 376 U.S. 254 (1954) ---------- 130

Oklahoma City v. Sanders, 94 F.2d 323 63

People v. Belous, 80 Cal. Rptr. 354, 359 (S.Ct. Cal. 1969) cert. denied 397 U.S. 915 (1970) ---------- 84

People v. Estergard, Colo. , 457 P.2d 698 (1969) ---------- 44

People ex rel Wallace v. Labrenz, 411 Ill. 618, 104 N.E. 2d 769, cert. denied, 344 U.S. 824, 73 S.Ct. 24 -- 44

Pierce v. Society of Sisters, 268 U.S. 510 ---------- 78

Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1944) -------- 77, 78, 79 80, 89

Public Utilities Commission of District of Columbia v. Capital Transit Co., 214 F.2d 242 (D.C. Cir. 1954)-- 37

Ex Parte Quirin, 317 U.S., 42 (1942) 49

Raleigh Pitkin-Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964) ---------- 45

Reynolds v. Sims, 377 U.S. 533(1964) 119, 120

Reynolds v. United States, 98 U.S. 145 ---------- 78

Rewis v. United States, 369 F. (C.A. 5, 1966) ---------- 61

	Page
Roberson v. Rochester Folding Box Co., 171 N.Y. 538 (Ct. App. N.Y., 1902) --	40
Robinson v. California, 370 U.S. 660 (1962) ----------	128
Roe v. Wade, 314 F. Supp 1217, 1221-1222 (N.D. Tex. 1970) ----------	83
Rosen v. Louisiana State Board of M Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970) ----------	81, 82, 88, 89
A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 553 (concurring opinion) ----------	91, 92
Scott v. McPheeters, 33 Cal. App.2d 629, 92 P.2d 678 (1939), rehearing denied, 93 P.2d 562 (1939) ----------	42
Scripps-Howard Radio, Inc. v. F.C.C., 316,U.S. 4 (1942) ----------	37
Shapiro v. Thompson, 394 U.S. 618, (1969) ----------	97,98,99
Shelley v. Kraemer, 334 U.S. 1 (1948)	119
Sox v. United States, 187 F. Supp. 465 (D.C.S.C., 1960) ----------	61
Skinner v. State of Oklahoma, 316 U.S. 535, 541-42 ----------	95
State v. Buck, 200 or. 87, 269 P.2d 502 (1953) ----------	116
State v. Dunklebarger, 206 Iowa 971, 221 N.W. 594, 596 (1928) ----------	116
State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962) ----------	45, 46

CASES CITED

	Page
Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970)	81, 82, 88
Sterling v. Constantin, 287 U.S. 378 (1932) at 396	38
Stewart & Co. v. Sadrakula, 309 U.S. 94	63
Swift v. Tyson, 16 Pet. 1 (1842)	30
Trop v. Dulles, 356 U.S. 86 (1958)	128
United States v. Barney, 5 Blatchf. 294, Fed. Cas. No. 14,524.	51
United States v. Josef Alstoetter, et al., (United States Milirary Tribunal No. III, 1947)	102
United States v. Monia, 317 U.S. 424 at 431, (1942)	28, 31
United States v. Philadelphia National Bank, 374 U.S. 321 (1963)	72
United States v. Sharpnack, 355 U.S. 286 at 291 (1958)	51, 62
United States v. United Mine Workers of America, 330 U.S. 258 (1947)	121
United States v. Vuitch, 402 U.S. 62 (1971)	59, 82
West India Fruit and Steamship Co. v. Seatrain Lines, 170 F.2d 775 (C.A., 1948)	37
Whitney v. California, 274 U.S. 357, 378-379 (1927)	130

CASES CITED

	Page
Williams v. United States, 327 U.S. 711, ----------	62, 63
Application of Yamashita, 327 U.S. 1 (1946) ----------	5, 6, 7
Zemel v. Rusk, 381 U.S. 1 (1965) --	90, 91, 92, 93

STATUTES CITED

	Page
Constitution of the United States	
Article I, Section 8	28
Article III	29, 30, 31,32
Article III, Section 3	8
First Amendment	11, 47, 85,131
Third Amendment	85
Fourth Amendment	28, 32, 33, 38, 49,118
Fifth Amendment	2, 3, 4, 5, 7, 8, 9 13, 28, 30, 32, 33, 38, 41 42, 46, 49, 57, 81, 85, 86 88,118,131
Seventh Amendment	31, 32, 33, 49
Eighth Amendment	49, 57,128
Ninth Amendment	2, 3, 4, 5, 7, 8, 9, 28
Fourteenth Amendment	2, 3, 4, 5, 7, 8, 9, 28 30,32,33,34,35, 36, 37, 38 42,46,47,49,52, 81, 82, 85 95,118,122,129
United States Statutes	
Pub. Law 91-662 (Jan. 8, 1971)	60
4 Stat. 115 (Mar. 3, 1825)	49
14 Stat. 13 (April 5, 1866)	51
17 Stat. 598-599 (Mar. 3, 1873)	60
19 Stat. 90 (July 12, 1876)	60
84 Stat. 1504 (Dec. 24, 1970)	61, 62
10 U.S.C. 1071-1085	53
10 U.S.C. 1072	54
10 U.S.C. 1076	54, 56
10 U.S.C. 1077	58, 54
15 U.S.C. 18	72
18 U.S.C. 13	58, 51
18 U.S.C. 1461	60
19 U.S.C. 1305	60
28 U.S.C. 2671 et seq.	58
42 U.S.C. 1981, 1988	58
State Statutes	
Cal. Civil Code, Sec. 29	43

STATUTES CITED

	Page
State Statutes	
Cal. Penal Code, sec. 270	44
Cal. Stats. 1850, ch. 99, s. 45, p. 233	50
Colo. L. 1861, p. 296, s. 42	50
Conn. Stat, Tit. 22, s. 14, p. 152	50
District of Columbia Code, s. 22-201	59
Ill. R.S., 1845, p. 158, s. 46	50
Mass. St., 1845, c. 27	50
New York Laws, 1903, c. 132, N.Y. Civil Rights Law, ss. 50,51	41
N.Y. Rev.S., Vol. 2, pp. 578-579 s. 21 (1836)	50
Penn. M.L., 1860, p. 382, s. 88	50
Tex. H.B. No. 1092 (1971)	105
Tex. Penal Code, Arts. 531-536 (1857)	50
Tex. Penal Code (Vernon's) Arts. 1191- 1194, 1196	2, 3, 4,118
Tex. Probate Code, s. 66 (Vernon's)	39
English Statutes 43 Geo. III, c. 58 (1803)	25, 50
Federal Regulations	
32 C.F.R. 577.64 (c) (7)	54
32 C.F.R. 577.64(e) (3, (9)	55
U.S. Air Force Regulation 160-12	57, 58

AUTHORITIES CITED

	Page
Andrews, James DeWitt, ed., The Works of James Wilson, 1896. Vol. II, p. 3	14
Arey, Leslie B., Developmental Anatomy (1954), Chaps. II, VI.	68, 69
Atkinson On Wills (2d ed. 1953) 75	39
Avins, Alfred, ed., The Reconstruction Amendments' Debates (1967) 760, 274, 166, 205, 558	33, 34, 35
Barr, Donald, July 4, 1776 (1958) 138	19
Boorstin, Daniel J., The Americans: The Colonial Experience (1958) 194, 202 347, 348, 352	22, 23, 24 25
Callaghan, Daniel, Abortion, Law, Choice and Morality (1970) 62, 63, 82, 93	105,106,109
Carpenter, W. F., "Introduction" to John Locke, Two Treatises of Civil Government, vii	16
Congressional Record, Vol. 102 (Mar. 2, 1956) p. 3847	53
Congressional Record, Vol. 102 (Mar. 2, 1956) pp. 3851-3853	54
United Nations, "Declaration of the Rights of the Child," Official Record, pp. 19-20.	74, 75
Decter, Midge, "Anti-Americanism in America", Harper's Magazine, (April, 1968) p. 39	103

AUTHORITIES CITED

	Page
Dickens, Bernard M., Abortion and the Law (1966) 22 , 148 ----------	26, 29
Federal Bureau of Investigation, Crime in the United States (1965) 3 -------	112
The Federalist (1945) 575-576 ----------	20, 27
"Fetology: The Smallest Patients", The Sciences (October, 1968) 159-163 ------	71
Feuer, Lewis S., "On Civil Disobedience", The New York Times Magazine (September 26, 1967) 29, 122 ----------	103
Flannigan, G. L., The First Nine Months of Life (1962) ----------	68, 69
Ford, Paul L., ed., Pamphlets on the Constitution of the United States (not dated) ----------	21
Fortas, Abe, Concerning Dissent and and Civil Disobedience: We Have An Alternative to Violence (1938) 80 ------	104
Gavit, Bernard C., ed., Blackstone's Commentaries on the Law (1941) 70 ------	25, 27
Gesell, Arnold, First Five Years of Life (1940) 65 ----------	68, 69
Gesell, Arnold, The Embryology of Behavior (1945) Chaps. IV-VI, X ----------	68
Gilson, Etienne, The Spirit of Mediaeval Philosophy (1950) 203 ----------	203
Gordon, David A., "The Unborn Plaintiff", 63 Mich. L. Rev. 579, --------- 627 (1965)	43

AUTHORITIES CITED

	Page
Gottlieb, Frederich J., Developmental Genetics (1966) 17 ----------	65
Granfield, David, The Abortion Decision (1969) ----------	66, 79, 81 105,108,111 113,114,122
Harper and James, Torts (1956) Sec. 18.3 ----------	43
Hearings before Committee on Armed Services, U.S. House of Representatives Comm. Rep. 53, 84th Cong., 2d Sess. 1956, 6029, 6034 ----------	55
Helligers, Dr. Andre, "Fetal Development", 31 Theological Studies No. 1 (March, 1970) 7 ----------	67
Helligers, Dr. Andre, National Symposium on Abortion, May 15, 1970, Prudential Plaza Auditorium, Chicago, Illinois ----------	70
Hellman, L. M., et al, "Growth and Development of the Human Fetus Prior to the 20th Week of Gestation", 103 Amer. J. Obstetrics and Gynecology 789-800 (Mar. 15, 1969) ----------	69
Henry, G. R., "The Role of Amnioscopy in the Prevention of Ante Partum Hypoxia of the Fetus", 76 J. Obstetrics and Gynecology of the British Commonwealth 790-794 (1969) ----------	70
Hooker, Davenport, The Prenatal Origin of Behavior (1952) ----------	69

AUTHORITIES CITED

	Page
Horger, E.O. II, and Hutchinson, D. L., "Diagnostic Use of Amniotic Fluid", 75 J. of Pediatrics 503-508 ----------	71
Institut zur Erforchung der UdSSR, Forty Years of the Soviet Regime, Munich (1957) ----------	102
Kennan, George F., "Rebels Without a Program", The New York Times Magazine (Jan. 21, 1968) 60 ----------	103
Lerner, Max, America as a Civilization (1957) 651 ----------	102
Lidz, Theodore, cited in Rosen, Harold, Therapeutic Abortions, Medical, Psychiatric, Legal, Anthropological, and Religious Considerations (1954) 278 ----------	106,107
Liley, Albert W., "Auckland MD to Measure Light and Sound Inside Uterus", Medical Tribune Report (May 26, 1969) ----------	70
Liley, H.M.I., and Day, B.F., Modern Motherhood: Pregnancy, Childbirth and the Newborn Baby (1969) 50, 202 ----------	68, 70
Locke, John, Two Treatises of Government, Book I (Everyman Library) ----	16, 17, 18 19
Louisell, David W., and Noonan, John T., Jr., "Constitutional Balance" in The Morality of Abortion (1970) 220, 226-230 ----------	43

AUTHORITIES CITED

	Page
MacDonald, P.R., "Complications of Abortion", Nursing Times (Mar. 10, 1967) 305-307 quoted in Callaghan, Daniel, Abortion: Law, Choice and Morality (1970) 35 ----------	115
Mietus, Norbert J., The Therapeutic Abortion Act: A Statement in Opposition (1967) 6, 48 ----------	113,114
Montagu, R. Ashley, Life Before Birth (1964) 2 ----------	65
The New York Times, Sunday, April 4, 1971, 1 ----------	58, 59
Novak, Michael, "The Secular Saint", The Center Magazine (May, 1968) 55-56 ----------	104
O'Doherty, N., "Prenatal Treatment of Adrenal Insufficiency", The Lancet No. 29 (1969) 1194-1195 ----------	71
Padover, Saul K., The Complete Jefferson (1943) 92, 935, 945 ----------	21, 22
Patten, Bradley M., Human Embryology (3d. ed. 1968) Ch. VII ----------	69
Pollock, Sir Frederick, Essays in the Law (1922) 80 ----------	16
Petre-Quadens, O., et al, "Sleep in Pregnancy: Evidence of Fetal Sleep Characteristics", 4 J. Neruologic Sciences 600-605 (May-June, 1967) ----------	69
Prosser on Torts (3d. ed., 1964) 355-356 --	43

AUTHORITIES CITED

	Page
Pye, Kenneth, "The Warren Court and Criminal Procedure", 67 Mich. L. Rev. 249, 258 (1968) ----------	126
Ramsey, Paul, "Reference Points in Deciding About Abortion", in Noonan, John T., Jr., ed., The Morality of Abortion: Legal and Historical Perspectives (1970) 66 ----------	66
Rutland, Robert Allen, The Birth of the Bill of Rights: 1776-1791 (1955) 119, 218, 231 ----------	10, 19
Second Vatican Council, De Ecclesia in mundo huius temporus (Gaudium et spes) (Dec. 5, 1965) sec. 51 ----------	1
Sevilla, Rafael M., "Oral Feeding of Human Fetus, a Possibility", Jama (May 4, 1970) 713-717 ----------	71
Shrirer, William L., The Rise and and Fall of the Third Reich (1960) ---------	102
Smith, Charles Page, James Wilson: Founding Father (1956) 87-88, 246-261, 305 ----------	14
Story, W.W., The Life and Letters of Joseph Story (1851) Vol. 1, 297 ---------	50
Texas State Department of Public Welfare, Manual of Services (Feb. 1967) ----	112
Basic Writing of St. Thomas Aquinas (1945) Vol. 1, 291 (Summa Theologica Part I, Question XXIX, Article I) ----------	64
Witherspoon, Dr. John, Lectures on Moral Philosophy (1912) 84 ----------	15, 21

Wood, Carl, "Weightlessness: Its Implications for the Human Fetus", 77 J. Obstetrics and Gynecology of the British Commonwealth 333-336 (1970) -- 70

INTEREST OF AMICUS CURIAE

The Association of Texas Diocesan Attorneys appears as amicus curiae with the written consent of both parties, given in letters which have been filed with the Clerk of this Court. The Association is organized to provide mutual aid and benefit for its members in dealing with all problems of a legal nature relating to bishops, priests, religious, dioceses, parishes, orders, congregations, societies in the Roman Catholic Church, and their work, and all that relates thereto. The Association has been in existence for a number of years and has an active voting membership consisting of licensed Texas lawyers designated by their respective Ordinaries. While subserving the end for which it was organized, the Association is an autonomous one and independent of the above-mentioned Church. One of the legal problems relating to the named offices, divisions, and societies of the Church with which they, and thus the Association, are concerned is the problem of abortion. The position of the Roman Catholic Church on abortion, long since taken, was elaborated for the first time by a general council of this Church, the Second Vatican Council, and promulgated by Pope Paul Paul VI on December 5, 1965. It stated:

> "Life from its conception is to be guarded with the greatest care. Abortion and infanticide are horrible crimes." Second Vatican Council, De ecclesia in mundo huius temporis (Guadium et spes), sec. 51.

The Roman Catholic Church in the United States and the amicus Association seek to encourage and foster the rights guaranteed by the Constitution of the United States and endeavor to vindicate those rights whenever threatened.

Amicus appears here because of its conviction that unborn children have been deprived by the decision of the court below of the protection of a valid state statute prohibiting abortion except in defined circumstances with the effect of denying their federal constitutional right to life and all other federal and state rights consequent upon the enjoyment of this right.

STATEMENT OF THE CASE

Amicus respectfully refers the Court to the statements of the case incorporated in the brief for appellants but asserts that the statement of appellants contained in their last sentence on page 15 of their brief is incorrect insofar as it advances the argument that the issuance of the judgment by the lower court in declining to enforce its declaratory judgment was one "without meaningful effect." Whether or not that judgment was without meaningful effect depends upon the resolution of constitutional issues presented in this case and focused upon in the brief of amicus.

QUESTIONS PRESENTED

1. the unborn child must or may reasonably be viewed by the State of Texas as a person for the purposes of giving effect through statutory and decisional law to the safeguards of the person contained in the Constitution of the United States as expressed in the Fourth Amendment, the Due Process Clauses of the Fifth and Fourteenth Amendment, and the Ninth Amendment?

2. Whether, in the event the unborn child must or may reasonably be viewed by the State of Texas as a person for the purposes of giving effect to the safeguards of the person in the Fourth, Fifth, Fourteenth, and Ninth Amendments, the unborn child has a right to life under these amendments vis-a-vis its single mother or married parents who desire to terminate its life that this State has reasonably protected through Articles 1191-1194 and 1196 of the Texas Penal Code, which prohibit the performance of abortions unless "procured or attempted by medical advice for the purpose of saving the life of the mother"?

3. Whether, in the event the unborn child has a right to life protected by the Fourth, Fifth, Fourteenth, and Ninth Amendments but Articles 1191-1194 and 1196 of the Texas Penal Code, although directed to protection of that

life, are held to be unconstitutional and to be given no further operation, a federal court can constitutionally delegate the power of decision-making with respect to the continued enjoyment by unborn children of their right to life to private persons, viz., single women, married persons, and physicians such as the appellants in this case without making provision for the grounds upon which abortions may constitutionally be secured or performed and for official institutions to administer such standards in accordance with the requirements of procedural due process?

SUMMARY OF ARGUMENT

Although there are numerous issues involved in this case, this brief will address itself only to three, so as to avoid repetition of the arguments presented by appellee and by other briefs of amicus curiae. We believe that the time is ripe for this Court to determine that the unborn child or foetus is a person for the purpose of administering the safeguards of the person contained in the Fifth, Fourteenth, and Ninth Amendments; that the unborn child, however unwanted or considered to be a burden by its parents, has a constitutionally protected right to life; and that the protection of their lives accorded by a state to unborn children through statutory provisions like Articles 1191-1194 and 1196 of the Texas Penal Code is a reasonable protection that a state can constitutionally provide those children. Stating the last proposition differently, the protection of the unborn child or foetus under statutory provisions like Articles 1191-1194 and 1196 of the Texas Penal Code does not unreasonably impair the personal freedom of married couples or of single women, their right to determine the number and spacing of their children, or their rights to marital privacy, personal privacy, or physical privacy so far as these are constitutionally recognized. Neither do these statutory provisions unreasonably impair the constitutional right of physicians to administer health care to women.

Most of the arguments by appellants and amicus curiae in support of appellants proceed almost exclusively

to consider the constitutional rights of married couples and of single women and to analyze the applicable constitutional provisions as well as the judicial gloss upon them without really considering whether, for the purpose of administering the constitutional safeguards of the person, the unborn child or foetus is a person and has the right to life as a matter of federal constitutional right. It is the position of amicus that the unborn child or foetus possesses the status of a person and is entitled to protection of its life as a matter of fundamental federal constitutional right. This court cannot adequately dispose of this case on the merits without a decision upon these and related matters.

Amicus urges this Court to render a decision holding that the three-judge court erred in holding that Articles 1191-1194 and 1196 of the Texas Penal Code are unconstitutional (1) insofar as that decision was reached without recognition that the unborn child or foetus is a person within the meaning of and has a right to life protected by the constitutional safeguards of the person contained in the Constitution of the United States and, most especially, in its Fifth, Fourteenth, and Ninth Amendments; (2) insofar as that court held the right of single women and married persons to choose whether to have children, as protected by the Fourteenth Amendment, was infringed by the above articles; and (3) insofar as the court did not apply in favor of unborn children and the protection of their right to life the same constitutional standard it applied "under the Ninth Amendment" in favor of single women and married persons and their right to choose whether to have children.

ARGUMENT

POINT ONE

THE UNBORN CHILD OR FOETUS IS OR MAY BE REASONABLY TREATED BY THE STATE AS A PERSON WITHIN THE MEANING OF THE CONSTITUTIONAL SAFEGUARDS OF THE PERSON CONTAINED IN THE CONSTITUTION OF THE UNITED STATES, AND ESPECIALLY IN THE FOURTH, FIFTH, NINTH, AND FOURTEENTH AMENDMENTS.

A. The Stance From Which The Court Should Approach This Constitutional Issue

In Application of Yamashita, 327 U.S. 1 (1946) the petitioner, a defeated general of a recent enemy nation had been sentenced to hang by a United States military commission, asked this Court to consider the issue of whether or not, as he contended, he, as a person, had been deprived of his rights to a fair trial in violation of the Due Process Clause of the Fifth Amendment by the action of that commission in admitting in evidence of depositions, affidavits and hearsay and opinion evidence. This Court, in a decision by a divided panel that had been subjected to extensive criticism, refused to pass upon this contention, without even determining whether the petitioner was a "person" entitled to invoke the protection of the clause invoked. In response to the petitioner's contention, the Court simply stated:

> "We have considered, but find it unnecessary to discuss other contentions which we find to be without merit." 327 U.S. at 25.

This case, as it has been handled by the lower court, is very similar to the Yamashita case. It involves a party, here a state officer, who impliedly asserted before the lower tribunal that a certain class of human beings, here unborn children, are "persons" within the meaning of the Due Process Clauses of the Fifth and Fourteenth Amendments; that these persons have a right to life protected by these clauses; that the State has a right to enact an abortion law to protect that constitutional right; and that the abortion law, as enacted, does not violate the Fourth, Fifth, Fourteenth, or Ninth Amendments insofar as single women and married couples also have constitutional rights protected by these provisions. The lower court, as did this Court in the Yamashita case, did not address itself to the central, primordial constitutional issues that had been properly raised by one of the parties in the case, here the appellee. It is the position of amicus that the decisional process utilized by the lower court was a denial of procedural due process of law to appellee and to the

unborn children whose lives were sought to be protected by the statute appellee was attempting to defend as to its constitutionality. Since what the lower court did in this case follows the precedent for that action contained in Yamashita, amicus urges this Court to overrule the latter case at least insofar as it seems to authorize what the lower court did.

Mr. Justice Rutledge, in a dissenting opinion in the Yamashita case, stated the point of view that must surely control consideration of the issues by this Court in this case. Referring to the fact that the decision was "unprecedented in our history," he stated:

> "The novelty is legal as well as historical. We are on strange ground. Precedent is not all-controlling in law. There must be room for growth, since every precedent has an origin. But it is the essence of our tradition for judges, when they stand at the end of the marked way, to go forward with caution keeping sight, so far as they are able, upon the great landmarks left behind and the direction they point ahead. If, as may be hoped, we are now to enter upon a new era of law in the world, it becomes more important than ever before for the nations creating that system to observe their greatest traditions of administering justice, including this one, both in their judging and in their new creation. The proceedings in this case veer so far from some of our time-tested road signs that I cannot take the large strides validating them would demand.
>
> "...I am completely unable to accept or to understand the Court's ruling concerning the applicability of the due process clause of the Fifth Amendment to this case. Not heretofore has it been held that any human being is beyond its universally protecting spread in the guaranty of a fair trial in the most fundamental sense. That door is dangerous to open. I will have no part in opening it. For once it is ajar, even for enemy

belligerents, it can be pushed back wider for others, perhaps ultimately for all.

"The Court does not declare expressly that petitioner as an enemy belligerent has no constitutional rights, a ruling I could understand but not accept. Neither does it affirm that he has some, if but little, constitutional protection. Nor does the Court defend what was done. I think the effect of what it does is in substance to deny him all such safeguards. And this is the great issue in the cause." 327 U.S. at 43, 79.

In this case this Court once again, as in Yamashita, stands on strange ground and at the end of the narked way. The great issue in this case is whether the nborn child or foetus is a person within the meaning of he constitutional safeguards of the person contained in he Constitution of the United States, and especially in ts Fourth, Fifth, Fourteenth, and Ninth Amendments. For, f the unborn child is a person for constitutional purposes, he whole framework of argument and decision must be changed rom that adopted, respectively, by the appellants and the ower court. This result would mean that the unborn child, s a person, is entitled, in general, to the protection of ts life under the Constitution of the United States and hat in assessing the validity of state abortion legisla- ion directed toward the protection of this constitutional ight, the right to life of the unborn child must be con- idered and evaluated by the courts quite as thoroughly and qually as the rights of single women and married couples ith respect to marital privacy, personal privacy, physical ntegrity, personal freedom, and determination of the num- er and spacing of their children.

In short, amicus urges this Court squarely to face nd resolve the issue properly and explicitly raised by the ppellee, a state officer charged with the performance of important function by his state, as to whether the un- orn child or foetus is a person within the meaning of the onstitutional safeguards of the person contained in the onstitution of the United States, and especially in its

Fourth, Fifth, Ninth and Fourteenth Amendments, and as to whether the unborn child or foetus, as a person, has a constitutional right to life. To do otherwise would be for this Court to deny procedural due process to appellee and to all those whom, in the name of the State of Texas, this appellee represents.

B. The concept of the person utilized in the Constitution of the United States and in its first ten Amendments had a well-defined meaning for those who framed and adopted their provisions that clearly included the unborn child or foetus who was deemed by them to be a subject of rights, including the right to life, and a person to whom its parents as well as political society itself owed important duties of care and support. As a matter of sound constitutional interpretation theory, this Court must recognize and apply this meaning of the concept of the person and implement the purpose underlying the employment of this concept as the foremost principle of this Constitution.

Chief Justice Marshall in Marbury v. Madison, 1 Cranch 137, 179-180, stated "that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature." While his focus in that case was primarily upon a legislative disregard of a Constitutional rule, it was also upon avoiding a like judicial disregard of that rule. It is not without significance for the instant case that the Chief Justice, in selecting a few of many parts of the Constitution to illustrate his basic proposition, referred to one of the explicit safeguards of the person contained in the Constitution, Section 3 of Article III:

> "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." Ibid.

It would have been just as inadmissible by the Chief Justice and the other members of the Court in 1803 that this rule

did not speak to and bind the Court insofar as it provided that a "person" was to be protected by the rule as it was inadmissible to them that the type of the protection to be accorded the person as specified in this rule did not speak to and bind the Court. Not just part but the whole of this and other rules of the Constitution must be deemed to be "rules for the government of courts." Thus, each of the rules of the Constitution providing a safeguard either expressly or impliedly for the "person," including the Fifth, Fourteenth, and Ninth Amendments, must be viewed in the same way. For this reason, the inevitable first task for the Court in this case, where a state asserts the right of the unborn child, as a person, to live, as the basis for sustaining its challenged abortion law, is to determine what is the appropriate meaning to be assigned the term "person" expressly or impliedly used by the framers of the Constitution in establishing its fundamental safeguards of the person. The Court must recognize that the Fifth, Fourteenth, and Ninth Amendments also provide a "rule for the government of the legislature" of a state in the sense that the state is entitled and in some instances duty bound to take positive, affirmative action to protect the federal constitutional rights of the persons safeguarded by them. See, e.g., Brewer v. Hoxie School District No. 46, 238 F.2d 91 (8th Cir. 1956).

Chief Justice Marshall in the Marbury case provided the essential principle for approaching the problem of determining the meaning of the term "person" as used in the Constitution. He said:

> "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act,

they are designed to be permanent." 1 Cranch at 176.

Of all the principles the people of the United States established in their Constitution none can be more paramount than those designed by them for safeguarding the civil rights of the individual person. Indeed, so concerned were the people of the United States for providing these safeguards that it is altogether likely that the Constitution, which did not contain such safeguards in the form of a Bill of Rights as did the state constitutions, would not have been adopted by sufficient states unless the Federalists, sensing the impending disaster, had not made a gentlemen's agreement that they would propose and submit in the First Congress in 1789 detailed amendments to establish a comprehensive federal Bill of Rights.[1] Both John Adams and Thomas Jefferson, when they first received news of the Constitution at their London and Paris ministerial posts, respectively, agreed that they were very distressed that it did not contain a bill of rights providing "for the whole catalog of civil rights commonly accepted as fundamental in America" to guarantee freedom of the person.[2] This agreement was, of course, carried out by the next Congress on September 25, 1789.

Moreover, it was the "original right" of the people of the United States to adopt a concept of the person for inclusion in and administration of their Constitution as "in their opinion, shall most conduce to their own happiness," as Marshall stated. It is the meaning and the purpose of the people who framed, debated, and adopted the Constitution and its Bill of Rights to safeguard the person that must be respected by this Court. Even if many of the present generation have come to view the religious motiva-

---

[1]See, Robert Allen Rutland, The Birth of the Bill of Rights: 1776-1791. Chapel Hill: The University of North Carolina Press, 1955, 119-218.

[2]Id. at 129.

tion, the philosophy of natural rights, and the views of the person entertained by the framers and adopters of the Constitution as lacking in validity, this Court is not free, because of its dedication and commitment to the rule of law, to disregard the meaning of the concept of person the framers entertained when they inserted it into the constitution safeguards of the person. It was their "original right to establish, for their future government" the principles that "in their opinion" were to be subsequently treated as "fundamental" and as "designed to be permanent." Citizens may today reject, although with perhaps great loss of societal direction, the religious motivations, philosophy of natural rights, and view of the person entertained by the constitutional framers, but they cannot avoid or set aside the objective choice made by those framers of the meaning to be given the normative concept of the person placed by them in the Constitution. If this Court must respect still today the choice of the framers in the First Amendment rule that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...," it must also still respect the rule that "nor shall any person... be deprived of life, liberty, or property, without due process of law." If we must be very vigilant about judicially enforcing the requirement that "no law" respecting an establishment or religion shall be made, we must also be very vigilant about judicially assuring that any person obtains due process of law with respect to deprivations of his life, liberty, or property by action of the state or nation.

Chief Justice Marshall has also provided this Court with the interpretative theory to implement the basic approach he laid down for assigning meaning to provisions of the Constitution. In Gibbons v. Ogden, 9 Wheat. 1, 188-189, while referring to the problem of construction of a clause conferring a power upon Congress, he stated:

> "As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlighted patriots who framed our constitution,

> and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well-settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case."

Precisely the same reasons that commended this rule of constitutional interpretation to the Court for the purpose of assigning meaning to a provision granting power to Congress commends it even more highly as the basis for assigning meaning to provisions designed for the safeguarding of the persons who established the constitution. In Boyd v. United States, 116 U.S. 616, 635, Mr. Justice Bradley in the opinion for the Court stated this principle:

> "...illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis."

Still another principle of constitutional interpretation bears even more closely upon the function of this Court in giving effect to the safeguards of the person which the people of the United States established in the exercise of their "original right." This principle was also articulated by this Court in the Boyd case, supra, and has

reference to the relevance of conceptions of personal freedom entertained by those who framed the provisions of the Constitution and its first ten amendments. In the Boyd case, the question was whether a statute which provided for compulsory production of a man's private papers to be used in evidence against him in a proceeding to forfeit his property, was unconstitutional as authorizing an unreasonable search and seizure within the meaning of the Fourth Amendment. In deciding that the statute was unconstitutional, the Court referred to the contemporary conceptions of personal freedom entertained by American statesmen at the time of the adoption of the Constitution and of the first ten amendments to it. The subject of unreasonable searches and seizures had been thoroughly canvassed in the quarter of a century just preceding their adoption, and especially in the discussion of Lord Camden in the celebrated case of Entick v. Carrington, 19 Howell, St. Tr., 1029. Referring to this discussion, Justice Bradley stated for the Court:

> "As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures. ...Can we doubt that when the Fourth and Fifth Amendments to the Constitution of the United States were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and unreasonable character of such seizures?" 116 U.S. at 627, 630.

Putting these three long established and honored principles of constitutional interpretation to work in this instant case requires this Court to hold that the unborn child was clearly within the meaning of the concept of the

person adopted by the American statesmen who formulated the Constitution and its first ten amendments and that it was their purpose to have its safeguards of the person applied by courts and legislatures to the unborn child or foetus and especially so as to recognize a constitutionally guaranteed right to life.

James Wilson, who helped formulate, voted for, and signed the Declaration of Independence, participated in the Constitutional Convention and signed the proposed Constitution of the United States, and served as an Associate Justice of the Supreme Court of the United States had something to say about the concept of the person.[1] This remarkable Pennsylvania lawyer, member of the Continental Congress, classical scholar, draftsman of the Pennsylvania Constitution, and person chiefly responsible for the adoption of the Constitution of the United States by Pennsylvania was also a professor of law at the College of Philadelphia at the same time he served upon the Supreme Court of the United States. Steeped in the philosophy of natural law and well-acquainted with the basic concepts of those revolutionary times, he was in an especially good position to articulate the meaning of the concept of the person generally shared by his fellow citizens and woven into the sinews of the colonial and state Bills of Rights and finally into the Constitution of the United States. In his law lectures delivered in the winter of 1792, Justice Wilson stated:

> "Persons are divided into two kinds — natural and artificial. Natural persons are formed by the great Author of nature. Artificial persons are the creatures of human sagacity and contrivance; and are formed and intended for the purposes of government and society."[2]

---

[1]Charles Page Smith, James Wilson: Founding Father. Chapel Hill: The University of North Carolina Press, 1956. 87-88, 246-61, 305.

[2]The Works of James Wilson, James DeWitt Andrews, Ed., Chicago: Callaghan and Co., 1896. Vol. II, p. 3.

In this statement Wilson was simply reflecting the ommon view of the Constitutional Fathers that the person as not something subject to man's contrivance, like the rtificial person which is the corporation or the state, ut above and apart from and prior to any construction or ontrivance of man. The person was for the makers of our onstitution a datum, a given, a being created "by the reat Author of nature." The status of person was not omething to be conferred by the state or even all the eople of the state. A person simply is and has his being y virtue of an act of creation by God himself — this was he concept of the person for those who wrote and adopted he Constitution of the United States.

This concept of the person was Christian in its rigin and in its development. Its meaning had been laborated long before the period of American constitution-aking even if it had never been woven as securely into the abric of a legal order as it was to be in 18th Century erica. Man was deemed to be a composite of body and soul, he latter having been given to him closely consequent upon he human event of conception in an act of creation by "the nly Creator of human souls: God."[1] As Doctor John itherspoon, the sixth president of Princeton University nd signer of the Declaration of Independence, observed and aught his students:

> "Considering man as an individual, we discover the most obvious and remarkable circumstances of his nature, that he is a compound of body and spirit."[2]

d as the great teacher of American statesmen, John Locke, t it in the best Christian tradition:

---

[1]Etienne Gilson, The Spirit of Mediaeval Philos-hy. London: Sheed & Ward, 1950. 203.

[2]John Witherspoon, Lectures on Moral Philosophy. rinceton: Princeton University Press, 1912. 8.

> "God, I say, having made man and the world, ... directed him by his senses and reason...to the use of those things which were serviceable for his subsistence, and gave him the means of his 'preservation'...and therefore had a right to make use of those creatures (animals) which by his reason or sense he could discover would be serviceable thereunto..."[1]

No man had greater influence upon the minds of the Constitutional Fathers than John Locke. His Second Treatise of Government was characterized by Sir Frederick Pollock as "probably the most important contribution ever made to English constitutional law by an author who was not a lawyer by profession."[2] Beyond this it has been generally recognized that "the principles of the American Revolution were in large part an acknowledged adoption of the ideas it contained."[3] In Locke's discussion of paternal, or as he preferred to call it, "parental" power, he observes that

> "Adam and Eve, and after them all parents were, by the law of Nature, under an obligation to preserve, nourish and educate the children they had begotten, not as their own workmanship, but the workmanship of their own Maker, the Almighty, to whom they were to be accountable."[4]

---

[1]John Locke, Two Treatises of Government. Book I. New York: E.M. Dutton & Co. (Everyman Library) 55.

[2]Sir Frederick Pollock, Essays in the Law. 1922.80.

[3]W.F. Carpenter, "Introduction to John Locke, "Two Treatises of Civil Government, vii.

Locke, Two Treatises, p. 143.

"The power, then, that parents have over their children arises from that duty which is incumbent on them, to take care of their offspring during the imperfect state of childhood. ...that duty which God and Nature has laid on man, as well as other creatures, to preserve their offspring till they can be able to shift for themselves..."[1]

Locke pointed out that although the parental duty after procreation of children to care for them could not be put aside until they could shift for themselves, the name and authority of a father or indeed any parent over a child could be quickly lost:

"So little power does the bare act of begetting give a man over his issue, if all his care ends there, and this be all the title he hath to the name and authority of a father."[2]

Locke was simply making the point of the great concern of political society for children and its insistence upon their protection from and after the act of procreation. The name and authority of the parent could be lost if that parent disregarded the very precious value borne by the child as a person through the soul created for it by God. Thus, the foster-father who rescued and then took care of a child who had been exposed by its natural father for the purpose of letting it die gains the title and authority of father and the latter loses it.[3]

Again, in order to emphasize the importance of the child, because it is a person created by God at all of its stages of development, Locke states:

---

[1]Locke, Two Treatises, pp 144-145.

[2]Id.

[3]Id. at 147.

"Conjugal society is made by a voluntary compact between man and woman and though it consists chiefly in such a communion and right in one another's bodies as is necessary to its chief end, procreation, yet it draws with it mutual support and assistance, and a communion of interest, too, as necessary not only to unite their care and affection, but also necessary to their common offspring, who have a right to be nourished and maintained by them till they are able to provide for themselves.

"For the end of conjunction between male and female being not barely procreation, but the continuation of the species, this conjunction betwixt male and female ought to last, even after procreation, so long as is necessary to the nourishment and support of the young ones. ...This rule...the infinite wise Maker hath set to the works of His hands..."[1]

Moreover, a person, whether a child or an adult, was deemed superior, in a very basic sense to the state and to its law, even its most fundamental law, the constitution. Not only was the person not a creation of man or of his state, but the person was before and above the state and its constitution. Locke stated the principle that

"Men being,... by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent, which is done by agreeing with other men, to join and be united into a community for their comfortable, safe, and peaceable living..."[2]

---

[1] Id. at 155.

[2] Id. at 164.

Each of the principal American constitutions and bills of rights made this conception of the person and of his relation of the person to the state abundantly clear. The American Declaration of Independence states:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are Life, Liberty, and the pursuit of Happiness....That to secure these rights Governments are instituted among Men, deriving their just powers from the consent of the governed, ..."[1] [Emphasis added]

The principal American constitutions and bills of rights also made it clear that while the adult persons were the persons from whom the just powers of government were actually derived by their consent, these adults relative to their children, unborn or born, were performing an act not only for themselves but also for their children, as trustees or guardians for their lives, futures, and happinesses, according to the Lockeian doctrine. Thus, we see that the Virginia Bill of Rights states:

> "1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity: namely, the enjoyment of life and liberty..."[2] [Emphasis added]

And, as especially pointed out by Alexander Hamilton in his Paper No. 84, the preamble of the Constitution of the United States states:

---

[1]Donald Barr, July 4, 1776. New York: Crown Publishers, 1958. 138.

[2]Robert Allen Rutland, The Birth of the Bill of Rights: 1776-1791. Chapel Hill: The University of North Carolina Pre-s, 1955. 231.

> "We THE PEOPLE of the United States,...to secure the blessing of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States."[1]

It is not without significance that Hamilton quoted the preamble precisely in the form above set out. He was arguing in this paper that there was no necessity for inclusion of a Bill of Rights in the original Constitution to safeguard the persons constituting the people of the United States against their representatives in government. His argument was that these persons, both individually and collectively, were the source of the authority and power of their representatives and the latter had been granted no authority to abridge the fundamental rights of the person, such as life, liberty, or property. Thus he states:

> "Here, in strictness, the people surrender nothing and as they retain everything, they have no need of particular reservations (of rights)."[2] [parenthesis added]

Thus, by his quotation, Hamilton indicates that he is thinking of the rights not only of adults but also children, both born and unborn, their "posterity." It is these rights, he contends, that are not surrendered to the representatives of the people.

Richard Henry Lee, who was closely associated with Patrick Henry and Thomas Jefferson and introduced the resolution in the second Continental Congress for declaring independence on July 2, that was adopted two days later, worked vigorously for the addition of a Bill of Rights to the proposed Constitution. An orator whose associates compared with Cicero, he perhaps articulated better than

---

[1] The Federalist. New York: The Heritage Press, 1945. 575-576.

[2] Id. at 575.

most of the Constitution Fathers the sense of what they were about when he said on October 12, 1787 in a popular pamphlet widely read in the states:

> "...when we are making a constitution, it is to be hoped, for ages and millions yet unborn, why not establish...essential rights, which we have justly understood to be the rights of freemen..."[1]

Dr. John Witherspoon in some of his lectures at Princeton at least as early as 1772:

> "Some nations have given parents the power of life and death over their children, and Hobbs insists that children are the goods and absolute property of their parents, and that they may alienate them and sell them either for a time, or for life. But both these seem ill founded, because they are contrary to the end of this right, viz. instruction and protection. Parental right seems in most cases to be limited by the advantage of the children."[2]

Here Dr. Witherspoon carries through to the constitution-making times, to which he contributed much, the basic doctrine of Locke about the duty of parents and the right of their children vis-a-vis each other.

Thomas Jefferson introduced a bill concerning crimes and punishments in 1779 in the Virginia Legislature. It is interesting that he provided for the penalty of hanging and dissection of the body for the murder of a child by its parent.[3] In view of the usual Founding Father

---

[1]Pamphlets on the Constitution of the United States, Paul Leicester Ford. ed. 314.

[2]Dr. John Witherspoon, Lectures on Moral Philosophy. Princeton: Princeton University Press, 1912. 84.

[3]Saul K. Padover, The Complete Jefferson. New York: Duell, Sloan & Pearce, 1943. 92.

view of the child as a being a person from the very moment of its procreation or begetting by its parents, one would assume that this bill was directed against abortion at any stage of the development of the child in the womb. Jefferson also showed that he was quite familiar with the law of England with respect to abortion as far back as the Laws of King Alfred. He noted that this law penalized the killing both of a pregnant woman and of her child and that that law required the payment or weregild not only for the killing of the mother but also for the killing of the child. He also took the position that despite his espousal of a constitutional safequard for religious freedom, the state could not permit churches in their sacred rites "to murder a child."[1]

Life on the colonial frontiers involved raids upon the early settlements by hostile Indians. The unborn child was a special target of these raids. The Rev. Joseph Doddridge reported upon the Indian attacks in Western Virginia in the latter part of the 18th Century. He stated that children were the special victims of Indian vengeance because they could either become warriors or reproduce the species. With respect to the unborn child, he reported upon its treatment by the hostile Indians and showed the special concern of the colonists for such treatment and what their reaction was:

> "The Indian kills indiscriminately. His object is the total extermination of his enemies. It is not enough that the fetus should perish with the murdered mother, it is torn from her pregnant womb, and elevated on a stick or pole, as a trophy of victory and an object of horror to the survivors of the slain."[2]

---

[1] Id. at 935, 945.

[2] Daniel J. Boorstin, The Americans: The Colonial Experience. New York: Vintage Books, 1958. 347-348.

The Indian forays and attacks in which these and other atrocities were committed were not isolated instances seldom repeated. As Boorstin reports:

> "The Indian was omnipresent; he struck without warning and was a nightly terror in the remote silence of backwood cabins....Every section of the seacoast colonies suffered massacres. The bloody toll of the Virginia settlements in 1622, and again in 1644, was never forgotten in the colony. ...Such nightmares shaped the military policy of settlers until nearly the end of the 18th century. ...The apprehension of another visit from the Indians, and of being driven back to the detested fort, was painful in the highest degree, and the distressing apprehension was frequently realized. In such colonial warfare all were soldiers because all lived on the battlefield. ...among Colonial Americans...war was the urgent defense of the hearth by everybody against an omnipresent and merciless enemy."[1]

The loss of children in warfare was an especially drastic loss in colonial America. The colonials placed a very high value upon children not only because, according to their religion they were persons, but also because they were badly needed in the emerging nation. As Boorstin reports:

> "Labor and skills were scarce in colonial America; men had to do many things for themselves simply because they could not hire others to do them."

Benjamin Franklin indicated that it was easy for poor families to get their children instructed in a trade:

> "for the Artisans are so desirous of Apprentices,

---

[1] Id. at 348-352. [Citing The Rev. Joseph Doddridge]

> that many of them will even give Money to the Parent, to have Boys from Ten to Fifteen Years of Age bound Apprentices to them till the Age of Twenty-one; and many poor Parents have, by the means, on their Arrival in the Country, raised Money enough to buy Land sufficient to establish themselves, and to subsist the rest of their Family by Agriculture."[1]

Thus, colonial Americans generally down through the period of the making of the Constitutuion not only revered and respected the unborn child as a person created by God but saw in the unborn an addition to the family who, after birth, could be the way to meet the labor scarcity on the farm and frontier and to enable the family, particularly the poor one, to establish itself firmly in the cities.

The English law concerning abortion discussed by Jefferson as previously noted, had existed since at least the time of King Alfred with both secular and ecclesiastical laws being directed at the problem although by different kinds of sanctions. The Leges Henrici of the time of Henry I reveals that the ecclesiastical laws provided for a lighter penalty if a woman deliberately destroyed her unborn child within the first forty days following conception and a heavier one if she destroyed her unborn child after that period. The common law courts also handled cases of abortion although they exercised a less extensive jurisdiction than that of the ecclesiastical courts. The rule applied by the former was primarily concerned with abortion of a child that was quick or able to stir in the mother's womb. Blackstone in 1765 observed in his Commentaries:

> "1.Life. This right is inherent by nature in every individual, and exists even before the

---

[1] Id. at 194.

the child is actually born.

> Rights of Unborn Child. The offence of abortion of a quick child is not murder, but homicide or manslaughter. An infant in ventre sa mere is supposed in law to be born for many purposes. It is capable of having a legacy made to it. It may have a guardian assigned to it, and may have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born."[1]

This recognition of the unborn child as a person before the law is highly significant in view of the fact that as Boorstin reports,

> "...by 1775
> "Blackstone's Commentaries had sold nearly as many copies in America as in England...he had provided for the first time the means by which any literate person could grasp the large outlines of his legal tradition. ...was a godsend to the rising American, to the ambitious backwoodsman and the aspiring politician."[2]

In 1803, only a little over a decade after the adoption of the Constitution of the United States and its first amendments, the English Parliament adopted a statute which characterized as felonies abortions performed either before or after a woman was "quick with child", 43 Geo. III c. 58. The former type of abortion was made punishable by fine, imprisonment, and other lesser penalties. The latter type was made punishable by death. The enactment of this statute may have been a part of the movement

---

[1] Blackstone's Commentaries on the Law. Bernard C. Gavit, Ed. Washington: Washington Law Book Co., 1941. 70

[2] Boorstin, supra, at 202.

of replacing the jurisdiction of the ecclesiastical courts, which covered the offense of abortion in a similar way, by enactment of statutes defining crimes to be handled by the common law courts.[1]

We have established that the unborn child or foetus was considered by the Founding Fathers and their fellow citizens to be a person; a subject of rights against its parents from and after their act of begetting or procreating the child until it was born and thereafter until it could shift for itself; a person who was created by the act of God in infusing it with a soul consequent upon the act of procreation; a person, like its parents, endowed by God with unalienable rights to life, liberty and pursuit of happiness and the qualities of being free, equal, and independent; and a person who could not be deprived of these rights and qualities by their parents through a compact or constitution or any other means. This concept of the person was drawn by colonial Americans from their predominantly Christian background; from political philosophers and especially from their principal mentor in political philosophy, John Locke; from ministers and educators like Dr. John Witherspoon of Princeton University; from legal scholars like Blackstone; and especially from their intuition as reinforced by their difficulties and opportunities in dealing with a hostile but bountiful environment.

Since this was the colonial concept of the person, the Founding Fathers who framed the Constitution and their fellow citizens who adopted it must be understood to have employed the word "person" in the constitutional safeguards of the person in what was for them its eminently "natural sense" so as to include the unborn child or foetus. This sense reinforces and supports their goal of wanting to ordain and establish a Constitution not only for themselves but also for their posterity and to

---

[1]See, Bernard M. Dickens, Abortion and the Law, Bristol: MacGibbon & Kee, 1966. 22.

secure from the action of wilful men "certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity: namely, the enjoyment of life and liberty." It was the "original right" of the Founding Fathers to adopt such a meaning for the term "person" and to impress it on the Constitution. If effect is to be given to the foundational criterion, established by Marbury v. Madison, supra, for assigning meaning to a constitutional provision- the natural sense in which words are employed and the sense that will promote the objects expressed in the Constitution itself - this Court must hold that the unborn child or foetus is a person within the constitutional safeguards of the person.

Similarly, if effect is to given to the presumption for constitutional interpretation established by Boyd v. United States, supra, that a constitutional provision for the security of the person should be liberally construed, then the term "person" should certainly be extended to cover the unborn child or person, there being so many other good reasons for this construction.

Finally, if effect is to be given to the third basic principle for constitutional interpretation, also articulated in the Boyd case, supra, that contemporary conceptions of personal freedom are to be regarded and particularly those framed in the leading expositions of those conceptions, then the term "person" in the Constitution must clearly be held to cover the unborn child or foetus. The leading expositions were contained in Locke's Second Treatise of Civil Government, supra,; Blackstone's Commentaries on the Law, supra; the Virginia Bill of Rights, and Hamilton's Paper No. 84 in the Federalist, supra. All of these highlighted the position of the unborn child as a person and the duty of parents and political society to provide for its care. The latter two expositions extended this duty to those who make and administer constitutions.

C. Regard for the Context of the Constitution, in the sense of its whole framework in relation to

its various parts and especially those provisions providing safeguards for the person, such as the Fourth, Fifth, Ninth and Fourteenth Amendments, argues strongly for holding that an unborn child or foetus is a person within the meaning of those safeguards.

1. The concept of context in constitutional interpretation.

The value of an examination of the context in which a statutory provision is set for determining the appropriate meaning to be assigned to it has long been recognized. Justice Frankfurter, in a dissenting opinion in United States v. Monia, 317 U. S. 424 at 431, (1942), gave classic formulation to this value:

> "A statute like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process, having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. On the historic process of which such legislation is an incomplete fragment--that to which it gave rise as well as that which gave rise to it-- can yield its true meaning."

Since McCulloch v. Maryland, 4 Wheat. 316, it has been well established that the context in which a term is used in the Constitution must be closely regarded in assigning meaning to it. In construing the word "necessary" in the "necessary and proper" clause of Article I, section 8 of the Constitution, Chief Justice Marshall stated that:

> "...in its construction, the subject, the context the intention of the person using them, are all t be taken into view." 4 Wheat. at 407.

A recent example of the context of the Constitution for this purpose was provided in Duncan v. State of Louisiana, 391 U. S. 145 (1968), where this Court pointed out that, in construing a particular constitutional safeguard of the person, such as the Due Process Clause of the Fourteenth Amendment, "it has looked increasingly to the Bill of Rights for guidance..."[1]

As demonstrated by Chief Justice Marshall's opinion for the Court in the McCulloch case, the concept of context includes not only the immediate context of a provision whose meaning is drawn in question but also the more remote context of the whole Constitution, including other parts likely to throw light upon the usage in that provision.

2. The unborn child has a constitutional right to application of state common law in diversity of citizenship actions at common law under Article III and to a jury trial under the Seventh Amendment.

As construed by this Court Article III, Section 2 of the Constitution, which extends the jurisdiction conferred upon the courts of the United States to controversies between citizens of different states, necessarily provides extensive protection for the unborn child or foetus. In Erie Railroad Co. v. Tompkins, 304 U. S. 64 (1938), this Court held that Article III of the Constitution required federal courts exercising jurisdiction in diversity of citizenship cases to apply as their rules of decision the law of the state in which they sit, unwritten as well as written, except in matters governed by the Federal Constitution or by Acts of Congress. Mr. Justice Brandies, in the opinion for the Court, stated that the prior practice of the courts in disregarding the decisional law established by a state's highest court in favor of a federal general common law, was quoting

---

[1]Dickens, Abortion, pp 148.

Mr. Justice Holmes:

> "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."[1]

As a result of this decision, the interpretation of the Rules of Decision Act of 1789 established by Swift v. Tyson, 16 Pet. 1, to the contrary was overruled and the constitutional required interpretation substituted for it. While Erie did not involve a plaintiff who was an unborn child or who was representing an unborn child at the time of the injury which occasioned the suit, it set the stage for application by federal courts of the extensive state tort law, property law, and other law protecting the rights of unborn children. This law, as will be seen in Point one, provides extensive protection for the rights of unborn children. Thus, Article III of the Constitution of the United States, the Rules of Decision Act of 1789, and the decision in Erie, supra, now operate together to provide the unborn child with the constitutional status of a person in trials at common law in federal courts in cases where state law in applicable because state law accords that status to that child and that law, whether common law or statute law, is constitutionally required to be applied by these courts.

It would be a strange and bizarre constitutional doctrine that would provide protection for the unborn child as a person for the purpose of applying state law in its behalf in diversity of citizenship cases in federal courts under Article III of the Constitution but would deny protection for that same child in the same courts for the purpose of applying the Fifth, Fourteenth, and Ninth Amendments of the same document in a case in which a state asserted the constitutional validity of a statute under those Amendments designed as a reasonable protection of the constitutional right of that child, as a person,

---

[1] Id. at 79.

to its life vis-a-vis its mother or parents. This Court should avoid an interpretation of the concept of person which would create such a violent conflict within the Constitution between Article III and the consitutional safeguards of the person contained in the federal Bill of Rights, particularly the Fifth and Ninth Amendments, and in the Fourteenth Amendment. It has refused to reach interepretations. As indicated in the McCulloch, Monia, and Duncan cases, supra, this Court has avoided such results and read the provisions of the Constitution as constituting one harmonious whole, with the purpose and meaning of one part being treated as providing illumination for the construction of its other parts.

Indeed, once this Court reached its decision in the Erie case, it became clear that one of the essential provisions of the federal Bill of Rights, the Seventh Amendment, must be construed to accord the unborn child or its representative an important procedural right at common law. This Amendment provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Yet, in Erie, this Court decided that there was no federal general common law but that in diversity of citizenship cases the rules for decision were constitutionally required to be the law of the state in which its sits, including both the statutory law and the decisional law of state courts. Thus, where, as is universally the case, the unborn child is given various substantive rights under the common law or statutes of a state and that child invokes the diversity of citizenship jurisdiction of a federal court, it would seem eminently clear that not only must that court apply the state common or statute law in question under Article III, but also where the protection of state common law is

invoked, it must accord the right of trial by jury to that child or its representatives under the Seventh Amendment. Both that Amendment as a matter of explicit requirement and Article III as construed by this Court in Erie make "the rule of the common law" the rule for decision-making purposes by federal courts, where the suit is at common law. Thus, the decision in Erie necessarily implies, in light of state common law according substantive rights to unborn children, that these unborn children must be recognized to be persons within the meaning of the constitutional safeguard of the person contained in the Seventh Amendment guaranty of a jury trial in suits at common law.

In view of this Court's decisions in the Duncan case, supra, and like cases, the fact that the unborn child must be recognized to be a person within the meaning of the Article III guaranty of the application of state common law in diversity of citizenship cases and within the meaning of the Seventh Amendment guaranty of a jury trial in such cases must surely mean that this Court will give the same scope to the concept of person, as including the unborn child, in administration of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Moreover, since the unborn child must be treated as a person within the meaning of the Seventh of the ten Amendments contained in the federal Bill of Rights as well as within the meaning of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, it seems clear that this Court must also hold that the unborn child must be treated as a person within the meaning of any other Amendment of the Bill of Rights in which the protection provided is relevant to the protection of the interests of the unborn child. This would obviously include the Due Process Clause of the Fifth Amendment, the Ninth Amendment, and probably also, the Fourth Amendment protection of "persons against unreasonable . . . seizures." Construction of the concept of person in all of these Amendments must be the same since the federal Bill of Rights was adopted, as previously indicated, as an integral package proposed by the Federalists for the better protection of many fundamental rights of the person after the framers recognized that adoption of the Constitution had become doubtful due to its lack of any guarantees of these rights.

In light of the above considerations it must be concluded that the Fourth, Fifth, Ninth, and Fourteenth Amendments must be construed to provide guarantees for the protection of the unborn child as a person. Any other holding would be so to sever them from their environment in the whole Constitution and from historical development of the concept of the person at the time of its adoption as to mutilate their "significance and sustenance."

3. The Citizenship Clause of the Fourteenth Amendment recognizes the unborn child as a person, who, when born, obtains the further status of a citizen. The unborn child has the right to protection of its prospective status as a citizen under the Citizenship Clause of the Fourteenth Amendment.

The first sentence of Section 1 of the Fourteenth Amendment provides:

> "All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

Section 1 of the Fourteenth Amendment was drafted by Representative John A. Bingham of Ohio.[1] The debates concerning the adoption of the Fourteenth Amendment demonstrates the continuity in the conception of the person as between the times of the American Revolution and those of the post-Civil War period. The view of the person as an act of creation by God when he infuses a soul into the unborn child or foetus upon its being conceived is expressed by the draftsman of Section 1:

> "By that great law of ours it is not to be inquired whether a man is 'free' by the laws of England; it is only to be inquired is he

---

[1] The Reconstruction Amendments' Debates. Alfred Avins, Ed. Virginia, Richmond: Virginia Commission on Constitutional Government, 1967. 760.

> a man, and therefore free by the law of that creative energy which breathed into his nostrils the breath of life, and he became a living soul, endowed with the rights of life and liberty. . . . Every man is entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal ".[1]

Representative Andrew J. Rogers of New Jersey emphasized the two types of right being spoken to by the Civil Rights Bill under discussion in March 1966:

> "There are only two kinds of right: one is that which a man acquires from the municipal laws. There is another right which God gives us, the right of self-defense, the right to protect our lives from invasion by others. There are no other rights but the rights of nature and the great civil rights. . . ."[2]

One of the central purposes of the Citizenship Clause of Section 1 of the Fourteenth Amendment was to make it certain that members of the Negro ethnic group as well as every other class of person obtained the political right of citizenship when born in the United States to add to their natural rights that they were considered to have received at conception from God. A common view of the members of Congress in 1866 was expressed by Representative William Lawrence of Ohio:

> "This clause is unnecessary, but nevertheless proper, since it is only declaratory

---

[1] Id. at 274.

[2] Id. at 166.

of what is the law without it."[1]

The most significant aspect of Section 1 of the Fourteenth Amendment was to reinforce the rights of the person by conferring upon the "person born . . . in the United States" the political right of citizenship and by making it incumbent upon the states to respect the natural rights of the person. In reinforcing the natural rights of the person vis-a-vis the states, the overriding purpose was to give the concept of person the widest possible coverage. As stated by Senator Arthur I. Boreman of West Virginia:

> "This, you will see, sir, is not confined to citizens of the United States, but it includes every person that is found within these States, and guarantees to all life, liberty, and property, and equal protection of the laws." . . . So that while, before this amendment, any class of persons in this country over whom the protection of the Constitution of the United States was not extended, there cannot now be any longer any question on that subject."[2]

The above extracts from the debates concerning the Fourteenth Amendment and Civil Rights legislation in the post-Civil War period, which are typical, demonstrate not only the continuity of those times with the times of the American Revolution so far as the concept of the person as including the unborn child is concerned, but also manifest a purpose to confer citizenship upon any person upon his birth and to give the concept of person the widest possible application in the event there "was any question whether there were any class of person in this country over whom the protection of the Constitution of the United States was not extended . . ." particularly, in applying to the states a bill of rights comparable to that applicable to the federal government.

---

[1] Id. at 205.

[2] Id. at 558.

Due to its origin and purpose, the Citizenship Clause of Section 1 of the Fourteenth Amendment must be viewed as referring to unborn children, among others, when it speaks of "[A]ll persons born . . . in the United States and subject to the jurisdiction thereof. . . ." The unborn child is the "person" before birth who, by virtue of being "born" in the United States, becomes a citizen of the United States. In what sense could an unborn child be in any substantial sense less a "person" 8 minutes, 8 weeks, or 8 months before birth than at the moment of birth or some equivalent time thereafter? The child was, in the view of the person generally accepted at the time of the adoption of the Constitution and of the Fourteenth Amendment, as much a person before birth as after. Its natural right to life came to it, as again expressed by the draftsman of Section 1, by virtue of the fact of creation of its soul by God.

But if the unborn child is a person included within the concept of the person utilized in the Citizenship Clause of the Fourteenth Amendment, surely the unborn child must be recognized under this clause to have the right to claim protection from the federal courts for its prospective status when born, of citizenship. Surely, also, the state in which it is present must have the right to enact statute law designed to protect that prospective status of the unborn child also. The Citizenship Clause speaks of two forms of citizenship: a citizenship of the United States and a citizenship of the State where the person resides. The State wherein an unborn child resides has a very special reason, aside from its general interest in protecting persons in the enjoyment of their fundamental rights, for protecting the life of the unborn child. That child is a prospective citizen of that State. It is greatly needed by the State and the child greatly needs the State.

If the unborn child cannot obtain the protection of its prospective status as a citizen under the Fourteenth Amendment from federal and state courts and the state legislatures, citizenship of the United States and of a state is a very precarious right. Next to the right to life, the right to citizenship ranks very high in the hierarchy of

rights of the person. That was the judgment of the common law and it was the judgment of those who drafted and adopted the Fourteenth Amendment. In general, there can be no citizenship attained by birth unless the right to life of the unborn child is protected. No unborn child can attain its citizenship unless its life is protected from and after the moment of its conception until the moment of birth against action that will certainly destroy it. Thus, protection of the right of the "person born" in the United States to be a citizen of the United States surely cannot be confined only to the period beginning with birth. If that right is to be effectively protected, the unborn child must be recognized to possess a prospective right to citizenship, a right contingent only upon successful completion of the process of birth from a mother living in the United States.

The matter may be viewed in another light. We are accustomed to speaking of the prospective jurisdiction of courts and the necessity they are sometimes under of acting to preserve that jurisdiction. We also speak of the prospective jurisdiction of administrative agencies and the necessity for seeking the aid of courts to preserve the status quo or rights pending the completion of an administrative action. See, e.g., Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942); Board of Governors of Federal Reserve System v. Transamerica Corp., 184 F.2d 311 (C.A. 9, 1950) cert. denied, 340 U.S. 883 (1940); West India Fruit and Steamship Co. v. Seatrain Lines, 170 F.2d 775 (C.A., 1948); Public Utilities Commission of District of Columbia v. Capital Transit Co., 214 F. 2d 242 (D.C. Cir. 1954). If courts can act to preserve their prospective jurisdiction over such matters as proceedings before administrative agencies and to preserve the jurisdiction of administrative agencies over the subject matters committed to their care, they can and should act to protect their own prospective jurisdiction over unborn children who, when born, are entitled to ask the courts to vindicate their rights to citizenship, e.g., their privileges or immunities as citizens of the United States against state

laws that abridge them as protected by the Fourteenth amendment and their entitlement to all privileges and immunities of citizens of the several states as protected by Section 2 of Article IV.

4. The concept of property utilized in the Due Process Clauses of the Fifth and Fourteenth Amendments has reference primarily to the concept of property in state law. Thus, to the extent that state law of property recognizes that the unborn child has property rights, the Due Process Clause of these Amendments protects the unborn child as a person. Similar protection for the life and liberty of the unborn child cannot rationally be denied under these Amendments.

As demonstrated in Sterling v. Constantin, 287 U.S. 378 (1932), the concept of property contained in the Due Process Clause of the Fourteenth Amendment has primary reference to the law of states under which rights to property are created. The Court observed in this case:

> "The existence and nature of the complainants' rights are not open to question. Their ownership of the oil properties is undisputed." Id. at 396.

The complainants in this case were owners of interests in oil and gas leaseholds in the State of Texas, interests that had been acquired pursuant to the law of property of this state. The same principle must necessarily govern administration of the Due Process Clause of the Fifth Amendment with respect to property rights arising under state law.

The common law in England and in this country has long since recognized the right of an unborn child or foetus to take by inheritance, subject to the event of subsequent birth:

"An intestate's posthumous child is considered in being and will inherit just as if he had been born in the intestate's lifetime ...(T)his was the common law rule with respect to both realty and personalty...(A) posthumous child may recover his share of the father's land from a bona fide purchaser obtaining title through a judicial partition sale."[1]

In Texas a child en ventre sa mere is held included among those children in being at the death of the testatrix who are to take under her will. See James v. James, 174 S.W. 47 (Tex. Civ. App., 1914.) By statute in Texas, when a posthumous child is unprovided for by settlement and pretermitted by his father's last will and testament, he succeeds to the same portion of the father's estate as he would have been entitled if the parent had died intestate.[2]

As early as 1795, English courts recognized the rights of the unborn child in property law. In Doe v. Clarke, 2 H.Bl. 399, 126 Engl Rep. 617 (1795), the court held that the description in a devise to "children living at the time of his (the life tenant's) decease" included unborn children. American courts utilized the same approach. In Hall v. Hancock, 15 Pick, 255 (Mass., 1834, Chief Justice Shaw held that an unborn child fell within the meaning of a bequest to grandchildren "living at ... decease." In the case of La Blue v. Specker, 358 Mich. 358, 100 N. W. 2d 445 (1960), an unborn illegitimate child was held to be a child or "other person" having standing to bring suit under a dram shop act, for the death of his father, which had occurred before the child's birth. The Court stated:

---

[1] Atkinson on Wills (2nd ed. 1953) 75

[2] See, Vernon's Annotated Texas Statutes, Probate Code, Section 66.

"For certain purposes, indeed for all beneficial purposes, a child en ventre sa mere is to be considered as born.... It is regarded as in esse for all purposes beneficial to itself, but not to another....Formerly, this rule would not be applied if the child's interests would be injured thereby, ...but, for purpose of the rule against perpetuities such a child is now regarded as a life in being, even though it is prejudiced by being considered as born.... Its civil rights are equally respected at every period of gestation."[1]

It is important in considering the concept of property at this point to remember the admonition Justice Gray addressed to other members of the New York Court of Appeals in his dissent filed in the case of Roberson v. Rochester Folding Box Co., 171 N.Y. 538 (Ct. App. N.Y., 1902). He stated:

"Property is not, necessarily, the thing itself, which is owned; it is the right of the owner in relation to it. The right to be protected in one's possession of a thing, or in one's privileges, belonging to him as an individual, or secured to him as a member of the commonwealth, is property, and as such entitled to the protection of the law. The protective power of equity is not exercised upon the tangible thing, but upon the right to enjoy it; and, so, it is called forth for the protection of the right to that which is one's exclusive possession, as a property right."[2]

The majority's forgetting of this fundamental concept of the person as being at the center of even the concept of

---

[1] 1 Bouvier, Law Dictionary, p. 1038

[2] Id.

"An intestate's posthumous child is considered in being and will inherit just as if he had been born in the intestate's lifetime ...(T)his was the common law rule with respect to both realty and personalty...(A) posthumous child may recover his share of the father's land from a bona fide purchaser obtaining title through a judicial partition sale."[1]

In Texas a child en ventre sa mere is held included among those children in being at the death of the testatrix who are to take under her will. See James v. James, 174 S.W. 47 (Tex. Civ. App., 1914.) By statute in Texas, when a posthumous child is unprovided for by settlement and pretermitted by his father's last will and testament, he succeeds to the same portion of the father's estate as he would have been entitled if the parent had died intestate.[2]

As early as 1795, English courts recognized the rights of the unborn child in property law. In Doe v. Clarke, 2 H.Bl. 399, 126 Engl Rep. 617 (1795), the court held that the description in a devise to "children living at the time of his (the life tenant's) decease" included unborn children. American courts utilized the same approach. In Hall v. Hancock, 15 Pick, 255 (Mass., 1834, Chief Justice Shaw held that an unborn child fell within the meaning of a bequest to grandchildren "living at my decease." In the case of La Blue v. Specker, 358 Mich. 358, 100 N. W. 2d 445 (1960), an unborn illegitimate child was held to be a child or "other person" having standing to bring suit under a dram shop act, for the death of his father, which had occurred before the child's birth. The Court stated:

---

[1]Atkinson on Wills (2nd ed. 1953) 75

[2]See, Vernon's Annotated Texas Statutes, Probate Code, Section 66.

> "For certain purposes, indeed for all beneficial purposes, a child en ventre sa mere is to be considered as born.... It is regarded as in esse for all purposes beneficial to itself, but not to another....Formerly, this rule would not be applied if the child's interests would be injured thereby, ...but, for purpose of the rule against perpetuities such a child is now regarded as a life in being, even though it is prejudiced by being considered as born.... Its civil rights are equally respected at every period of gestation."[1]

It is important in considering the concept of property at this point to remember the admonition Justice Gray addressed to other members of the New York Court of Appeals in his dissent filed in the case of Roberson v. Rochester Folding Box Co., 171 N.Y. 538 (Ct. App. N.Y., 1902). He stated:

> "Property is not, necessarily, the thing itself, which is owned; it is the right of the owner in relation to it. The right to be protected in one's possession of a thing, or in one's privileges, belonging to him as an individual, or secured to him as a member of the commonwealth, is property, and as such entitled to the protection of the law. The protective power of equity is not exercised upon the tangible thing, but upon the right to enjoy it; and, so, it is called forth for the protection of the right to that which is one's exclusive possession, as a property right."[2]

The majority's forgetting of this fundamental concept of the person as being at the center of even the concept of

---

[1] 1 Bouvier, Law Dictionary, p. 1038

[2] Id.

"An intestate's posthumous child is considered in being and will inherit just as if he had been born in the intestate's lifetime ...(T)his was the common law rule with respect to both realty and personalty...(A) posthumous child may recover his share of the father's land from a bona fide purchaser obtaining title through a judicial partition sale."[1]

In Texas a child en ventre sa mere is held included among those children in being at the death of the testatrix who are to take under her will. See James v. James, 174 S.W. 47 (Tex. Civ. App., 1914.) By statute in Texas, when a posthumous child is unprovided for by settlement and pretermitted by his father's last will and testament, he succeeds to the same portion of the father's estate as he would have been entitled if the parent had died intestate.[2]

As early as 1795, English courts recognized the rights of the unborn child in property law. In Doe v. Clarke, 2 H.Bl. 399, 126 Engl Rep. 617 (1795), the court held that the description in a devise to "children living at the time of his (the life tenant's) decease" included unborn children. American courts utilized the same approach. In Hall v. Hancock, 15 Pick, 255 (Mass., 1834, Chief Justice Shaw held that an unborn child fell within the meaning of a bequest to grandchildren "living at my decease." In the case of La Blue v. Specker, 358 Mich. 358, 100 N. W. 2d 445 (1960), an unborn illegitimate child was held to be a child or "other person" having standing to bring suit under a dram shop act, for the death of his father, which had occurred before the child's birth. The Court stated:

---

[1] Atkinson on Wills (2nd ed. 1953) 75

[2] See, Vernon's Annotated Texas Statutes, Probate Code, Section 66.

> "For certain purposes, indeed for all beneficial purposes, a child en ventre sa mere is to be considered as born.... It is regarded as in esse for all purposes beneficial to itself, but not to another....Formerly, this rule would not be applied if the child's interests would be injured thereby, ...but, for purpose of the rule against perpetuities such a child is now regarded as a life in being, even though it is prejudiced by being considered as born.... Its civil rights are equally respected at every period of gestation."[1]

It is important in considering the concept of property at this point to remember the admonition Justice Gray addressed to other members of the New York Court of Appeals in his dissent filed in the case of Roberson v. Rochester Folding Box Co., 171 N.Y. 538 (Ct. App. N.Y., 1902). He stated:

> "Property is not, necessarily, the thing itself, which is owned; it is the right of the owner in relation to it. The right to be protected in one's possession of a thing, or in one's privileges, belonging to him as an individual, or secured to him as a member of the commonwealth, is property, and as such entitled to the protection of the law. The protective power of equity is not exercised upon the tangible thing, but upon the right to enjoy it; and, so, it is called forth for the protection of the right to that which is one's exclusive possession, as a property right."[2]

The majority's forgetting of this fundamental concept of the person as being at the center of even the concept of

---

[1] 1 Bouvier, Law Dictionary, p. 1038

[2] Id.

"An intestate's posthumous child is considered in being and will inherit just as if he had been born in the intestate's lifetime ...(T)his was the common law rule with respect to both realty and personalty...(A) posthumous child may recover his share of the father's land from a bona fide purchaser obtaining title through a judicial partition sale."[1]

In Texas a child en ventre sa mere is held included among those children in being at the death of the testatrix who are to take under her will. See James v. James, 174 S.W. 47 (Tex. Civ. App., 1914.) By statute in Texas, when a posthumous child is unprovided for by settlement and pretermitted by his father's last will and testament, he succeeds to the same portion of the father's estate as he would have been entitled if the parent had died intestate.[2]

As early as 1795, English courts recognized the rights of the unborn child in property law. In Doe v. Clarke, 2 H.Bl. 399, 126 Engl Rep. 617 (1795), the court held that the description in a devise to "children living at the time of his (the life tenant's) decease" included unborn children. American courts utilized the same approach. In Hall v. Hancock, 15 Pick, 255 (Mass., 1834, Chief Justice Shaw held that an unborn child fell within the meaning of a bequest to grandchildren "living at my decease." In the case of La Blue v. Specker, 358 Mich. 58, 100 N. W. 2d 445 (1960), an unborn illegitimate child was held to be a child or "other person" having standing to bring suit under a dram shop act, for the death of his father, which had occurred before the child's birth. The Court stated:

---

[1] Atkinson on Wills (2nd ed. 1953) 75

[2] See, Vernon's Annotated Texas Statutes, Probate Code, Section 66.

"For certain purposes, indeed for all beneficial purposes, a child en ventre sa mere is to be considered as born.... It is regarded as in esse for all purposes beneficial to itself, but not to another....Formerly, this rule would not be applied if the child's interests would be injured thereby, ...but, for purpose of the rule against perpetuities such a child is now regarded as a life in being, even though it is prejudiced by being considered as born.... Its civil rights are equally respected at every period of gestation."[1]

It is important in considering the concept of property at this point to remember the admonition Justice Gray addressed to other members of the New York Court of Appeals in his dissent filed in the case of Roberson v. Rochester Folding Box Co., 171 N.Y. 538 (Ct. App. N.Y., 1902). He stated:

"Property is not, necessarily, the thing itself, which is owned; it is the right of the owner in relation to it. The right to be protected in one's possession of a thing, or in one's privileges, belonging to him as an individual, or secured to him as a member of the commonwealth, is property, and as such entitled to the protection of the law. The protective power of equity is not exercised upon the tangible thing, but upon the right to enjoy it; and, so, it is called forth for the protection of the right to that which is one's exclusive possession, as a property right."[2]

The majority's forgetting of this fundamental concept of the person as being at the center of even the concept of

---

[1] 1 Bouvier, Law Dictionary, p. 1038

[2] Id.

"An intestate's posthumous child is considered in being and will inherit just as if he had been born in the intestate's lifetime ...(T)his was the common law rule with respect to both realty and personalty...(A) posthumous child may recover his share of the father's land from a bona fide purchaser obtaining title through a judicial partition sale."[1]

In Texas a child en ventre sa mere is held included among those children in being at the death of the testatrix who are to take under her will. See James v. James, 174 S.W. 47 (Tex. Civ. App., 1914.) By statute in Texas, when a posthumous child is unprovided for by settlement and pretermitted by his father's last will and testament, he succeeds to the same portion of the father's estate as he would have been entitled if the parent had died intestate.[2]

As early as 1795, English courts recognized the rights of the unborn child in property law. In Doe v. Clarke, 2 H.Bl. 399, 126 Engl Rep. 617 (1795), the court held that the description in a devise to "children living at the time of his (the life tenant's) decease" included unborn children. American courts utilized the same approach. In Hall v. Hancock, 15 Pick, 255 (Mass., 1834, Chief Justice Shaw held that an unborn child fell within the meaning of a bequest to grandchildren "living at my decease." In the case of La Blue v. Specker, 358 Mich. 558, 100 N. W. 2d 445 (1960), an unborn illegitimate child was held to be a child or "other person" having standing to bring suit under a dram shop act, for the death of his father, which had occurred before the child's birth. The Court stated:

---

[1]Atkinson on Wills (2nd ed. 1953) 75

[2]See, Vernon's Annotated Texas Statutes, Probate Code, Section 66.

> "For certain purposes, indeed for all beneficial purposes, a child en ventre sa mere is to be considered as born.... It is regarded as in esse for all purposes beneficial to itself, but not to another....Formerly, this rule would not be applied if the child's interests would be injured thereby, ...but, for purpose of the rule against perpetuities such a child is now regarded as a life in being, even though it is prejudiced by being considered as born.... Its civil rights are equally respected at every period of gestation."[1]

It is important in considering the concept of property at this point to remember the admonition Justice Gray addressed to other members of the New York Court of Appeals in his dissent filed in the case of Roberson v. Rochester Folding Box Co., 171 N.Y. 538 (Ct. App. N.Y., 1902). He stated:

> "Property is not, necessarily, the thing itself, which is owned; it is the right of the owner in relation to it. The right to be protected in one's possession of a thing, or in one's privileges, belonging to him as an individual, or secured to him as a member of the commonwealth, is property, and as such entitled to the protection of the law. The protective power of equity is not exercised upon the tangible thing, but upon the right to enjoy it; and, so, it is called forth for the protection of the right to that which is one's exclusive possession, as a property right."[2]

The majority's forgetting of this fundamental concept of the person as being at the center of even the concept of

---

[1] 1 Bouvier, Law Dictionary, p. 1038

[2] Id.

"An intestate's posthumous child is considered in being and will inherit just as if he had been born in the intestate's lifetime ...(T)his was the common law rule with respect to both realty and personalty...(A) posthumous child may recover his share of the father's land from a bona fide purchaser obtaining title through a judicial partition sale."[1]

In Texas a child en ventre sa mere is held included among those children in being at the death of the testatrix who are to take under her will. See James v. James, 174 S.W. 47 (Tex. Civ. App., 1914.) By statute in Texas, when a posthumous child is unprovided for by settlement and pretermitted by his father's last will and testament, he succeeds to the same portion of the father's estate as he would have been entitled if the parent had died intestate.[2]

As early as 1795, English courts recognized the rights of the unborn child in property law. In Doe v. Clarke, 2 H.Bl. 399, 126 Engl Rep. 617 (1795), the court held that the description in a devise to "children living at the time of his (the life tenant's) decease" included unborn children. American courts utilized the same approach. In Hall v. Hancock, 15 Pick, 255 (Mass., 1834, Chief Justice Shaw held that an unborn child fell within the meaning of a bequest to grandchildren "living at my decease." In the case of La Blue v. Specker, 358 Mich. 558, 100 N. W. 2d 445 (1960), an unborn illegitimate child was held to be a child or "other person" having standing to bring suit under a dram shop act, for the death of his father, which had occurred before the child's birth. The Court stated:

---

[1]Atkinson on Wills (2nd ed. 1953) 75

[2]See, Vernon's Annotated Texas Statutes, Probate Code, Section 66.

> "For certain purposes, indeed for all beneficial purposes, a child en ventre sa mere is to be considered as born.... It is regarded as in esse for all purposes beneficial to itself, but not to another....Formerly, this rule would not be applied if the child's interests would be injured thereby, ...but, for purpose of the rule against perpetuities such a child is now regarded as a life in being, even though it is prejudiced by being considered as born.... Its civil rights are equally respected at every period of gestation."[1]

It is important in considering the concept of property at this point to remember the admonition Justice Gray addressed to other members of the New York Court of Appeals in his dissent filed in the case of Roberson v. Rochester Folding Box Co., 171 N.Y. 538 (Ct. App. N.Y., 1902). He stated:

> "Property is not, necessarily, the thing itself, which is owned; it is the right of the owner in relation to it. The right to be protected in one's possession of a thing, or in one's privileges, belonging to him as an individual, or secured to him as a member of the commonwealth, is property, and as such entitled to the protection of the law. The protective power of equity is not exercised upon the tangible thing, but upon the right to enjoy it; and, so, it is called forth for the protection of the right to that which is one's exclusive possession, as a property right."[2]

The majority's forgetting of this fundamental concept of the person as being at the center of even the concept of

---

[1] 1 Bouvier, Law Dictionary, p. 1038

[2] Id.

"An intestate's posthumous child is considered in being and will inherit just as if he had been born in the intestate's lifetime ...(T)his was the common law rule with respect to both realty and personalty...(A) posthumous child may recover his share of the father's land from a bona fide purchaser obtaining title through a judicial partition sale."[1]

In Texas a child en ventre sa mere is held included among those children in being at the death of the testatrix who are to take under her will. See James v. James, 174 S.W. 47 (Tex. Civ. App., 1914.) By statute in Texas, when a posthumous child is unprovided for by settlement and pretermitted by his father's last will and testament, he succeeds to the same portion of the father's estate as he would have been entitled if the parent had died intestate.[2]

As early as 1795, English courts recognized the rights of the unborn child in property law. In Doe v. Clarke, 2 H.Bl. 399, 126 Engl Rep. 617 (1795), the court held that the description in a devise to "children living at the time of his (the life tenant's) decease" included unborn children. American courts utilized the same approach. In Hall v. Hancock, 15 Pick, 255 (Mass., 1834, Chief Justice Shaw held that an unborn child fell within the meaning of a bequest to grandchildren "living at my decease." In the case of La Blue v. Specker, 358 Mich. 558, 100 N. W. 2d 445 (1960), an unborn illegitimate child was held to be a child or "other person" having standing to bring suit under a dram shop act, for the death of his father, which had occurred before the child's birth. The Court stated:

---

[1]Atkinson on Wills (2nd ed. 1953) 75

[2]See, Vernon's Annotated Texas Statutes, Probate Code, Section 66.

> "For certain purposes, indeed for all beneficial purposes, a child en ventre sa mere is to be considered as born.... It is regarded as in esse for all purposes beneficial to itself, but not to another....Formerly, this rule would not be applied if the child's interests would be injured thereby, ...but, for purpose of the rule against perpetuities such a child is now regarded as a life in being, even though it is prejudiced by being considered as born.... Its civil rights are equally respected at every period of gestation."[1]

It is important in considering the concept of property at this point to remember the admonition Justice Gray addressed to other members of the New York Court of Appeals in his dissent filed in the case of Roberson v. Rochester Folding Box Co., 171 N.Y. 538 (Ct. App. N.Y., 1902). He stated:

> "Property is not, necessarily, the thing itself, which is owned; it is the right of the owner in relation to it. The right to be protected in one's possession of a thing, or in one's privileges, belonging to him as an individual, or secured to him as a member of the commonwealth, is property, and as such entitled to the protection of the law. The protective power of equity is not exercised upon the tangible thing, but upon the right to enjoy it; and, so, it is called forth for the protection of the right to that which is one's exclusive possession, as a property right."[2]

The majority's forgetting of this fundamental concept of the person as being at the center of even the concept of

---

[1] 1 Bouvier, Law Dictionary, p. 1038

[2] Id.

property led to the rejection of its decision shortly thereafter by the people and the Legislature of the State of New York. (New York Laws, 1903, c. 132, N. Y. Civil Rights Law ss 50, 51.)

Thus, when the state recognizes that the unborn child may take real or personal property under a will or a statute of descent and distribution, it is not only declaring what is "property" that is within the meaning of the Due Process Clause of the Fourteenth Amendment. It is also declaring that the unborn child is a person to be protected with respect to its property right. The very concept of property, as Justice Gray long ago pointed out, is a concept of the person and of the right of the person. It is the state's definition of the person and of the rights of the person relative to property that is referred to by the term "property" in the Due Process Clause of the Fourteenth Amendment.

If the unborn child is a person protected as to its property under the Due Process Clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States, the child must also be a person under the same clauses for the purpose of the protection of its life and liberty. It would be a strange and bizarre doctrine that protected the property of the unborn child under these Amendments, as is clearly the case, but not its life and liberty. As to life, we are dealing with a matter that is less dependent upon the state for its being than property is. Life is the product of natural processes, although with the Founding Fathers many of us may affirm that it is not wholly so, whereas property is wholly the product, as a concept, of legal processes. The life of the person does not depend for its being so much upon the state as the state depends upon the life of the persons composing it. It is for this reason that the Founding Fathers recognized it to be the foundational right to all other rights. It was perhaps not without significance that they mentioned it before "liberty" and "property" in the Fifth Amendment. Thus, if any lesser

right of the unborn child is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments, the foundational right to life of the unborn child must also necessarily be protected by them.

In determining upon the propriety of protecting the unborn child as a person, with respect to its life and liberty, under the Due Process Clauses of the Fifth and Fourteenth Amendments and under other constitutional safeguards of the person, this Court should be as guided by decisions of state courts at common law with respect to the protection of the unborn child's life and liberty as it is necessarily controlled by their decisions with respect to the unborn child being a person who may own property when administering the protection of property contained in Due Process Clauses. The Constitution, after the decision in the Erie case, supra, and as applied in the actual administration of the Due Process Clauses, must be taken as at least establishing a principle requiring this Court to give strong consideration, if not a prima facie effect, to state decisional law and statute law in determining who is a person for purposes of the constitutional safeguards of the person. A regard for state decisional and statute law indicates that states have long since determined that the unborn child's liberty and life are to be as much protected at common law and by statutes as the unborn child's property is.

In the area of tort law, the unborn child has come into his own as a person since World War II. In Scott v. McPheeters, 33 Cal.App.2d 629, 92 P. 2d 678 (1939), rehearing denied, 93 P.2d 562 (1939), the court held that a child might sue for injury to her in delivery before birth. The District of Columbia courts reached the same result. Bonbrest v. Kotz, 65 F.Supp 138 (D.D.C. 1946). Since 1946, this result has been generally reached:

> "...(A) series of more than thirty cases, many of them espressly overruling prior holdings, have brought about the most spectacular abrupt reversal of a well-settled rule in the whole history of the

law of torts." [1]

The Supreme Court of Texas in 1967, in overruling a prior holding, likewise held that the parents of a viable child who had been injured in the sixth or seventh month of its mother's pregnancy as a result of the defendant's negligence could recover damages for its death after birth due to these injuries. Leal v. C. C. Pitts Sand and Gravel, Inc. Tex. , 419 S.W.2d 820 (1967). On October 6, 1971, the same court extended the new principle of protection to an unborn child injured prior to its having become viable. Delgado v. Yandell, Tex. , (1971) The majority of jurisdictions now recognize that a wrongful death action may be brought for negligently inflicted injury to the unborn child resulting in its death, whether or not it was viable at the time of the injury, and whether born alive or still born. Torigian v. Watertown News Co., 352 Mass. 446, 225 N.E. 2d 926, 927 (1967).[2]

In the area of family law, the courts have recognized the right of the unborn child as a person to support by his parents. Kyne v. Kyne, 38 Cal.App2d 122, 100 P.2d 506 (1940), involved a suit for support brought by the guardian ad litem of a six month's old unborn child against the natural father. The court held that under Section 29 of the Civil Code the father of an unborn child could be compelled by that child, acting through a guardian ad litem, to support it. This section provided that an unborn child "is to be deemed an existing person", so far as may be necessary for its interests..." The court also

---

[1] Prosser on Torts, (3rd ed.,1964) p. 355, 356. Also see, Gordon, The Unborn Plaintiff, 63 Mich. L. Rev. 579 at 627 (1965).

[2] Harper and James, Torts, Sec. 18.3 (1956); David E. Louisell and John T. Noonan, Jr., "Constitutional Balance" in The Morality of Abortion (Harvard Press, 1970) 220 at 226-230.

referred to a provision of the California criminal law having an even broader reach in protecting the unborn child as "an existing person." Section 270 of the California Penal Code, as amended in 1925, St. 1925, p. 544. The Supreme Court of Colorado has recently held that an unborn child is within the concept of "child" utilized in a paternity statute and that a juvenile court may issue temporary orders for support of that child pending adjudication or disposition of the child's case. People v. Estergard, Colo. , 457 P.2d 698 (1969). Otherwise, said the Court, "the father of an unborn child ... (could) evade his responsibility for support by leaving the state at any time prior to the birth of the child."[1]

The unborn child has been recognized as a person to have a right to life that is superior to his mother's right to free exercise of her religion. In Application of the President and Directors of Georgetown College, Inc., 331 F.2d 1000 (C.A. D.C., 1964), cert. den., 377 U.S. 978 (1964), Judge J. Skelly Wright issued, after the District Court for the District of Columbia had refused to do so, an order to a hospital to administer blood transfusions to a mother carrying a seven-month unborn child so far as necessary to save the mother's life, the mother and her husband having refused to permit the transfusions on religious grounds. The Court based his authority for the order upon the lack of right of the parent to forbid the saving of his child's life by action of the state, citing such cases as People ex rel Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769, cert. denied, 344 U.S. 824, 73 S.Ct. 24. It also suggested that the state, in this instance the United States, may also be under a corresponding duty to act in behalf of the mother and child:

> "Under the circumstances, it may well be the duty of a court of general jurisdiction, such as the United States District Court for the District of

---

[1] Id. at 699.

Columbia, to assume the responsibility of guardianship for her, as for a child, at least to the extent of authorizing treatment to save her life.

"The state, as parens patriae, will not allow a parent to abandon a child, and so it should not allow this most untimate of voluntary abandonments. The patient had a responsibility to the community to care for her infant. Thus the people had an interest in preserving the life of this mother."[1]

In Raleigh Pitkin-Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964) cert. den., 377 U.S. 985 (1964), the Court held that an unborn child was entitled to the Law's protection and thus to obtain a court order directing a blood transfusion for his mother if necessary to save her life or the life of the child. The Court referred to its earlier decision in State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962), in which it had held that the concern of the state for the welfare of an infant justified the ordering of blood transfusions for the child notwithstanding the objections of its parents on religious grounds. In that case, it cited the opinion of the Supreme Court of the United States in Prince v. Massachusetts, 321 U.S. 158, 166-167, 64 S.Ct. 438-432.

"Neither rights of religion nor rights of parenthood are beyond limitation. ...The right to practice religion freely does not include liberty to expose...the child...to ill health or death."

The New Jersey Court pointed out that the facts of the case before it:

"clearly evidence a more compelling necessity for the protection of a child's welfare than those in

---

[1] Id. at 1008.

Prince." 181 A.2d at 757.

These decisions should be persuasive to this Court that the unborn child should be considered a person for the purpose of administering the protection of the life and liberty of the person provided by the Fifth and Fourteenth Amendments just as other decisions by state courts are controlling upon this Court for the purpose of administering the protection of property of the person provided by these same Amendments.

The result of the argument in subpoint C is that there are numerous parts of the Constitution which protect the unborn child as a person. That the unborn child is so protected in these parts of the Constitution should be persuasive to this Court that the unborn child should be held to be a person within the meaning of any constitutional safeguard of the person that is relevant to protecting its interests.

D. The concept of person must be held as much beyond the power of the state or nation to define, in the sense of determining whether or not some child of human beings is entitled to be treated before the law as a person, as it is beyond the power of the state or nation to define the concept of religion, in the sense of determining whether or not some group is pursuing a religious cause and entitled to solicit support for it, and for the same reasons.

This Court held in Cantwell v. State of Connecticut, 310 U.S. 296 (1940) that the Due Process Clause of the Fourteenth Amendment was violated by a state statute that required a person to obtain a permit as a condition of soliciting support for the perpetuation of his religious views where the official passing upon the permit application was empowered to determine whether the cause for which the solicitation was sought to be done was for a religious cause and to deny the permit if he found the cause was not a religious one.

Speaking for the Court, Justice Roberts stated:

"His (the official's) decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of the liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth." 310 U.S. at 305. [parentheses added]

By the Cantwell case, this Court put it completely eyond the authority of the state to define what a reli- ious cause is and to determine in light of that state efinition whether the activities of a given group of per- ons constituted the pursuit of religion or of a religious use and thus whether that group would enjoy the right to rvive or live through the efforts of its members in so- iciting support for perpetuation of its views. The con- pt of religion was by this decision held a concept not bject to definition by the state but rather as a concept ving an integrity and meaning independent of the state d to be respected by it. In effect, the Court held that e Fourteenth Amendment insofar as it contained the pro- ction of the person set out in the First Amendment ainst any "law respecting the establishment of religion, prohibiting the free exercise thereof..." took the finition of the concept of religion out of the hands of e state or nation and elevated it to the level of a con- itutional concept. The Court was not called upon in that se to state what the constitutional concept means.

The recognition of the constitutional immunity and dependence of the concept of religion by this Court was d to be necessary for the protection of the free exer- e of the chosen form of religion by way of giving the edom to act "appropriate definition to preserve the en- cement of that protection." 310 U.S. at 304. The

"appropriate definition" of the freedom to act in the exercise of one's chosen religion was achieved by preventing the state from determining what a religion or a religious cause is and conditioning one's exercise of his religion thereby.

Similarly, if the concept of the "person" contained explicitly or implicitly in numerous safeguards of the person in the Constitution of the United States is one the state or the nation is permitted to define according to majority vote, the state can readily control by the whim of a capricious majority that looks askance upon various types of person, who is entitled to be treated as a "person" within the state or nation. The concept of person utilized in the Constitution is an even more fundamental concept than the Constitutional concepts of "religion", "freedom of speech", "freedom of the press", "right...peacably to assemble, "petition..for a redress of grievances", "citizen", "right to a speedy and public trial", and many others. It is more fundamental as a concept simply because where a being or person is in a position of claiming that he or she is a "person" within the meaning of the constitutional safeguards of the person, the decision upon this claim can conclude that being's or person's right to life and to all the other rights guaranteed to the person.

The argument just made does not tell us what the definition is of the constitutional concept of the person any more than the decision of this Court in the Cantwell case revealed what the definition is of the constitutional concept of "religion". It does tell us that if that definition is necessary, as it seems to be in order to dispose of this case, it must be made in accordance with the constitutional interpretation criteria that this Court has applied in previous cases. It also tells us that no federal court can rationally dispose of the issues in this case without confronting and resolving the issue of whether an unborn child is a person under the constitutional concept of the person. It also tells that if the unborn child is a person within the meaning of the

POOR COPY

Constitution then a state has the right to enact a statute seeking to protect the constitutional right to life of the unborn child providing it has done so in a reasonable way.

E. The long continued construction of the Constitution by the Congress and by the Chief Executive as comprehending the unborn child within its concept of the person bind this Court in administering the Constitutional safeguards of the person, particularly the Fourth, Fifth, Seventh, Eighth, Ninth, and Fourteenth Amendments.

This Court has long since recognized that a Congressional construction of the Constitution of the United States through the enactment of statutes or resolutions which is either contemporaneous or long continued is "entitled to the greatest respect."[1] Indeed, the respect accorded a contemporaneous or long continued construction of the Constitution by Congress and followed by the executive department over a period of 73 years was so great that it has been held that construction "fixes the construction to be given its provisions" by this Court so that Congress may not thereafter depart from the construction it has, as an institution, been responsible for creating. Myers v. United States, 272 U. S. 52, 175 (1926).

The Congress of the United States enacted a statute in 1825 which adopting, among others, state criminal laws prohibiting abortion for application within federal enclaves located in the different states. 4 Stat. 115 (March 3, 1825). This statute was modeled upon a section of bill drawn by Mr. Justice Story. Of the latter bill, its distinguished author stated:

"The state courts have not jurisdiction of crimes committed on the high seas, or in places ceded to

---

[1] Ex Parte Quirin, 317 U. S., 42 (1942)

the United States. Rapes, arsons, batteries, and a host of other crimes may in these places be now committed with impunity."[1]

The formula proposed and later adopted for dealing with this problem was the following:

> "where the punishment of which offense is not specially provided for by any law of the United States, such offense shall, upon a conviction in any court of the United States having cognizance thereof, be liable to, and receive the same punishment as the laws of the state in which such ...placed, ceded as aforesaid, is situated, provide for the like offense when committed within the body of any county of such state."

The statute came to be called the "Assimilative Crimes Statute." At the time this comprehensive formula was adopted, Congress did not have any law providing specially for the punishment of abortion. However, Connecticut had four years previously enacted an abortion law based upon the English Statute of 1803 (43 Geo. 3, c. 58.) which penalized all forms of abortion whether or not the abortion occurred before the "quickening" of the unborn child. Conn. Stat. Tit. 22 ss14, at 152 (1821). New York added an abortion statute in 1828 (N. Y. Rev. S. Vol. 2, ps 578-579 21 (1836) of the type that became traditional in this country, as was true of Maine in 1840, Ohio in 1841, as well as of Massachusetts and Illinois in 1845 (Mass. St. 1845, c. 27; Ill. R. S., 1845, p. 158, s. 46); of California in 1850 (Stats. 1850, ch. 99, s. 45, p. 233); of Texas in 1854 (Tex. Pen. Code, Arts. 531-536; Texas L. 1854, ch. 49, 58, Texas Penal Code, 1857), Pennsylvania in 1860 (1860, M.L. 382, s. 88), and Colorado in 1861 (L. 1861, p. 296, s. 42), and Virginia in 1848 (L 1847-8, p. 96, ch. 3 §9).[2]

---

[1] W.W.Story, The Life and Letters of Joseph Story, Boston, Little & Brown, 1851. Vol. 1, 297.

[2] David Granfield, The Abortion Decision.Garden City Doubleday & Co., 1969. 79.

Since the 1825 Federal Act had been held to apply only to places that had been ceded to the United States, prior to its enactment, United States v. Barney, 5 Blatchf. 294, Fed. Cas. No. 14,524, its coverage was much less than the extent of the problem to which Justice Story had sought to direct it. Thus, in 1866, when congress substantially reenacted the 1825 statute it made the law applicable to "any place which has been or shall hereafter be ceded." (14 Stat. 13, April 5, 1866). The effect of this statute was to extend its coverage to all of the states previously mentioned as well as to all others that theretofore or thereafter enacted the traditional form of abortion statutes. All fifty states eventually proscribed abortion. In all of them abortion was permitted to save the life of the mother. In Colorado and New Mexico only was abortion to prevent serious and permanent bodily injury to the mother permitted, and only in Alabama, Oregon, and Massachusetts was abortion to protect the health of the mother permitted.

The policy of The Assimilative Crimes statute has been continuously in effect in this country since 1825 through various reenactments, see United States v. Sharpnack, 355 U.S. 286 at 291 (1958), and is now codified in the Revised Criminal Code as 18 U.S.C. s 13. The effect of the 1825 statute and its subsequent reenactments was, prior to 1967, to adopt a substantially uniform state law against abortion for application in federal enclaves. All fifty states had proscribed abortion. In all of them abortion was permitted in order to save the life of the mother. Only in Colorado and New Mexico was abortion permitted to prevent serious and permanent injury to the mother, and only in Alabama, Oregon, and Massachusetts was it permitted to protect the health of the mother.[1]

---

[1] See David Granfield, Id. at 79.

Thus, through the Assimilative Crimes Statute of 1825, the United States initiated a policy that made enforceable a substantially uniform policy directed against abortion in federal enclaves located within the fifty states of the nation. That policy by 1967 had been in existence for a total of 142 years. It was a policy, like that of the state criminal law for whose application it proveded in federal enclaves, that involved.

> "recognition of the human dignity of the unborn and the protection of unborn life by criminal sanctions." [1]

This congressional protection of the life of the unborn extending over a period of 142 years without variation under the Assimilative Crimes Statute constitutes one of the clearest legislative constructions of the appropriate use of its powers to protect federal interests within federal enclaves under the Constitution of the United States. It is a recognition that the unborn child is a human person, under the constitution, and that Congress has the authority under the 17th clause of Article I, Section 8 to provide for the protection of its right to life. The reenactment of the original Assimilative Crimes Statute on April 5, 1866, during the period of Congressional consideration of various civil rights measures and of the proposed Fourteenth Amendment, in light of the substantial number of statutes directed against abortion that had been enacted since 1825 suggests that the Congress saw this statute as, in part, a civil rights statute for the protection of the security of the person. In any event, this legislative construction of the Constitution was continued for a period of nearly double the 73 years of another legislative construction which this Court held, as previously noted, "fixes the construction" to be given its provisions."

---

[1] David Granfield, Id. at 81.

POOR COPY

Surely, if Congress and the Court are not free after 73 years of a consistent Congressional construction of the Constitution to change that Construction, several state governments are not free by enactment of unlimited or substantially unlimited abortion laws to change a congressional construction of 142 years standing that the unborn child is a human person deserving protection of its right to life in the exercise of the power to provide exclusive legislation for places ceded by the states to the United States. The 142 year old construction should surely "fix the construction" by Congress for the Congress, the State Legislatures, and this Court that the unborn child is a person within the meaning of the Constitution of the United States.

Congress and the Chief Executive have given numerous long standing as well as recent constructions of the Constitution recognizing the unborn child to be a person deserving protection by the United States for its life and health.

Prior to the enactment of the Uniformed Services Dependents' Medical Care Act of 1956 (70 Stat. 250, Title 10, U.S.C. ss 1071-1085), the dependent wives and children, both born and unborn, had been receiving medical care from the uniformed services for over 100 or more years despite the fact that there was no specific statutory authority for rendering this care until 1884 in the case of the United States Army and 1943 in the case of the United States Navy. Congressional Record Statement of Representative P. Kilday of Texas, Congressional Record, Vol. 102, 3847 (March 2, 1956). Medical care was provided dependents of the U.S. Navy and U.S. Marine Corps by the Navy, of members of the Coast Guard, Public Health Service, and Coast and Geordetic Survey by the Public Health Service, and of the U.S. Army and Air Force Personnel by the Army. These statutes gave virtually unlimited discretion to the Secretaries of the Army, Navy, Air Force, and the Secretary of Health, Education, and Welfare in providing medical care to members of these services and their wives and children.

The Uniformed Services Dependents' Medical Care Act of 1956 was designed to continue the long standing policy of providing medical care to dependent wives and children, both born and unborn, of members of the Uniformed services, but also to improve greatly the quality of medical care available, to make it more uniform in nature, and to make more readily available to the more than 40 per cent of all dependents who had not been able to take advantage of it due to the "shortage of military doctors, overcrowding of military medical facilities, (and the fact that)...so many of the military dependents are located where they cannot take advantage of existing military care." Congressional Record. Vol. 102, 3851-3853 (March 2, 1956).In its section 1072 (Title 10, USC) the term dependent was defined to include:

> "an unmarried legitimate child who has not passed his twenty-first birthday ...(or) is incapable of self-support because of mental or physical incapacity."

Section 1077 of Title 10 U.S.C. provided that only the kinds of health care specified in that section were authorized to be provided dependents of a member of a uniformed service. One of the authorized kinds of health care was "maternity and infant care." This phrase was further defined in joint regulations issued by the Secretaries of Defense and Health, Education, and Welfare who were required under Section 1076 to issue these regulations in order to prescribe in greater detain the medical care available under Section 1077. Joint regulations issued under the Act provided, by way of further definition of the statutory phrase "maternity and infant care", that the phrase include:

> "prenatal and postnatal care, and routine care and examination of the newborn infant." Title 32, Section 577.64 (e) (7).

Neither the Act nor the joint regulations issued under them referred to or authorized the latter but rather referred to the following health benefits, among others

"Drugs: Prescriptions written by either uniformed services or civilian physicians will be filled at uniformed services facilities...."

Family planning services and supplies, including counseling and guidance. These services and supplies will be provided in accordance with sound medical practice to any eligible dependent upon request. Title 32, Section 577.64(e)(3),(9).

The Congress that enacted this Act obviously was concerned with the welfare of mothers and unborn children. Congressman Paul Kilday, Chairman of the House Committee on Armed Forces Subcommittee No. 2 which conducted hearings on H.R. 9429 which became the new Act, made statements that typify the congressional mind in 1956 in discussing the right of dependent wives and their unborn children to obtain medical care under the statute from private physicians in private hospitals:

"A woman (military member's wife) expecting a baby has a number of friends who have recently had babies who knew the doctor who took care of them, and they knew everything came out all right and they naturally want to go to that doctor in the community...If they (military personnel) do not have quarters on the base, they are out in the civilian community where they meet the people and hear these things talked about.

"...the woman expecting her baby might go home in the sixth month of pregnancy. Most Texans do that. They want their kids born in Texas and they go home." Hearings before Committee on Armed Services, U.S. House of Representatives, Comm. Rep. 53, 84th Cong., 2nd Sess. 1956 6029, 6034.

Clearly, at this point, Congressman Kilday had reference to a new feature of the bill that would permit a serviceman's dependent wife to obtain medical care for herself and her child in a private hospital under the cognizance of state law. His statement not only reflects the concern of the legislators for providing medical care for the wife and the unborn child but also for the provision of this care in the context of a private hospital by a private physician subject to and controlled by the state law of abortion. In the particular example he gave, that law was the one now being challenged in this case. Congress at the time it enacted the Uniformed Services Dependents' Medical Care Act in 1956 was reaffirming its 100 year commitment to respect for the unborn child as a human person and seeking to provide for improved health care to be made available to it and to its mother. Having indicated this concern with the unborn child as a dependent entitled to medical or health care, Congress drove home the point by providing that no dependent should be denied equal opportunity for that care through requiring the Secretaries of Defense and Health, Education, and Welfare to issue joint regulations;

> "to assure that dependents entitled to medical or dental care under this section will not be denied equal opportunity for that care because the facility concerned is that of a uniformed service other than that of the member."[1]

Throughout the history of the administration of the 1956 Act the Uniformed Services continued to give effect to the Assimilative Crimes Statute policy of respecting the state law on abortion in federal enclaves. In July 22, 1970, the Surgeons General of the Departments of the Army, Navy, and Air Force joined in a memorandum addressed to the Assistant Secretary of Defense (Health and Environment) taking the position that

---

[1]Title 10, S 1076(d), U.S.C.

"Abortions will be performed within the limits of local state laws."

On July 31, 1970 the Assistant Secretary of Defense, Louis M. Rousselot, M.D., F.A.C.S. issued a memorandum by way of reply to the joint memorandum of the Surgeons General of the Armed Forces stating, without citation of authority for his directive, disapproval of the above limitation on performance of abortions. He referred to his Memorandum of July 16, 1970, which also was without citation of authority, directing that

> "Pregnancies may be terminated in military medical facilities when medically indicated or for reasons involving mental health and subject to the availability of space and facilities and the capabilities of the medical staff."

There was no authorization for this action either in the 1956 Act or any joint regulation issued by the Secretaries of Defense and Health, Education, and Welfare as required by that Act with respect to forms of health care to be available to dependents.

After the implementation of this new "memorandum" policy on abortion by the Secretary of the Air Force by Air Force Regulation 160-13 and its application in Texas at the Willford Hall Air Force Base Medical Center, Lackland Air Force Base located in San Antonio, Texas, and the destruction of more than 100 unborn children without compliance with the Texas law of abortion, the case of Paul B. Haring v. Commander Willford Hall Air Force Base, No. SA 71 CA 11 was instituted on January 15, 1971, before the United States District Court for the Western District of Texas. This case challenged the validity of these abortions and of the regulation under which they were being performed by virtue of Fifth, Eighth,

and Ninth Amendments to the Constitution of the United States.[1] A temporary restraining order against further abortion under the challenged regulation by the Court was, on Defendants' Motion to Dismiss, permitted to expire without extension as requested by the Plaintiff and the Defendants' Motion was granted on the ground that the plaintiff had not satisfied the Court on the legal question of having sufficient standing to bring the suit. The case is now on appeal before the Fifth Circuit Court of Appeals, docketed as No. 71-1404.

On April 3, 1971, following institution of and the decision in the Haring case, supra, the President of the United States, Richard M. Nixon, issued a directive overturning the "memorandum policy" of the Assistant Secretary for Defense (Health and Environment) and the Air Force Regulation 160-12. He stated:

> "I have directed that the policy on abortions at American military bases in the United States be made to correspond with the laws of the states where those bases are located. If the laws in a particular state restrict abortions, the rule at the military base hospitals are to correspond to that law."...
>
> "From personal and religious beliefs I consider abortions an unacceptable form of population control. Further, unrestricted abortion policies, or abortion on demand, I cannot square with my personal belief in the sanctity of human life-including the life of the yet unborn. For, surely, the unborn have rights also, recognized in law, recognized even in principles expounded by the United Nations.

---

[1] U.S.C. Title 42, Secs. 1981 and 1988; USC., Title 10, Section 1077; and Title 18, Sec. 13.

"Ours is a nation with a Judeo-Christian heritage. It is also a nation with serious social problems-problems of malnutrition, of broken homes, of poverty and of delinquency. But none of these problems justifies such a solution.

"A good and generous people will not opt, in my view, for this kind of alternative to its social dilemmas. Rather, it will open its hearts and homes to the unwanted children of its own, as it has done for the unwanted millions of other lands."[1]

The action of the President caused the health policy of the Department of the Air Force to be returned after a brief, unauthorized departure therefrom, to the traditional administration of health care by the armed forces of the United States in behalf of unborn children, a policy that had been unbroken in its administration between approximately 1856 and 1970, a total of 114 years. This, too, constitutes a long-continued Congressional and Executive construction of the Constitution of the United States as authorizing the exercise of federal power to protect the unborn child as a person in its right to life.

Congress has consistently between 1873 and 1971 maintained a vigorous policy against abortion by statutes specifically directed at the practice. One of these statutes, the District of Columbia Code provision section 22-201, was recently examined by this Court in United States v. Vuitch, 402 U. S. 62 (1971). The Court held the statute, originally enacted in 1901, was not unconstitutionally vague insofar as it excepted from its coverage an abortion "for the preservation of the mother's life or health".

---

[1]The New York Times, Sunday, April 4, 1971, p. 1.

Congress has since 1873 prohibited the importation of any drug, medicine, or article for causing unlawful abortion. 17 Stat. 598-599 (March 3, 1873). It has also since 1876 prohibited the use of the mails for the support of operations to effectuate an abortion through the mailing of information concerning these operations. 19 Stat. 90 (July 12, 1876). These two laws are now contained in the United States Code, Title 18, sec. 1461 and Title 19, sec. 1305, respectively. When these laws were modified on January 8, 1971, so as to strike their coverage of the same matter relative to "the prevention of conception", Congress continued intact their policy relative to "unlawful abortion". Pub. Law 91-662. Thus, for nearly a hundred years Congress has directed two major statutes against vital avenues for effectuating "unlawful abortions" in areas subject to exclusive federal regulation. The Court of Appeals for the Seventh Circuit in Bours v. United States, 22 Fed. 960 (C.A. 7, 1915) held that the word "abortion", as used in the predecessor to Title 19, section 1305, U.S.C.,

> "must be taken in its general medical sense. ... Therefore a physician may lawfully use the mails to say that if an examination shows the necessity of an operation to save life he will operate, if such in truth is his real position. If he uses the mails to give information that he elects, intends, is willing to perform abortions for destroying life, he is guilty, irrespective of whether he has expressly or impliedly bound himself to operate."[1]

Thus, for nearly a hundred years, Congress has directed two major statutes against vital avenues for effectuating "unlawful abortions", the latter being construed to mean any abortion not performed due to the necessity of an operation to save life. This action in regulating the use of the mails and the importation of goods into this

---

[1] Id. at 964.

BLEED THROUGH POOR COPY

country constitutes a third long-continued construction by Congress that the unborn child is a person within the meaning of the Constitution having a right to life which Congress has the authority to act to protect.

A more recent construction of the Constitution by Congress is represented by the Federal Tort Claims Act, Title 28, Sections 2671 et seq., U.S.C., which was enacted in 1948. This act gives the unborn child the right to recover for injuries inflicted upon them as a result of the negligent acts of federal officers and employees generally and of the uniformed services, including physicians when the latter are rendering medical care to them and to their mothers. In Sox v. United States, 187 F.Supp. 465 (D.C.S.C., 1960) the Government stipulated that it was liable for any injuries sustained as a result of the negligence of a military policeman by an unborn child during the sixth month of its mother's pregnancy and the child recovered the sum of $260,000 for those injuries which left her "completely helpless and entirely dependent upon others". In Rewis v. United States, 369 F. (C.A. 5, 1966) the Court held that in a tort action brought by the parents of a child for causing her wrongful death as a dependent treated by an Air Force Medical Officer that it was not necessary for the plaintiffs to adduce specific testimony, as the trial court had rules was necessary, that "to a reasonable degree of medical certainty" the child's life could have been saved. This child was fifteen months old. These cases indicate that Congress is as concerned with protecting the unborn child as a person as it is with protecting other children from injuries inflicted by the negligent action of its own officers and employees.

Even more recently, Congress has show its concern with the efforts of some states to promote family planning by abortion. Section 1008 of the Family Planning Services and Population Research Act of 1870, signed by the President on December 24, 1970, provided:

"None of the funds appropriated under this title

CPOY BOUND CLOSE IN CENTER

shall be used in programs where abortion is a method of family planning." Pub. Law 91-572, 84 Stat. 1504.

Thus, from 1825 to the present Congress has created not less than six major statutory policies all of which are directed toward treating the unborn child as a person and protecting its right to life and to freedom from invasion of its bodily integrity or privacy. All of these policies are still in force today. Some of the oldest of these have been reaffirmed as late as 1971. Others are newer policies that widen the area of protection for the unborn child such as those concerned with health care and redress for tortious invasions of its interests. One of these policies, that of health care for dependents of uniformed services' personnel originated in the Executive Branch of government and was later codified by an act of Congress. Taken together, this long-continued Congressional and Executive construction of the Constitution as contemplating the unborn child as a person and as authorizing these branches of government to provide protection of the life and other interests of the unborn child would seem to foreclose this Court from taking any other view in construing the constitutional safeguards of the person.

The fact that since 1967 several states have enacted abortion laws in basic conflict with this long-standing federal policy against abortion except for the necessity of preserving the life or avoiding a grave peril to the health of the mother does not, by operation of the federal Assimilative Crimes Statute, supra, undercut that policy.

This Court in United States v. Sharpnack, specifically reserved decision upon the point of the effect of the Assimilative Crimes Act

> "where an assimilated state law conflicts with a specific federal criminal statute, cf. Williams

v. United States, 327 U.S. 711, or with a federal policy. Cf. Johnson v. Yellow Cab., 321 U.S. 383; Stewart & Co. v. Sadrakula, 309 U.S. 94; Hunt v. United States, 278 U.S. 96; Air Terminal Services, Inc. v. Rentzel, 81 F. Supp. 611; Oklahoma City v. Sanders, 94 F. 2d 323."[1]

The position of amicus is that because of the long-standing and current pervasive federal policy against abortion as evidence in six major federal statutory areas and in the Constitution itself the Assimilative Crimes Statute does not operate to assimilate a state statute going beyond the grounds for abortion approved in federal statutes and policy.

F. Judged from the standpoint of what it is in itself, the unborn child is a person and justice demands that government recognize this fact and treat the unborn child for what it is.

Up to this point, the argumentation of amicus has been directed to application of the well-established criteria for interpretation of the Constitution. The final argument that the unborn child is a person focuses upon what the unborn child is in itself. The relevance of this argumentation is that all law, and especially constitutional law, is a method of accomplishing "justice according to the law". For this reason, it is important to determine what the child is itself. If the unborn child must be acknowledged to be a person, the justice demands that this Court construe the Constitution, especially with regard to the constitutional safeguards of the person, so that all government, both state and federal, is required to treat the unborn child for what it is. Justice has always been recognized to involve action, whether by an individual or private or public group, that accords to

---

[1] Id. at note 9, p. 296.

an other or others what is their due, what is due is what respects the dignity and needs of the person upon whom the action bears.

The classic definition of the person is that provided by St. Thomas Aquinas in his Summa Theologica. He defined the person as being "the individual substance of a rational nature."[1] By the notion of "individual substance" Aquinas meant that the person has an existence that is peculiar to itself and different and distinct from the existence of anything else, an existence that is not a part of the existence of another but an existence which belongs to it alone: e.g. we refer to "this particular man". By "rational nature" Aquinas had in mind "a reality of human nature. With reference to human being, the reality of human nature is the nature or principle within man that moves us to recognize man as being a different kind of being from other animals. Aquinas had in mind by this principle the cognitive and appetitive rational powers of man, which he discusses in the first part of the second part of his principal work.[2]

The unborn child at every stage of its development satisfies sufficiently the concept of the person. The unborn child is an individual substance, differing from its mother and having a life that is remarkably separate from, although obviously dependent upon, its environment even as the child who has just been born and

---

[1]Basic Writings of St. Thomas Aquinas. New York: Random House, 1945. Vol. 1, p. 291 (Part I, Question XXIX, Article I).

[2]Part II-I, Questions VI-XVII, Summa Theologica: Basic Writings of St. Thomas Aquinas Id. Vol. II. pp. 225-316.

man in all his stages is dependent upon his physical and social environment. The unborn child also possesses a rational nature in the sense that all that is to be present in him when born is already formed at an early period in the womb. Professor R. Ashley Montagu of Columbia University has referred to this latter in saying:

> "The basic fact is simple: Life begins, not at birth, but at conception.
>
> "This means that a developing child is alive, not only in the sense that he is composed of living tissue, but also in the sense that from the moment of conception, things happen to him, even though he may be only two weeks old, and he looks more like a creature from another world than a human being--he reacts. In spite of his newness and his appearance, he is a living striving human being from the very beginning. [1]

It is undisputed that the conceptus, or new fetus, possesses at the moment of its formation the so-called genetic code, the transmitter of all the potentialities that make men human, something that is not present in either their spermatoozoon or ovum. [2]

> "Thus it might be said that in all essential respects the individual is whoever he is going to become from the moment of impregnation. He already is this while not knowing this or anything else. Thereafter, his subsequent development cannot be described as his becoming someone he now is not. It can only be described as

---

[1] R. Ashley Montagu, Life Before Birth, New York: New American Library, 1964, P. 2

[2] Frederick J. Gottleib, Developmental Genetics (1966) p. 17.

a process of achieving, a process of becoming the one he already is. Genetics teaches that we were from the beginning what we essentially still are in every cell and in every generally human attribute and in every individual attribute." 1

With respect to the separateness of the unborn child from its mother, it has been observed:

"The child may be parasitic and dependent, but it is a functioning unit, an independent life... However visceral may be its temporary residence, however dependent it may be before birth--and for some years after birth--it is a living being, with its separate growth and development, with its separate nervous system and blood circulation, with its own skeleton and musculature, its brain and hearing and vital organs." 2

Following the implantation of the fertilized egg in the uterus seven or eight days after ovulation, the development into the human fetus and embryo is extraordinarily rapid. This development has been described by Dr. Andre Hellegers as follows:

"After this second week of pregnancy the zygote rapidly becomes more complex and is now called the embryo. Somewhere between the third and fourth week the differentiation of the embryo will have been sufficient for heart pumping to occur, although the heart will by no means yet have reached its final configuration. At the

---

[1]Paul Ramsey, "Reference Points in Deciding About Abortion" in The Morality of Abortion: Legal and Historical Perspectives, John T. Noonan, Jr., Ed (Harvard Press, 1970) p. 66.

[2]David Granfield, The Abortion Decision, Garden City, Doubleday & Co., 1969, p.25.

end of six weeks all of the internal organs of the fetus will be present, but as yet in a rudimentary stage. The blood vessels leading from the heart will have been fully deployed, although they too will continue to grow in size with growth of the fetus. By the end of seven weeks tickling of the mouth and nose of the developing embryo with a hair will cause it to flex its neck, while at the end of eight weeks there will be readable electrical activity coming from the brain. The meaning of the activity cannot be interpreted. By now also the fingers and toes will be fully recognizable. Sometime between the ninth and tenth week local reflexes appear such as swallowing, squinting, and tongue retraction. By the tenth week spontaneous movement is seen, independent of stimulation. By the eleventh week thumb-sucking has been observed and X rays of the fetus at this time show clear details of the skeleton. After twelve weeks the fetus, now 3-1/2 inches in size, will have completed its brain structure, although growth of course will continue. By this time also it has become possible to pick up the fetal heart by modern electrocardiographic techniques, via the mother."[1]

Dr. H.M.I. Liley, the pioneer of the medical science concerning the human fetus, which is called Fetology, has recently written concerning his observations of the unborn child through closed circuit ex-ray television:

"The fluid that surrounds the human fetus at 3, 4, 5 and 6 months is essential to both its growth and its grace. The unborn's structure at this

---

[1]Dr. Andre Hellegers, "Fetal Development," Theological Studies, Vol. 31, No. 1 (March, 1970)

> early stage is highly liquid, and although his organs have developed...(t)he head, housing the miraculous brain, is quite large in proportion to the remainder of the body and the limbs are still relatively small. ...(H)e is quite beautiful and perfect in his fashion, active and graceful. He is neither an acquiescent vegetable nor a witless tadpole as some have conceived him to be in the past, but rather a tiny human being as independent as though he were lying in a crib with a blanket wrapped around him instead of his mother."[1]

An eminent child psychologist concluded as early as thirty years ago that the development of the human fetus reflects a mental growth as early as the fourth week.[2] In the sixth to seventh weeks, the nerves and muscles of the unborn child work together for the first time.[3] By eight and a half weeks the child's eyelids and palms of the hands become sensitive to touch.[4] By the end of the twelfth week, each unborn child shows a distinct individuality in his behavior due to the difference in inherited muscle structure from one child to the next. His facial expressions for this reason are already similar to the facial expressions of his parents.[5] By the end of

---

[1]H.M.I. Liley and B.F. Day, Modern Motherhood: Pregnancy, Childbirth, and the Newborn Baby, New York: Random House (1967) pp. 26-27.

[2]Arnold Gesell, The First Five Years of Life, New York: Harper Bros. (1940) 11.

[3]Leslie B. Arey, Development Anatomy, Philadelphia: W.B. Saunders Co. (1954) II, VI.

[4]G.L. Flannagan, The First Nine Months of Life, Simon and Shuster (1962).

[5]Arnold Gesell, Embryology of Behavior, Harper Bros. (1945) Ch. IV-VI, X.

the twelfth week, the child can also kick his legs, turn his feet, curl and fan his toes, make a fist, move his thumb, bend his wrist, turn his head, squint, frown, open his mouth, press his lips tightly together.[1] At this point also "we may assert that the organization of his psycho-somatic self is now well under way."[2] From the twelfth to the sixteenth week, the child grows very rapidly, his weight increasing six times and his height to eight or ten inches as a result of his consumption of oxygen and food received from his mother through the placental attachment which is part of the child.[3]

In the fifth month, the baby's weight increases to one pound and his height to one foot. Hair begins to grow on his head, eyebrows, and eyes, his skeleton hardens, and his muscles become much stronger.[4] The baby sleeps and wakes just as it does after birth.[5] The child

---

[1]Davenport Hooker, The Prenatal Origin of Behavior, University of Kansas Press (1952).

[2]Arnold Gesell, The First Five Years of Life, New York: Harper Bros. (1940) 65.

[3]L.M. Hellman, et al: "Growth and Development of the Human Fetus Prior to the 20th Week of Gestation," Amer. J. Obstetrics and Gynecology, Vol. 103, No. 6 (Mar. 15, 1969) pp. 789-800 and Bradley M. Patten, Human Embryology, 3d ed. New York: McGraw-Hill (1968), Ch. VII.

[4]Arey, Supra, Ch. II, VI.

[5]Petre-Quadens, O. et al.: "Sleep in Pregnancy: Evidence of Fetal Sleep Characteristics," J. Neurologic Science, Vol. 4, (May-June, 1967), pp. 600-605.

hears and recognizes his mother's voice.[1]

In the sixth month, the child develops a strong muscular grip with his hands, starts to breathe regularly, and can maintain respiratory response for twenty-four hours if born prematurely.[2] He has about a 10 per cent chance of surviving at this point.[3]

The human fetus or unborn child is just as much a patient of the physician as is the mother.[4] With new optical equipment, a physician can look at the amniotic fluid through the cervical canal and predict life-threatening problems that are reflected by a change in the fluid's color and turbidity.[5] The blood of an RH unborn baby can now be exchanged through use of a new image intensifier X-ray equipment and the placement of a needle through the abdominal wall of the mother into the abdominal cavity of the child. This not only makes it possible to save the life of the child but it also reveals that the child experiences pain and protests it just as violently as a baby in a crib and for this reason must be given sedation and pain relieving medication.[6] Recent

---

[1]Wood, Carl. "Weightlessness: Its Implications for the Human Fetus," Obstetrics and Gynecology of the British Commonwealth. Vol. 77 (1970) pp. 333-336; Albert W. Liley, "Aukland MD to Measure Light and Sound Inside Uterus," Medical Tribune Report, May 26, 1969.

[2]Flannagan, Supra.

[3]Andre Helligers, National Symposium on Abortion, May 15, 1970, Prudential Plaza Auditorium, Chicago, Ill.

[4]Henry, G. R. "The Role of Amnioscopy in the Prevention of Ante Partum Hypoxia of the Fetus," J. of Obstetrics and Gynecology of the British Commonwealth, Vol. 76 (1969 pp. 790-794.

[5]Liley and Day, Supra, p. 50.

work indicates that the unborn child who is diagnosed as failing to get adequate nutrition may be fed by the physician through introducing nutrients into the amniotic fluid being swallowed by the child.[1] The amniotic fluid surrounding the unborn child offers the physician a convenient and assessable fluid that he can now test in order to diagnose a long list of diseases, just as he tests the urine and blood of his adult patients.[2] Some of these diseases can be treated before birth.[3] The new science has now developed to the point that the fetus can now be partially delivered and, after giving it an exchange blood transfusion, the surgeon can return the unborn child to the amniotic cavity so that it can continue its intrauterine growth. This development during the past eight years indicates that "surgery on the fetus in utero is quite feasible, even in early pregnancy" and that "(p)renatal surgery may soon be tried against a variety of crippling or fatal ills that defy postnatal treatment."[4]

---

[1]Sevilla, Rafael M., "Oral Feeding of Human Fetus, a Possibility," JAMA, May 4, 1970, pp. 713-717.

[2]O'Doherty, N., "Prenatal Treatment of Adrenal Insufficiency," The Lancet, No. 29 (1969) pp. 1194-1195

[3]E.O. Horger, II and A.L. Hutchinson, Diagnostic Use of Amniotic Fluid," J. Pediatrics, Vol. 75, No. 3, pp. 503-508.

[4]"Fetology: The Smallest Patients," The Sciences (The New York Academy of Sciences, October, 1968) pp. 159-163.

The scientific data just reviewed concerning the unborn child of human beings from the moment of and after its conception emphasizes its individuality; its functional unity; its independent life; its striving, developing nature; its containment of all that it will ever be essentially in every cell, in every generally human attribute, and in every individual attribute; its mental growth from as early as the fourth week after conception; its ability to move its legs, feet, toes, fists, thumbs, head, and lips by the twelfth week of its existence; its ability to hear and recognize its mother's voice in the fifth month of its existence; and its 10 per cent chance of surviving if it is born prematurely in the sixth month. Other scientific data shows the growing ability of medicine to diagnose and to treat successfully the diseases of the unborn child even to the extent of removing the child for the purpose of surgery and then placing it back into its mother's womb.

Surely the above scientific data warrants this Court in taking the position that the unborn child is "an individual substance of a rational nature." The characteristics of the unborn child which this data reveals amply supports the judgment long since universally made by our Founding Fathers and their citizen peers by the Common Law, by the philosophers of natural rights, by adherents to religious beliefs at the time the Constitution was adopted that the unborn child is a human person, a judgment since concurred in by long continued construction of the Constitution by the Congress and by the Chief Executive over a period of 146 years.

Certainly, at a minimun, the above scientific data plus the argumentation set forth previously in this point should move this Court to say that a prima facie case has been made that the unborn child is a human person. This Court has previously known when to construct rules of substantive law that employ the prima facie concept, as in United States v. Philadelphia National Bank, 374 U.S. 321 (1963). In that case, this Court was concerned with lightening the burden of proving under Section 7 of the Clayton Antitrust Act (15 U.S.C. s. 18) that the effect

of a merger "may be substantially to lessen competition" in a relevant market. It created a test that if satisfied by the facts surrounding the particular merger would operate to establish that the merger was prima facie one the effect of which may be substantially lessened competition in the relevant market. The test was developed by this Court in light of what it characterizes as an "intense congressional concern with the trend toward concentration." Id. at 363. This Court selected certain percentages relative to market share resulting from a merger from which it would conclude that the merger was prima facie one that might produce the prohibited economic effect. It justified its selection of these percentages in light of prior adjudications under other phases of antitrust law. Applying these prima facie substantive rules in the Philadelphia Bank case, this Court observed:

> "There is nothing in the record of this case to rebut the inherently anticompetitive tendency manifested by these percentages." Id. at 366.

What this Court did in the Philadelphia Bank case is entirely instructive for what it should do in this case. Amicus has clearly demonstrated the considerations that warrant this Court in concluding that the unborn child is or at least prima facie is a human person within the meaning of the Constitution of the United States entitled to invoke or have invoked in its behalf by the state the constitutional safeguards of the person. If this Court is unwilling to hold that the unborn child is a human person, it should at least hold that prima facie it is a human person and that the burden should shift, for constitutional purposes, to those who assert the unborn child is not a human person to demonstrate that proposition. In record of this case and in the briefs of appellants there is nothing to rebut many considerations that argue so strongly in favor of treating the unborn child as a human person within the meaning of the Constitution. In fact, the appellants never addressed themselves to this point in any substantial way.

If this Court found it advisable to construct substantive rules employing the "prima facie" concept so as to put the burden upon those who have merged elements of an industry to demonstrate that they are not what these substantive rules indicate they are, surely it is advisable for this Court to construct substantive rules employing the "prima facie" concept so as to put the burden upon those who challenge the existence of the quality of person in the unborn child to show that that child is not a person. It must surely be advisable for this Court to do at least this much in view of the consequences for the unborn child of invalidating the state law of abortion that protects its life. Surely, the views of the Founding Fathers and their citizen peers, the Common Law, the philosophers of natural rights, and adherents to religious beliefs at the time the Constitution was founded plus the long continued construction of the Constitution by the Congress and the Chief Executive concerning the unborn child as a person within the meaning of the Constitution manifest a very "intense...concern" with preventing destruction of the unborn child and promoting its interests. Surely, the prior decisions of this Court concerning the law that is applicable as the rule for decision by federal courts in diversity cases alone warrants such an approach.

We need not and should not confine our analysis to the view of Americans or Englishmen, either historically or currently, concerning whether the unborn child should be viewed as a human person. In 1959 the United Nations adopted a "Declaration of the Rights of the Child" which constituted a supplement to its "Universal Declaration of Human Rights." Its preamble stated the reason for the supplementary declaration as being that

> "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." G.A. Res. 1836, 14 U.N. GAOR Supp. 16 at 19, U.N. Doc. A/4354 (1959).

In elaborating the rights of the child, the United Nations took the position that it should be protected against all forms of neglect cruelty and exploitation, enabled to grow and develop in health, and have provided both to

im and to his mother,...adequate prenatal and postnatal care." General Assembly of the United Nations, "Declaration of the Rights of the Child."[1]

The result of the argument in subpoint F is that there is extraordinarily sound ground for holding that the unborn child is, when considered from the standpoint of what he is, in himself, a person and, in justice, entitled to be treated for what he is by this Court in administering the constitutional safeguards of that person. A consideration of modern scientific data concerning the unborn child confirms that he possesses the qualities or characteristics that philosophy has long since established as the hallmarks of the human person: "an individual substance of rational nature." This data in relation to the classic philosophic definition of the person serve to confirm the view taken by various significant sources at the time of the adoption of the Constitution; by the Congress and The Chief Executive in their long-continued construction of the Constitution; by the definition given to the concept of property in the Fifth and Fourteenth Amendments by this Court; by the construction given to Article III by this Court with respect to the rule for decision in diversity cases; by this Court's recognition of the reasonable authority of the State to protect the life and health of children; by this Court's placing of fundamental concepts, such as religion, beyond the authority of the State or Nation to define; by the State's common and statute law recognition of the unborn child as a person; and by the United Nations in its "Declaration of the Rights of the Child.

The argument under Point I would seem overwhelmingly to require this Court to hold the unborn child is a person within the protection of the Constitution. But, if amicus is wrong in this, that argument at the minimum would seem to require this Court to note that it establishes a prima facie case for holding the unborn child to be a person and is sufficient to put the burden upon the appellents which they have in no respect discharged either before the lower court or this Court, of demonstrating that the unborn child is not a person.

---

[1] Official Records, pp. 19-20.

POINT TWO

THE UNBORN CHILD BEING A PERSON AND HAVING THE RIGHT TO LIFE WITHIN THE MEANING OF THE CONSTITUTIONAL SAFEGUARDS OF THE PERSON, THE STATE HAS THE DUTY OR THE RIGHT UNDER THE CONSTITUTION TO PROTECT THE LIFE OF THAT CHILD REASONABLY VIS-A-VIS ITS SINGLE MOTHER OR MARRIED PARENTS WHO DESIRE TO TERMINATE ITS LIFE. THE STATE OF TEXAS IN PROVIDING THAT ALL ABORTIONS PERFORMED OR PROCURED BY A PERSON FOR A PREGNANT WOMAN WITH HER CONSENT THROUGH ADMINISTRATION OF ANY MEANS WHATEVER IS A FELONY EXCEPT SUCH AN ABORTION PROCURED OR ATTEMPTED BY MEDICAL ADVICE FOR THE PURPOSE OF SAVING THE LIFE OF THE MOTHER HAS REASONABLY ACTED TO PROTECT THE RIGHT TO LIFE OF THE UNBORN CHILD WITHOUT UNREASONABLY AFFECTING THE RIGHTS OF ITS SINGLE MOTHER OR MARRIED PARENTS.

A. The state is faced with a difficult decision-making problem in resolving the correlative rights of the unborn child as a person and of its single mother or married parents, and its decision to protect the life of the unborn child through an abortion statute should be allowed to stand if it is a reasonable decision.

Once it is determined that the unborn child is a person within the meaning of the constitutional safeguards of the person, the state is no longer capable of standing neutrally by with respect to the treatment of the unborn child by its single mother, its married parents, or by a physician employed by them to destroy its life. This proposition is even more obviously true once the state has acted, as all states have long since done and all still do in one or more respects, to protect the life and other interests of the unborn child either in the civil law or the criminal law or, as is usually the case, in both areas. Because the unborn child is a person, the state is faced with the question of the extent to which it is required to protect the life and other interests of that person with reference to the due process and equal protection concepts as well as other constitutional safeguards of the person.

It must consider that, apart from giving permission to others to take the life of the unborn child being considered as state action in view of its prior action which may be tested as to its constitutional validity, such a permission will extend to agents and employees of the state in many circumstances so that state action will be involved directly with the carrying out of such a policy. The state must also consider what it may or should reasonably do to give effect to the desires of its citizens relative to the protection of the life and other interests of the unborn child and of the interests of the state in that child.

This Court has had occasion to consider the rights of parents vis-a-vis their children in a challenge to the constitutional validity of state statutes limiting those rights. For example, in Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1944), this Court was faced with the contention that a state statute precluding labor by a child of tender years in distributing religious tracts was a violation of its parent's constitutional rights to freedom of conscience and religious practice and to freedom to bring up its child in a religion. Recognizing that the rights asserted by the parent have a "preferred position in our basic scheme," Mr. Justice Rutledge in the opinion for the Court, spoke of the appropriate approach to be used in evaluating the constitutional validity of the state statute in question:

> "To make accommodation between these freedoms and an exercise of state authority always is delicate. It hardly could be more so than in such a clash as this case presents. On one side is the obviously earnest claim for freedom of conscience and religious practice. With it is allied the parent's claim to authority in her own household and in the rearing of her children. The parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters. Against these sacred private interests, basic in a democracy, stand the interests of society to protect the

welfare of children, and the state's assertion of authority to that end, made here in a manner conceded valid if only secular things were involved. The last is no mere corporate concern of official authority. It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent, well-developed men and citizens. Between contrary pulls of such weight the safest and most objective recourse is to the lines already marked out, not precisely but for guides, in narrowing the no man's land where this battle has gone on."

Rejecting the position of Justice Murphy that any restriction of First Amendment freedoms must be treated by the Cout as "prima facie invalid" and as placing the burden on the state "to prove the reasonableness and necessity" of its regulation, 321 U.S. at 166, Mr. Justice Rutledge stated for the Court:

"It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. Pierce v. Society of Sisters, supra (268 U.S. 510). And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.

"But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. Reynolds v. United States, 98 U.S. 145; Davis v. Beason, 133 U.S. 333. And Neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's

course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. The catalogue need not be lengthened. It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.

"A democratic society rests, for its continuance, upon the health, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street. ...

"The zealous though lawful exercise of the right to engage in propagandizing the community, whether in religious, political or other matters, may and at time does create situations difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face. Other harmful possibilities could be stated of emotional excitement and psychological or physical injury. Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves. Massachusetts has determined that an absolute prohibition, though one limited to streets and public places and to the incidental

uses proscribed, is necessary to accomplish its legitimate objectives. Its power to attain them is broad enough to reach these peripheral instances in which the parent's supervision may reduce but cannot eliminate entirely the ill effects of the prohibited conduct. 321 U.S. at 166-170.

The decision in Prince should be viewed as concluding the appellants in this case, which from every standpoint is an a fortiori case relative to Prince. This Court there assumed that the child had a right to life that the state had a right to protect by legislation. Once it is decided that the unborn child is a person within the meaning of the constitutional safeguards of the person, the Prince decision means that it also has a right to life that the state has a right to protect by legislation. Moreover, appellants cannot rely upon First Amendment freedoms as did the appellant in Prince. Appellants do not present a case in which they are in good faith seeking to implement their own notions of what is for the welfare of their actual or future child. Instead, they seek to destroy or to obtain the right to destroy their present or future unborn child. The State of Texas has acted, as had Massachusetts, in "the interest of youth itself, and of the whole community, that children be safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens." Indeed, the state has acted to prevent the parent from acting "to expose...the child...to...death," something this Court stated a parent has no right to do. 321 U.S. at 166-167. If this Court was willing to affirm a state's power, as in Prince, to preclude by statute a parent from exposing its child to "the crippling effects of child employment" including the harmful possibilities...of emotional excitement and psychological or physical injury" involved in soliciting funds for religious tracts being distributed, 321 U.S. at 169-170, it should be moved even more strongly to affirm a state's power to preclude a parent or another at its direction from destroying the life of the former's child. Certainly, under the Prince decision, the state in enacting and retaining the traditional form of abortion statute is entitled to the presumption in enacting and maintaining it. Indeed, in view of the diffi-

cult decision problem the state faces in balancing the competitive or correlative interests of the unborn child and of its single mother or married parents, this Court should be relatively reluctant to disturb the state's choice of what seems to it to be the appropriate solution, particularly when it can be so strongly supported as to its reasonableness as will be demonstrated below.

Federal District Courts in Louisiana and Ohio have sustained the right of the state under abortion statutes substantially identical to that of Texas to protect the constitutional right of the unborn child as a person to its life. Rosen v. Louisiana State Board of Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970) and Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970).

Judge Young in the Steinberg case stated:

"Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it.

"There is authority for the proposition that human life commences at the moment of conception.

> "Biologically speaking, the life of a human being begins at the moment of conception in the mother's womb. ...
>
> "From the viewpoint of the civil law and the law of property, a child en ventre sa mere is not only regarded as human being, but as such from the moment of conception...which it is in fact.

"If the law is in accord with science for the purpose of protecting property rights, how can it possibly not be in accord with science for the purpose of protecting property rights, how can it possibly not be in accord with science for the purpose

of protecting life itself, without which no property right has any worth or value whatsoever." Id. at 746-747.

Judge Ainsworth of the Rosen case, supra, relied primarily in his opinion upon a proposition stated by Mr. Justice Holmes in Lochner v. New York, 198 U.S. 45, 76 (1905) (dissenting opinion):

> "The word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. ...We are not persuaded that the Louisiana abortion laws infringe any fundamental principle as understood by the traditions of our people. As an ethical, moral, or religious matter a woman's refusal to carry an embryo or fetus to term, both historically and today, has been condemned as wrong by a substantial, if not a dominant, body of opinion, except in very limited circumstances." Id. 318 F. Supp. at 1231.

Neither of the theories of decision employed in the Steinberg and Rosen cases is precisely the theory of decision urged by amicus upon this Court which is primarily based upon principles of constitutional interpretation and upon a judicial gloss upon the Constitution that indicate that the unborn child is a person and has a right to life protected by the Constitution. Nevertheless, amicus considers the theories of decision employed in the Steinberg and Rosen cases to be appropriate supportive theories for adoption by this Court in disposing of this case.

The courts in the Steinberg and Rosen cases also correctly anticipated the decision by this Court in United States v. Vuitch, 402 U.S. 62 (1971),

holding the traditional type of state abortion statute t to be unconstitutionally vague. They also correctly plied this Court's decision in Griswold v. Connecticut, 1 U.S. 479 (1965) as the other federal district courts, cluding the lower courts, that have struck down the tra- tional type of state abortion statute, have not. Without y consideration of the issue of whether the unborn child s a person and without the constitutional safeguards of e person, including the Ninth Amendment, the lower court mply looked to the rights of single women and married uples and stated:

> "Plaintiffs argue as their principal contention that the Texas abortion Laws must be declared unconsitutional because they deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children. We agree."
>
> "Since the Texas Abortion Laws infringe upon plaintiffs' fundamental right to choose whether to have children, the burden is on the defendant to demonstrate to the satisfaction of the Court that such an infringement is necessary to support a compelling state interest. The defendant has failed to meet this burden." Roe v. Wade, 314 F. Supp. 1217, 1221-1222 (N.D. Tex. 1970).

milarly, the lower court in Doe v. Bolton, 319 F. Supp. 48 (N.D. Ga. 1970) stated after referring to the Gris- ld case, supra:

> "For whichever reason, the concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy." Id. at 1055

ile the court in the Bolton case, supra, recognized at the parent's decision to abort affects others, it s unwilling to

"posit( ) the existence of a new being with its own identity and federal constitutional rights,.. 319 F. Supp. 1955

Taking a somewhat more cautious position than the lower court in this case, that court held that the state had a right to participate in the decision to abort and to treat the problem wholly "as a medical one," Ibid., but that the state had no right to "limit() the number of reasons for which an abortion may be sought." Id. at 1056. So far as the unborn child is concerned, the decision by the court in the Bolton case does not differ from the decision by the lower court in this case.

The position taken by the lower court below in the Bolton case has also been taken by several other courts. People v. Belous, 80 Cal. Rptr. 354,359 (S. Ct. Cal. 1969) cert. denied, 397 U.S. 915 (1970); Doe v. Scott, 321 F. Supp. 1385, 1389 (N.D. Ill. 1971) (appeal docketed sub nom. Hanrahan v. Doe, 39 U.S. L.W. 3438 (U.S. Mar. 29, 1971) (No. 1522, 1970 Term; renumbered No. 70-105, 1971 Term), stay issued (Marshall, J. Sup. Ct. Feb. 10, 1971) Doe v. Rampton, No. C-234-70 (D. Utah. 1970); and Babbitz v. McCann, 310 F. Supp 293, 301 (E.D. Wis. 1970) appeal dismissed for want of jurisd. 400 U.S. 1 (1970) (per curiam);

All of these cases, other than the Steinberg and Rosen cases, commit a fundamental error in constitutional law adjudication. They fail to confront and to decide whether the unborn child is a person within the meaning of the constitutional safeguards of the person, including the Ninth Amendment. For this reason, they also fail to confront and to decide whether the unborn child as a person protected by the Constitution has a constitutional right to life that the state may or must protect. Once these issues are confronted and resolved, as demonstrated above they must be in favor of the unborn child, then the whole framework of constitutional argumentation and decision changes. The Griswold case, supra, instead of being authority for these decisions is rather authority for their complete rejection.

The Griswold case concerned the validity of a state law that operated "directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation." 381 U.S. at 482. That law proscribed use of a drug or instrument for preventing conception as well as any action assisting or counseling this use. The defendants, an officer and a medical director of a Planned Parenthood League, had been fined for instructing and advising a married couple as to means of preventing conception. The Court held the statute invalid under the Fourteenth Amendment because it was designed "to achieve its goals by means having a maximum destructive impact" upon the above human relationship and thereby "sweeping unnecessarily broadly and thereby invading the area of protected freedoms." 381 U.S. at 485. The particular sector of the area of protected freedoms involved in this case was the right to privacy of the husband and wife in an intimate relationship--described by the Court as a "zone of privacy" created by several fundamental constitutional guarantees, including the First, Third, Fourth, Fifth, and Ninth Amendments. Id. at 484-485. The Court emphasized that each of the specific guarantees in the Bill of Rights "have penumbras, formed by emanations from those guarantees that help give them life and substance." Id. at 484. It was in this respect that the Court's reliance upon the general protective language of the Ninth Amendment took on special significance, suggesting that it might serve as the vehicle for these emanations. Its very content emphasizes that rights other than those specifically guaranteed exist and that there may be other important zones of privacy involving human relationships besides that existing between husband and wife.

The Appellants' heavy reliance upon the Griswold case, supra, could not have been a more misplaced one. Griswold is one of the principal cases supporting the position of the Appellee. It is a case which elaborates the theory of constitutional protection of privacy in human relationships. A human relationship involves human persons. One of the most vital of human relationships

is that between the parent and the child, including the unborn child, and especially the relationship between mother and child. Nature has given the father an important initiative and supportive role in the relationship between parent and child. It has given the mother, however, the role of providing the temple in which the human life process starts upon conception with the embryo and unborn child rapidly developing thereafter and then growing in an orderly and wonderful fashion to the point when it is ready for birth. The unborn child is very much a human person, as previously demonstrated, and is a very important part of the relationship between parent and child. If there ever was a "zone of privacy" in human relationships that should generate and receive respect, it is that involved in the relation between mother and unborn child. The unborn child is by nature closed off in its mother's womb from the world and provided with the protection and assistance of the mother as it grows and as its bones, nervous system, brain, and organs, which develop at a very early date in the pregnancy, continue to develop. This privacy is essential to the maturing of the child and there is still no substitute for it throughout most of its period of development in the womb. Nature "intended" this privacy.

Surely, also, this is one of the most important "zones of privacy" to political society and required to be protected by it. It involves one of the most primordial and basic of the "privacies of life". The Supreme Court recalled in Griswold that "the Fourth and Fifth Amendments were described in Boyd v. United States, 116 U.S. 616, 630 as protection against all governmental invasions of...the privacies of life." Id. at 484. It is the privacy of life that belongs to the unborn child, a human person before the law. Unless this zone of privacy--"the privacy of life" of an unborn child--is protected by either the terms of the Due Process Clauses of the Constitution which after all, directed toward protection of "life", or by its "penumbras" or those of other specific guarantees, or by the Ninth Amendment,

nat child, the institution of the family, and political ociety itself are gravely threatened. The unborn child, n this event, cannot be born, become a citizen, enjoy he fellowship and love of the family, participate in olitical society by enjoying its benefits and bearing ts burdens, or realize upon its potential for self- ealization and contribution to others. The family in- titution becomes degraded through the insertion and ractice of violence against itself and one of its mem- ers although this violence and destruction is wholly nnecessary. Political society becomes endangered and the ommon good is sacrificed to the whim and caprice of usband and wife who seek, in the name of their own pri- acy and convenience, another's privacy of life who can- ot defend itself and who has done nothing to threaten hose who destroy it. It is this kind of result--the nvasion of privacy of the human person--about which riswold was very much concerned. That case necessarily emands, if the relationship between husband and wife s protected against invasion in its intimate aspects by the state, that the relationship between parent and child--and especially between mother and child--be pro- tected against invasion by its parent or parents or even by the state itself through an abortion.

What the lower courts failed to recognize in this and the Bolton case, supra, is the simple fact em- phasized by the courts in Steinberg and Rosen, supra:

> "Contraception, which is dealt with in Griswold, is concerned with preventing the creation of a new and independent life. The right and power of a man or a woman to determine whether or not to participate in this process of creation is clearly a private and personal one with which the law cannot and should not interfere.
>
> It seems clear, however, that the legal con- clusions in Griswold as to the rights of in- dividuals to determine without governmental

interference whether or not to enter into the processes of procreation cannot be extended to cover those situations wherein, voluntarily or involuntarily, the preliminaries have ended, and a new life has begun. Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it. 321 F. Supp. at 746.

"For the purposes of this case we assume, if we are not required to recognize, e.g.., Griswold v. Connecticut, 318 U.S. 479 (1965);.. that as a general matter women possess under our constitution a 'fundamental right' to determine whether they shall bear children before they have become pregnant. A state may interfere with this right of choice only in special circumstances. We deal in this case, however, not merely with whether a woman has a generalized right to choose whether to bear children, but instead with the more complicated question of whether a pregnant woman has the right to cause the abortion of the embryo or fetus she carries in her womb. We do not find that an equation of the generalized right of the woman to determine whether she shall bear children with the asserted right to abort an embryo or fetus is compelled by fact or logic... The basic distinction between a decision whether to bear children which is made before conception and one which is made after conception is that the first contemplated the creation of a new human organism, but the latter contemplates the destruction of such an organism already created. To some engaged in the controversy over abortion, this distinction is one without a difference....To others, however,... the difference between the decision not to conceive and the decision to abort is of fundamental, determinative

importance. Thus the root problem in the controversy over abortion is the one of assigning value to embryonic and fetal life. 318 F. Supp. at 1222-1224.

Thus, once it is determined, as it must be that the unborn child is a person within the meaning of the constitutional safeguards of the person, the Prince and Griswold cases require this Court to sustain the good faith effort of the State of Texas to protect the life and other interest of that child by an abortion law, if that law is a reasonable one in its assessment of the competing interests of that child, its parents, and of the State itself.

B. The State cannot reasonably leave the fate of the unborn child to be decided by private persons such as the appellants in this case either with respect to whether an abortion is to be performed or with respect to the appropriate reason for an abortion. To do so would be an unconstitutional delegation of authority and a denial of equal protection of the laws guaranteed to the unborn child as a person protected by the Fourteenth Amendment.

If the state provided no statute for regulating the performance of abortions, it would be delegating unconstitutionally its authority to regulate the subject of abortions over to private persons. If this would be the case, this fact constitutes one of the major reasons for the reasonableness of state action in seeking to protect the constitutional right to life of the unborn child by some form of regulation of the subject matter of abortion. It is particularly fitting that when a state has been held to have violated the Fourteenth Amendment and the Ninth Amendment by the enactment of an abortion statute, that that state be judged in terms of federal standards as to the reasonableness of its actions in attempting to avoid an unconstitutional delegation of power to private

persons who have challenged that statute and seek to assume the exercise of that power.

Justice Black in his dissent in Zemel v. Rusk, 381 U.S. 1 (1965) has articulated the kind of argument that is relevant to the point now being made with respect to an unconstitutional delegation of power. In that case, the question presented was whether, if the Secretary of State was statutorily authorized to refuse to validate passports of United States citizens for travel to Cuba, his authority was constitutionally permissible. Justice Black took the position that that authority was not constitutionally permissible since the subject matter was a law "restricting the liberty of our people." He stated:

> "Nor can I accept the Government's contention that the passport regulations here involved are valid 'because the Passport Act of 1926 in unequivocal words delegates to the President and Secretary a general discretionary power over passports....' That Act does provide that ' the Secretary may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries...under such rules as the President shall designate and prescribe.." Quite obviously, the Government does not exaggerate in saying that this Act 'does not provide any specific standards for the Secretary' and 'delegates to the President and Secretary a general discretionary power over passports'--a power so broad, in fact, as to be marked by no bounds except an unlimited discretion. It is plain therefore that Congress has not inself passed a law regulating passports; it has merely referred the matter to the Secretary of State and the President in words that say in effect, 'We delegate to you our constitutional power to make such laws regulating passports as you see fit.' The Secretary of State has proceeded to exercise the power to make laws regulating the

issuance of passports by declaring that he will issue them for Cuba only to 'persons whose travel may be regarded as being in the best interest of the United States,' as he views that interest. For Congress to attempt to delegate such an undefined law-making power to the Secretary, the President, or both, makes applicable to this 1926 Act what Mr. Justice Cardoza said about the National Industrial Recovery Act: 'This is delegation running riot. No such plentitude of power is susceptible of transfer.' A.L.A. Schecter Poultry Corp. v United States, 295 U.S. 495, 553 (concurring opinion)....

"Our Constitution has ordained that laws restricting the liberty of our people can be enacted by the Congress and by the Congress only. I do not think our Constitution intended that this vital legislative function could be farmed out in large blocks to any governmental official, whoever he might be, or to any governmental department or bureau. Whatever administrative expertise it might be thought to have. The Congress was created on the assumption that enactment of this free country's laws could be safely entrusted to the representatives of the people in Congress, and to no other official or government agency. The people who are called on to obey laws have a constitutional right to have them passed only in this constitutional way." Id. at 21-22. (dissenting opinion)

Mr. Justice Douglas and Mr. Justice Goldberg concurred in the dissent of Justice Black. Id. at 23, 27. The Court in an opinion by Mr. Chief Justice Warren sustained the challenged statute on the ground that regard for the recent historical context in which it had been administered before its enactment indicated that area restrictions had been utilized by the Secretary of State. It is to be noted that in the Zemel case at least the

basic statute drawn in question delegated to the Secretary of State the specific authority "to grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries..." rather than only a more general authority such as "to provide for the interests of American Citizens relative to foreign travel." Moreover, as pointed out by the majority, there had been the administrative practice of utilizing area restrictions prior to the most recent reenactment of the statute.

The situation in which the state would be clearly placed if it repealed its abortion statute, however, would be quite similar to the situation which Justices Black, Douglas, and Goldberg believed the Congress to have been in after enactment of the statute challenged in the Zemel case. It would be in the situation of simply having turned over the protection of the right of unborn children relative to their lives to the uncontrolled discretion of their parents and the physicians they employed. It would simply be the situation referred to by both Justice Black in his Zemel dissent and earlier by Justice Cardoza in the Schecter case, supra:"

> "This is delegation running riot. No such plenitude of power is susceptible of transfer." 295 U.S. 495, 553 (concurring opinion).

Moreover, the "delegation running riot" would be operating in the context not of economic regulations of prices and wages by private groups but in the context of control of the constitutional right to life of unborn children by private persons. It seems clear that Justice Black would have been moved to say in the instant case that the State of Texas acts reasonably when it refuses to turn over such control to private persons over the most important right a person possesses, his right to life.

The situation in which the State of Texas would find itself should it not have some regulation of abortion on its statute books would be much more like the situation

presented in the case of Kent v. Dulles, 357 U.S. 116 (1958). In that case it was contended that the statute authorized the Secretary of State to withhold passports to citizens because of their beliefs or associations. The same statute involved in the later Zemel case, supra, was the basis of this asserted authority. The claim of authority was challenged as an unconstitutional delegation of legislative power. Instead of reaching this constitutional issue, the Court wisely concluded that the statute did not delegate to the Secretary the kind of authority he had claimed. As in Green v. McElroy, 360 U.S. 474 (1959), this Court was at pains to point out that it was the constitutional right to travel and to freedom of speech that was affected by the action of the Secretary for which he claimed statutory authority. In the opinion for this Court, Mr. Justice Douglas stated:

> "Since we start with an exercise by an American citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it....
>
> "And, as we have seen, the right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress. And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them...Id. at 129.

In the situation we are now assuming the State of Texas to be as a result of acting to repeal its statute of abortion and replacing it with no statute, we are confronted with the right of a human person, the unborn

child, to live, the right prior to, and the necessary foundation of, all other rights he may possess, including the right to travel. It is "life" rather than "liberty" or "property" that is at stake and this makes all the difference. If that "life" is to be regulated, indeed taken (assuming that it is constitutionally possible under some limited circumstances, "it must be pursuant to the law-making functions..." of the Texas Legislature. But, by hypothesis, the Legislature has turned over the power to control the life of the unborn child to private persons. Amicus suggests that the federal doctrine concerning unconstitutional delegations of legislative power demonstrate how reasonable the State of Texas has been in refusing to turn over the matter of whether to preserve the life of unborn children to private persons.

But the hypothetical situation we have been discussing is the situation that appellants want and that others like them have been able to persuade some federal district courts to provide them. The decision of the courts that have invalidated state laws of abortion and especially those that have denied the state any right to control the reasons for which an abortion may be performed, as in the Bolton case, supra, in effect are compelling the delegation of state authority to regulate the subject matter of abortions over to private persons without any standards whatsoever.

The State of Texas is acting reasonably in refraining from turning over power to regulate the subject matter of abortions to private persons for another reason, the prevention of a denial of equal protection of the laws to unborn children. If the state turned over control of the lives to unborn children to private persons in the form appellants seek and that others have obtained by the decisions such as that in the Bolton case, supra, this would permit the drawing of irrational and invidious distinctions between unborn children whose lives it permits to be destroyed by abortions with the mere consent of their parents, on the one hand, and the unborn children whose lives it protects so long as their parents have not

consented to an abortion. This irrational and invidious distinction, based upon the bare consent of the parents of these unborn children, clearly is a denial of equal protection of laws to these citizens.

This Court in Levy v. Louisiana, 391 U.S. 68 (1968) established the definitive approach to the problem of equal protection which the State of Texas has properly solved by its abortion statute. In that case a Louisiana statute was challenged as a denial of due process and equal protection of the law under the Fourteenth Amendment. That statute, which provided for a right to recover damages for injuries inflicted by another, was construed by the Louisiana courts as permitting the survival of the right to recover in favor of a child only if that child was a legitimate child. In holding this statute to be a denial of equal protection of the law, Mr. Justice Douglas in the opinion for the Court stated:

> "We start from the premise that illegitimate children are not 'nonpersons'. They are humans, live and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment."
>
> "While a State has broad power when it comes to making classifications, it may not draw a line which constitutes an invidious discrimination against a particular class. See Skinner v. State of Oklahoma, 316 U.S. 535, 541-542. Though the test has been variously stated, the end result is whether the line drawn is a rational one.
>
> "We have been extremely sensitive when it comes to basic civil rights and have not hesitated to strike down an invidious classification even though it had history and tradition on its side. The rights asserted here involve the intimate, familial relationship between a child and his own mother. When the child's claim of damage

for loss of his mother is in issue, why, in terms of 'equal protection,' should the tortfeasors go free merely because the child is illegitimate? Why should the illegitimate child be denied rights merely because of his birth out of wedlock. He certainly is subject to all the responsibilities of a citizen, including the payment of taxes and conscription under the selective Service Act. How under our constitutional regime can he be denied correlative rights which other citizens enjoy?

"Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent upon her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would.

"We conclude that it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother." Id. at 70-72

In the Levy case, the statutory right of illegitimate children to recover damages for an injury resulting in the death of their mother was at stake. In this case the even more important constitutional right to life of unborn children is at stake. These rights of the unborn children protected by the Texas statute also "involve the intimate, familial relationship between a child and his (or her) own mother." The rights protected by this statute also involve their relationship to the father, to other children of their parents, to the American political society, and to the whole human race. These rights also involve the relationship between the unborn child and the vast spectrum of common law, statutory, and constitutional rights that they have long since been recognized to possess and for which they are entitled to secure protection.

Most children are legitimate and their conception simply the most normal outcome of married life of their parents who now have had a change of mind about rearing children. Why should the unborn child be denied the right to life merely because his parents do not want the child? Why should this unborn child, a perfectly healthy human being waiting to be born, be subjected to the destruction of its life while another unborn child is not so subjected, the only basis for the vast difference in treatment of the two being the consent of one set of parents to the abortion and the non-consent of the other set of parents. The consent or non-consent of the two sets of parents has no relation to the alledged wrong inflicted on the mother or the two parents of the child; indeed, there is no possibility of alledging any wrong on the part of the unborn child. The consent or non-consent of the two sets of parents does not intrinsically relate to the chils or any problem it might be creating for its parent or parents. It is wholly connected with an evaluation of the right of the unborn child to its life and objective factors that might, under narrow circumstances, warrant the destruction of the child's life.

The recent case of Shapiro v. Thompson, 394 U.S. 618 (1969) provides additional guidance for the response to this question. In that case, the Court considered appeals from decisions of three-judge District Courts relative to a state or District of Columbia statutory provision denying welfare assistance to residents of a state or district who have not resided within their jurisdictions for at least one year immediately preceding their applications for such assistance. The assistance that had been applied for included assistance for dependent children (AFDC) and several of the applicants were pregnant at the time they filed their applications for assistance. The Court held these statutory provisions to be a denial of equal protection of the laws. Mr. Justice Brennan in the opinion for the Court, stated:

> "There is no dispute that the effect of the waiting-period requirement in each case is to create

> two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more , and the second of residents who have resided less than a year, in the jurisdiction. On the basis of this sole difference the first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist--food, shelter, and other necessities of life. .. appellees' central contention is that the statutory prohibition of benefits to residents of less than a year creates a classification which constitutes an invidious discrimination denying them equal protection of the laws. We agree. The interests which appellants assert are promoted by the classification either may not constitutionally be promoted by government or are not compelling governmental interests." Id. at 627.

Mr. Justice Brennan also observed that the traditional criteria for determining whether equal protection of the laws had been denied were not applicable:

> "Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest. Under this standard, the waiting period requirement clearly violates the Equal Protection Clause." Id. 638

Thus, the opinion of the Court pointed out that while a certain legitimate interest of the state or of the District of Columbia might be promoted by the legislation and thus "a rational relationship between the waiting period and these four admittedly state objectives" established, this was not sufficient to justify the classification. Instead, it must be shown that the classification

s necessary to promote a compelling governmental interest. Pointing to one of the state or district interests, r. Justice Brennan observed:

> "Since double payments can be prevented by a letter or a telephone call, it is unreasonable to accomplish this objective by the blunderbuss method of denying assistance to all indigent newcomers for an entire year." Id. at 637.

Applying the rationale of the Levy and Shapiro ases to the instant case, it is necessary in order to justify the State of Texas turning over the control of bortions to private persons like the appellants, rather han retaining that control as it has in its present abor- ion law, to show that it is necessary to take the lives f unborn children in order to promote a compelling gov- rnmental interest. Otherwise, the state in turning over his control to private persons would be acting unconsti- utionally by denying to unborn children equal protection f the laws. Far from the burden being on the state to emonstrate it has a compelling state interest for limiting he right of single women and married couples to determine hether to abort their unborn children, the burden under he Levy and Shapiro cases would be on the state to demon- trate the compelling interest it has should it take legis- lative action that would submit the lives of unborn child- ren to the uncontrolled discretion of their parents and hysicians they employ. And amicus suggests that the bur- den that would have been on the state in such a situation s the burden that appellants properly face in the in- tant case. This Court cannot deny the right of the State f Texas to comply with its standards for determining what s necessary in order to respect the right to equal pro- tection of the laws of persons, including unborn children.

Thus, the action of the state of Texas in en- cting an abortion statute is eminently reasonable because t is designed not only to avoid an unconstitutional de- legation of power over one of the most fundamental of

human rights to private persons, the right of life, but also to avoid invidious and irrational distinctions being drawn between unborn children and between those children and their parents, each considered in their status as human persons with respect to this right to life. Moreover, the appellants have not discharged their burden of demonstrating a compelling interest of the state that would justify the state giving permission to appellant single mother and appellant married couple to destroy or to direct the destruction of the lives of their children. Unless that can be done, this Court is not justified in holding the state has acted unreasonably in protecting these children under its abortion statute.

C. The affirmative, particular reasons that can be adduced in behalf of the Texas law of abortion demonstrate the reasonableness of the state legislative judgment to enact and maintain that law and they counsel extreme caution on the part of federal courts in declaring that state legislative judgment to be unconstitutional.

There are eight principal, affirmative reasons for the State of Texas to adopt and to maintain its law of abortion. Most of these have already been developed and are as follows: (1) the unborn child is a person within the meaning of the constitutional safeguards of the person; (2) the unborn child, as such a person, has the constitutional right to life; (3) the state has the right, if not the duty, to protect the constitutional right to life of the unborn child; (4) for the state to turn the control over the protection of the constitutional right to life of unborn children to private persons, such as appellants, would result in an unconstitutional delegation of legislative power and in the drawing of invidious and irrational distinctions by these private persons between unborn children and between unborn children and other persons, such as the appellants; (5) the state has an interest in protecting the continuation of the body of persons and citizens forming the human element of families and of political society itself; (6) the state has an

interest in preventing destruction of innocent human life where no adequate reason exists for that destruction in order to prevent the citizenry from becoming habituated to violence as a mode of social control and insensitivity to the value and the dignity of the human person; (7) in light of all the above reasons, the state has a compelling governmental interest in protecting the constitutional right to life of the unborn child absent a showing, in individual cases upon the basis of individual data, that there is a compelling governmental interest that overrides the former compelling governmental interest; and (8) there has been no persuasive demonstration of any compelling governmental interest by persons in the position of appellants that would warrant the state turning over to private persons the power to make decisions as to whether or not, and for what reasons, unborn children should continue to enjoy their constitutional right to life or that would warrant the state in extending the grounds upon which abortions could be secured by persons such as appellants.

Only the sixth and eighth reasons set out above for adoption and maintenance of the Texas law of abortion will be discussed here since the others have already been sufficiently developed.

The twentieth century has more and more frequently been described as a century in which violence and brutality have been promoted psychologically and as a technique for achieving social goals. For the National Socialists war became a way of life for the German government, a way of achieving national goals irrespective of the lack of justice in those goals or the methods used. Within Germany itself and in countries it occupied it addressed itself to the sordid task of destroying in gas ovens and by other means some 6,000,000 innocent men, women and children, including the unborn, of the Jewish faith on the view expressed by Hitler that the Jew deserved extermination as an "anti-man" or "unperson". Many additional millions of jews and eastern European peoples were seized in their homelands, without respect for family

units, and committed to slave labor in Germany. Even the judicial system itself was converted into a technique of violence by German judges against German citizens in which the hard-won procedural guarantees respected elsewhere throughout Western Society were cast aside and adjudication was converted into a technique of murder, false imprisonment, and extortion. This story has been thoroughly elaborated in such trials as the Nuremburg Justice Trial, United States v. Josef Alstoetter, et al., (United States Military Tribunal No. III, 1947). and in books such as that of William L. Shirer.[1] In the Soviet Union the Communist regime utilized methods of collectivization of farms and industrialization in its autonomous republics that equally thorough and ruthless. Genocide was practiced against whole peoples. National cultures were destroyed. Groups of people were forced to migrate from their home areas to other republics. Millions of persons died in the process of enforcement of a policy of starvation in farm areas while the survivors were taken from their lands and placed in slave labor camps. All who opposed the program of the Communists in the Soviet Union were destroyed or effectively disabled by arbitrary means from causing trouble.[2] In our own country, we have seen an extraordinary increase in the pervasiveness of organized crime, whose leaders have undertaken new forms of violence for the achievement of their unjust ends since World War II. Careful students of our culture, such as Max Lerner, state that "America today, as in the past, presents the picture both of a lawless society and an overlegislated one." [3] Organized crime represents a

---

[1] William L. Shirer, The Rise and Fall of the Third Reich, N.Y.: Simon & Schuster, 1960.

[2] Institut zur Erforschung der USSR, Forty Years of the Soviet Regime, Munich, 1957.

[3] Max Lerner, America as a Civilization. New York: Simon & Schuster, 1957.

idespread phase of what Lerner terms the ruthlessness of ur society. More recently, as a kind of disillusionment as set in among minority groups and the young following he hopes entertained in the early 1960's for solving ome of our country's persistent problems, there has ccurred an elaboration and action upon philosophies of iolence that in their extreme forms have included kid- apping, killing, and maiming of the innocent; the des- truction of property; the effort to disparage and disrupt he orderly administration of justice in our courts; and pposition to the entire system of what we have deemed to e the "free and democratic society." [1] What has been so triking about the philosophers of violence, as one able bserver has stated,

> "is the extraordinary degree of certainty by which it is inspired: certainty of one's own rectitude, certainty of the correctness of one's own answers, certainty of the accuracy and profundity of one's own analysis of the problems of contemporary society, certainty as to the iniquity of those who disagree. [2]

A member of this Court was moved to observe with respect to this emerging philosophy:

> "Violence is never defensible-and it has never succeeded in securing massive reform in an open society where there were alternative methods of winning the minds of others to one's cause and securing changes in the government or its policies." [3]

---

[1] See, e.g., Midge Decter, "Anti-Americanism in America," Harper's Magazine (April, 1968) 39; Lewis S. Feuer, "On Civil Disobedience", The N.Y. Times Magazine (Sept. 26, 1967) 29, 122.

[2] George F. Kennan, "Rebels Without a Program," The N.Y. Times Magazine (Jan. 21, 1968) 60.

[3] Associate Justice Abe Fortas, Concerning Dissent and Civil Disobedience: We have an Alternative to Violence. New York: Signet Books, 1938. 80.

Many have felt that the American involvement in a series of wars throughout the twentieth century, and especially in the Viet Nam war, have been contributing to a breakdown in the high regard for the value of human life among Americans.

It would seem most evident, in the context of this violent generation, one which lives with the daily possibility of all-out nuclear warfare capable of wiping out most of mankind in a thirty minute period as we are told, the State of Texas cannot be charged with acting unreasonably when it has continued to maintain its law of abortion on its statute books for the same purposes for which it was enacted: the protection of the constitutional right to life of innocent unborn children who are unable to defend themselves against parents who would destroy them although the life of the mother is not in danger and there are reasonable alternatives both before the conception of that child or after its birth for avoiding the burden of rearing children. The State of Texas can reasonably say of those who seek the power to control the matter of abortion, as part of their constitutional right of privacy, what Michael Novak has said of certain other groups:

> "Prophetic minorities in history commonly rectify a balance by holding to one clean line; and in doing so they cast a lovely light. But they are inclined to be inhuman, to move upon too narrow a base, and to falsify human possibilities by prematurely foreclosing them." [1]

Several typical arguments have been made in support of invalidating state statutes on abortion like that of Texas. They have been in legislative halls across the country, including those of the Texas Legislature during

---

[1]Michael Novak, "The Secular Saint," The Center Magazine (May, 1968) 55-56.

its 1971 session in conjunction with the proposal of one of the most unlimited forms of liberalized abortion statutes.[1] They are far from persuasive and demonstrate the reasonableness of the Texas Legislature in adopting and continuing to maintain its present law on abortion.

The typical arguments are listed below and a sufficient comment upon them given to support the reasonableness of the Texas Legislative judgment in adopting and maintaining its present law on abortion. Amicus has relied principally upon the discussion of these arguments contained in the works of two distinguished authors, Daniel Callahan of the Institute of Society, Ethics and the Life Sciences and David Granfield, Professor of Law, Catholic University School of Law.[2]

> Argument One: The grounds for abortion should be extended to include psychiatric reasons in order to prevent the mother from carrying out a valid suicide threat which endangers her life.

Callahan reports upon numerous careful studies that indicate a consensus upon the following proposition: that suicide following rejection of an application for abortion is "very rare", "often used to blackmail psychiatrists," and "the pregnancy is not the most important cause of her emotional distress."[3] He further points out where there is

---

1 Texas Legislature, H.B. No. 1092.

2 David Granfield, The Abortion Decision, New York: Doubleday & Co. 1969

3 Daniel Callaghan, Abortion: Law, Choice and Morality. London: Macmillan Company, 1970. 62

a "liklihood of a severe neurosis or psychosis as a result of a pregnancy carried to term, the general opinion seems to be that only in the rarest cases would supportive therapy be totally useless."[1] He also reports that psychiatrists and many authorities feel that "there exist alternative ways of handling these difficulties other than by abortion."[2] Callaghan also records the lack of any sort of a consensus among psychiatrists "on fixed and clear norms for psychiatric indications for abortion."[3]

Dr. Theodore Lidz, Yale Professor of Psychiatry, has observed:

> "If we wish to have the laws concerning abortion changed, wishing to do away with that which seems hypocritical at present, let us be honest and seek to have the burden of such decisions left with the parents and not make judges out of doctors. The doctor is burdened enough trying to preserve life without getting involved in questions of when to terminate it. Indeed, it is a burden of modern man that so much is to be resolved by conscious choice unguided by ethical code. One may feel at times that whatever gods may be laughing in their far-off heavens at the dilemma of man who, through seeking to control nature and bring more and more out of the realm of contingency and under human control, has managed to become increasingly perplexed, confused, and self-destructive. There is a law concerning therapeutic abortion and it seems to me that, although such rigid limitation provokes us at times,

---

[1] Id. at 63

[2] Id.

[3] Id. at 82

such laws are a benefit to physicians, protecting them from the need to make impossible decisions--decisions that often go beyond their knowledge."[1]

Clearly, in this state of knowledge about "psychiatric reasons", the Texas legislative judgment in refusing to extend the grounds for legal abortion to include "psychiatric reasons" is most reasonable. There is little evidence to show that the neuroses or psychoses of pregnant women represent a significant danger to their lives comparable to the certainty of death for unborn children in abortion. Moreover, there are modes of treatment and confinement to protect pregnant women from their own defect or illness that might lead to suicide.

Argument Two: The grounds for abortion should be extended to include fetal indications for abortion such as "where there is a sensitization to the Rh factor, where the fetus has been exposed to a dangerous amount of radiation, where serious hereditary defects are likely to be present and cause genetic abnormalities; where harmful drugs (such as thalidomide) which have a high liklihood of producing fetal defects have been taken during pregnancy; and, finally, where the mother has contracted viral infections, particularly rubella."

Amicus has earlier pointed out the development of the new science of Fetiologyand the present ability of the science to employ exchange transfusion techniques. In addition, Callaghan indicates that there is now a gamma-globulin injection which forestalls Rh complications from the outset. With respect to radiation,Callaghan reports that data on the dangers involved from radiation are incomplete and there is no establishment of the certainty that each child born will be defective.

---

[1]Theodore Lidz, as cited in Harold Rosen, Therapeutic Abortions, Medical, Psychiatric, Legal, Anthropological, and Religious Considerations. N.Y.: Julian Press, 1954. 278

Granfield states that "the current prediction rate in the area of genetic fetal abnormalities is very limited."[1] There are a number of constructive steps that can be taken rather than legislating these children out of existence: support for the family in need of it to care for the defective child; support for medical and scientific research that has proved in this century its ability to deal very effectively with both childhood defects and diseases; and provision of facilities and facilities for the rehabilitation and education of defective children.

Where the child defect is feared because of the taking of a harmful drug, such as thalidomide, the obvious first answer is that government must take care through tests and experiments to assure that harmful drugs likely to cause child defects do not come on the market. Beyond this is the fact that the particular child defect resulting from a drug, such as thalidomide, does not justify destroying the life of the child. The main defect resulting from the taking of thalidomide by expectant mothers was the absence of various limbs. The defect can be dealt with through rehabilitative techniques. The child is otherwise a perfectly normal human being. Moreover, the danger of having a defective child was only considerable as result of the mother having taken thalidomide. To authorize the destruction of all children where the mother has taken such a drug is to authorize the destruction of not only an innocent life but in many cases also a perfectly sound one. Again, the same measures that were recommended with respect to genetic fetal abnormalities are good alternatives here. It is entirely defensible also that government which has failed to conduct adequate testing so as to result in harm doing drugs should be held responsible in damages to affected parents and children. Callaghan states that the most frequent child defect most frequently urged as a basis for extension of the grounds for abortion is the situation where the mother has contracted rubella.[2]

---

[1]Granfield, supra at 116.

[2]Callaghan, supra at 93.

Here, again, science has provided an adequate answer. There is now an effective vaccine against the disease and its incidence will likely drop greatly in the future.[1] Moreover, there is a strong liklihood that the mother who has contracted rubella will have a normal child or that the child will have only minor defects that can be corrected.[2] Beyond all this, no more than 15 percent of women capable of bearing children are subject to contracting rubella at all. [3] This seems scant justification, if there ever was any, for urging that grounds for abortion be extended to cover child defects in the situation where the mother has contracted rubella. Finally, the same efforts should be taken by the community to provide support for the family with defective children, and to provide facilities for the rehabilitation and education of these children.

One thing neglected in the above analysis is the viewpoint of the child with a defect at birth resulting from any of the above listed causes. That child is the person who has the constitutionally protected right to life. Its view and that of the community should be considered with respect to the worth of its life rather than the parents view as to the financial and other difficulty placed upon them of raising such a child. The burden of proof should be and is on the latter to prove that there is a compelling governmental necessity for authorizing the destruction of the child, who is after all a human person. As the Court observed in Goldberg v. Kelly, 397 U.S. 254, 264-265 (1970), where it was contended that countervailing governmental interests in conserving fiscal and administrative resources warranted terminating welfare assistance payments without a hearing:

> "The interest of the eligible recipient in uninterrupted receipt of public assistance, coupled

---

[1] Callaghan, supra at 93

[2] Id. at 104

[3] Id.

with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens.

"The crucial factor in this context...is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits."

Similarly, if the principal argument that appellants can make in their own behalf against the Texas statute on abortion as being unreasonable for not permitting abortion where the child may be born with a defect from any of the previously listed causes is that caring for the child will place financial and other burdens upon them, the Texas legislative judgment must be sustained as a reasonable one. The value of human life and its continuance is too precious to warrant crediting such an argument. Children born with defects can be assisted in many ways and so can their families. Many of the causes of these defects are already controllable. When children with defects are born from these causes, they can be provided with services of rehabilitation and education.

Argument Three: The grounds for abortion should be extended to include a pregnancy resulting from forcible rape and incest.

The argument made in favor of this ground is lacking even the support that pro-abortionists can bring to bear in favor of abortion in the first two arguments. In many instances, if not most, there will be no possibility of urging that there is a psychiatric reason or a probable child defect as a justification for the abortion. The basis for urging that the Texas legislative judgment in not allowing this ground for an abortion is unreasonable must be that the child is unwanted and will create various kinds of burdens for the mother or the mother's family.

No one can fail to have the deepest sympathy for the woman or teenager who becomes pregnant as a result of forcible rape or incest. But at the center of the problem for the community is the existence of a perfectly healthy and probably normal unborn child who is innocent of any wrong doing and as a human person has the constitutional right to life. With recognition of and committment to the unborn child as a human person, there is only one answer which a reasonable political society and its government can give to this problem: the protection of the life of the unborn child.

The first pertinent observation is that life in civilized society involves some risk. Daily we experience the commission of crimes against both the person and property. We also witness the ravages which automobile accidents inflict upon the health and lives of our citizenry. And we have lived through years of large and small wars with the weekly reports of the dead and wounded among our young men. Society has not been without resources, although it has been frequently tardy in utilizing them, for overcoming these risks and dealing with the facts of death and injury. So, too, in the case of forcible rape and incest that results in pregnancy, there are societal measures that are being taken and can be taken to protect against these invasions of bodily integrity and respond to the problems which they engender for the woman or teenager who becomes pregnant as a result.

Granfield observes greater efforts by the community at providing information about birth control, sex education, and caveats about behavior in certain social and physical contexts likely to subject a woman to attack provide a first kind of alternative to destruction of the unborn child.[1] They at least are directed at the cause of the rape whereas abortion following rape will neither undo the rape nor prevent others from occuring.

---

[1]Granfield, Supra at 209

While forcible rape cases represent less than one per cent of the total of nearly 3,000,000 serious crimes in the country annually, and while perhaps no more than 5% of the 23,000 forcible rape cases annually result in pregnancy, the problem is a serious one for the woman affected. While there exist Child and Family Services in Texas and other states that provide special care for pregnant women in a situation of indigency or emergency, undoubtedly these states should undertake greater measures to provide for their problems. Both counseling and financial assistance should be provided in sufficient amounts. The Texas State Department of Public Welfare already provides a wide range of services for children and their mothers which includes the unmarried mother.[2]

There apparently are medical means increasingly becoming available to prevent progress of the pregnancy by forestalling nidation or implantation such as the administration by a physician of an appropriate dosage of estrogen to the victim of forcible rape. Norbert J. Mietus has stated:

> "This procedure is not regarded as abortion and many doctors, with support from some moral theologians, argue that it is defensible because no direct attack is directed against the potentially fertilized ovum. Other observers and the author would argue that biologically and legally, if conception has occurred, only morally questionable sophistry could justify the action which thwarts the normal development of the existing life. However, it is possible that the estrogen acts somewhat in the manner assumed to be true of the IUD (intra-uterine device): to speed the journey

---

[1]Federal Bureau of Investigation, "Crime in the United States, Washington D.C., U.S. Dept. of Justice, 1965. 3.

[2]Texas State Department of Public Welfare, Manual of Services, Austin: Feb. 1967

of the female ova through the Fallopian tubes too rapidly to be fertilized." 1

Amicus specifically refrains from joining in any advocacy of the use of estrogen. The purpose of mentioning its potential usage is simply to indicate that medical science is devoting its research efforts to methods of avoiding pregnancy that may be quite responsive to the problem of the woman or teenager subjected to a forcible rape. Undoubtedly, a science that could develop the "pill" can discover means of preventing pregnancy following a forcible rape.

In light of the foregoing, the Texas legislative judgment of refusing to extend the grounds for abortion to cases of pregnancy resulting from forcible rape or incest seems quite reasonable.

Since every child resulting from a forcible rape is illegitimate where, as is usually the case, its parents do not marry each other, one necessary societal stel, as Granfield suggests, is reform the existing discriminatory laws against illegitimates. In Texas, for example, there is no requirement that the father support his illegitimate child. There are also problems for the illegitimate child with respect to inheritance, name, custody, and welfare assistance laws. Rationalizing this law vis-a-vis the illegitimate will materially assist to lessen the burden upon the woman or teenager of carrying to term the unborn child who is the product of a forcible rape. 2

In light of the foregoing consideration, the Texas legislative judgment of refusing to extend the grounds for abortion to cases of pregnancy resulting from

---

[1]Norbert J. Mietus, The Therapeutic Abortion Act A Statement in Opposition, Sacramento: April, 1967. 48

[2]Granfield, supra, at 210-212

forcible rape or incest seems quite reasonable.

Argument Four: Liberalized abortion laws would greatly reduce the number of illegal abortions.

The author of the California Therapeutic Abortion Act estimated that this law would legalize no more than 5 per cent of what may now be illegally performed abortions.[1] Granfield reports upon the studies of Scandinavian-type abortion legislation which shows that instead of illegal abortions being eliminated, which was one of the purposes of the legislation, they have actually increased. This is true of all the Scandinavian countries.[2] Thus, this argument seems hardly to warrant an attack upon the reasonableness of the Texas legislative judgment in maintaining its current abortion law as being the source of illegal abortions unless the position of appellants is that Texas cannot constitutionally control the reasons for which abortions are performed, the position taken concerning Georgia in the Bolton case, supra, a position that seems wholly unsupportable for reasons developed earlier.

One of the positive reasons for not extending the grounds for abortion beyond that of preserving the life of the mother is that there is considerable evidence that the performance of abortions still involves considerable danger to the mother. All of the current methods utilized for performing abortions are thoroughly reviewed by Callaghan. While most recent literature is less pessimistic about the dangers of induced abortion, there are physicians and scientists of distinction who take the position that abortions performed even by skilled physicians are more dangerous than the public and many doctors realize.

---

[1]Mietus, supra at 6.

[2]Granfield, supra, at 89-90

allaghan quotes R. R. MacDonald with respects to the dangers involved in abortions performed after the tenth week:

> "By that time the cervix has softened appreciably and the uterus is palpable abdominally, globular in shape, soft and vascular. Dilation and curettage is quite likely to cause traume to the cervix and, even with drugs to make the uterus contract, there is usually a lot of bleeding, while perforation of the uterine wall is surprisingly easy. Abdominal hysterotomy may be necessary to empty the larger uterus. This can be quite difficult and there is the extra hazard of the abdominal incision. Hypertonic glucose or saline injected into the amniotic cavity kills the fetus and induces uterine contraction quite quickly. This gives the impression of being an elegant method of inducing abortion when the uterus has reached 16 weeks' size, but in fact quite a few deaths have occurred from pelvic infection and cerebral hemorrhage...A British urologist reported (Feb., 1967) after a visit to a kidney unit in Rumania that 300 patients had been admitted to the unit with renal failure following septic abortion.[1]

It would appear that Texas legislative judgment is reasonably supportable from the point of view that it confines abortion to those unavoidable situations involving the necessity for preserving the life of the mother although considerable danger may be involved for the mother from the abortion itself.

Finally, it should be observed that the Texas law of abortion is not without a reasonable scope for protecting the life and death of the mother. There has not been

---

[1]Callaghan, supra, at 35 quoting R.R. MacDonald, "Complications of Abortion," Nursing Times. 63 (March 10, 1967) pp. 305-307.

extensive adjudication covering the meaning of the exception to the traditional abortion laws permitting, as in Texas, an abortion "by medical advice for the purpose of saving the life of the mother." What cases have construed such provisions are clear that these statutes give considerable scope to a physician in making a good faith judgment that an abortion is necessary in order to save the life of the mother and even to avoid a grave impairment to her health. As the Supreme Court of Iowa stated in State v. Dunklebarger, 206 Iowa 971 (1928):

> "In order to justify the act of Dr. Wallace (the defendant), it was not essential that the peril to life should be imminent. It was enough that it be potentially present, even though its full development might be delayed to a greater or less extent. Nor was it essential that the death of the patient would be otherwise certain in order to justify him in affording present relief.
>
> "Inasmuch as the question of necessity can ordinarily be determined only by medical opinion, it follows naturally that a physician, who examines a patient, must form an opinion in good faith, and must act upon it in like good faith. It follows also that if a regular physician does make an examination , and does act upon it, he is entitled to the presumption of correct judgment and good faith until the contrary be proven. 221 N.W. at 596, 594.

The Supreme Court of Oregon in State v. Buck, 200 Or. 87 (1953) stated:

> "The relief of a woman whose health appears in peril because of her pregnant condition attains the same importance as the necessity 'to preserve the life of such mother'." 262 P.2d at 502.

The result reached in the Buck case was based upon the Court's construing together the state's Criminal Abortion

Act and its Medical Practice Act as if they were one act. The latter act had characterized as "unprofessional" and "dishonorable"

> "The procuring or aiding or abetting in procuring an abortion unless such is done for the relief of a woman whose health appears in peril after due consultation with another licensed medical physician and surgeon." 262 P.2d at 500.

These two cases indicate that there is considerable room for addressing the traditional abortion statute to a wide variety of situations involving the necessity of preserving the life of the mother or avoiding a grave peril to her health.

The choice that Texas has made in favor of permitting only such abortions as there seems quite reasonable in light of its proportioning the death of the unborn child to act of a physician or another on the basis of medical advice in performing an abortion deemed necessary in good faith in order to preserve the life of the mother or to avoid a grave peril to her life. Its reasonableness is based not only upon that proportion but also upon the status of both the unborn child and the mother as human persons protected by the constitutional safeguards of the person and the necessity for the state to regard the status and condition of both the mother and child. Its reasonableness is based further upon the inadequacy or lack of persuasiveness of the reasons urged for extending the grounds for abortion to those urged by appellants and others like them. It reasonableness is based finally upon the still considerable danger to the mother of abortions at various stages according to the assertions of able physicians and scientists.

POINT THREE

SINCE THE UNBORN CHILD IS A PERSON AND HAS A A RIGHT TO LIFE PROTECTED BY THE FOURTH, FIFTH, NINTH AND FOURTEENTH AMENDMENTS, IF THIS COURT SUSTAINS THE LOWER COURT DECISION THAT ARTICLES 1191-1194 AND 1196 OF THE TEXAS PENAL CODE ARE UNCONSTITUTIONAL AND TO BE GIVEN NO FURTHER OPERATION, THIS COURT MUST ALSO RENDER A DECISION STATING THE GROUNDS UPON WHICH ABORTIONS MAY CONSTITUTIONALLY BE SECURED OR PERFORMED AND PROVIDE OR DESIGNATE THE TRIBUNALS FOR ADMINISTRATION OF THOSE STANDARDS IN ACCORDANCE WITH THE REQUIREMENTS OF BOTH SUBSTANTIVE AND PROCEDURAL DUE PROCESS AND EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT, AND, SINCE IT IS FEDERAL ACTION THAT CREATES THE HAZARD FOR UNBORN CHILDREN, OF THE FOURTH, FIFTH, AND NINTH AMENDMENTS.

In Point One, amicus has demonstrated that the unborn child is a person and has a right to life protected by the Fourth, Fifth, Ninth, and Fourteenth Amendments. Amicus also has demonstrated in its Point Two that the Texas legislative judgment in establishing and continuing to maintain its law of abortion is clearly a reasonable one in light of the reasons for its adoption and the unpersuasiveness of the reasons offered by appellants and others for changing it. Should, however, this Court hold that, for some reason, the Texas law of abortion is unconstitutional and is to be given no operation, as the lower court has held, then this Court, as has the lower court, will have by federal action placed in jeopardy the rights of the unborn child to life, which, it is assumed for the purposes of this point, this Court is willing to hold is protected by the Constitution.

The federal judicial action assumed for discussion in this point would leave the right of the unborn child to life unprotected by state criminal law and, for all practical purposes, by much, if not all, of its civil law. Without this protection, the federal judicial action

would, in effect, be delegating over to private persons, such as the appellants, control over the unborn child's right to life. Unless this Court, in such event, provides standards to be observed before abortions may be performed by private persons and provides or designates tribunals for administration of those standards, it is the contention of amicus that this federal judicial action would be violative of the rights of the unborn child protected by the Fourth, Fifth, Ninth, and Fourteenth Amendments.

It is well established that the action of a court is either state or federal action that can be violative of constitutional limitations upon government. Shelley v. Kraemer, 334 U.S. 1 (1948); cf., Hurd v. Hodge, 334 U.S. 24 (1948) and Bolling v. Sharpe, 347 U.S. 497 (1954). Even though this Court is the final arbitrer of what the constitutional protections of the person are, it is, of course, obvious that it is subject to constitutional limitations with respect to the method by which it implements the last word decisionally, as in this case, with respect to the invalidity of a state statute directing itself to the protection of the constitutional right to life of a person. The Court has been faced with a similar problem earlier. In Baker v. Carr, 369 U.S. 188 (1962) this Court held that a complaint charging that a Tennessee legislative districting statute denied equal protection of the laws to voters alleged a justiciable cause of action. In Reynolds v. Sims, 377 U.S. 533 (1964) this Court held that the legislature of Alabama had been unconstitutionally apportioned. It also held that the lower court

> "in ordering into effect a reapportionment of both houses of the Alabama Legislature for purposes of the 1962 primary and general elections, by using the best parts of the two proposed plans which it had found, as a whole, to be invalid, was an appropriate and well considered exercise of judicial power." 377 U.S. at 586-587.

In discussing the problem of federal judicial rem-

edy to be dealt with once a state legislative districting statute had been held unconstitutional, this Court had four concerns: (1) the protection of the right to vote in the absence of a valid statute; and (2) the protection of the right to vote against further elections under the invalid statutory plan; (3) recognition of the state interest in conducting elections so that, under certain circumstances, such as where an impending election is imminent and a state's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief; (4) establishment of standards for governing action by a federal district court in considering the various factors that should inform its decision-making with respect to that action: viz., "general equitable principles". Id. at 585-586.

In discussing the problem of federal judicial remedy presented in the event that this Court holds the Texas law of abortion to be unconstitutional but affirms that the unborn child is a person and has a right to life protected by the constitutional safeguards of the person, amicus suggests that a central focus of a decision about remedy must be the unborn child whose right to life is placed in danger by the federal invalidation of the Texas law. Just as its mother, father, and their physician have, under the hypothesis being here pursued, a constitutional right that serves to move this Court to invalidate the Texas law, so, too, does the unborn child have a constitutional right to life and the State of Texas a right to act to protect that right to life in a reasonable, constitutional manner. It is in this respect that the problem of remedy is a far more complex and urgent one than that presented to this Court in the legislative redistricting cases.

Under this hypothesis, not only must the Court, as in the legislative redistricting cases, act to protect the interest of the persons whose constitutional right it may hold to have been infringed, but also it must act to protect the interest of the person, viz., the unborn child, whose constitutional right to life would otherwise be in-

fringed by persons in the position of the appellants without possibility of recourse by that child and the State of Texas.

Amicus incorporates by reference the argument made under its Point Two, subpoint B, supra, with respect to the issue of unconstitutional delegation of legislative power and the issue of denial of equal protection of laws and makes that argument applicable to the action of the federal courts in not devising a remedy that will adequately safeguard the right to life of the unborn child. The thrust of the argument in Point Two was that the State of Texas had acted reasonably in enacting its law of abortion because it had thereby avoided an unconstitutional delegation of legislative power to private persons and permitting private persons to draw invidious and arbitrary distinctions constituting a denial of equal protection of the laws to unborn children. The thrust of the argument here with respect to these two issues is that the federal courts must design remedies that also avoid these two results. Amicus assumes that the federal courts are subject to limitations in delegating judicial power similar to those under which the Congress operates in delegating legislative power where a constitutional safeguard of the person, and particularly the safeguard of the right to life, is involved. Cf., Eli Lilly & Co. v. Schwegmann Bros. Giant Super Markets, 109 F.Supp. 269 (D.C. La. 1953) affirmed 205 F.2d 788 (C.A. 5, 1953), cert. denied 346 U.S. 856 (1953); United States v. United Mine Workers of America, 330 U.S. 258 (1947).

It is generally recognized that many of the grounds for abortion that have been urged by appellants and by others in their position involve vague judgmatical standards that enter into realms of decision and prediction going well beyond the medical world and its expertise, such as considerations of morals, religion, economic factors, social relationships within the family, number of children, the "socioeconomic state" of the patient, and even legal standards such as the concept of rape and incest. What standards of "rape" and "incest" shall be used? That there are considerable difficulties

in the application of these concepts by the courts is well recognized. There are serious fact-finding problems concerning the actual occurrence of intercourse, the participation by the defendant, and the lack of consent by the affected woman. With respect to incest, there are vast differences in the legal standards adopted in the various states concerning the prohibited relationship, the knowledge that is required concerning the prohibited relationship, and the element of consent.[1] It would seem utterly necessary, if the Texas law of abortion is to be invalidated, that the federal courts set up substantive standards to protect the constitutional right to life of unborn children.

Application of such substantive standards required of federal courts, under this hypothesis, must as a matter of procedural due process be done either by the federal courts or by some adequate tribunal. This Court has recently had occasion to speak of the requirements of due process of law with respect to termination, not of a person's life, but of his or her welfare assistance payments under federally assisted programs in the case of Goldberg v. Kelly, 397 U.S. 254 (1970).

In the Goldberg case the question for decision was whether a state which terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment. The New York statute in question did provide the recipient a "fair hearing" following termination of his public assistance. Prior to termination the statute required only an informal investigation without any provisions for personal appearance of the recipient before the appropriate official, for oral presentation of evidence, or for confrontation and cross-examination of adverse witnesses. This Court held that the New York statute denied recipients of public assistance payments procedural due process of law by virtue of failing to pro-

1 See, Granfield, supra at 188-193.

vide them with an evidentiary hearing prior to the termination of their payments. In the opinion for the Court, Mr. Justice Brennan stated:

"'By hypothesis, a welfare recipient is destitute, without funds or assets. ...Suffice it to say that to cut off a welfare recipient in the face of ... brutal need' without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it. Kelly v. Wyman, 294 F.Supp. 893, 899, 900 (1968).

"The constitutional challenge cannot be answered by an argument that public assistance benefits are 'a privilege' and not a 'right'.

"It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing. But we agree with the District Court that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process. For qualified recipients welfare provides the means to obtain essential food, clothing, housing, and medical care. Thus the crucial factor in this context--a factor not present in the case of the blacklisted governmental contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended--is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.

"Moreover, important governmental interests are

promoted by affording recipients a pre-termination evidentiary hearing. From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. ...We have come to recognize that forces not within the control of the poor contribute to their poverty. ...Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the community. ...The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end." 397 U.S. at 261-3.

In the instant case more than the right to public assistance in the form of medical care for unborn children or assistance for their mothers is involved. It seems clear that the federal courts must, in the absence of a valid state law on abortion, provide or designate a tribunal to consider individual cases of desired abortion and provide for the appointment of a guardian ad litem to protect the life of the unborn child against unwarranted invasion due to the failure to satisfy constitutional criteria for valid abortions. If public assistance, whether of money or medical care, for the mother, including the mother of an unborn child, cannot be terminated without a prior hearing and the opportunity to know the grounds being relied upon for termination and for cross-examination of the social worker involved, it must be even more true that the life of a human person, including that of the unborn child, cannot be terminated validly, at least under standards going beyond the "medical" standards of the State of Texas and District of Columbia statutes, without a hearing of the child through a guardian ad litem before some competent tribunal. All that can be said of the recipient of welfare and his or her dependence upon it is even more true of the unborn child in its mother's womb. The child in the womb also needs "essential food, ...housing, and medical care." Termination of the life of the unborn child also deprives that child "of the very means

by which to live." Also, "(h)is situation becomes immediately desperate." Indeed, the situation for the unborn child becomes much more desperate than for the welfare recipient once the decision to terminate has been made. There is no hope of escape for the unborn child while at least the welfare recipient can hope to escape by some effort of his own or by some unforeseen course of events. Moreover, by requiring a pre-termination hearing "important governmental interests are promoted". "From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders..." including unborn children. By meeting the unborn child's basic demands for life, government generally and the federal courts, in particular, "can help bring within the reach of..." unborn children "the same opportunities that are available to others to participate meaningfully in the life of the community." Ibid.

The application of the Goldberg case rationale to the situation now envisaged is an a fortiori matter, therefore. Indeed, it may well be that the pre-termination hearing required under that rationale will not suffice with respect to the official decision to permit termination of human life by abortion. Under the New York statute the right was accorded to the welfare recipient to a fair hearing after the termination of public assistance to him. But that kind of hearing is not an available or feasible one in the instant situation. The unborn child's life is taken by the termination and not merely his right to welfare assistance. Moreover, it is life and not just public assistance that is at stake. Amicus contends that the abbreviated evidentiary hearing required by Goldberg before termination of public assistance is an insufficient protection of the constitutional right to life of unborn children before termination of that right by action or permission of a competent tribunal. The pre-termination stage is, for the unborn child, the final stage. For this reason, amicus contends that all of the due process requisites, including notice, representation by counsel, evidentiary hearing, trial, and record, must be provided the unborn child at the pre-termination proceeding before abortion is performed.

The reliance placed so far, in this question of procedural due process, upon the Goldberg case must not divert attention from the fact that the whole realm of procedural due process cases, whether involving the criminal or civil procedure in adjudication by courts, the procedure employed by administrative agencies, or the procedure utilized by other official agencies of government, support the position of amicus. It would be a mockery of the very concept of procedural due process to insist upon important procedural safeguards in criminal adjudication and in administrative decision-making in matters involving life, liberty, and property while permitting federal courts, in the situation here hypothesized, to decide upon permitting the termination or destruction of the life of a human being, an unborn child, without requiring the substance of the same important procedural safeguards absent some emergency involving the necessity of acting to save the life of the mother or avoiding a grave peril to her health. Perhaps the matter has been no better stated than by Professor Kenneth Pye:

> "The notion of a national concept of basic justice does not seem too radical for America a century after the Civil War. It is not surprising that the majority of the Court has accepted the argument that the genius of federalism does not require that states be permitted to experiment with the fundamental rights of defendants in criminal cases any more than it permits experimentation with first amendment freedoms. The mere status of being in America should confer protection broad enough to protect any man from the vagaries of a state which by inertia or design fails to keep pace with a national consensus concerning the fundamental rights of the individual in our society."[1]

But if the states cannot be permitted to experiment with the fundamental rights of the individual human person in

1 Kenneth Pye, "The Warren Court and Criminal Procedure," 67 Mich. L. Rev. 249 at 258 (1968).

our society, neither can the federal government be permitted to experiment with those rights, and especially with the right to life of defenseless, innocent unborn children.

As appellants would have it, the federal courts should simply declare the Texas law of abortion unconstitutional and enjoin its further enforcement. The disregard for the sanctity of human life involved in this position is total with respect to unborn children. There is no focus upon the interests of these children. There is left no express standard for judgment which requires either the parents, the federal courts, or any other agency of government, or physicians to consider the interests and welfare of unborn children. On the other hand, the only focus of this position is upon the interests of the mother and the father. The denial of substantive due process to which the present argument is directed is not the invidious discrimination between two human persons, the mother and her unborn child or the unborn child subjected to abortion and the one not so subjected. It is rather the denial of substantive due process involved in the total failure of the appellants and the lower court to take the human person into account whose life is to be destroyed as a result. This type of position and decision-making cannot be permitted. It contains no rational connection between the means selected and the goal pursued. Protection of the health, both physical and mental, of the mother is a legitimate goal of government. It is not a legitimate means of government to destroy the innocent human life of an unborn child in a situation in which that life bears no threat to the life of its mother or a grave peril for her health. Rather the protection of such life is a goal or end of government in free political societies. Before the life of an innocent unborn child can be destroyed as a result of a federal court decision, there must be a sufficient reason for destroying it, if this is to be allowed at all. The reason must be grounded in the nature or situation of the child and the threat it carries, if it so does, to its mother. The threat must be real and not feigned. The threat must be one that cannot be otherwise dealt with

by physicians than by the taking of the life of the unborn child. If the situation is anything short of this, there can be no rational justification for the taking of the life of an innocent unborn child. From the standpoint of substantive due process, the essential vice of the position of appellants and the decision of the lower court, is that it requires no focus upon the interests of the unborn child and whether the child is a threat to the life of or a grave peril to the health of its mother. Because that position and decision is devoid of any regard for the interests of the unborn child, the destruction of whose life they support, they are wholly arbitrary and unreasonable. They fail to insist upon a reason for destroying the life of the unborn child that is sufficient relative to the great interest that is being destroyed and that is grounded upon what is necessary to be done in order to deal with harm to the mother that is being caused by or that is traceable to that child.

The cases that most closely support the above analysis are those that view the infliction of great deprivation upon innocent persons as punishment that cannot be constitutionally justified. If it is not constitutionally permissible to make it a misdeameanor, subject to a mandatory jail term of not less than 90 days, for a person to be addicted to the use of narcotics, surely it is not constitutionally permissible to destroy an innocent unborn child, a human person also, for a reason that is not grounded in the threat to the life or the grave peril to the health of its mother which it presents, but rather for a reason grounded wholly in the interests of the mother unrelated to the interests of the child. See, e.g., Robinson v. California, 370 U.S. 660 (1962). Moreover, if it is not constitutionally permissible to impose expatriation upon a native-born citizen because of war-time desertion from the armed services or for voting in a foreign election, surely it is not constitutionally permissible to expatriate an unborn child from all human society by abortion for a reason that is not grounded in any threat to the life of or grave peril to the health of its mother. See, e.g., Trop v. Dulles, 356 U.S. 86 (1958). These cases were decided in part under the Eighth Amendment as involving cruel and unusual punish-

ment.

The decisions holding that Congress has no power to strip citizens of their citizenship without their consent because of the Fourteenth Amendment regulation of what persons are citizens of the United States are obviously also relevant. See, e.g., Afroyim v. Rusk, 387 U.S. 253.(1967). It is not inappropriate to point out that in the latter case the Court was talking about a person who was born in the United States. The Court specifically observed that Congress had no authority under the Fourteenth Amendment to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship. But if Congress has no such power, how can it constitutionally undercut the effect of birth by decreeing before that event the destruction of the innocent unborn child who, upon birth, would have become a citizen by virtue of the same Constitution. If this Court or Congress could permit or direct this destruction without regard for the interests of the unborn child, they could destroy its right of citizenship, which is not constitutionally permissible. For this reason, it cannot be constitutionally permissible to prevent the unborn child from becoming a citizen by birth except for reasons that can pass muster under the concept of substantive due process.

The substantive due process cases bearing the closest analogy to the instant case are those concerned with the protection of the right to free speech. The right to life is one of the most important, if not the most important of, constitutional rights. The right to free speech is also a very important constitutional right of the person. Under the Fourteenth Amendment Due Process Clause "life"is specifically protect d while free speech is protected under the aegis of "liberty". Of course, the First Amendment protects free speech specifically against federal action and the Fifth Amendment protects life specifically against such action. The point here is that without protection of the life of a person there cannot be any recognition or protection of his right to liberty and to property.

We should say, at least, that the important constitutional right to life should not be less protected than the constitutional right to free speech. Probably, it should receive even greater protection. Yet an examination of the free speech cases indicates that the right to free speech is a highly protected constitutional right. In the earlier cases, the doctrine emerged that "the holding of meetings for peaceable political action cannot be proscribed". De Jonge v. Oregon, 299 U.S. 353, 365 (1937). The right of free speech in this context was an absolute right against government. Even in the context of speech advocating the overthrow of government by unlawful force, Justices Brandeis and Holmes articulated the test of the protection of such speech that was to be given effect in a broad spectrum of cases involving speech:

> "The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. ...the issue (is) whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was so substantial as to justify the stringent restriction interposed by the legislature." Whitney v. California, 274 U.S. 357, 378-379 (1927).

In more recent decades, the degree of the constitutional protection of speech has brought even more stringent standards for its protection by the courts in many contexts. Mr. Justice Black insisted that there is an absolute prohibition against the government awarding damages to a public official in his suit against critics of his official conduct. New York Times v. Sullivan, 376 U.S. 254, 293 (1964). With respect to advocacy of possibly violent political action at a meeting of the Ku Klux Klan, Mr. Justice Douglas took the position that the "clear and present danger" test does not sufficiently protect speech and

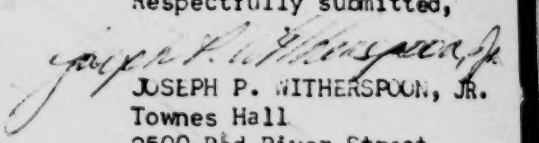
"is not reconciliable with the First Amendment in days of peace. ...I see no place in the regime of the First Amendment for any 'clear and present danger test', whether strict and tight as some would make it, or free-wheeling as the Court in Dennis rephrased it." Brandenburg v. Ohio, 395 U.S. 444, 452, 454 (1969) (dissenting opinion, Mr. Justice Black, concurring).

If there ever was a constitutional right that was entitled to be treated as an "absolute" one, it is the right to life of an innocent person, and especially that of an unborn child. There is good precedent for so holding drawn from the cases protecting the lesser, although highly important, constitutional rights of free speech, freedom of religion, and freedom from law respecting establishment of religion. But at the very least, that protection should not be less than the highest protection accorded under the decided cases to these important rights. In light of these cases no decision can possibly pass constitutional muster under the Due Process Clause of the Fifth Amendment, considered in its substantive aspects, if that decision authorizes the performance of abortions without a consideration of the crucially important interests and rights of the unborn child, without a direction for a response to those interests, and without a requirement that the most compelling and vital interests of government be involved and that the abortion be necessary to accomplish those interests where no reasonable alternative is available.

CONCLUSION

For the reasons stated in this brief and in the brief of the appellee, amicus respectfully urges that this Court reverse the judgment of the three-judge court below insofar as it held unconstitutional the Texas law of abortion and affirm the judgment of that court insofar as it denied injunctive relief. But if this Court affirms the judgment of the three-judge court below insofar as it held unconstitutional the Texas law of abortion, amicus respectfully urges, in the alternative, that this Court provide substantive standards for guiding decision concerning performance of abortions so as to protect the constitutional right to life of the unborn child and provide or direct the resort to a competent tribunal for a hearing in accordance with procedural due process before an abortion going beyond the Texas law of abortion is permitted to be performed.

Respectfully submitted,



JOSEPH P. WITHERSPOON, JR.
Townes Hall
2500 Red River Street
Austin, Texas 78705

October 15, 1971

FILE COPY

Supreme Court, U.S.
FILED
OCT 19 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 70-18, 1971 TERM

JANE ROE, JOHN DOE, MARY DOE, AND
JAMES HUBERT HALLFORD, M.D.
Appellants,

vs.

HENRY WADE
DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS,
Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR APPELLEE

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant

ALFRED WALKER
Executive Assistant

ROBERT C. FLOWERS
Assistant Attorney General

JAY FLOYD
Assistant Attorney General

P. O. Box 12548
Capitol Station
Austin, Texas 78711

Attorneys for Appellee

HENRY WADE
Criminal District Attorney
Dallas County, Texas

JOHN B. TOLLE
Assistant District Attorney

Dallas County Government
Center
Dallas, Texas 75202

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1-5
STATUTES IN ISSUE	5-6
QUESTIONS PRESENTED	6-7
SUMMARY OF ARGUMENT	719
ARGUMENT	
I. Appellants Jane Roe, and John and Mary Doe, have not presented a justiciable controversy in their challenge to the Texas Abortion Laws.	
A. Justiciability and standing	9-11
B. Standing of Appellants John and Mary Doe	11-12
C. Standing of Appellant Jane Roe	12-14
D. Class action aspects	14-16
II. This Court should refuse declaratory and injunctive relief to Appellant James Hubert Hallford, M.D.	16-20
III. The United States District Court did not err in refusing to enjoin future enforcement of the Texas abortion laws after declaring such laws unconstitutional	20-21
IV. This Court can consider plenary review of the entire case when a lower court grants declaratory relief holding a state statute unconstitutional, but refuses to enjoin future enforcement of such statute, and the appeal to this Court is from that portion of the judgment denying injunctive relief	21-23
V. Articles 1191, 1192, 1193, 1194 and 1196 of the Texas Penal Code are not unconstitutional on their face because of overbreath and vagueness	23-25
VI. The Constitution of the United States does not guarantee a woman the right to abort an unborn child.	
A. The interest of marital privacy	26-27
B. Physician–patient relationship	27-28
C. The interest of the woman	28-29
D. The human-ness of the fetus	29-54

TABLE OF CONTENTS (continued)

Page

ARUGMENTS (continued)

VII. The State of Texas has a legitimate interest in prohibiting abortion except by medical advice for the purpose of "saving the life of the mother" 54-77

CONCLUSION 58

CERTIFICATE OF SERVICE 59

AUTHORITIES CITED

CASES:

Adderley v. Florida, 385 U.S. 39 (1967) 24
Aetna Life Insurance Company v. Hayworth 300 U.S. 227 (1937) 9
Alabama Power Company v. Ickes, 302 U.S. 464 (1938) 11
Application of President & Directors of Georgetown, Col., 331 F.2d 100 (D.C. Cir. 1964), cert. denied, 377 U.S. 978 (1964) 28
Atlantic Coast Line R. Co. v. Engineers, 398 U.S. 281 (1970) 18
Atherton Mills v. Johnston, 259 U.S. 13 (1922) 14
Babbitz v. McCann, 310 F.Supp. 293 (E.D. Wis. 1970) 24
Baker v. Carr, 369 U.S. 186 (1962) 9-11
Barsky v. Board of Regents, 347 U.S. 442 (1954) 28
Beal v. Missouri Pacific Railroad Corporation, 312 U.S. 45 (1961) 21
Bell v. Maryland, 378 U.S. 266 (1964) 9
Boyle v. Landry, 401 U.S. 77 (1971) 19
British Transport Commission v. United States, 354 U.S. 129 (1957) 23
Bryan v. Austin, 354 U.S. 933 (1957) 13
Burrows v. Jackson, 346 U.S. 249 (1953) 16, 20
Byrne v. Karalexis, 401 U.S. 216 (1971) 19, 21
Cameron v. Jackson U.S. 611 (1968) 18, 24
City of Greenwood v. Peacock, 384 U.S. 808 (1966) 18
Connally v. General Construction Company, 269 U.S. 385 (1926) 24

TABLE OF CONTENTS (continued)

Page

AUTHORITIES CITED (continued)

Cramp v. Board of Public Instruction, 368 U.S. 278 (1961) 11
Dombrowski v. Pfister, 380 U.S. 479 (1965) 17-18, 21
Douglas v. City of Jeannette, 319 U.S. 157 (1943) 21
Dyson v. Stein, 401 U.S. 200 (1971) 19, 21
Ex Parte Levitt, 302 U.S. 633 (1937) 10
Fairchild v. Hughes, 258 U.S. 126 (1922) 10
Flask v. Cohen, 392 U.S. 83 (1968) 9, 10, 12
Florida Lime and Avocado Growers v. Jacobsen, 362 U.S. 73 (1960) 23
Frothingham v. Mellon, 262 U.S. 447 (1923) 10
Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) 26
Golden v. Zwickler, 394 U.S. 103 (1969) 9, 12, 13, 14, 15, 20
Gray v. State, 178 S.W. 337 (Tex.Crim. 1915) 12
Griswold v. Connecticut, 381 U.S. 479 (1965) 26
Gunn v. University Committee, 399 U.S. 383 (1971) 22
Hall v. Beals, 396 U.S. 45 (1969) 15
Hartford Accident and Indemnity Company v. Southern Pacific Company, 273 U.S. 207 (1927) 23
Jacobson v. Massachusetts, 197 U.S. 11 (1905) 28
Jones v. Jones, 208 Misc. 721, 144 N.Y.S.2d. 820 (Sup.Ct. 1955) 27
Jordan v. De George, 341 U.S. 223 (1951) 25
Just v. Chambers, 312 U.S. 383 (1941) 23
Katz v. United States, 389 U.S. 347 (1967) 29, 56-57
Kelly v. Gregory, 282 App.Div. 542, 125 N.Y.S.2d 696 (1953) 31
Kovacs v. Cooper, 336 U.S. 77 (1949) 57
Lanzetta v. New Jersey, 306 U.S. 451 (1939) 24
Lewis v. United States, 385 U.S. 206 (1966) 29
Local No. 8-6 v. Missouri, 361 U.S. 363 (1960) 14
Mayo v. Lakeland Highlands Canning Co., Inc., 309 U.S. 310 (1940) 21
McGowan v. Maryland, 366 U.S. 420 (1961) 57

TABLE OF CONTENTS (continued)

Page

AUTHORITIES CITED (continued)

Mechling Barge Lines, Inc. v. United States, 368 U.S. 324 (1961) 14
Mitchell v. Donovan, 398 U.S. 427 (1970) 22
National Association for the Advancement of Colored People v. Button, 371 U.S. 415 (1963) 11
Oklahoma Packing Co. v. Oklahoma Gas and Elec. Co., 309 U.S. 4 (1940) 17
Parker v. Ellis, 362 U.S. 574 (1960) 14
People v. Belous, 71 Cal.Rptr. 354, 458 P.2d 194 (1969), cert. denied, 397 U.S. 915 (1970) 23
Perez v. Ledesma, 401 U.S. 82 (1971) 19
Perkins v. Lukens Steel Co., 310 U.S. 113 (1941) 11
Poe v. Ullman, 367 U.S. 497 (1961) 10
Powell v. McCormack, 395 U.S. 486 (1969) 21
Prince v. Massachusetts, 321 U.S. 158 (1944) 26
Public Service Commission of Utah v. Wycoff Company, 344 U.S. 237 (1952) 9, 22
Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964), cert. denied, 377 U.S. 985 (1964) 29
Reynolds v. United States, 98 U.S. 145 (1879) 26
Rosen v. Louisiana State Board of Medical Examiners, 318 F.Supp. 1217 (E.D. La. 1970) 24
Samuels v. Mackell, 401 U.S. 66 (1971) 19, 21
Schmerber v. California, 384 U.S. 757 (1966) 28
Seattle-First National Bank v. Rankin, 59 Wash.2d 288, 367 P.2d 835 (1962) 27
Shaw v. Garrison, 293 F.Supp. 937 (E.D. La. 1968), aff'd per curiam, 393 U.S. 220 (1968) 18
Shaw v. State, 165 S.W. 930 (Tex.Crim. 1914) 12
Skinner v. Oklahoma, 316 U.S. 535 (1942) 56
Spielman Motor Sales Co., Inc. v. Dodge, 295 U.S. 89 (1935) 18, 20
Stefanelli v. Minard, 342 U.S. 117 (1951) 17
Sterling v. Constantin, 287 U.S. 378 (1932) 23
Sylvia v. Gobeille, 101 R.I. 76, 220 A.2d 222 (1966) 27

Page

AUTHORITIES CITED (continued)

Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 118 (1937) ——— 11
Terry v. Ohio, 392 U.S. 1 (1968) ——— 28
Tileston v. Ullman, 318 U.S. 44 (1943) ——— 20
Time v. Hill, 385 U.S. 374 (1967) ——— 26
United Public Workers v. Mitchell, 330 U.S. 75 (1947) ——— 21
United States v. Fruehauf, 365 U.S. 146 (1961) ——— 9
United States v. Petillo, 332 U.S. 1 (1947) ——— 25
United States v. Ragen, 314 U.S. 513 (1942) ——— 25
United States v. Vuitch, 402 U.S. 62 (1971) ——— 8, 25, 55
United States v. Wurzback, 280 U.S. 396 (1930) ——— 25
Wasmuth v. Allen, 14 N.Y.2d 391, 200 N.E.2d 756, 252 N.Y.S.2d 65 (1964), appeal dismissed, 379 U.S. 11 (1964) ——— 28
Younger v. Harris, 401 U.S. 37 (1971) ——— 8, 12, 19, 20, 21
Zwickler v. Koota, 389 U.S. 241 (1967) ——— 21

MEDICAL BIBLIOGRAPHY:

Alexander, D. P.; Britton, H.G.; Nixon, D.A.: *Maintenance Of Sheep Fetuses By An Extra Cororeal Circuit For Periods Up To 24 Hours,* Am. J. Obstet. and Gynec. Vol. 102, No. 7, Dec. 1968, pp. 969-975 ——— 53

Arey, Leslie B.: *Developmental Anatomy,* 6th Ed. Philadelphia W.B. Sounders Co. 1954 Chap. II VI ——— 31, 33, 34, 36, 38, 31, 42, 44, 49

Fetology: *The Smalles Patients. The Sciences,* published by the New York Academy of Sciences, Vol. 8 No. 10, Oct. 1968, pp. 11-15 ——— 53

Flannagan, G.L.: *The First Nine Months Of Life,* Simon and Schuster, 1962 ——— 33, 34, 36, 38, 42, 44, 47, 49, 52

Gairdner, Douglas: *Fetal Medicine*: *Who Is To Practice It,* J. Obstet. and Gynec. Brit. Commonwealth, 75:1123-1124, Dec. 1968 ——— 30, 44, 49, 53

Gesell, Arnold, M.D., Amatruda, C.S., M.D.: *Developmental Diagnosis,* P.S. Hoeber, 1958 pp. 8-9 ——— 42

TABLE OF CONTENTS (continued)

Page

AUTHORITIES CITED (continued)

Gesell, Arnold: *The Embryology of Behavior*, Harper & Bros. Publishers, 1945, Chap. IV, V, VI, X ... 38, 45

Hellegers, Andre, M.D.: *National Symposium On Abortion*, May 15, 1970, Prudential Plaza, Chicago, Illinois ... 53

Hellman, L.M., et al: *Growth And Development To The 20th Week Of Gestation*, Am. J. Obstet. and Gynec. Vol. 103, No. 6, March 15, 1969, pp. 789-800 ... 44

Hooker, Davenport: *Early Human Fetal Behavior With A Preliminary Note On Double Simultaneous Fetal Stimulation*, Proceedings of the Association for Research in Nervous and Mental Disease, Baltimore, The Williams & Wilkins Co., 1954 ... 42, 44

Hooker, Davenport: *The Origin Of Overt Behavior*, Ann Arbor, Univ. of Michigan Press, 1944 ... 42, 44

Hooker, Davenport: *The Prenatal Origin Of Behavior*, Univ. of Kansas Press, 1952 ... 38, 41, 42, 44

Ingelman-Sundberg, Axel, and Wirsen, Cloes: *A Child Is Born: The Drama Of Life Before Birth*, photos by Lennart Nilsson, Del Publishing Co., New York, 1965 ... 31, 34, 38

Liley, Albert W.: *Auckland M.D. To Measure Light And Sound Inside Uterus*, Medical Tribune Report, May 26, 1969 ... 52

Liley, H.M.I., *Modern Motherhood*, Random House, Rev. Ed., 1969 ... 31

Marcel, M.P., and Exchaquet, J.P.: *L'Electrocardiogramme Du Foetus Human Avec Un Cas De Double Rythme Auriculaire Verifie*, Arch. Mal. Couer, Paris 31: 504, 1938 ... 33, 36

Miller, James, R.: *Dermal Ridge Patterns: Technique For Their Study In Human Fetuses*, J. Pediatric, Vol. 73, No. 4, Oct. 1969, pp. 614-616 ... 41

POOR COPY

TABLE OF CONTENTS (continued)

Page

AUTHORITIES CITED (continued)

Patten, Bradley M.: *Human Embryology,* 3rd Ed. McGraw-Hill Book Co. New York, 1968 Chap. VII 31, 34, 36, 38, 41, 44

Petre-Quadens, O., et al: *Sleep In Pregnancy: Evidence Of Fetal Sleep Characteristics,* J. Neurologic Science, 4:600-605, May, June, 1967 49

Potter, Edith: *Pathology Of The Fetus And Infant,* Year Book Publishers, Inc., Chicago, 1961 41

Rugh, Robert, and Shettles, Landrum, B., with Richard N. Einhorn: *From Conception To Birth: The Drama Of Life's Beginnings,* Harper and Row, New York, 1971 ..... 31, 33, 34, 36, 38

Still, J.W.: J. Washington Acad. Sci. 59:46, 1969 ..... 38, 47, 52

Straus, Reuben, et al: *Direct Electrocardiographic Recording Of A Twenty-Three Millimeter Human Embryo,* The American Journal Of Cardiology, September 1961, pp. 443-447 31

Streeter, Geo. L.: *Development Of The Auricle In The Human Embryo,* Contribution to Embryology, Vol. XIII, No. 61, 1921 41

Wood, Carl: *Weightlessness: Its Implications For The Human Fetus,* J. Obstetrics & Gynecology of the British Commonwealth, 1970, Vol. 77, pp. 333-336 52

Zapol, Warren, and Kolobow, Theodore: *Medical World News,* May 30, 1969 53

MISCELLANEOUS:

Prosser on Torts, 3rd Edition, 1964, Chapter 22 28

RULES:

Rule 23, Fed. Rules Civ. Proc. 14, 16

Rule 82, Fed. Rules Civ. Proc. 16

CONSTITUTION OF THE UNITED STATES:

Article III 9, 16

TABLE OF CONTENTS (continued)

Page

AUTHORITIES CITED (continued)

Amendment I ____ 3
Amendment IV ____ 3, 29, 56
Amendment V ____ 3, 56
Amendment IX ____ 3, 5
Amendment XIV ____ 3

TEXAS PENAL CODE:

Article 1191 ____ 1, 5, 7, 23
Article 1192 ____ 1, 6, 7, 23
Article 1193 ____ 1, 6, 7, 23
Article 1194 ____ 1, 6, 7, 23
Article 1196 ____ 1, 6, 7, 18, 23

UNITED STATES CODE:

18 U.S.C. 1461 ____ 55
28 U.S.C. 1253 ____ 4, 22
28 U.S.C. 2281 ____ 20
28 U.S.C. 2283 ____ 4, 17

POOR COPY

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 70-18, 1971 TERM

JANE ROE, JOHN DOE, MARY DOE, AND JAMES HUBERT HALLFORD, M.D.

Appellants,

vs.

HENRY WADE,
DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS

Appellee.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Appellant Jane Roe instituted an action, suing on behalf of herself and all others similarly situated, contending she was an unmarried pregnant female who desired to terminate her pregnancy by "abortion" and that she was unable to secure a legal abortion in the State of Texas because of the prohibitions of the Texas Penal Code, Articles 1191, 1192, 1193, 1194, and 1196.[1] She further contends she cannot *afford* to travel to another jurisdiction to secure a legal abortion.[2]

---

[1]A. 11. (The Statutes in issue are commonly referred to as the Texas Abortion Laws and are set out verbatim, *infra*, at pp. 5-6.

[2]A. 12.

Appellants John and Mary Doe instituted their action, suing on behalf of themselves and all others similarly situated, contending they were a childless married couple and that Appellant Mary Doe's *physician had advised her to avoid pregnancy because of a neural-chemical disorder.*[3] They further contend *their physician has further advised against the use of birth control pills* and, though they are now practicing an alternative method of contraception, *they understand* there is nevertheless a significant risk of contraceptive failure.[4] They contend that *should* Appellant Mary Doe become pregnant, she would want to terminate such pregnancy by abortion and would be unable to do so in the State of Texas because of the above prohibitory statutes.[5]

Appellant James Hubert Hallford, M.D., filed his Application for Leave to Intervene in Appellant Roe's action[6] and his Application was granted.[7] He contends he is in the active practice of medicine and contends the Texas Abortion Laws are a principal deterrent to physicians and patients in their relationship in connection with therapeutic hospital and clinical abortions.[8] Appellant Hallford was under indictment in two (2) cases in Dallas County, Texas, charged with the offense of abortion in violation of the Statutes in issue.[9]

In substance, Appellants contended in their Complaints filed in the lower court that (1) the Texas Abortion Laws are unconstitutionally vague and uncertain on their face,

---

[3]A. 16.
[4]A. 16-17.
[5]A. 17.
[6]A. 22-23.
[7]A. 36.
[8]A. 28.
[9]A. 30. (These cases are still pending).

(2) they deprive a woman of the "fundamental right to choose whether and when to bear children", (3) they infringe upon a woman's right to personal privacy and privacy in the physician-patient relationship, (4) they deprive women and their physicians of rights protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States.[10]

Appellants sought declaratory relief that the Texas Abortion Laws were unconstitutional in violation of the Constitution of the United States and injunctive relief against the future enforcement of such Statutes.[11] They prayed that a three-judge court be convened to hear and determine their causes of action.[12]

Appellee Henry Wade filed his Answer to Appellant Roe's Complaint[13], his Motion to Dismiss the Complaint of Appellants John and Mary Doe[14] and his Answer to Appellant Hallford's Complaint.[15] The State of Texas was granted leave to respond to the Appellants' Complaints and filed its Motion to Dismiss all Complaints and its alternative plea for Judgment on the Pleadings.[16] Both Motions to Dismiss challenged the standing of Appellants John and Mary Doe[17] and the State of Texas' Motion to Dismiss challenged the standing of Appellants Roe and Hallford.[18] In addition, the State of Texas' Motion to Dismiss asserted that Appellants (1) failed to state a claim upon which relief may be granted, (2) failed to raise a

[10]A. 12-13, 19-20, 31-32, 34.
[11]A. 14, 20-21, 34.
[12]A. 13, 20, 34.
[13]A. 37-39.
[14]A. 40-41.
[15]A. 42-46.
[16]A. 47-49.
[17]A. 40, 48.
[18]A. 48.

substantial Constitutional question, (3) failed to show irreparable injury and the absence of an adequate remedy at law, and (4) Appellant Hallford's Complaint was barred by 28 U.S.C. 2283.[19]

In the course of proceeding in the lower court, Appellants filed their Motions for Summary Judgment.[20] In support of Appellant Jane Doe's Motion for Summary Judgment, she filed her affidavit[21] and an affidavit of one Paul Carey Trickett, M.D.[22] Appellant Hallford filed his affidavit in support of his Motion for Summary Judgment[23] and annexed copies of the indictments pending against him.[24]

The cases were consolidated and processed to a hearing before the Honorable Irving L. Goldberg, Circuit Judge, and the Honorable Sarah T. Hughes and W. M. Taylor, Jr., District Judges.[25] Neither the Appellants nor the Appellee offered any evidence at such hearing[26] and arguments were presented by all parties. The Court tendered its Judgment[27] and Opinion[28] on June 17, 1970.

Appellants filed Notice of Appeal to this Court pursuant to the provisions of 28 U.S.C. 1253.[29] Appellants Roe and Hallford and Appellee Wade filed Notice of Appeal to the United States Court of Appeals for the Fifth Circuit.[30]

---

[19]A. 47-48.
[20]A. 50, 59-60.
[21]A. 56-60. (an alias affidavit)
[22]A. 51-55.
[23]A. 61-72.
[24]A. 73, 74.
[25]A. 75-110.
[26]A. 77.
[27]A. 124-126.
[28]A. 111-123.
[29]A. 127-129.
[30]A. 133, 134, 135.

POOR COPY

Appellants filed their Motion to Hold Appeal to Fifth Circuit of Appellee Wade in Abeyance Pending Decision by the Supreme Court of the United States[31], which Motion was granted.[32]

The lower court found that Appellants Roe and Hallford and the *members of their respective classes*[33] had standing to bring their lawsuits, but that Appellants John and Mary Doe had failed to allege facts sufficient to create a present controversy and did not have standing.[34] That court held the Texas Abortion Laws unconstitutional in that they deprived single women and married persons of the right to choose whether to have children in violation of the Ninth Amendment to the Constitution of the United States and that such Laws were void on their face for unconstitutional overbreath and vagueness.[35] The court denied Appellants' applications for injunctive relief.[36]

STATUTES IN ISSUE

The Texas Abortion Laws and the statutes in issue are contained in the Texas Penal Code and consist of the following:

Article 1191. ABORTION

> If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use toward her any violence or means whatsoever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary for not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is

[31] A. 136-138.
[32] A. 139-140. (The Court of Appeals has taken no further action in these cases).
[33] A. 124.
[34] A. 124.
[35] A. 125-126.
[36] A. 126.

meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth shall be caused.

Art. 1192. FURNISHING THE MEANS

Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

Art. 1193. ATTEMPT AT ABORTION

If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means was calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

Art. 1194. MURDER IN PRODUCING ABORTION

If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

Art. 1196. BY MEDICAL ADVICE

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.[37]

QUESTIONS PRESENTED

In Appellee's opinion the questions presented may be precisely stated as follows:

I. WHETHER APPELLANTS JANE ROE, AND JOHN AND MARY DOE, PRESENT A JUSTICIABLE CONTROVERSY IN THEIR CHALLENGE TO THE TEXAS ABORTION LAWS?

II. WHETHER THE COURT SHOULD ENJOIN THE ENFORCEMENT OF THE TEXAS ABORTION LAWS AS TO APPELLANT HALLFORD IN THE LIGHT OF PENDING STATE CRIMINAL CHARGES?

[37]The omitted article, Article 1195, concerns destruction of the vitality or life of a child in a state of being born and before actual birth, which such child would otherwise have been born alive.

POOR COPY

III. DID THE DISTRICT COURT ERR IN REFUSING TO ENJOIN FUTURE ENFORCEMENT OF THE TEXAS ABORTION LAWS AFTER DECLARING SUCH LAWS UNCONSTITUTIONAL?

IV. WHETHER THIS COURT CAN CONSIDER PLENARY REVIEW OF AN ENTIRE CASE WHEN A LOWER COURT GRANTS DECLARATORY RELIEF HOLDING A STATE STATUTE UNCONSTITUTIONAL, BUT REFUSES TO ENJOIN FUTURE ENFORCEMENT OF SUCH STATUTE, AND THE APPEAL TO THIS COURT IS FROM THAT PORTION OF THE JUDGMENT DENYING INJUNCTIVE RELIEF?

V. WHETHER ARTICLES 1191, 1192, 1193, 1194 AND 1196 OF THE TEXAS PENAL CODE ARE VOID ON THEIR FACE BECAUSE OF UNCONSTITUTIONAL OVERBREATH AND VAGUENESS?

VI. WHETHER THE CONSTITUTION OF THE UNITED STATES GUARANTEES A WOMAN THE RIGHT TO ABORT AN UNBORN FETUS?

VII. WHETHER THE STATE OF TEXAS HAS A LEGITIMATE INTEREST IN PREVENTING ABORTION EXCEPT UNDER THE LIMITED EXCEPTION OF "AN ABORTION PROCURED OR ATTEMPTED BY MEDICAL ADVICE FOR THE PURPOSE OF SAVING THE LIFE OF THE MOTHER"?

SUMMARY OF ARGUMENT

Appellant Jane Roe has not presented a justiciable controversy admitting of specific relief for this Court in her challenge to the Texas Abortion Laws. She has not shown that she has sustained or is immediately in danger of sustaining some direct injury as a result of enforcement of the Texas Abortion Laws. Any cause of action that she may have had is not established by the record and has been mooted by the termination of her pregnancy.

Appellants John and Mary Doe's cause of action is based on speculation and conjecture and they also have not

shown they have sustained or are immediately in danger of sustaining some direct injury as a result of enforcement of the Texas Abortion Laws essential to standing and a justiciable controversy.

Appellant Hallford is under indictment in two cases for violation of the statutes he attacks in the controversy before the Court. The Court should abstain from exercising jurisdiction under the principles enunciated in *Younger* v. *Harris*, etc. Appellant Hallford is not entitled to assert a cause of action on behalf of his patients in the physician-patient relationship.

For a federal court to grant injunctive relief against the enforcement of a state statute, there must be a clear and persuasive showing of unconstitutionality and irreparable harm. The lower court can divorce injunctive and declaratory relief under its equity power and declare a statute unconstitutional, yet refuse to enjoin the enforcement of such statute.

Once a federal court has assumed jurisdiction of a cause, it may properly assume jurisdiction of the entire controversy and render a decision on all questions presented and involved in the case. If this Court determines that it has jurisdiction to consider the denial of injunctive relief to Appellants by the lower court, it may consider the constitutionality of the Texas Abortion Laws determined to be unconstitutional by the Court below.

The Texas Abortion Laws are not violative of the Constitution of the United States as being unconstitutionally vague and overboard. *United States v. Vuitch* is decisive of the issues in this case as to vagueness and overbreath.

Though the right of "marital privacy" and "personal privacy" are recognized, they have never been regarded as

absolute. The "right to privacy" is a relative right that, in the matter of abortion, is not attached to an express right guaranteed under the Constitution of the United States. The right to life of the unborn child is superior to the right of privacy of the mother.

The state has a legitimate, if not compelling, interest in prohibiting abortion except under limited circumstances. In the light of recent findings and research in medicine, the fetus is a human being and the state has an interest in the arbitrary and unjustified destruction of this being.

ARGUMENT

I. APPELLANTS JANE ROE, JOHN AND MARY DOE, HAVE NOT PRESENTED A JUSTICIABLE CONTROVERSY IN THEIR CHALLENGE TO THE TEXAS ABORTION LAWS.

A. JUSTICIABILITY AND STANDING.

Article III of the Constitution of the United States limits the judicial power of Federal Courts to "cases" and "controversies". This has been construed by the courts to prohibit the giving of advisory opinions. *Flast v. Cohen*, 392 U.S. 83 (1968); *Bell v. Maryland*, 378 U.S. 226 (1964); *United States v. Fruehauf* 365 U.S. 146, (1961). There must be a real and substantial controversy admitting of specific relief as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. *Aetna Life Insurance Company v. Hayworth*, 300 U.S. 227 (1937); accord, *Public Service Commission of Utah v. Wycoff Company*, 344 U.S. 237 (1952); *Baker v. Carr*, 369 U.S. 186 (1962); *Golden v. Zwickler*, 394 U.S. 103 (1969). Correlatively, a party challenging a statute as invalid must show that he has sustained or is immediately in danger of sustaining some direct injury as a result of the statute's enforcement before a three-judge court or any

Federal court can entertain the action. *Frothingham v. Mellon*[38], 262 U.S. 447 (1923); *Ex parte Levitt*, 302 U.S. 633 (1937); *Fairchild v. Hughes* 258 U.S. 126 (1922); *Poe v. Ullman*, 367 U.S. 497 (1961). In a per curiam opinion this Court stated in *Ex Parte Levitt*:

> "It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action and *it is not sufficient that he has merely a general interest common to all members of the public.*" (Emphasis added). 302 U.S. at 634.

In *Flask v. Cohen*, supra, this Court gave careful consideration to the nexus between *standing* and *justiciability* and stated that "Standing is an aspect of justiciability and, as such, the problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability". 392 U.S. at 98-99. Most probably, the best known decision of this Court on standing is *Frothingham v. Mellon*, supra, in which Mrs. Frothingham claimed that she was a taxpayer of the United States and sued to restrain payments from the Treasury to the several states which chose to participate in a program created by the Maternity Act of 1921. She claimed that the Federal government lacked power to appropriate money for the reduction of maternal and infant mortality, and that such appropriations would cause an unconstitutional increase in her future taxes. After considerations of the interest of an individual taxpayer, remoteness, and other issues, this Court finally stated that its power to declare statutes unconstitutional exists only where the statute is involved in a justiciable case, and that to present such a case the plaintiff "must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining

[38]This case is usually referred to as *Massachusetts v. Mellon.*

some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with the people generally". 262 U.S. at 488. See, *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); *Baker v. Carr*, supra; *National Association for the Advancement of Colored People v. Button*, 371 U.S. 415 (1963).

A review and analysis of the decisions on standing indicate they are not easy to reconcile on the facts. It is frequently stated that to have standing a party must be able to demonstrate injury to a legally protected right or interest. *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1937); *Alabama Power Company v. Ickes*, 302 U.S. 464 (1938); *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

B. STANDING OF APPELLANTS JOHN AND MARY DOE.

Applying the standards of justiciability and standing stated above, an examination of the cause of action asserted by Appellants John and Mary Doe discloses they do not have standing. In their Complaint they contend they are a childless married couple and Mary Doe was not pregnant at that time.[39] Their cause of action is based upon their fear of contraceptive failure resulting in pregnancy to Mary Doe at a time *when they are not properly prepared to accept the responsibilities of parenthood* and upon the *advice of their physician to avoid pregnancy until her health condition improves.*[40] The record is wholly lacking in proof of these contentions. The lower court properly and correctly denied standing to these Appellants upon finding they failed to allege facts sufficient to create a present controversy.[41]

[39]A. 16.
[40]A. 17.
[41]A. 124.

Initially, it may be stated that neither Appellants Doe nor Roe can be prosecuted under the Texas Abortion Laws for securing an abortion or for attempted abortion. *Gray v. State*, 178 S.W. 337 (Tex.Crim. 1915); *Shaw v. State*, 165 S.W. 930 (Tex.Crim. 1914). Appellants John and Mary Doe's cause of action is based upon speculation of future contraceptive failure resulting in pregnancy of Mary Doe and the future speculation that these Appellants will not at that time be prepared for parenthood and, further, that Appellant Mary Doe's health condition at that time will be impaired by pregnancy. These speculative fears cannot support a cause of action. See, *Younger v. Harris*, 401 U.S. 37 (1971); *Golden v. Zwickler*, supra. For a court to decide the merits of Appellants John and Mary Doe's cause of action would result in giving an advisory opinion upon a hypothetical state of facts contrary to Federal Constitutional limitations and this Court's holdings in *Flask v. Cohen*, supra, and cases cited, supra, at p. 9.

C. STANDING OF APPELLANT JANE ROE.

Appellant Jane Roe occupies a more unique position in regard to standing. She filed her Amended Complaint in the District Court on April 22, 1970,[42] and an "alias affidavit" on May 21, 1970.[43] *The only support in the record for her contentions and allegations giving rise to her cause of action is found in her Amended Complaint and her "alias affidavit"*. The affidavit filed after the commencement of her action indicates she did not desire an aboration at the time of its filing.[44] This affidavit further shows that Appellant Roe had been pregnant for several months prior to its

---

[42]A. 10.

[43]A. 56.

[44]"At the time I filed the lawsuit I wanted to terminate my pregnancy by means of an abortion . . ." (A. 57) and "I wanted to terminate my pregnancy because . . ." (A. 57).

BLEED THROUGH POOR COPY

filing.[45] The hearing was held before the three-judge panel on July 22, 1970,[46] some four and one-half (4½) months after the filing of her Original Complaint[47] and on November 3, 1971, some twenty (20) months will have expired since the filing of said Original Complaint. There is no indication in the record that Appellant Jane Roe was pregnant at the time of the hearing on July 22, 1970, and it can be reasonably concluded that she is not now pregnant.[48]

The argument that Appellant Jane Roe has not presented a justiciable controversy to give her standing is not intended to be fictitious or spurious. If her statements in her affidavit did not moot her cause of action, resort may be had to *Golden v. Zwickler,* supra, wherein this Court stated:

> "The District Court erred in holding that Zwickler was entitled to declaratory relief if the elements essential to that relief existed '[w]hen this action was initiated.' The proper inquiry was whether a 'controversy' requisite to relief under the Declaratory Judgment Act existed at the time of the hearing on remand." 394 U.S. at 108.[49]

Golden v. Zwickler indicates that this Court should consider an issue as to standing *at the time* it reviews the case and not when the suit was filed. This is supported to some extent by *Bryan v. Austin.* 354 U.S. 933 (1957), wherein Plaintiffs sought to have a South Caroline statute declared unconstitutional and, pending appeal, the statute in question was repealed. In a per curiam opinion this Court stated that the repeal of the statute in issue after the de-

---

[45]"Each month I am barely able to make ends meet" (A. 58).
[46]A. 77.
[47]Docket Entries in CA-3-3690-B (A. 1).
[48]The Court may desire to take judicial notice of this fact.
[49]This case was reversed and remanded with direction to enter a new judgment dismissing the complaint.

cision of the District Court rendered the cause moot. *Atherton Mills v. Johnston*, 259 U.S. 13 (1922), involved a suit for injunctive relief to prevent the discharge of a minor employee because of the Child Labor Act of 1919, which was challenged as being invalid. While the case was on appeal, the minor employee involved became of age. This Court held that the case became moot by the lapse of time and the case could not be considered by the Court.

Mootness deprives a federal court of its judicial power since no case or controversy exists. *Mechling Barge Lines, Inc., v. United States*, 368 U.S. 3224 (1961); *Local No.8-6 v. Missouri*, 361 U.S. 363 (1960); *Flast v. Cohen*, supra; *Parker v. Ellis*, 362 U.S. 574 (1960).

D. CLASS ACTION ASPECTS.

It is questionable whether the requirements of Rule 23, Fed. Rules Civ. Proc., have been complied with in connection with Appellants Roe and John and Mary Doe's attempt to bring their suits as class actions. These Appellants have alleged the prerequisites required in Rule 23 (a),[50] but have not designated whether their actions are (b) (1) or (b) (2) actions under Rule 23. Again, the record is wholly void of any showing of the propriety of class action relief and the only other mention of this aspect of the case is found in the lower court's judgment as follows:

> "(1) Plaintiff Jane Roe, plaintiff-intervenor James Hubert Hallford, M.D. and the members of their respective classes have standing to bring this lawsuit." (A. 124).[51]

---

[50]A. 12, 19.

[51]Appellant Hallford's Complaint makes no mention of class action relief. (A. 24-35).

POOR COPY
BLEED THROUGH

The 1966 amendments to Rule 23 require the judgment in a (b) (1) or (b) (2) class action to include and describe those whom the court finds to be members of the class. In a Rule 23 (b) (3) class action the 1966 amendments require the judgment include and specify or describe those to whom notice was directed, as required by Rule 23 (c) (2), and who have not requested exclusion, and who are found by the court to be members of the class.

In *Hall v. Beals*, 396 U.S. 45 (1969), this Court had before it on direct appeal a case involving new residents of the State of Colorado, who had moved into the State four (4) or five (5) months prior to the November, 1968, presidential election. They were refused permission to vote because of a Colorado statute imposing a six (6) months residency requirement. They commenced a suit as a class action challenging the constitutionality of the statute. A three-judge court upheld the constitutionality of the statute. Thereafter, the election was held, and the State statute was amended to reduce the residency requirement for a presidential election to two (2) months. This Court, in a per curiam opinion, held that, aside from the fact that the election had been held, the case was rendered moot by the amendment to the statute that reduced the residency requirement to two (2) months, and under which the Appellants could vote, since the case had lost its character as a present, live controversy, notwithstanding that the Appellants had denominated their suit as a class action and had expressed opposition to residency requirements in general. In *Golden v. Zwickler*, supra, a distributor of anonymous handbills criticizing a congressman's voting record sought a declaratory judgment concerning the constitutionality of a New York statute which penalized the distributor of anonymous literature in connection with an election campaign. While the case was pending, the congressman left the House of Representatives and ac-

cepted a term as a justice on the Supreme Court of New York. The United States District Court held that the distributor was nevertheless entitled to a declaratory judgment because a genuine controversy had existed at the commencement of the action. This Court held there was no "controversy" of "sufficient immediacy and reality" to warrant a declaratory judgment and, in addition, stated as follows:

> "It is not enough to say, as did the District Court, that nevertheless Zwickler has a 'further and far broader right to a general adjudication of unconstitutionality . . . [in] [h]is *own interest as well as that of others* who would with like anonymity practise free speech in a political environment . . . .' The constitutional question, First Amendment or otherwise, must be presented in the context of a specific live grievance." (Emphasis added). 394 U.S. at 118.

See, *Burrows v. Jackson*, 346 U.S. 249 (1953).

The Federal Constitution limitations in Article III cannot be extended or limited by asserting a "class action" under Rule 23. Rule 82, Fed. Rules Civ. Proc., in referring to the preceding rules, including Rule 23, provides in part that "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. . . ."

II. THIS COURT SHOULD REFUSE DECLARATORY AND INJUNCTIVE RELIEF TO APPELLANT JAMES HUBERT HALLFORD, M.D.

In Indictment No. 2023 A, Appellant James Hubert Hallford stands charged by the State of Texas with performing an abortion on Frances C. King,[52] and in Indictment No. 556 J with performing an abortion on Jane Wilhelm.[53] He sought and obtained leave to intervene in

[52]A. 73.
[53]A. 74.

POOR COPY

Appellant Roe's action[54] seeking a permanent injunction against the enforcement of the Texas Abortion Laws,[55] but reserving a right to make an application for an interlocutory injunction.[56] In reality, Appellant Hallford is seeking to avoid criminal prosecution in the criminal cases pending against him.

Historically there has been great reluctance by the federal courts to interfere in the operations of a state court. *Stefanelli v. Minard*, 342 U.S. 117 (1951). General principles should be enough to show that an independent federal action is not an appropriate means to raise what should be a state court defense, but this does not stand alone. A statute almost as old as the Republic, the Anti-Injunction Act of 1793, has, with some variations in language over the years, provided that a court of the United States "may not grant an injunction to stay proceedings in a State court . . ." 28 U.S.C. 2283. This statute is no happenstance. It is a "limitation of the power of federal courts dating almost from the beginning of our history and expressing an important Congressional policy—to prevent friction between state and federal courts." *Oklahoma Packing Co. v. Oklahoma & Elec. Co.*, 309 U.S. 4 (1940).

Appellant Hallford's Complaint allegations do not justify the conclusion that any criminal charges have been brought against him in bad faith or under any conditions that would place his case within *Dombrowski's* "special circumstances". *Dombrowski v. Pfister*, 380 U.S. 479 (1965.) There is no relationship worthy of note in the allegations contained in Paragraph 14 of this Complaint[57] to *Dom-*

[54]A. 22, 36.
[55]A. 34.
[56]A. 34 (it is submitted that Appellate Hallford reserved this right in the event the pending cases were set for trial).
[57]A. 30.

browski's "special circumstances". He appears to indicate that the State of Texas must negate the exception provided in Article 1196, supra,[18] and that he cannot offer medical testimony to bring him within the purview of the exception.

In *Atlantic Coast Line R. Co. v. Engineers*, 398 U.S. 281 (1970), the railroad obtained a state injunction against a union's picketing and the union sought and obtained in the Federal District Court an injunction against the enforcement of the state court injunction. The Court of Appeals for the Fifth Circuit affirmed the Federal District Court's judgment and, on certiorari, this Court reversed and remanded stating as follows:

> "First, a federal court does not have inherent power to ignore the limitations of Section 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear. This rule applies regardless of whether the federal court itself has jurisdiction over the controversy, or whether it is ousted from jurisdiction for the same reason that the state court is." (Omitting authority). 398 U.S. at 294-295.

The above principle of federal abstention is further enunciated in *Spielman Motor Sales Co., Inc., v. Dodge*, 295 U.S. 89 (1935); *Cameron v. Johnson*, 390 U.S. 611 (1968); *Shaw v. Garrison*, 293 F.Supp. 937 (E.D.La. 1968), aff'd per curiam, 393 U.S. 220 (1968); *City of Greenwood v. Peacock*, 384 U.S. 808 (1966).

More recently, this Court has announced certain guidelines on the subject of federal court interference with

---

[18]See Article 1196, supra, at p. 6 containing the exception "procured or attempted by medical advice for the purpose of saving the life of the mother."

BLEED THROUGH POOR COPY

pending state criminal proceedings in what is sometimes referred to as the "February 23rd Decisions". *Younger v. Harris*, supra, *Samuels v. Mackell*, 401 U.S. 66 (1971); *Boyle v. Landry*, 401 U.S. 77 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Byrne v. Karalexis*, 401 U.S. 216 (1971). These cases very strongly indicate the availability of federal injunctive relief against pending state criminal prosecutions has been severely curtailed even in the area of First Amendment rights of expression. Thus, federal interference, even to the extent of granting preliminary restraining orders and convening three-judge courts is by far the exception rather than the rule.

The above cases further indicate that, independent of any obstacles posed by the federal anti-injunction statute, the primary prerequisite to federal court intervention in the present context, is a showing of irreparable injury. Even irreparable injury is insufficient unless it is "both great and immediate". In *Younger v. Harris*, supra, this Court stated as follows:

> "Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term. Instead, the threat to the Plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." 401 U.S. at 46.

Accord, *Byrne v. Karalexis*, supra.

Samuels v. Mackell, supra, considered declaratory relief prayed for in relation to the federal court's reluctance to interfere with pending state criminal proceedings and this Court stated:

> "We therefore hold that, in cases where the state criminal prosecution was begun prior to the federal suit, same equitable principles relevant to the propriety of an injunction must be

taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and that *where an injunction would be impermissible under these principles, declaratory relief should be denied as well* . . . . Ordinarily, however, the practical effect of the two forms of relief will be virtually identical, and the basic policy against federal interference with pending state criminal prosecutions will be frustrated as much by a declaratory judgment as it would be by an injunction." (Emphasis added). 401 U.S. at 73.

Nor can Appellant rely upon his patients' rights, which a statute supposedly threatens. See *Tileston v. Ullman*, 318 U.S. 44 (1943); accord, *Golden v. Zwicker*, supra; *Burrows v. Jackson*, supra.

Applying the guidelines set forth in *Younger v. Harris*, supra, and the other "February 23rd Decisions", this Court can properly conclude Appellant Hallford has not suffered, nor under the present state of the record, will suffer both great and immediate irreparable injury of the nature required to authorize federal injunctive or declaratory relief. His case is precisely the type to which this Court was addressing itself in the recent pronouncements condemning, except in very limited circumstances, federal court equitable injunctive and declaratory interference with pending state criminal prosecutions.

III. THE UNITED STATES DISTRICT COURT DID NOT ERR IN REFUSING TO ENJOIN FUTURE ENFORCEMENT OF THE TEXAS ABORTON LAWS AFTER DECLARING SUCH LAWS UNCONSTITUTIONAL.

This Court has been unwaivering in holding that a three-judge court cannot consider an action for injunctive relief under 28 U.S.C. 2281 on its merits without a preliminary showing of irreparable harm and no adequate legal remedy. In *Spielman Motor Sales Co. Inc., v. Dodge*, supra, a suit requesting a three-judge court to enjoin a New York district attorney from instituting criminal prosecutions against certain defendants under an alleged uncon-

BLEED THROUGH POOR COPY

stitutional state statute, this court affirmed the lower court's dismissal of the action and stated:

> "The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. . . . To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights." 295 U.S. at 95.

In *Mayo v. Lakeland Highlands Canning Co., Inc.*, 309 U.S. 310 (1940), a suit was brought before a three-judge court seeking to enjoin the Florida Agriculture Commission from enforcing an alleged unconstitutional state statute. This Court reversed the lower court's disposition on the merits and made the following observation:

> "The legislation requiring the convening of a court of three judges in cases such as this was intended to insure that the enforcement of a challenged statute should not be suspended by injunction except upon a clear and persuasive showing of unconstitutionality and irreparable injury." 309 U.S. at 318-319.

Accord, *Beal v. Missouri Pacific Railroad Corporation*, 312 U.S. 45 (1961); *Douglas v. City of Jeannette*, 319 U.S. 157 (1943); *Bryne v. Karalexis*, supra; *Dyson v. Stein*, supra; *Samuels v. Mackell*, supra; *Younger v. Harris*, supra.

The lower court cited *Dombrowski v. Pfister*, supra, and *Zwickler v. Koota*, 389 U.S. 241 (1967), as authority for the court to divorce injunctive and declaratory relief.[59] In *Powell v. McCormack*, 395 U.S. 486 (1969), this Court held that a court may grant declaratory relief even though it chooses not to issue an injunction or mandamus. 395 U.S. at 504. See, *United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

IV. THIS COURT CAN CONSIDER PLENARY REVIEW OF THE ENTIRE CASE WHEN A LOWER COURT

[59]A. 121, 122.

GRANTS DECLARATORY RELIEF HOLDING A STATE STATUTE UNCONSTITUTIONAL, BUT REFUSES TO ENJOIN FUTURE ENFORCEMENT OF SUCH STATUTE, AND THE APPEAL TO THIS COURT IS FROM THAT PORTION OF THE JUDGMENT DENYING INJUNCTIVE RELIEF.

Should this Court determine that it has jurisdiction to consider the propriety of injunctive relief in this case, it can properly assume jurisdiction of this entire controversy and render a decision on all questions involved in this case, including the constitutionality of the Texas Abortion Laws. Appellee joins Appellants in requesting this Court reach the issue of the Constitutionality of the Texas Abortion Laws. Appellee is in a somewhat awkward procedural position in that it lost on the merits in the lower court as to declaratory relief and neither the grant nor the refusal of a declaratory judgment, without more, will support a direct appeal to this Court under 28 U.S.C. 1253. *Mitchell v. Donovan*, 398 U.S. 427 (1970); *Gunn v. University Committee*, 399 U.S. 383 (1971). Appellee has the avenue of appeal to the Fifth Circuit.[60] Should this Court in the present case hold that the lower court properly granted declaratory relief but improperly denied injunctive relief, it then might be faced, at least indirectly, with the consideration and decision of the same constitutional issues that are being directly raised by the Appellee in the Court of Appeals for the Fifth Circuit.

Though not directly in point, *Public Service Commission of Utah v. Wycoff Co.*, supra, lends support to the premise that a federal court has the right, power, and authority to decide and determine the entire controversy and all the issues and questions involved in a case of which it has

[60]Appellee has appealed to the United States Court of Appeals for the Fifth Circuit (A. 135) and this appeal is being held in abeyance pending a decision of this Court (A. 139-140).

properly acquired jurisdiction. Accord, *Just v. Chambers*, 312 U.S. 383 (1941); *Florida Lime and Avocado Growers v. Jacobson*, 362 U.S. 73 (1960); cf, *Hartford Accident & Indemnity Company v. Southern Pacific Company*, 273 U.S. 207 (1927); *British Transport Commission v. United States*, 354 U.S. 129 (1957). In *Sterling v. Constantin*, 287 U.S. 378 (1932); this Court stated that:

> "As the validity of provisions of the state constitution and statutes, if they could be deemed to authorize the action of the Governor, was challenged, the application for injunction was properly heard by three judges. Stratton v. St. Louis S. W. R. Co., 282 U.S. 10, 75 L. ed. 135, 51 S. Ct. 8. The jurisdiction of the District Court so constituted, and of this Court upon appeal, extends to every question involved, whether of state or federal law, and enables the *court to rest its judgment on the decisions of such of the questions as in its opinion effectively dispose of the case." (Omitting authority). 287 U.S. at 393-394.

V. ARTICLES 1191, 1192, 1193, 1194 AND 1196 OF THE TEXAS PENAL CODE ARE NOT UNCONSTITUTIONAL ON THEIR FACE BECAUSE OF OVERBREATH AND VAGUENESS.

The possible vagueness of state abortion statutes which allow for such a procedure only when the life, or in some cases, health, of the expectant mother is threatened has recently come under judicial scrutiny in a number of instances. One author, in commenting on the decision of the California Supreme Court in *People v. Belous*, 71 Cal. Rptr. 354, 458 P.2d 194 (1969), cert. denied, 397 U.S. 915 (1970), stated as follows:

> "In attempting to define the phrase 'necessary to preserve . . . life . . .' the California Supreme Court first examined the isolated words of the statute, and concluded that no clear meaning of 'necessary' and 'preserve' could be ascertained. It is not surprising that a seriatim examination of the words convinced the court that the phrase was vague. Necessity is a relative concept and must refer to a particular object to be meaningful. Nor can the word 'preserve' be understood out of context. In

> the abstract, such words are not just vague, they are meaningless. Taken in context, however, these words do have meaning. The object of the necessity in this statute is 'to preserve life.' The term is defined by its object—life." 118 U. Penn. L. Rev. 643, 644 (1970).

There is some inherent vagueness in many homicide laws, such as laws which define justifiable homicide as self-defense, or those which differentiate between first- and second-degree murder. The courts, like society, however, have learned to live with a certain element of inevitable vagueness in all laws and have learned to apply it reasonably. See, *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Connally v. General Construction Company*, 269 U.S. 385 (1926). In order for a statute to be unconstitutionally vague, it must be so vague and lacking in standards so as to compel men of ordinary intelligence to guess at its meaning. *Adderley v. Florida*, 385 U.S. 39 (1967); *Cameron v. Johnson*, supra.

A number of three-judge panels have been convened recently to consider the constitutionality of abortion laws which allowed for the performance of such operations only when the life of the mother was threatened by continuance of the pregnancy. While one such court, in dealing with such a law in Wisconsin, did hold the statute to be unconstitutional on other grounds, it said that whatever vagueness existed in the law was not sufficient, of itself, for a declaration of unconstitutionality. *Babbitz v. McCann*, 310 F.Supp. 293 (E.D. Wis. 1970). The court observed:

> "We have examined the challenged phraseology and are persuaded that it is not indefinite or vague. In our opinion, the word 'necessary' and the expression 'to save the life of the mother' are both reasonably comprehensible in their meaning." 310 F.Supp. at 297.

Accord, *Rosen v. Louisiana State Board of Medical Examiners*, 318 F. Supp. 1217 (E.D. La. 1970).

In *United States v. Petrillo*, 332 U.S. 1 (1947), this Court stated:

> "There may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense, Robinson v. United States, 324 US 282, 285, 286, 89 L.ed 944, 946, 947, 65 S Ct 666. It would strain the requirement for certainty in criminal law standards too near the breaking point to say that it was impossibly judicially to determine whether a person knew when he was wilfully attempting to compel another to hire unneeded employees. (Omitting authority). 332 U.S. at 7-8.

See *Jordan v. DeGeorge*, 341 U.S. 223 (1951); *United States v. Ragen*, 314 U.S. 513 (1942); *United States v. Wurzback*, 280 U.S. 396 (1930).

The court below did not have the advantage of this Court's decision in *United States v. Vuitch*, 402 U.S. 62 (1971), at the time it handed down its decision in this case. In *Vuitch* this Court reversed the decision of a district court judge who had found that the District of Columbia abortion law was unconstitutionally vague. The exception clause in *Vuitch* stated in part "unless the same were done as necessary for the preservation of the mother's life or health".[61] Though this Court directed its attention to the word "health", its holding should be dispositive of the case at bar in that the exception clause is less certain of meaning than the exception found in the Texas Abortion Laws. This Court in *Vuitch* further disposed of the contention of the physician that once an abortion is performed he is "presumed guilty".

VI. THE CONSTITUTION OF THE UNITED STATES DOES NOT GUARANTEE A WOMAN THE RIGHT TO ABORT AN UNBORN FETUS.

[61] 22 D C Code 201

A. THE INTEREST OF MARITAL PRIVACY.

One must recognize the interest of a husband and w
in preserving their conjugal relations from state int
ference, an interest which, in *Griswold v. Connecti*
381 U.S. 479 (1965), was found to be violated by C
necticut's statute forbidding the use of contraceptives. T
law interfered with the most private aspect of the mar
relation, sexual intercourse, making it criminal for a cou
to engage in sexual intercourse when using contracepti
In contrast, the usual statute restricting abortions does
affect the sexual relations of a couple except under so
circumstances and only for a limited time. Prevention
abortion does not entail, therefore, state interference w
the right of marital intercourse, nor does enforcement
the statute requiring invasions of the conjugal bedro

Assuming arguendo that there are other marital rig
the state must respect, may it then be urged that the ri
of marital privacy includes the freedom of a married cou
to raise and educate a child they do not want, or com
infanticide, incest, engage in pandering and the l
Family privacy, like personal privacy, is highly valued,
not absolute. The news media may publicize the eve
that occur when a family is victimized by criminals thou
they seek seclusion. *Time v. Hill*, 385 U.S. 374 (1967). T
family may not practice polygamy,[62] may not proh
schooling for a child,[63] or prohibit the child's labor,[64] or
pose the community or a child to communicable diseas
In *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (196
the unborn child's right to live came into conflict w
family privacy. The Gleitmans contended that their do

[62] *Reynolds v. United States*, 98 U.S. 145 (1879).
[63] *Prince v. Massachusetts*, 321 U.S. 158 (1944).
[64] Id.
[65] Id.

POOR COPY

failed to warn that Mrs. Gleitman was suffering from German measles and this failure deprived the family of the opportunity of terminating the pregnancy. They alleged the child was born with grave defects as a result of the doctor's omission. The court stated as follows:

> "The right to life is inalienable in our society. . . .
>
> We are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of the single human life is the decisive factor in this suit in tort. Eugenic considerations are not controlling. We are not talking here about the breeding of prize cattle. It may have been easier for the mother and less expensive for the father to have terminated the life of their child while he was an embryo, but these alleged detriments cannot stand against the preciousness of a single human life to support a remedy in tort." 227 A.2d at 693.

B. PHYSICIAN–PATIENT RELATIONSHIP.

Proponents of abortion-on-demand assert that anti- abortion laws unlawfully intrude into the privacy of the physician-patient relationship. They assume necessarily that the doctor treating a pregnancy owes an obligation of good medical care to only one patient, the pregnant woman. In *Jones v. Jones,* 208 Misc. 721, 144 N.Y.S.2d 820 (Sup.Ct. 1955), the court stated (concerning an unborn child) as follows:

> ". . . became a patient of the mother's obstetrician, as well as the mother herself. In so holding, I can think of the infant as a third-party beneficiary of the mother-doctor contract or perhaps a principal for whom the mother acted as agent." 144 N.Y.S.2d at 826.

As a patient of the obstetrician, the child may recover damages for a prenatal injury suffered as the result of the negligence of his doctor. *Sylvia v. Gobeille,* 101 R.I. 76, 220 A.2d 222 (1966); *Seattle-First National Bank v. Rankin,* 59 Wash. 2d 288, 367 P.2d 835 (1962). It is elemental that a doctor cannot be freed from legal restraints in making socio-moral judgments. The state may regulate

the medical profession to protect the health and welfare of all its citizens. See *Wasmuth v. Allen*, 14 N.Y.2d 391, 200 N.E.2d 756, 252 N.Y.S.2d 65 (1964), appeal dismissed, 379 U.S. 11 (1964); *Barsky v. Board of Regents*, 347 U.S. 442 (1954). Appellants' contentions of intrusion upon physician-patient relationship are not self-sustaining and must be associated with and connected to a violation of some basic right.

C. THE INTERESTS OF THE WOMAN.

Personal privacy is an exalted right but, as in marital privacy, it has never been regarded as absolute. A person may be subjected to a "stop and frisk" though it constitutes an intrusion upon his person,[66] or a person may be required to submit to a vaccination,[67] and a blood sample may forcibly be extracted from the body of an individual arrested for suspicion of driving while intoxicated.[68] A woman has been required to submit to a blood transfusion necessary to preserve her life in order that her small child shall not be left without a mother.[69] The "right of privacy" is a highly cherished right—however one which is nowhere expressly mentioned in the Constitution of the United States or its amendments. Numerous examples in tort and criminal law indicate the right to privacy is a relative right.[70] A woman cannot in privacy, even though she harm no other person, legally utilize or even possess certain forbidden drugs, such as LSD or herion. The right to privacy was considered a mere relative right by the framers of the Constitution. Had they not considered the right to

---

[66] *Terry v. Ohio*, 392 U.S. 1 (1968).

[67] *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

[68] *Schmerber v. California*, 384 U.S. 757 (1966).

[69] *Application of President and Directors of Georgetown, Col.*, 331 F.2d 1000 (D.C. Cir. 1964), cert. denied, 377 U.S. 978 (1964).

[70] See Tort Law limitations on the Right of Privacy as outlined in *Prosser on Torts*, 3rd Edition, 1964, Chapter 22.

privacy a mere relative right, they would have carefully defined additional protection for the small portion of the right to privacy protected by the guarantee against unreasonable search and seizure. In *Katz v. United States*, 389 U.S. 347 (1967), referring to searches and seizures, stated that the Fourth Amendment to the Constitution of the United States cannot be translated into a general constitutional "right of privacy". See, *Lewis v. United States*, 385 U.S. 206 (1966).

When the "right of privacy" is attached to an "express right" such as the "right of freedom of religion" a very strong constitutional basis exists for upholding the "right"—except when in conflict with the most basic and fundamental of all rights—the "right to life". In *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421, 201 A.2d 537 (1964), cert. denied, 377 U.S. 985 (1964), the New Jersey Supreme Court was asked to decide just such an issue—a conflict between the mother's privacy and the life of the unborn child. The issue was whether the rights of a child *in utero* were violated by the pregnant woman's refusal on religious grounds to submit to a blood transfusion necessary to preserve the lives of both the mother and the unborn child. The Court's finding favored the right to life of the unborn child over the pregnant woman's freedom of religion and stated:

> "The blood transfusions (including transfusions made necessary by the delivery) may be administered if necessary to save her life or the life of the child, as the physician in charge at the time may determine." 201 A.2d at 538.

D. THE HUMAN-NESS OF THE FETUS.

The crux of the moral and legal debate over abortion is, in essence, the right of the woman to determine whether or not she should bear a particular child versus the right of the child to life. The proponents of liberalization of abortion laws speak of the fetus as "a blob of protoplasm" and

feel it has no right to life until it has reached a certain stage of development.[71] On the other hand, the opponents of liberalization maintain the fetus is human from the time of conception, and so interruption of pregnancy cannot be justified from the time of fertilization. It most certainly seems logical that from the stage of differentiation, after which neither twinning nor re-combination will occur, the fetus implanted in the uterine wall deserves respect as a human life. If we take the definition of life as being said to be present when an organism shows evidence of individual animate existence, then from the blastocyst stage the fetus qualifies for respect. It is alive because it has the ability to reproduce dying cells. It is human because it can be distinguished from other non-human species, and once implanted in the uterine wall it requires only nutrition and time to develop into one of us.

The recent recognition of autonomy of the unborn child has led to the development of new medical specialties concerning the unborn child from the earliest stages of the pregnancy.[72]* Modern obstetrics has discarded the unscientific the concept that the child in the womb is but tissue of the mother. Dr. Liley, the New Zealand pediatrician, who perfected the intrauterine transfusion, has said:

> "Another medical fallacy that modern obstetrics discards is the idea that the pregnant woman can be treated as a patient alone. No problem in fetal health or disease can any longer be considered in isolation. At the very least two people are involv-

---

[71]This is given variously as from 12 weeks to 28 weeks of intrauterine life, and some apparently feel it has no life at all until after full-term delivery.

[72]Gairdner, Douglas: *Fetal Medicine: Who Is To Practice It,* J. Obstet. and Gynec. Brit. Commonwealth, 75:1123-1124, Dec. 1968.

*The citations in this and the following are according to Medical Journal Practice.

ed, the mother and her child." Liley, H.M.I.: *Modern Motherhood*, Random House, Rev. Ed. 1969.

Yet the attack on the Texas statute assumes this discredited scientific concept and argues that abortions should be considered no differently than any medical measure taken to protect maternal health, (see appellant's brief pp. 94-98) thus completely ignoring the developing human being in the mother's womb.

The court has also abandoned that concept in *Kelly v. Gregory*, 282 App.Div. 542, 125 N.Y.S.2d 696 (1953), wherein the court stated:

> "We ought to be safe in this respect in saying that legal separability should begin where there is biological separability. We know something more of the actual process of conception and fetal development now than when some of the common law cases were decided; and what we know makes it possible to demonstrate clearly that separability begins at conception.
>
> "The mother's biological contribution from conception on is nourishment and protection; but the fetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe the conditions under which life will not continue." 125 N.Y.S.2d at 697.

It is our task in the next subsections to show how clearly and conclusively modern science—embryology, fetology, genetics, perinatology, all of biology—establishes the humanity of the unborn child. We submit that the data not only shows the constitutionality of the Texas legislature's effort to save the unborn from indiscriminate extermination, *but in fact suggests a duty to do so*. We submit also that no physician who understands this will argue that the law is vague, uncertain or overbroad for he will understand that the law calls upon him to exercise his art for the benefit of his *two patients*: mother *and* child.

From conception the child is a complex, dynamic, rapidly growing organism. By a natural and continuous process the single fertilized ovum will, over approximately nine months, develop into the trillions of cells of the newborn. The natural end of the sperm and ovum is death unless fertilization occurs. At fertilization a new and unique being is created which, although receiving one-half of its chromosomes from each patient, it really unlike either.[73]

About seven to nine days after conception, when there are already several hundred cells of the new individual formed, contact with the uterus is made and implantation begins. Blood cells begin at 17 days and a heart as early as 18 days. This embryonic heart which begins as a simple tube starts irregular pulsations at 24 days, which, in about one week, smooth into a rythmic contraction and expansion.[74] It has been shown that the ECG on a 23 mm embryo (7.5 weeks) presents the existence of a functionally complete cardiac system and the possible existence of a myoneurol or humoral regulatory mechanism. All the classic elements of the adult ECG were seen.[75] Occasional contractions of the heart in a 6 mm (2 week) embryo have been

---

[73]Ingleman-Sundberg, Axel, and Wirsen, Cloes: *A Child Is Born: The Drama Of Life Before Birth,* photos by Lennart Nilsson, Dell Publishing Co., New York, 1965.

Arey, Leslie B.: *Developmental Anatomy,* 6th Ed. Philadelphia W. B. Saunders Co. 1954 Chap. II VI.

Patten, Bradley M.: *Human Embryology,* 3rd Ed. McGraw-Hill Book Co. New York, 1968 Chap. VII.

[74]Ingelman-Sundberg, Axel, and Wirsen, Cloes: *A Child Is Born: The Drama Of Life Before Birth,* supra.

[75]Arey, Leslie B.: *Developmental Anatomy,* supra.

Patten, Bradley M.: *Human Embryology,* supra.

Rugh, Robert, and Shettles, Landrum B., with Richard N. Einhorn: *From Conception To Birth: The Drama Of Life's Beginnings,* Harper and Row, New York 1971.

Straus, Reuben, et al: *Direct Electrocardiographic Recording Of A Twenty-Three Millimeter Human Embryo,* The American Journal of Cardiology, September 1961, pp. 443-447.

observed as well as tracings exhibiting the classical elements of the ECG tracing of an adult in a 15 mm embryo (5 weeks).[76]

Commencing at 18 days the developmental emphasis is on the nervous system even though other vital organs, such as the heart, are commencing development at the same time. Such early development is necessary since the nervous system integrates the action of all other systems. By the end of the 20th day the foundation of the child's brain, spinal cord and entire nervous system will have been established. By the 6th week after conception this system will have developed so well that it is controlling movements of the baby's muscles, even though the woman may not be aware that she is pregnant. By the 33rd day the cerebral cortex, that part of the central nervous system that governs motor activity as well as intellect may be seen.[77]

The baby's eyes begin to form at 19 days. By the end of the first month the foundation of the brain, spinal cord, nerves and sense organs is completely formed. By 28 days the embryo has the building blocks for 40 pairs of muscles situated from the base of its skull to the lower end of its spinal column. By the end of the first month the child has completed the period of relatively greatest size increase and the greatest physical change of a lifetime. He or she is ten thousand times larger than the fertilized egg and will increase its weight six billion times by birth, having in only

---

[76]Marcel, M.P., and Exchaquet, J.P.: *L'Electrocardiogramme Du Foetus Human Avec Un Cas De Double Rythme Auriculaire Verifie*, Arch. Mal. Couer, Paris 31: 504, 1938.

[77]Arey, Leslie B.: *Developmental Anatomy*, supra.

Rugh, Robert, and Shettles, Landrum B., with Richard N. Einhorn: *From Conception To Birth: The Drama Of Life's Beginnings*, supra.

Flannagan, G.L.: *The First Nine Months Of Life*, Simon and Schuster, 1962.

the first month gone from the one cell state to millions of cells."[78] [See Fig. 1.]

Shettles and Rugh describe this first month of development as follows:

> "This, then, is the great planning period, when out of apparently nothing comes evidence of a well integrated individual, who will form along certain well tried patterns, but who will, in the end, be distinguishable from every other human being by virtue of ultra microscopic chromosomal differences." Rugh, Robert, and Shettles, Landrum B., with Richard N. Einhorn: *From Conception To Birth: The Drama Of Life's Beginnings*, supra at p. 35.

By the beginning of the second month the unborn child, small as it is, looks distinctly human. (See Fig. 1). Yet, by this time the child's mother is not even aware that she is pregnant."[79]

As Shettles and Rugh state:

> "And as for the question, 'when does the embryo become human?' The answer is that it *always* had human potential, and *no other*, from the instant the sperm and the egg came together because of its chromosomes." (Emphasis in original). Id at p. 40.

At the end of the first month the child is about ¼ of an inch in length. At 30 days the primary brain is present and the eyes, ears and nasal organs have started to form. Although the heart is still incomplete, it is beating regularly

---

[78]Arey, Leslie B.: *Developmental Anatomy*, supra.
Patten, Bradley M.: *Human Embryology*, supra.
Rugh, Robert, and Shettles, Landrum B., with Richard N. Einhorn: *From Conception To Birth: The Drama Of Life's Beginnings*, supra.
Ingelman-Sundberg, Axel, and Wirsen, Cloes: *A Child Is Born: The Drama Of Life Before Birth*, supra.
Flannagan, G.L.: *The First Nine Months Of Life*, supra.

[79]Ingelman-Sundberg, Axel, and Wirsen, Cloes: *A Child Is Born: The Drama Of Life Before Birth*, supra.

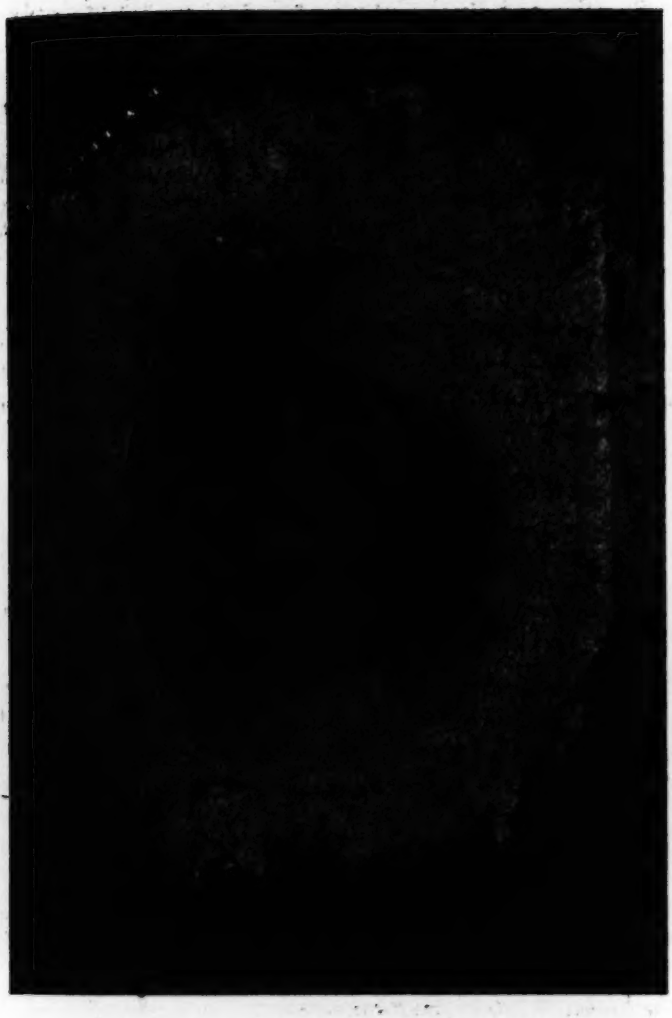


Fig. 1—40 days

and pumping blood cells through a closed vascular system.[80] The child and mother do not exchange blood, the child having from a very early point in its development its own and complete vascular system.[81]

Earliest reflexes begin as early as the 42nd day. The male penis begins to form. The child is almost ½ inch long and cartilage has begun to develop.[82] [See Fig. 2]

Even at 5½ weeks the fetal heartbeat is essentially similar to that of an adult in general configuration. The energy output is about 20% that of the adult, but the fetal heart is functionally complete and normal by 7 weeks. Shettles and Rugh describe the child at this point of its development as a 1-inch miniature doll with a large head, but gracefully formed arms and legs and an unmistakably human face.[83] [See Fig. 2]

By the end of the seventh week we see a well proportioned small scale baby. In its seventh week, it bears the familiar external features and all the internal organs of the adult, even though it is less than an inch long and weighs only 1/30th of an ounce. The body has become nicely rounded, padded with muscles and covered by a thin

---

[80]Arey, Leslie B.: *Developmental Anatomy*, supra.

[81]Arey, Leslie B.: *Developmental Anatomy*, supra.

Patten, Bradley M.: *Human Embryology*, supra.

Rugh, Robert, and Shettles, Landrum B., with Richard N. Einhorn: *From Conception To Birth: The Drama Of Life's Beginnings*, supra.

Marcel, M.P., and Exchaquet, J.P.: *L'Electrocardiogramme Du Foetus Human Avec Un Cas De Double Rythme Auriculaire Verifie*, supra.

Flannagan, G.L.: *The First Nine Months Of Life*, supra.

[82]Arey, Leslie B.: *Developmental Anatomy*, supra.

Patten, Bradley M.: *Human Embryology*, supra.

[83]Rugh, Robert, and Shettles, Landrum B., with Richard N. Einhorn: *From Conception To Birth: The Drama Of Life's Beginnings*, supra at p. 54.

Fig 2–6 weeks

skin. The arms are only as long as printed exclamation marks, and have hands with fingers and thumbs. The slower growing legs have recognizable knees, ankles and toes." [See Figs. 3 and 4]

The new body not only exists, it also functions. The brain in configuration is already like the adult brain and sends out impulses that coordinate the function of the other organs. The brain waves have been noted at 43 days.[86] The heart beats sturdily. The stomach produces digestive juices. The liver manufactures blood cells and the kidney begins to function by extracting uric acid from the child's blood.[87] The muscles of the arms and body can already be set in motion.[87]

After the eighth week no further primordia will form; *everything* is already present that will be found in the full term baby.[88] As one author describes this period:

> "A human face with eyelids half closed as they are in someone who is about to fall asleep. Hands that soon will begin to grip, feet trying their first gentle kicks." Rugh, Roberts, and Shettles, Landrum B., with Richard N. Einhorn: *From Conception To Birth*: *The Drama Of Life's Beginnings*, supra at p. 71.

---

[84]Arey, Leslie B.: *Developmental Anatomy*, supra.
Patten, Bradley M.: *Human Embryology*, supra.
Rugh, Robert, and Shettles, Landrum B., with Richard N. Einhorn: *From Conception To Birth*: *The Drama Of Life's Beginnings*, supra.
Ingelman-Sundberg, Axel, and Wirsen, Cloes: *A Child Is Born*: *The Drama Of Life Before Birth*, supra.

[85]Still, J.W.: J. Washington Acad. Sci. 59:46, 1969.

[86]Flannagan, G.L.: *The First Nine Months Of Life*, supra.
Gesell, Arnold: *The Embryology of Behavior*, Harper & Bros. Publishers, 1945, Chap. IV, V, VI, X.

[87]Hooker, Davenport: *The Prenatal Origin Of Behavior*, Univ. of Kansas Press, 1952.

[88]Rugh, Robert, and Shettles, Landrum B., with Richard N. Einhorn: *From Conception To Birth*: *The Drama Of Life's Beginnings*, supra at p. 71.

Fig. 3–9 weeks 7 weeks

Fig. 4—10 weeks

6 weeks

From this point until adulthood, when full growth is achieved somewhere between 25 and 27 years, the changes in the body will be mainly in dimension and in gradual refinement of the working parts.[89]

The development of the child, while very rapid, is also very specific. The genetic pattern set down in the first day of life instructs the development of a specific anatomy. The ears are formed by seven weeks and are specific, and may resemble a family pattern.[90] The lines in the hands start to be engraved by eight weeks and remain a distinctive feature of the individual.[91] [See Fig. 3]

The primitive skeletal system has completely developed by the end of six weeks.[92] This marks the end of the child's embryonic (from Greek, to swell or teem within) period. From this point, the child will be called a fetus (Latin, young one or offspring).[93] [See Fig. 2]

In the third month, the child becomes very active. By the end of the month he can kick his legs, turn his feet, curl and fan his toes, make a fist, move his thumb, bend his wrist, turn his head, squint, frown, open his mouth, press his lips tightly together.[94] He can swallow and drinks the amniotic fluid that surrounds him. Thumb sucking is first noted at this age. The first respiratory motions move fluid

---

[89]Arey, Leslie B.: *Developmental Anatomy*, supra.
Potter, Edith: *Pathology Of The Fetus And Infant*, Year Book Publishers Inc., Chicago, 1961.

[90]Streeter, Geo. L.: *Development Of The Auricle In The Human Embryo*, Contributions to Embryology, Vol. XIII No. 61, 1921.

[91]Miller, James, R.: *Dermal Ridge Patterns: Technique For Their Study In Human Fetuses*, J. Pediatric, Vol. 73, No. 4, Oct. 1969, pp. 614-616.

[92]Arey, Leslie B.: *Developmental Anatomy*, supra.
Patten, Bradley M.: *Human Embryology*, supra.

[93]Patten, Bradley M.: *Human Embryology*, supra.

[94]Hooker, Davenport: *The Prenatal Origin Of Behavior*, supra.

in and out of his lungs with inhaling and exhaling respira-
tory movements."[95] [See Fig. 5.]

The movement of the child has been recorded at this
early stage by placing delicate shock recording devices on
the mother's abdomen and direct observations have been
made by the famous embryologist, Davenport Hooker,
M.D. Over the last thirty years, Dr. Hooker has recorded
the movement of the child on film, some as early as six
weeks of age. His films show that prenatal behavior de-
velops in an orderly progression."[96]

The prerequisites for motion are muscles and nerves.
In the sixth to seventh weeks, nerves and muscles work
together for the first time."[97] If the area of the lips, the first
to become sensitive to touch, is gently stroked, the child
responds by bending the upper body to one side and
making a quick backward motion with his arms. This is
called a total pattern response because it involves most of
the body, rather than a local part. Localized and more
appropriate reactions such as swallowing follow in the
third month. By the beginning of the ninth week, the baby
moves spontaneously without being touched. Sometimes
his whole body swings back and forth for a few moments.
By eight and a half weeks the eyelids and the palms of
the hands become sensitive to touch. If the eyelid

---

[95]Flannagan, G.L.: *The First Nine Months Of Life*, supra.
Hooker, Davenport: *The Prenatal Origin Of Behavior*, supra.

[96]Hooker, Davenport: *The Prenatal Origin Of Behavior*, supra.
Hooker, Davenport: *Early Human Fetal Behavior With A Pre-
liminary Note On Double Simultaneous Fetal Stimulation*, Pro-
ceedings of the Association for Research in Nervous and Mental
Disease, Baltimore, The Williams & Wilkins Co., 1954.

Gesell, Arnold, M.D., Amatruda, C.S., M.D.: *Developmental
Diagnosis*, P. S. Hoeber, 1958 pp. 8-9.

[97]Arey, Leslie M.: *Developmental Anatomy*, supra.

POOR COPY

Fig. 5–12 weeks

CROX ROUND CLOSE IN STATUS

stroked, the child squints. On stroking the palm, the finger close into a small fist.[98]

In the ninth and tenth weeks, the child's activity leaps ahead. Now if the forehead is touched, he may turn his head away and pucked up his brow and frown. He now has full use of his arms and can bend the elbow and wrist independently. In the same week, the entire body becomes sensitive to touch.[99] [See Fig. 6.]

The twelfth week brings a whole new range of responses. The baby can now move his thumb in opposition to his fingers. He now swallows regularly. He can pull up his upper lip; the initial step in the development of the sucking reflex.[100] By the end of the twelfth week, the quality of muscular response is altered. It is no longer marionette like or mechanical—the movements are now graceful and fluid, as they are in the newborn. The child is active and the reflexes are becoming more vigorous. All this is before the mother feels any movement.[101] [See Figs. 5 and 7.]

Every child shows a distinct individuality in his behavior by the end of the third month. This is because the actual structure of the muscles varies from baby to baby. The alignment of the muscles of the face, for example, follow an inherited pattern. The facial expressions of the

---

[98]Hooker, Davenport: *Early Human Fetal Behavior With A Preliminary Note On Double Simultaneous Fetal Stimulation*, supra.
Hooker, Davenport: *The Prenatal Origin Of Behavior*, supra.
Flannagan, G.L.: *The First Nine Months Of Life*, supra.
Hooker, Davenport: *The Origin Of Overt Behavior*, Ann Arbor Univ. of Michigan Press, 1944.

[99]Hooker, Davenport: *The Prenatal Origin Of Behavior*, supra.

[100]Gairdner, Douglas: *Fetal Medicine: Who Is To Practice*, supra.

[101]Gairdner, Douglas: *Fetal Medicine: Who Is To Practice*, supra.
Hooker, Davenport: *The Origin Of Overt Behavior*, supra.

Fig. 6–10 weeks

Fig. 7—12 weeks

POOR COPY

baby in his third month are already similar to the facial expressions of his parents.[102] [See Figs. 5 and 7.]

Further refinements are noted in the third month. The fingernails appear. The child's face becomes much prettier. His eyes, previously far apart, now move closer together. The eyelids close over the eyes. Sexual differentiation is apparent in both internal and external sex organs, and primitive eggs and sperm are formed. The vocal cords are completed. In the absence of air they cannot produce sound; the child cannot cry aloud until birth, although he is capable of crying long before.[103]

From the twelfth to the sixteenth week, the child grows very rapidly.[104] His weight increases six times, and he grows to eight to ten inches in height. For this incredible growth spurt the child needs oxygen and food. This he receives from his mother through the placental attachment—much like he receives food from her after he is born. His dependence does not end with expulsion into the external environment.[105] We now know that the placenta belongs to the baby, not the mother, as was long thought.[106] [See Fig. 8.]

---

[102]Flannagan, G.L: *The First Nine Months Of Life*, supra.
Still, J.W.: J. Washington Acad. Sci., supra.
Gesell, Arnold: *The Embryology Of Behavior*, supra.

[103]Arey, Leslie B.: *Developmental Anatomy*, supra.
Flannagan, G.L.: *The First Nine Months Of Life*, supra.
Patten, Bradley M.: *Human Embryology*, supra.
Gairdner, Douglas: *Fetal Medicine*: *Who Is To Practice It*, supra.

[104]Hellman, L.M., et al: *Growth And Development Of The Human Fetus Prior To The 20th Week of Gestation*, Am. J. Obstet. and Gynec. Vol. 103, No. 6, March 15, 1969, pp. 789-800.

[105]Arey, Leslie B.: *Developmental Anatomy*, supra.
Patten, Bradley M.: *Human Embryology*, supra.

[106]Gairdner, Douglas: *Fetal Medicine*: *Who Is To Practice It*, supra.

COPY BOUND CLOSE IN CENTER

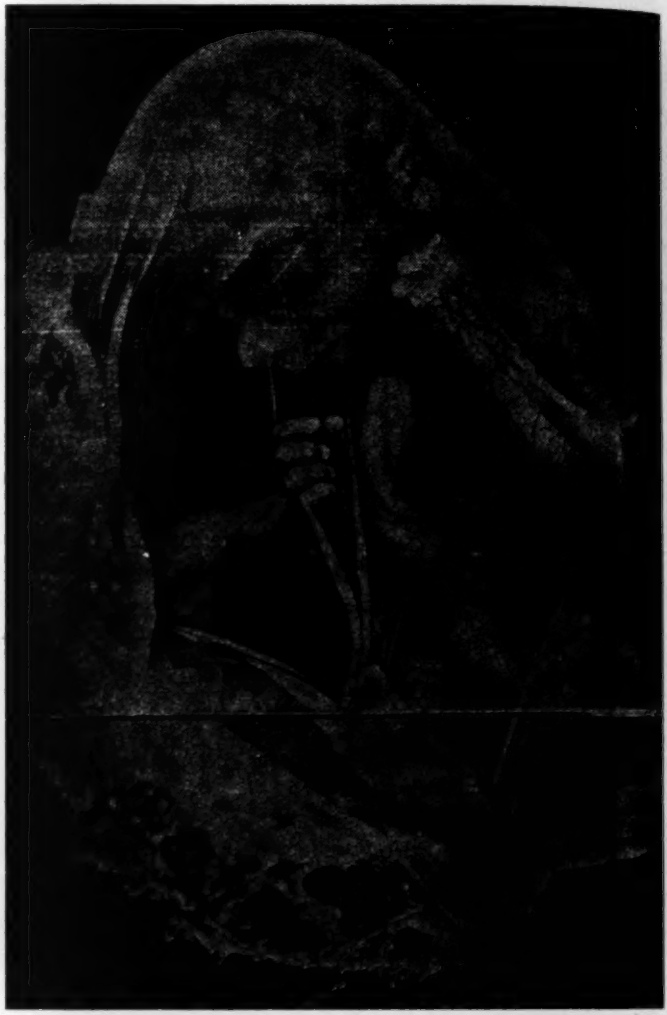


Fig. 8—16 weeks

POOR COPY

In the fifth month, the baby gains two inches in height and ten ounces in weight. By the end of the month he will be about one foot tall and will weigh one pound. Fine baby hair begins to grow on his eyebrows and on his head and a fringe of eyelashes appear. Most of the skeleton hardens. The baby's muscles become much stronger, and as the child becomes larger his mother finally perceives his many activities.[107] The child's mother comes to recognize the movement and can feel the baby's head, arms and legs. She may even perceive a rhythmic jolting movement–fifteen to thirty per minute. This is due to the child hiccoughing.[108] The doctor can now hear the heartbeat with his stethoscope.[109] [See Figs. 9 and 10.]

The baby sleeps and wakes just as it will after birth.[110] When he sleeps he invariably settles into his favorite position called his "lie". Each baby has a characteristic lie.[111] When he awakens he moves about freely in the bouyant fluid turning from side to side, and frequently head over heel. Sometimes his head will be up and sometimes it will be down. He may sometimes be aroused from sleep by external vibrations. He may wake up from a loud tap on the tub when his mother is taking a bath. A loud concert or the virbations of a washing machine may also stir him into activity.[112] The child hears and recognizes his

---

[107]Arey, Leslie B.: *Developmental Anatomy*, supra.

[108]Flannagan, G.L.: *The First Nine Months Of Life*, supra.
Gairdner, Douglas: *Fetal Medicine: Who Is To Practice It*, supra.

[109]Arey, Leslie B.: *Developmental Anatomy*, supra.
Flannagan, G.L.: *The First Nine Months Of Life*, supra.

[110]Petre-Quadens, O., et al: *Sleep In Pregnancy: Evidence Of Fetal Sleep Characteristics*, J. Neurologic Science, 4:600-605, May, June, 1967.

[111]Gairdner, Douglas: *Fetal Medicine: Who Is To Practice It*, supra.

[112]Flannagan, G.L.: *The First Nine Months Of Life*, supra.

COPY BOUND CLOSE IN CENTER

Fig. 9—17 weeks

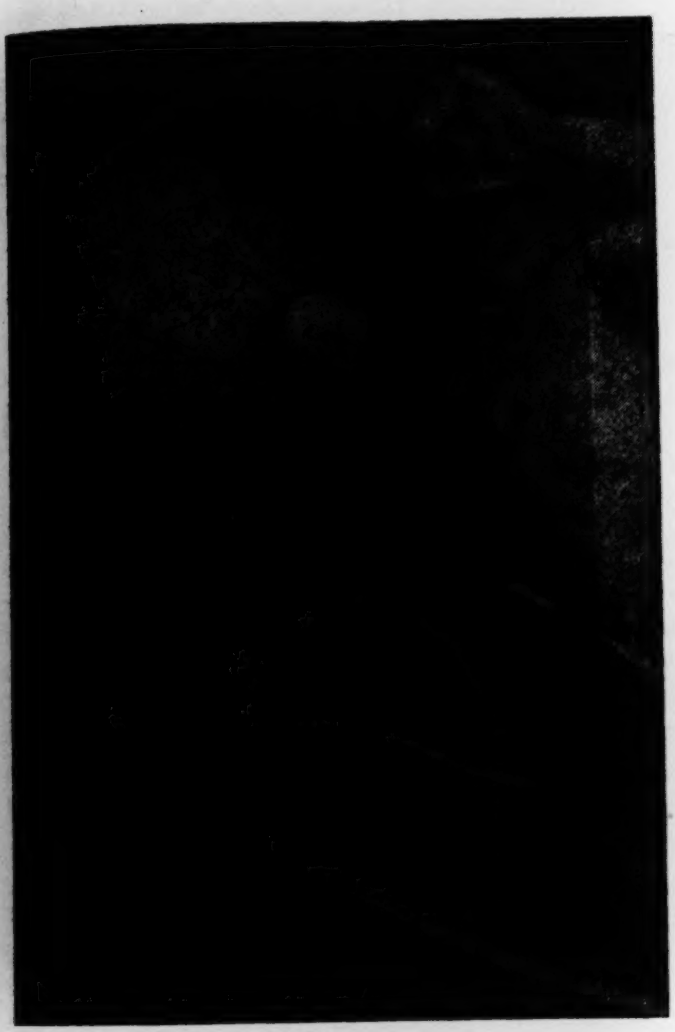


Fig. 10–18 weeks

mother's voice before birth.[113] Movements of the mother, whether locomotive, cardiac or respiratory, are communicated to the child.[114]

In the sixth month, the baby will grow about two more inches, to become fourteen inches tall. He will also begin to accumulate a little fat under his skin and will increase his weight to a pound and three-quarters. This month the permanent teeth buds come in high in the gums behind the milk teeth. Now his closed eyelids will open and close, and his eyes look up, down and sideways. Dr. Liley of New Zealand feels that the child may perceive light through the abdominal wall.[115] Dr. Still has noted that electroencephalographic waves have been obtained in forty-three to forty-five day old fetuses, and so conscious experience is possible after this date.[116]

In the sixth month, the child develops a strong muscular grip with his hands. He also starts to breathe regularly and can maintain respiratory response for twenty-four hours if born prematurely. He may even have a slim chance of surviving in an incubator. The youngest children known to survive were beween twenty to twenty-five weeks old.[117] The concept of *viability* is not a static one. Dr. Andre Hellegers of Georgetown University states that 10% of children born between twenty weeks and twenty-four

---

[113]Wood, Carl: *Weightlessness: Its Implications For The Human Fetus*, J. Obstetrics & Gynecology of the British Commonwealth, 1970 Vol. 77, pp. 333-336.

Liley, Albert W.: *Auckland MD To Measure Light And Sound Inside Uterus*, Medical Tribune Report, May 26, 1969.

[114]Wood, Carl: *Weightlessness: Its Implications For The Human Fetus*, supra.

[115]Liley, Albert W.: *Auckland MD To Measure Light And Sound Inside Uterus*, supra.

[116]Still, J.W.: Washington Acad. Sci., supra.

[117]Flannagan, G.L.: *The First Nine Months Of Life*, supra.

weeks gestation will survive.[118] Modern Medical intensive therapy has salvaged many children that would have been considered non-viable only a few years ago. The concept of an articicial placenta may be a reality in the near future and will push the date of viability back even further, and perhaps to the earliest stages of gestation.[119] After twenty-four to twenty-eight weeks the child's chances of survival are much greater.

This review has covered the first six months of life. By this time the individuality of this human being should be clear to all unbiased observers. When one views the present state of medical science, we find that the artificial distinction between born and unborn has vanished. The whole thrust of medicine is in support of the motion that the child in its mother is a distinct individual in need of the most diligent study and care, and that he is also a patient whom science and medicine treats just as it does any other person.[120]

This review of the current medical status of the unborn serves us several purposes. Firstly, it shows conclusively the humanity of the fetus by showing that human life is a continuum which commences in the womb. There is no magic in birth. The child is as much a child in those

---

[118]Monroe, *Canadian Medical Association's Journal*, 1939.
Hellegers, Andre, M.D.: *National Symposium On Abortion*, May 15, 1970, Prudential Plaza, Chicago, Illinois.

[119]Zapol, Warren, and Kolobow, Theodore: *Medical World News*, May 30, 1969.
Alexander, D.P.; Britton, H.G.; Nixon, D.A.; *Maintenance Of Sheep Fetuses By An Extra Cororeal Circuit For Periods Up To* 24 *Hours*, Am. J. Obstet. and Gynec, Vol. 102, No. 7, Dec. 1968, pp. 969-975.

[120]*Fetology*: *The Smallest Patients. The Sciences*, published by the New York Academy of Sciences, Vol. 8 No. 10, Oct. 1968, pp. 11-15.
Gairdner, Douglas: *Fetal Medicine*: *Who Is To Practice It*, supra.

several days before birth as he is those several days after. The maturation process, commenced in the womb, continues through the post-natal period, infancy, adolescence, maturity and old age. Dr. Arnold Gesell points out in his work that no king ever had any other beginning than have had all of us in our mother's womb.[121] Quickening is only a relative concept which depends upon the sensitivity of the mother, the position of the placenta, and the size of the child. *

VII. THE STATE OF TEXAS HAS A LEGITIMATE INTEREST IN PROHIBITING ABORTION EXCEPT BY MEDICAL ADVICE FOR THE PURPOSE OF "SAVING THE LIFE OF THE MOTHER".

There seems little argument necessary if one can conclude the unborn child is a human being with birth but a convenient landmark in a continuing process—a bridge between two stages of life. The basic postulates from which the Appellees' arguments proceed are: (1) the pregnant woman has a right of control over her own body as a matter of privacy guaranteed to her by the Constitution of the United States; and (2) this right cannot be interfered with by the state since the state cannot demon-

---

[121]Gesell, Arnold: *The Embryology Of Behavior*, supra.

*If the court is interested in the actual medical history on nineteenth century legislative opposition to abortion, it may consult the American Medical Association, 1846-1951 *Digest of Official Actions* (edited F.J.L. Blasingame 1959), p. 66, where a list of the repeated American Medical Association attacks on abortion are compiled. It will be seen that the great medical battle of the nineteenth century was to persuade legislatures to eliminate the requirement of quickening and to condemn abortion from conception, see Isaac M. Quimby *Introduction to Medical Jurisprudence*, Journal of American Medical Association, August 6, 1887, Vol. 9, p. 164 and H. C. Markham *Foeticide and Its Prevention*, ibid. Dec. 8, 1888 Vol. 11, p. 805. It will be seen that the Association unanimously condemned abortion as the destruction of "human life", American Medical Association, *Minutes of the Annual Meeting* 1859, The American Medical Gazette 1859, Vol. 10, p. 409.

strate any compelling interest to justify its intrusion. The contrary position is the state's interest in preventing the arbitrary and unjustified destruction of an unborn child—a living human being in the very earliest stages of its development. Whatever personal right of privacy a pregnant woman may have with respect to the disposition and use of her body must be balanced against the personal right of the unborn child to life.

Whatever the metaphysical view of it is, or may have been, it is beyond argument that legal concepts as to the nature and rights of the unborn child have drastically changed, based on expanded medical knowledge, over the last 2,500 years.

In addition to the provisions of 22 D C Code 201,[122] the Congress of the United States has clearly indicated a firm general policy of the Federal government against abortion. 18 U.S.C. 1461 provides in part as follows:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
>
> Every article or thing designed, adapted, or intended for preventing conception or producing *abortion*, or for any indecent or immoral use; and
>
> Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing *abortion*, or for any indecent or immoral purpose; and
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made or where or by whom any act or operation of any kind for the procuring or producing of *abortion* will be done or performed, or how or by what means conception may

[122]The District of Columbia abortion statute in issue in *United States v. Vuitch.*

be prevented or *abortion* produced, whether sealed or unsealed; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for preventing conception or producing *abortion*, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing—

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

. . . ." (Emphasis added).

It is most seriously argued that the "life" protected by the Due Process of Law Clause of the Fifth Amendment includes the life of the unborn child. Further, it would be a denial of equal protection of law not to accord protection of the life of a person who had not yet been born but still in the womb of its mother. If it is a denial of equal protection for a statute to distinguish between a thief and an embezzler under a statute providing for the sterilization of the one and not the other,[123] then it is surely a denial of equal protection for either the state or federal government to distinguish between a person who has been born and one living in the womb of its mother.

In *Katz v. United States*, supra, this Court, after concluding that the Fourth Amendment cannot be translated into a general constitutional "right to privacy" and after making reference to other provisions of the Constitution of the United States protecting personal privacy from other forms of governmental intrusion,[124] stated that ". . . the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of

---

[123] *Skinner v. Oklahoma*, 316 U.S. 535 (1942)
[124] Note 5 at page 510.

his property and of his very life, left largely to the law of the individual States". 389 U.S. at 352. Compare *Kovacs v. Cooper*, 336 U.S. 77 (1949).

If it be true that the compelling state interest in prohibiting or regulating abortion did not exist at one time in the stage of history, under the result of the findings and research of modern medicine, a different legal conclusion can now be reached. The fact that a statute or law may originally have been enacted to serve one purpose does not serve to condemn it when the same statute, with the passage of time, serves a different but equally valid public purpose. See McGowan v. Maryland, 366 U.S. 420 (1961).

CONCLUSION

For the reasons above stated Appellee submits that the appeal from the judgment of the lower court denying injunctive relief to the Appellants should be affirmed; that this Court consider plenary review of this entire case and reverse the judgment of the court below declaring Articles 1191, 1192, 1193, 1194 and 1196 of the Texas Penal Code unconstitutional and enter its order accordingly.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

HENRY WADE
Criminal District Attorney
Dallas County, Texas

NOLA WHITE
First Assistant Attorney General

JOHN B. TOLLE
Assistant District Attorney

ALFRED WALKER
Executive Assistant

Dallas County Government Center
Dallas, Texas 75202

ROBERT C. FLOWERS
Assistant Attorney General

JAY FLOYD
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711

Attorneys for Appellee

CERTIFICATE OF SERVICE

I, Jay Floyd, Assistant Attorney General of Texas, Attorney for Appellee, do hereby certify that a copy of the above and foregoing Brief of Appellee has been deposited in the United States Mail, postage prepaid, on this the 8TH day of October, 1971, to the following addresses: Roy Lucas, James Madison Constitutional Law Institute, Four Patchin Place, New York, New York, 10011; Sarah Weddington and James R. Weddington, 709 West 14th Street, Austin, Texas 78701; Linda N. Coffee, 2130 First National Bank Building, Dallas, Texas 75202; Fred Bruner and Roy L. Merrill, Jr., Daugherty, Bruner, Lastelick & Anderson, 1130 Mercantile Bank Building, Dallas, Texas 75201; and Norman Dorsen, School of Law, New York University, Washington Square, New York, New York 10003.

Jay Floyd

JAY FLOYD
Assistant Attorney General

IN THE

Supreme Court of the United States

October Term, 1972

COPY

FILED
SEP 15 1972
MICHAEL RODAK, JR., CLERK

No. 70-18

JANE ROE, JOHN DOE, and MARY DOE,
Appellants,

JAMES HUBERT HALLFORD, M.D.,
Appellant-Intervenor,

v.

HENRY WADE,
Appellee.

On Appeal from the United States District Court for the Northern District of Texas

No. 70-40

MARY DOE, *et al.*,
Appellants,

v.

ARTHUR K. BOLTON, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

SUPPLEMENTAL BRIEF FOR *AMICI CURIAE* PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. AND AMERICAN ASSOCIATION OF PLANNED PARENTHOOD PHYSICIANS

HARRIET F. PILPEL
FREDERIC S. NATHAN
Attorneys for Amici Curiae
437 Madison Avenue
New York, New York 10022

Of Counsel:
GREENBAUM, WOLFF & ERNST
NANCY F. WECHSLER
RUTH JANE ZUCKERMAN

TABLE OF CONTENTS

	PAGE
Summary of Argument	2
Point I—The facts of record during the past year suggest that "compelling state interests" in public health and welfare require the removal of such restrictive abortion laws as those herein challenged	3
A. Background facts	3
B. Legal abortions are safer than childbirth	6
C. Availability of abortion reduces the infant mortality rate	7
D. Discrimination against the poor and the nonwhite is substantially eliminated	8
E. No increased risk is associated with the performance of abortions on an out-patient basis whether in a hospital or in a free-standing clinic	9
F. A substantial number of legal abortions replace criminal abortions	10
G. Professional and public support of abortion availability	10
H. Summary	12
Point II—The decisions of this Court, the lower federal courts and the state courts during the past year make clear the unconstitutionality of the laws herein challenged	14
A. The decision of this Court in *Eisenstadt* v. *Baird*	14

PAGE

B. The decisions of the lower federal courts in the past year 15

C. The decisions of the state courts in the past year 18

Point III—There is no constitutional right or compelling state interest in the fetus which can render constitutional the violations of women's and physicians' rights entailed by the Georgia and Texas statutes herein challenged 19

A. It is clear from the decisions of this Court, the lower federal courts and the state courts that the fetus is not a person for the purposes of the Fifth and Fourteenth Amendments 19

B. There is no basis in constitutional history for declaring the fetus a person 23

C. State law cases dealing with the legal rights of the unborn do not support the contention that the fetus is a person for purpose of the Fourteenth Amendment 24

1. The transfusion cases 25

2. The tort cases 27

3. The criminal cases 28

D. The fetus: science and metaphysics 29

Conclusion 30

TABLE OF AUTHORITIES

PAGE

Cases:

Abele v. Markle, 342 F. Supp. 800 (D. Conn., April 18, 1972) 15, 29

Abele v. Markle, —— F. Supp. —— (Civil Action No. B-521) (D. Conn., June 13, 1972) 15, 16

Abrams v. Foshee and Wife, 3 Clark 274 (Sup. Ct. Iowa, 1856) 28

Application of the President and Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir. 1964), *rehearing denied*, 331 F.2d 1010 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978 (1964) 26

Beecham v. Leahy, —— Vt. ——, 287 A.2d 836 (1972) 18, 29

Byrn v. New York City Health and Hospitals Corporation, 21 N.Y. 2d 194 (1972) 12, 22, 25

Commonwealth v. Page (Dkt. No. 1968-353) (Pa. Ct. Comm. Pl., Centre County, July 23, 1970) 18, 23

Endresz v. Friedberg, 24 N.Y.2d 478 (1969) 26, 27, 30

Eisenstadt v. Baird, —— U.S. ——, 92 S.Ct. 1029 (1972) 14, 16, 17

Evans v. People, 49 N.Y. 86 (1872) 28

Florida v. Sachs (Alachua County Court of Record, Dec. 10, 1971) 18

Foster v. State, 182 Wis. 298 (1923) 28

Griswold v. Connecticut, 381 U.S. 479 (1965) 14, 17

John F. Kennedy Memorial Hospital v. Heston, 58 N.J. 576 (1971) 25, 26

PAGE

Klein v. Nassau County Medical Center, —— F.Supp. —— (No. 72-C-386) (E.D. N.Y., August 24, 1972) 15, 16

McGarvey v. Magee-Womens Hospital, 340 F.Supp. 751 (W.D. Pa., March 17, 1972) 21, 22, 23, 25
Montana v. Rogers, 278 F.2d 68 (7th Cir. 1960), *aff'd. sub nom.* Montana v. Kennedy, 366 U.S. 308 (1961) 23
Moore v. State, 37 Tex. Cr. Rep. 552 (1897) 28

Payne v. Louisiana Industrial Life Ins. Co., 33 So. 2d 444 (Ct. App. La. 1948) 29
People v. Anast, No. 69-3429 (Ill. Cir. Ct., Cook County, July 29, 1970) 18
People v. Gwynne, No. 173309 (Mun. Ct. Orange County, Calif., June 16, 1970) 18
People v. Lovell, 40 Misc. 2d 458, 242 N.Y.S. 2d 958 (1963) 29
People v. McGonegal, 136 N.Y. 62 (1892) 29
People v. Robb, Nos. 149005, 159061 (Mun. Ct. Orange County, Calif., Jan. 9, 1970) 18
People v. Vedder, 98 N.Y. 630 (1885) 29
Poe v. Menghini, 339 F. Supp. 986 (D. Kan., March 13, 1972) 16, 17

Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421 (1964), *cert. denied,* 377 U.S. 985 (1964) 25
Rogers v. Danforth, No. 315512 (Mo. Cir. Ct., St. Louis, June 7, 1971) 18

Snyder Appeal, 398 Pa. 237 (1960) 28
State v. Barquet, —— Fla. ——, 262 So.2d 431 (Feb. 14, 1972) 18
State v. Ketchum (Mich. Dist. Ct., March 30, 1970) 18
State v. Montifoire, 95 Vt. 508 (1922) 29

PAGE

State v. Munson (S. Dak. 7th Cir. Ct., Pennington County, April 6, 1970) 18
State v. Nixon, No. 9579 (Ct. App., Mich., August 23, 1972) 18
State v. Parm and Viney, 5 Pennewill's Del. R. (21 Del.) 556 (1905) 28
Summerlin v. State, 150 Ga. 173 (1920) 28

U.S. v. Vuitch, 402 U.S. 62 (1971) 19, 20, 21

Vuitch v. Hardy, —— F.Supp. —— (Civil No. 71-1129-Y) (D. Md., June 22, 1972) 15, 17, 18

Young Women's Christian Association v. Kugler, 342 F. Supp. 1048 (D. N.J., March 1, 1972) 15, 16

Constitution and Statutes:

United States Constitution:
Art. 1, §2, Cl. 3 24
Fifth Amendment 19
Fourteenth Amendment 19, 21, 23, 24, 28

United States Statutes:
42 U.S.C.A. 1981 (Civil Rights Act) 21

State Statutes:
12 Vt. Stat. Ann. §101 (1959) 29

Articles, Publications and Other Authorities:

Hardin, Abortion or Compulsory Pregnancy?, 30 J. Marriage & Family No. 2 (May 1968) 30

Means, The Phoenix of Abortional Freedom, 17 N.Y.L. Forum 335 (1971) 24
Memorandum of Assemblywoman Constance Cook, New York Legislative Annual (1970) 8

PAGE

The New York Abortion Story, Planned Parenthood Federation of America, Inc. (1972) 6, 8, 11

New York City Health Services Administration Abortion Report (Feb. 20, 1972) 6, 7, 9

New York Times, Feb. 8, 1972, p. 39 10

New York Times, Aug. 25, 1972, p. 1 11

Pakter and Nelson, Abortion in New York City: The First Nine Months, Family Planning Perspectives (July 1971) 7, 8

Report of the Commission on Population Growth and the American Future (1972) 6, 7, 8, 11

Report of the Governor's Commission Appointed to Review New York State's Abortion Law (March 1968) 24

Report on Induced Abortions Recorded in New York State, January-December, 1971, New York State Department of Health (August 1972) 6, 7

Report to the Legislature, Abortion in Hawaii: The First Year, University of Hawaii (1972) 7, 8, 9

VII The Right to Abortion: A Psychiatric View, pp. 218-219 (Group for the Advancement of Psychiatry, 1969) 29

Tietze, The Potential Impact of Legal Abortion on Population Growth in the United States, unpublished report prepared for the Commission on Population Growth and the American Future (1971) 10

Tietze & Lewit, Legal Abortions: Early Medical Complications, Family Planning Perspectives (October 1971) 9

United States Department of Health, Education and Welfare, Center for Disease Control, Abortion Surveillance Report, Jan.-March 1971 (March 1972) 3, 4, 5

IN THE

Supreme Court of the United States

October Term, 1972

No. 70-18

JANE ROE, JOHN DOE, and MARY DOE,
Appellants,

JAMES HUBERT HALLFORD, M.D.,
Appellant-Intervenor,

v.

HENRY WADE,
Appellee.

On Appeal from the United States District Court for the Northern District of Texas

---

No. 70-40

MARY DOE, *et al.*,
Appellants,

v.

ARTHUR K. BOLTON, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

---

SUPPLEMENTAL BRIEF FOR *AMICI CURIAE* PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. AND AMERICAN ASSOCIATION OF PLANNED PARENTHOOD PHYSICIANS

Summary of Argument

Amici, Planned Parenthood Federation of America, Inc. and American Association of Planned Parenthood Physicians, submitted a brief *amicus curiae* to this Court in August of 1971. This supplemental brief is submitted for the purpose of bringing the prior brief up to date as of September 15, 1972 with reference to factual information to which the judicial notice of this Court is respectfully invited, with reference to developments in the applicable law in the past year, and with reference to the arguments as to the rights of the fetus advanced by appellees and various *amici* in their support subsequent to the filing of our brief.

The facts set forth in Point I relate to the experience under the recent statutes which permit abortion on request in the early stages of pregnancy. These facts support the conclusion reached in the majority of relevant cases decided in the past year (Point II), that no compelling state interest justifies statutes, like those of Texas and Georgia, which infringe the rights of women and doctors in relation to the obtaining and furnishing of abortion services. Indeed, it appears from these facts that compelling state interests require that such restrictions on the performance of abortion be removed.

The argument advanced by the appellees, that restrictive abortion statutes are justified by a compelling state interest in protecting the claimed constitutional rights of the fetus, is without merit (Point III). It is clear from the decisions that the fetus is not a person for the purposes of the Fourteenth Amendment. State cases dealing with the

legal rights of the unborn do not support a contrary conclusion. The law has never considered the unborn fetus as having a separate juridical existence. Nor can the basic human rights of women be subordinated to any claimed rights of the fetus.

POINT I

The facts of record during the past year suggest that "compelling state interests" in public health and welfare require the removal of such restrictive abortion laws as those herein challenged.

The attention of the Court is respectfully invited to the following material which was not available at the time we filed our prior brief and which is submitted to supplement Point I of that brief.

A. Background facts

Significant statistics have begun to become available as to the experience under statutes which permit abortion on request in the early stages of pregnancy (such as are in effect in Alaska, Hawaii, New York and Washington). The latest official statistics available to us on the number of legal abortions performed in the United States are those contained in the United States Department of Health, Education and Welfare's Center for Disease Control's *Abortion Surveillance Report,* Jan.-Mar. 1971 (Mar. 1972). This publication reported a total of 99,721 legal abortions in the United States in the first quarter of 1971, excluding abortions reported by the Department of Defense. The overall abortion ratio for the United States was 110 reported abor-

tions per 1,000 live births (*Op. cit.*). Every state which reported abortions for both 1970 and the first quarter of 1971 had a higher abortion ratio in 1971.

The fifteen states which reported legal abortions for the first quarter of 1971 reported an overall ratio of 292 abortions per 1,000 live births. This compares with a ratio for reporting states in the previous year of 178 abortions per 1,000 live births. Of particular significance to this case is the fact that of the states reporting, Georgia had the lowest ratio of abortions to live births in both periods. *Ibid.*

The following table gives a breakdown by states for the first quarter of 1971 (*Id.* at 2):

TABLE 1: REPORTED LEGAL ABORTION RATIOS BY STATE OF OCCURRENCE, SELECTED STATES,* JANUARY-MARCH 1971

State	*Abortions*	*Live Births*[1]	*Abortions/1,000 Live Births*
Alaska	237	1,926	123
Arkansas	130	9,212	14
California	23,880	92,911	257
Colorado	678	10,223	66
Delaware	252[2]	2,658	95
Georgia	320	25,307	13
Hawaii	938	3,978	236
Kansas	2,772	8,881	312
Maryland	1,880	14,716	128
New York	57,737	73,888	781
(Upstate)	(12,004)	(39,062)	(307)
(City)	(45,733[3])	(34,826)	(1,313)
North Carolina	561	24,305	23
Oregon	1,809	8,723	207
South Carolina	192	13,814	14
Virginia	875	20,597	42
Washington	2,158	12,132	178
TOTAL	94,419	323,271	292

The foregoing figures for New York include abortions performed on non-residents. New York State's official figures for the full calendar year 1971 for both residents and non-residents are available, however. They show a

1. Live birth data for all states except Hawaii taken from *Monthly Vital Statistics Reports Provisional Statistics,* Vol. 20, No. 3, May 26, 1971, published by the National Center for Health Statistics. Hawaii live birth data from Hawaii State Department of Health.
2. Abortions performed in three hospitals that reported more than 95 percent of state abortions in 1970.
3. Estimate from City of New York Department of Health.

* All states with data available.

total 262,807 recorded induced abortions for the year 1971, of which 206,673 were performed in New York City. 159,969 of the 262,807 were performed on non-residents. The ratio of legal abortions to live births among residents of New York City was 517 out of per 1,000 live births and for up-state New York residents 226 per 1,000 live births. *Report on Induced Abortions Recorded in New York State January-December, 1971,* New York State Department of Health (August, 1972) at 1-2.

No meaningful figures are available as to the number of illegal abortions. Estimates of the number of illegal abortions performed annually in the United States have in the past ranged from 200,000 to 1,200,000. *Report of the Commission on Population Growth and the American Future* (1972) at 102.

The most detailed recent statistics emanate from New York State where more than half of all legal abortions reported in the United States from July 1, 1970 through March 31, 1971 were performed. The New York experience is summarized below together with such information from other states as is available to us.

B. Legal abortions are safer than childbirth.

The overall maternal death rate from legal abortions in New York State dropped to 3.7 per 100,000 abortions in the last half of 1971. This is less than half of the death rate associated with live delivery. *The New York Abortion Story,* Planned Parenthood Federation of America, Inc., (1972), at 22. *See also New York City Health Services Administration Abortion Report,* Feb. 20, 1972, at 2. This record,

when combined with the decrease in illegal abortions (the major source of maternal mortality) caused the maternal mortality rate in New York City to drop by two-thirds to a record low in 1971, the first full year during which abortions were available on request in New York. Maternal deaths due to criminal abortions in New York City in the 1960's ranged from a high of 130 in 1961 to a low of 66 in 1968. This represented 33 maternal deaths due to criminal abortions per 100,000 live births in 1961 and 15 in 1968. In the first 6 months of 1971 only one maternal death due to criminal abortion was reported. Pakter & Nelson, *Abortion in New York City: The First Nine Months,* Family Planning Perspectives (July 1971) at 10.

The California experience was comparable. *Report of the Commission on Population Growth and the American Future,* at 102.

There were no maternal deaths as a result of any of the 3,643 legal abortions performed in Hawaii in the first year after the permissive statute became effective on March 13, 1970. The University of Hawaii, *Report to the Legislature: Abortion in Hawaii: The First Year,* at 7.

C. Availability of abortion reduces the infant mortality rate.

The 1971 New York State infant mortality rate of 18.7 per 1,000 live births is the lowest rate ever recorded in that state. *Report on Induced Abortions Recorded in New York State, supra,* p. 2. The New York City rate dropped from 24.4 in 1969, the last full year before the new abortion statute, to 20.7 in 1971. *New York City Health Services Administration Abortion Report, supra* at 2.

"Neo-natal" mortality (deaths occurring in the first 28 days of life) in New York City dropped from 18.1 percent per 1,000 live births in 1969 to 16.2 percent in 1970 to 14.9 percent in 1971. *Report of the Commission on Population Growth and the American Future,* at 102.

D. Discrimination against the poor and the non-white is substantially eliminated.

In New York City in 1960/1961 the ratio of therapeutic abortions per 1,000 deliveries was 2.6 for white women, .5 for Negro women, and .1 for Puerto Rican women. *Memorandum of Assemblywoman Constance Cook,* New York Legislative Annual, 1970, at 241.

During the first nine months under the present New York law (July 1, 1970-March 31, 1971) abortions were performed on New York City residents at the rate of almost 3 for every 10 live births among the City's Puerto Rican community, 4 for every 10 live births among whites and 6 for every 10 live births of black residents. Pakter and Nelson, *Abortion in New York City: The First Nine Months,* Family Planning Perspectives (July 1971) at 8.

The Hawaiian experience shows that "the family income distribution of abortion patients varies slightly from that of the state. * * * A higher proportion of abortion patients is found in the over $15,000 income bracket than is true for the state as a whole with a corresponding slight underrepresentation in the lower income brackets." University of Hawaii, *Report to the Legislature: Abortion in Hawaii: The First Year,* at 16-17.

The all-inclusive cost of a first trimester abortion in a free-standing clinic in New York City has dropped to a

ge of $145 to $175, complete with contraceptive coun-
ing and a post-operative examination. New York City
pitals charge approximately $200 for an ambulatory
cedure. Late pregnancy terminations are performed
hospitals and at an average cost of $325 to $500. *The*
w York Abortion Story, supra at 27. The usual cost of
abortion in Hawaii in the first year under the new
tute was about $350. *Report to the Legislature, supra*
12. The cost of criminal abortions is widely understood
have been much higher.

No increased risk is associated with the performance of abortions on an out-patient basis whether in a hospital or in a free-standing clinic.

An interim report based on 42,598 records submitted
or before June 15, 1971 to the Joint Program for the
udy of Abortion (JPSA) derived from 64 participating
stitutions in 12 states and the District of Columbia in
nnection with abortions performed after June 30, 1970
ntained the finding that

> "Among JPSA patients, there appears to be no increased risk associated with abortions performed on an outpatient basis, whether in a hospital or in a freestanding clinic. Indeed, JPSA patients whose pregnancies were terminated by suction on an outpatient basis had fewer major complications than those whose abortions were performed on an inpatient basis."

ietze & Lewit, *Legal Abortions: Early Medical Complica-*
ons, Family Planning Perspectives (October 1971) at 6,
. Almost one half of all abortions performed in New
ork in the last half of 1971 were performed in clinics.
ew York City Health Services Administration Abortion
eport, supra at 1.

F. A substantial number of legal abortions replace criminal abortions.

It is reliably estimated that only 25 percent of le abortions replace live births. Most of the others probe replace illegal abortions. Tietze, The Potential Imp of Legal Abortion on Population Growth in the Uni States, an unpublished report prepared for the Commiss on Population Growth in the United States (1971).

G. Professional and public support of abortion availability

The National Conference of Commissioners on Unifo State Law has adopted a Uniform Abortion Act wh permits abortion on request up to a specified time which thereafter permits abortion if the physician belie that there is a substantial risk of impairing the physi and mental health of the mother or that the child wo have a grave physical or mental defect or if the pregna resulted from rape or incest. The American Bar Asso tion's 307 member House of Delegates approved the U form Act with only 30 dissenting votes on February 1972. *New York Times,* Feb. 8, 1972, at 39.

The American Medical Association previously in Ju of 1970 had dropped the limitations on the grounds abortion contained in its prior policy statement (subst tially the same limitations as appear in the Georgia stat herein) and stated with reference to abortion that: "T standards of sound clinical judgment, * * * together w informed patient consent should be determinative acco ing to the merits of each individual case"; also that ab

tions should be performed "only by a duly licensed physician and surgeon" under procedural limitations not relevant here.

The American College of Obstetricians' and Gynecologists' policy on abortion sanctions abortions on request. The National Council of Obstetrics-Gynecology is among many other important medical associations which support the repeal of restrictive abortion laws.

An opinion survey conducted in 1971 for the Commission on Population Growth and the American Future indicated that half of all Americans believed that abortion should be a matter decided solely between the individuals and their physicians. An additional 40 percent would have permitted abortion under certain circumstances and only 6 percent flatly opposed abortion under any circumstances. *Report of the Commission on Population Growth and the American Future,* at 103. In a national Gallup poll in January, 1972, 57 percent of those questioned agreed that the "decision to have an abortion should be made solely by a woman and her physician." Thirty-seven percent disagreed and 6 percent had no opinion. For the first time in such national polls a majority of the Roman Catholics interviewed, 54 percent, expressed support of general abortion reform. *The New York Abortion Story,* Planned Parenthood Federation of America, Inc. (1972). The latest Gallup poll conducted in June, 1972, the results of which were published by the *New York Times* on August 25, 1972, show that 64% of the public (including a majority of Roman Catholics) now believe that the decision to have an abortion should be left solely to the woman and her doctor.

The extent of support for the liberal New York abortion statute among voluntary health, welfare, and civic agencies is indicated by the fact that when the first attack on the constitutionality of the statute was launched in December, 1971 (*Byrn* v. *New York City Health and Hospitals Corporation*, 21 N.Y.2d 194 [1972]), the following agencies filed a joint brief *amici curiae* in support of the statute:

Association of the Bar of the City of New York
Citizens Committee for Children of New York, Inc.
Citizens Union of the City of New York
Clergy and Lay Advocates for Hospital Abortion Performance (formerly Clergy Consultation Service)
Committee on Public Affairs of the Community Service Society of New York
Federation of Jewish Philanthropies of New York
Federation of Protestant Welfare Agencies, Inc.
New York Academy of Medicine
New York Chapter of the National Organization for Women
New York State Council of Churches
New York Urban Coalition, Inc.
Planned Parenthood Federation of America, Inc.
Planned Parenthood of New York City, Inc.
State Communities Aid Association (formerly State Charities Aid Association)
Women's City Club of New York

H. Summary

Although the collection of data with regard to the relatively recent experience under the permissive abortion statutes in Alaska, Hawaii, New York and Washington is far from complete, the emerging patterns and trends are clear:

(1) Restrictive abortion statutes cannot be justified on health grounds, whether we are speaking of the woman's health or the health of a total population.

(2) Restrictive abortion statutes and practices discriminate heavily against poor people and non-whites in denying them access to safe medical treatment and in severely limiting their right to choose whether or not to bear an unwanted child.

(3) Assuming *arguendo* that restrictive abortion statutes could be constitutionally sustained on the ground of a compelling state interest in safeguarding the alleged right of a fetus to be born, the evidence shows that such statutes are not even an effective means to that questionable end. As has been estimated, restrictive abortion statutes are widely ignored primarily by resort to illegal abortionists and more recently by travel to jurisdictions where abortions are freely available.

(4) Thus the effect of the new permissive state statutes on public health and welfare has been salutary and the substantive position they reflect is supported by the general public as well as by national spokesmen for the medical profession, the legal profession and many other professional and lay groups throughout the country.

POINT II

The decisions of this Court, the lower federal courts and the state courts during the past year make clear the unconstitutionality of the laws herein challenged.

A. The decision of this Court in *Eisenstadt* v. *Baird*

This Court has now on several occasions indicated its view that a woman has a fundamental constitutional right to decide whether or not to have a child. Most recently, in *Eisenstadt* v. *Baird*, —— U.S. ——, 92 S. Ct. 1029 (1972), the Court, through Justice Brennan, said:

> "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. See *Stanley* v. *Georgia*, 394 U.S. 557, 22 L. Ed. 2d 542, 89 S. Ct. 1243 (1969). See also *Skinner* v. *Oklahoma*, 316 U.S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942); *Jacobson* v. *Massachusetts*, 197 U.S. 11, 29, 49 L. Ed. 643, 651, 25 S. Ct. 358 (1905)." —— U.S. at ——, 92 S. Ct. at 1038 (footnote omitted) (emphasis in original).

The *Baird* decision followed logically from the decision of this Court in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), discussed in our prior brief. These decisions build a citadel of privacy around the most intimate aspects of a person's life which state action may not invade. The decisions of the lower courts, discussed below, invalidating state legislation which drastically restricts the right to abortion, are consistent with and indeed follow inevitably from the philosophy of the *Griswold* and *Baird* cases.

B. The decisions of the lower federal courts in the past year

There were at least five decisions in the past year by three-judge federal courts holding that a woman has a fundamental right to choose not to bear a child. They are *Klein* v. *Nassau County Medical Center,* —— F. Supp. —— (No. 72-C-386) (E.D. N.Y., filed August 24, 1972); *Abele* v. *Markle,* —— F. Supp. —— (Civil Action No. B-521) (D. Conn., June 13, 1972); *Abele* v. *Markle,* 342 F. Supp. 800 (D. Conn., April 18, 1972); *Poe* v. *Menghini,* 339 F. Supp. 986 (D. Kan., March 13, 1972); and *Young Women's Christian Association* v. *Kugler,* 342 F. Supp. 1048 (D. N.J., March 1, 1972). See also *Vuitch* v. *Hardy,* —— F. Supp. —— (Civil No. 71-1129-Y) (D. Md., June 22, 1972).

In the April *Abele* v. *Markle* decision, *supra,* Judge J. Edward Lumbard held that the Connecticut abortion statute "trespasse[d] unjustifiably" on women's "personal privacy and liberty" in violation of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment. Judge Lumbard characterized the determination of whether or not to bear a child as "of fundamental importance to a woman," and went on to find that the interests asserted by the state and specifically its asserted interest in the fetus were "insufficient to warrant removing from the woman all decision-making power over whether to terminate a pregnancy."

He also stated:

"* * * The essential requirement of due process is that the woman be given the power to determine within an

appropriate period after conception whether or not she wishes to bear a child."

In *Young Women's Christian Association* v. *Kugler, supra,* Circuit Judge Forman wrote, "Hence, we hold that a woman has a constitutional right of privacy cognizable under the Ninth and Fourteenth Amendments to determine for herself whether to bear a child or terminate a pregnancy in its early stages, free from unreasonable interference by the State." 342 F. Supp. at 1072.

In *Klein* v. *Nassau County Medical Center, supra,* the court said "* * * It may well be that a still more fundamental right is infringed whenever an attempt is made by statute or rule to deny, or, as here, substantially to interfere with, the pregnant woman's interest in freely determining whether or not to bear a child." Slip opinion at 11. Holding invalid an administrative directive which denied Medicaid to indigent women seeking abortions, the court held that these women could not be "subjected to State coercion to bear children which they do not wish to bear. * * *". *Ibid.*

In the June *Abele* v. *Markle* decision, *supra,* the court entered a temporary restraining order preventing the state from enforcing the new Connecticut abortion statute as to a particular applicant for abortion, citing *Eisenstadt* v. *Baird, supra,* for the proposition that women have a fundamental right to decide whether to bear or beget children.

In *Poe* v. *Menghini, supra,* a three-judge court invalidated two provisions of the Kansas abortion law; one required that abortions be performed only in state licensed

hospitals accredited by the Joint Commission on Accreditation of Hospitals and the other prohibited abortion "until the opinions of three (3) duly licensed physicians attesting to the necessity of such termination have been recorded in writing in the permanent records of the hospital," (*Id.* at 995), both provisions being similar to provisions in the Georgia statute herein attached. The court held that there is "a fundamental right to individual and marital privacy which includes within its scope the right to procure an abortion[.]" *Id.* at 993. It found that "[t]he JCAH-accreditation provision * * * places an unwarranted limitation upon the exercise of a fundamental right and is, therefore unconstitutional," (*Id.* at 994), and that "requiring the certification by three physicians in writing of the circumstances necessitating the abortion, violates the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 996. The decision of the three-judge court with reference to the Kansas statute is equally applicable to the Georgia statute.

To similar effect is *Vuitch* v. *Hardy, supra,* a decision on habeas corpus of the United States District Court for the District of Maryland which also indicates the unconstitutionality of the conditions for abortion set forth in the Georgia statute. In the words of the court, "this Court is convinced that a woman does have a constitutionally protected 'fundamental personal right' to such an abortion [citing *Griswold* and *Baird supra*] * * *" The court held that the requirement that all abortions take place in a hospital accredited by the Joint Commission for Accreditation of Hospitals and licensed by the State Board of Health and Mental Hygiene was unconstitutional since it "* * *

placed an unnecessary burden on the exercise of [a constitutional] right * * *." Slip opinion at 12. Clearly, the Georgia statute here involved is subject to the same constitutional infirmity.

C. The decisions of the state courts in the past year

In addition to the state cases cited in our earlier brief, we respectfully refer the Court to the following which had not been decided or were not available to us at the time we filed our prior brief.

People v. *Gwynne*, No. 173309 (Mun. Ct. Orange County, Calif., June 16, 1970); *People* v. *Robb*, Nos. 149005, 15906 (Mun. Ct. Orange County, Calif., Jan. 9, 1970); *Florida* v. *Sachs* (Alachua County Court of Record, Dec. 10, 1971); *People* v. *Anast*, No. 69-3-29 (Ill. Cir. Ct., Cook County, July 29, 1970); *State* v. *Ketchum* (Mich. Dist. Ct., March 30 1970); *Rogers* v. *Danforth*, No. 315512 (Mo. Cir. Ct., St Louis, June 7, 1971); *Commonwealth* v. *Page* (Dkt. No 1968-353) (Pa. Ct. Comm. Pl., Centre County, July 23 1970); *State* v. *Munson* (S. Dak. 7th Cir. Ct., Pennington County, April 6, 1970). *See also State* v. *Barquet*, —— Fla. ——, 262 So. 2d 431 (Feb. 14, 1972); *State* v. *Nixon*, No. 9579 (Ct. App., Mich., August 23, 1972); *Beecham* v. *Leahy* —— Vt. ——, 287 A. 2d 836 (1972).

POINT III

There is no constitutional right or compelling state interest in the fetus which can render constitutional the violations of women's and physicians' rights entailed by the Georgia and Texas statutes herein challenged.

Since we filed our prior brief, we have seen the briefs filed by appellees and various *amici* which are based in large part on the claimed constitutional rights of the fetus. Since in our prior brief we did not discuss the state's alleged interest in the fetus in any detail (pp. 43-44), we now address ourselves to the reasons why the contention that the fetus has constitutional rights or any interest here relevant is without merit.

A. It is clear from the decisions of this Court, the lower federal courts, and the state courts that the fetus is not a person for the purposes of the Fifth and Fourteenth Amendments.

In *United States* v. *Vuitch*, 402 U.S. 62 (1971), this Court upheld the District of Columbia abortion statute against a claim that it was unconstitutionally vague. In so doing, the Court, by necessary implication, rejected the argument that the fetus is a person for purposes of the United States Constitution. Thus, in holding that the statute, which permitted abortion where "necessary for the preservation of the mother's life or health" was sufficiently precise under constitutional standards, the Court relied on lower court decisions construing the law as permitting abortions "for mental health reasons, whether or not the patient had a

previous history of mental defects." 402 U.S. at 71-72.* It was with this specific construction before it that the Court sustained the statute. Obviously in upholding such a law, the Court had to reject any rights of constitutional or other dimension in the fetus. Indeed, the Court recognized the danger that jurors who believe that all abortions are evil might for that reason vote to convict doctors for performing any abortion but pointed out that there are well-established methods to protect "against any such jury prejudices", *e.g.*, challenges to prospective jurors. *Id.* at 72, n.7.**

Thus at least seven members of this Court—the five Justices who upheld the *Vuitch* health statute against a claim of vagueness plus the two Justices who dissented on the merits—would permit abortions in cases in which fetuses would be denied constitutional rights if they had any such rights. These seven Justices reached this conclusion de-

* Justices Burger, Black, Harlan, White and Blackmun joined in this aspect of the decision. Justices Douglas and Stewart dissented from the majority's holding that the statute was not void for vagueness. Justices Marshall and Brennan did not reach the merits of the vagueness issue, but instead restricted their views to the jurisdictional question.

** Justice Douglas, dissenting on the merits in *Vuitch*, found the District of Columbia abortion statute to be unconstitutionally vague. He indicated that problems of vagueness are magnified "where the regulation touches a protected constitutional right * * *. Abortion touches intimate affairs of the family, of marriage, of sex, which in Griswold v. Conn., 381 U.S. 479, we held to involve rights associated with several express constitutional rights and which are summed up in 'the right of privacy.'" *Id.* at 77-78 (dissenting opinion).

Justice Stewart also dissented on the merits in *Vuitch*. In his view the statute could be construed to uphold its constitutionality only "by extending the reasoning of the Court's opinion to its logical conclusion" and conclusively presuming "that when a physician has exercised his judgment in favor of performing an abortion, he has, by hypothesis, not violated the statute." *Id.* at 96, 97 (dissenting opinion).

spite the fact that the Court had before it in *Vuitch amici curiae* briefs in which it was argued that the fetus is a person for constitutional purposes. As a federal district court recently observed in discussing the *Vuitch* case, "Nowhere in the majority opinion, the dissenting opinion or the three concurring opinions was there any inference that fetal life was entitled to constitutional protection." *McGarvey* v. *Magee-Womens Hospital,* 340 F. Supp. 751 (W.D. Pa., March 17, 1972).

In *McGarvey* v. *Magee-Womens Hospital,* the plaintiff, as guardian *ad litem* for a class of conceived but unborn children, sought to enjoin the defendant-hospital from permitting the use of its facilities for the performance of abortions. Plaintiff claimed that the abortions performed by defendant violated the rights of the fetus under the Fourteenth Amendment and the Civil Rights Act (42 U.S.C.A. 1981 *et seq.*), and argued that judicial action must be taken to protect the unborn. The court held that the embryo or fetus is not a person or citizen within the meaning of the Fourteenth Amendment or the Civil Rights Act and granted defendant's motion for judgment on the pleadings on the basis of the constitutional rights of the woman. In the words of the court, "nor have we been cited authority that the framers of the Constitution contemplated fetal life or thought of unborn children as persons for purposes of constitutional protection or that Congress had fetal life in mind when it drafted the Civil Rights Act." The *McGarvey* court also, as indicated above, relied in part on this Court's decision in *United States* v. *Vuitch, supra,* and pointed out that "the statute and opinion * * * show that Congress and

the Supreme Court have had opportunity to comment on fetal life in constitutional terms." Accordingly, an injunction for the protection of the fetus was denied.

A leading state court case holding that the fetus has no constitutional rights is *Byrn* v. *New York City Health and Hospitals Corporation,* 21 N.Y.2d 194 (1972). In that case the plaintiff as guardian *ad litem* for a class of unborn fetuses alleged that the present New York law which permits abortion by a physician on the request of the woman until the 24th week of pregnancy unconstitutionally infringed the rights of fetuses. The Appellate Division of the New York Supreme Court had rejected this contention and held that the fetus had no such constitutional rights. This decision was affirmed by the New York Court of Appeals which stated "The issue, a novel one in the courts of law, is whether children in embryo are and must be recognized as legal persons or entities entitled under the state and federal constitutions to a right to life." The Court held that the answer to this question was in the negative.

The *McGarvey* and *Byrn* courts, explicitly, and all of the federal and state courts which have declared restrictive abortion statutes unconstitutional, implicitly, have rejected the argument that the fetus is constitutionally protected. These courts have, indeed, denied that the fetus has rights sufficient to constitute that compelling state interest required to justify the abridgment of women's fundamental constitutional rights by statutes such as the two here under review.

B. There is no basis in constitutional history for declaring the fetus a person.

In a century of Fourteenth Amendment litigation *amici* could find only one instance other than the very recent abortion cases in which the contention has been made that a fetus is a person under the Fourteenth Amendment. See *Montana* v. *Rogers*, 278 F. 2d 68 (7th Cir. 1960), *aff'd. sub nom. Montana* v. *Kennedy*, 366 U.S. 308 (1961). In that case, plaintiff claimed he was a citizen of the United States because he was conceived in the United States, was the son of a United States citizen mother, was outside of the United States for six months only (during which time he was born outside the United States because the American Consul refused his mother's request to return on the grounds of her pregnancy) and lived in the United States for the next 50 years. Upholding his deportation as an alien, the Court said that his being conceived in and being *in utero* in the United States was insufficient to confer to him Fourteenth Amendment citizen rights despite his ties to the United States. Until birth no rights existed. The argument for the right of the fetus was apparently not even pressed in this Court which upheld the decision below.

Other courts have responded similarly to the same argument. *See, e.g., McGarvey* v. *Magee-Womens Hospital*, quoted *supra*; *Commonwealth* v. *Page* (Dkt. No. 1968-353) (Pa. Ct. Comm. Pl., Centre County, July 23, 1970).

There is evidence elsewhere in the Constitution that "person" applies only to a live born person. The clause requiring a decennial census says "the whole Number of * * * Persons" in each state must be counted. U.S. Const.,

Art. 1, §2, Cl. 3. From the first census in 1790 to the present, census takers have counted only those born. Means, *The Phoenix of Abortional Freedom,* 17 N.Y.L. Forum 335, 402-403 (1971).

The constitutional status of the fetus was considered by the Governor's Commission appointed to review New York State's Abortion Law (the Froessel Commission). Responding to a lengthy minority report, the majority said:

> "The minority of this Commission virtually base their entire position on the premise that, by modern secular standards, the fetus is at all times a human being, possessed of corresponding legal rights. The premise is clearly fallacious. Let it first be noted that we are in the State of New York, governed by its laws. The differences in views among the early and modern theologians and their followers are of little assistance to us here." *Report of the Governor's Commission Appointed to Review New York State's Abortion Law* (March 1968) at 13.

C. State law cases dealing with the legal rights of the unborn do not support the contention that the fetus is a person for purposes of the Fourteenth Amendment.

Scattered state law authorities have recognized some legal rights in the fetus for some—here irrelevant—purposes. But no reliance can be placed on these tort, blood transfusion, and other cases, decided in other and different contexts, to support the statutes challenged in the instant case, for two reasons: first, the cases establish at most that the state can choose in some circumstances to protect the

fetus where the constitutional rights of others are not thereby impaired; and second, they fail to establish that the courts have treated the fetus as a person. The plaintiffs in the *Byrn* and *McGarvey* cases, *supra,* attempted to establish that the fetus was a person for constitutional purposes by citing proof of situations in which the law has recognized fetal life. The courts in both cases found these authorities unpersuasive in resolving the question of whether the fetus must be afforded constitutional protection at all and certainly not constitutional protection which overcomes the rights of the woman.

The state law cases fall into these categories:

1. ***The transfusion cases:***

One New Jersey court ordered blood transfusions to save the life of a nonconsenting Jehovah's Witness *and* her unborn child. The case did not hold that fetuses have constitutional rights, however, but only that the state, as *parens patriae,* had power to protect fetuses where the conflicting right in the mother was to practice her religion at the probable expense of her own life. *Raleigh Fitkin-Paul Morgan Memorial Hospital* v. *Anderson,* 42 N.J. 421 (1964), *cert. denied,* 377 U.S. 985 (1964).

The same court has recently noted the established distinction between religious beliefs (which are absolutely protected) and religious conduct or practices, which must yield to government restraint where compelling state interests such as life and health are involved, citing among other cases those authorizing the vaccination of children and banning the use of snakes in religious ritual. *John F. Kennedy Memorial Hospital* v. *Heston,* 58 N.J. 576, 580-1

(1971). The court also pointed out in *Heston* that the adult Jehovah's Witness involved there (as, no doubt in every case where the patient has sought hospitalization) wanted to live, not die. *Id.* at 582. Therefore, the court was in effect acting as *parens patriae* in respect to a woman by helping her to choose between two inconsistent values. Judge J. Skelly Wright in *Application of the President and Directors of Georgetown College, Inc.*, 331 F. 2d 1000, *rehearing denied*, 331 F.2d 1010 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978 (1964), discussed another common thread in these cases; the fact that the woman and family may welcome a court order as both saving the patient's life and excusing the patient and family of any sin by assuming the onus of authorizing the blood transfusions.

The blood transfusion cases provide no basis of support for the proposition that alleged constitutional rights of the fetus can outweigh, not a religious practice threatening the life of woman and fetus, but the fundamental positive constitutional rights of privacy and liberty of the woman. The fact that these courts have ordered blood transfusions in cases involving pregnant women in aid of their life and health as well as the life of the fetus, does not support the argument that the state must or may protect the fetus as a constitutional matter, as against the constitutional rights of the woman.

2. *The tort cases:*

Nor do wrongful death and other tort cases support the contention that the fetus is a legal person. In *Endresz v. Friedberg*, 24 N.Y. 2d 478 (1969), for example, the New York Court of Appeals held that there was no right of recovery under the New York wrongful death statute by

personal representatives of a stillborn fetus which died as a result of injuries received while *en ventra sa mere.*

The court in *Endresz* pointed out that the cause of action was given the born child only to recognize

> "the legal right of every human being to *begin life* unimpaired by physical or mental defects resulting from the negligence of another. The considerations of justice which mandate the recovery of damages by an infant, injured in his mother's womb and born deformed through the wrong of a third party, are absent where the fetus, deprived of life while yet unborn, is never faced with the prospect of impaired mental or physical health." *Id.* at 483 (emphasis added).

This passage, written in 1969, makes clear that legally the fetus "begins life" at birth. *Ibid.* Any event which occurs before birth, and which later results in a legal right for the child, creates only a conditional right, which "*attaches only* upon fulfillment of the condition that the child be born alive." *Id.* at 486 (citing *Keyes* v. *Construction Serv.,* 340 Mass. 633, 636) (emphasis added).

As the court said in *Endresz,*

> "In other words, even if, as science and theology teach, the child begins a separate 'life' from the moment of conception, it is clear that, 'except insofar as is necessary to protect the child's own rights'* (*Matter of Roberts,* 158 Misc. 698, 699, *supra*), the law has never considered the unborn fetus as having a separate 'juridical existence' (*Drabbels* v. *Skelly Oil Co.,* 155 Neb. 17, 22) or a legal personality or identity 'until it sees the light of day.' (*Matter of Peabody,* 5 N.Y. 2d 541, 547, *supra*)." 24 N.Y. 2d at 485.

* Meaning a child subsequently born alive.

3. *The criminal cases:*

State law restrictions on abortions do not support the view that the fetus must be deemed a person or may be given legal rights which negate the constitutional rights of the woman. An examination of state criminal statutes and cases thereunder makes clear that no state considers the fetus a person for purposes of the Fourteenth Amendment. *Amici* are aware of no abortion statute which provides that the destruction of the fetus constitutes murder. State cases dealing with the destruction of a fetus show that the courts do not consider the embryo or fetus a person for purposes of legal definition (*e.g., Foster* v. *State,* 182 Wis. 298 [1923] [citing, *inter alia, Evans* v. *People,* 49 N.Y. 86 (1872)]; *Summerlin* v. *State,* 150 Ga. 173 [1920]; *Abrams* v. *Foshee & Wife,* 3 Clark 274 [Sup. Ct. Iowa 1856]), irrespective of whether or not in a biological sense there is life in an embryo. *E.g., Foster* v. *State, supra.* Furthermore, the penalties for abortion provided for by statute are considerably less severe than those for murder. Thus, the criminal statutes on abortion and the cases construing them, coupled with the cases which have expressly held that the fetus is not a person under statutes defining murder or vehicular homicide are unconsistent with the thesis that abortion is murder and that the fetus is a person for constitutional purposes.

It is also relevant to note that a number of cases have held that in the absence of a special provision, the woman who commits an abortion on herself is not guilty of any criminal offense. *See, e.g., Snyder Appeal,* 398 Pa. 237, 246 (1960); *Moore* v. *State,* 37 Tex. Cr. Rep. 552, 560 (1897); *State* v. *Parm and Viney,* 5 Pennewill's Del. R. (21 Del.)

556, 558 (1905); *State* v. *Montifoire*, 95 Vt. 508, 512 (1922); *Payne* v. *Louisiana Industrial Ins. Co.*, 33 So. 2d 444 (Ct. App. La. 1948); *Abele* v. *Markle*, 342 F. Supp. 800 (D. Conn., April 18, 1972). Indeed, some states have made the exemption for women from prosecution for abortion explicit in their statute. *See, e.g.*, 12 Vt. Stat. Ann., §101 (1959), and *Beecham* v. *Leahy*, —— Vt. ——, 287 A. 2d 836 (1972).

If in fact the fetus were a person entitled to constitutional protection, neither the courts nor the legislatures would have exempted the woman from prosecution. And even in states where under the law the woman may be prosecuted, she almost never is. For example, there appears to be no New York case in which a woman was convicted for having an abortion or being a party to her abortion. *People* v. *Lovell*, 40 Misc. 2d 458, 242 N.Y.S. 2d 958 (1963); *People* v. *Vedder*, 98 N.Y. 630, at 632 (1885); *People* v. *McGonegal*, 136 N.Y. 62, at 76 (1892).

D. The fetus: science and metaphysics

Some of the briefs filed herein are devoted in considerable part to descriptions of scientific evidence with respect to whether or not a fetus is a living "person." Whatever the findings of science and embryology, whether a fetus is a person is, in the words of a prestigious association of physicians, "not a matter of fact"; the answer derives from matters of "religious philosophy and religious principle." VII The Right to Abortion: A Psychiatric View, pp. 218-219 (Group for the Advancement of Psychiatry, 1969). Thus, "whether the fetus is or is not a human being is a matter of definition, not fact; and we can define it

any way we wish." Hardin, Abortion or Compulsory Pregnancy? 30 J. Marriage & Family No. 2 (May, 1968). That our society has chosen to define human life as beginning at birth is sufficiently indicated by our method of calculating age. As the New York Court of Appeals said in *Endresz* v. *Friedberg, supra,* in commenting on the relation of scientific and theological teaching to law in this area: "The law has never considered the unborn fetus as having a separate juridical existence."

Conclusion

Stripped of all legalisms and argumentation, what the Georgia and Texas statutes do is compel a woman to bear a child she does not wish to have. Her whole life, not to mention the lives of all those connected with her, is affected by such compulsory child-bearing. Except possibly for military service, imprisonment and capital punishment, as to which there are elaborate safeguards, it is difficult to imagine a more drastic restriction on privacy or on the fundamental freedom to control one's body and one's life. The facts we have referred to in our original brief and herein make clear that when abortion is available on the joint decision of the woman and her physician in the early stages of pregnancy, the effect on public health and welfare is not adverse but enormously beneficial according to all measurable indices. *Amici* once again request that this Court affirm the judgments of the three-judge courts below insofar as they held unconstitutional the limitations in the Georgia and Texas statutes on the grounds for the performance of abortions, reverse the judgment of the Texas three-judge court insofar as it denied injunctive relief, and re

verse the judgment of the Georgia three-judge court insofar as it denied injunctive relief and upheld the constitutionality of the residency, consultation, committee approval and joint accreditation requirements of the Georgia law.

September 15, 1972

Respectfully submitted,

HARRIET F. PILPEL
FREDERIC S. NATHAN
Attorneys for Amici Curiae

Of Counsel:
GREENBAUM, WOLFF & ERNST
NANCY F. WECHSLER
RUTH JANE ZUCKERMAN
EVE PAUL

E COPY
(D)

FILED
SEP 16 1972
CLE

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 70-18, 1972 TERM

JANE ROE, JOHN DOE, MARY DOE, AND
JAMES HUBERT HALLFORD, M.D.,
Appellants

v.

HENRY WADE,
DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

SUPPLEMENTAL BRIEF FOR APPELLANTS

ROY LUCAS
James Madison Constitutional
Law Institute
230 Twin Peaks Boulevard
San Francisco, California 94114

LINDA N. COFFEE
2130 First Nat'l Bank Bldg.
Dallas, Texas 75202

SARAH WEDDINGTON
JAMES R. WEDDINGTON
709 West 14th
Austin, Texas 78701

FRED BRUNER
ROY L. MERRILL, JR.
Daugherty, Bruner, Lastelick
& Anderson
1130 Mercantile Bank Bldg.
Dallas, Texas 75201
Attorneys for Appellants

September 1972.

INDEX

	Page
STATEMENT	1
ARGUMENT	4
I. Recent Cases Support Appellants' Contentions Regarding Standing.	4
II. The Right to Seek and Receive Medical Care for the Protection of Health and Well-Being is a Fundamental Personal Liberty.	7
III. The Texas Abortion Law Violates Fundamental Rights of Privacy.	8
IV. The Texas Statute Does Not Advance Any State Interest of Compelling Importance in a Manner Which is Narrowly Drawn.	9
V. The Texas Abortion Law is Unconstitutionally Vague.	15
VI. The Texas Abortion Law Places an Unconstitutional Burden of Proof on the Physician.	16
CONCLUSION	17

TABLE OF AUTHORITIES

Statutes:

UNITED STATES CONSITUTION Art. 1, § 2, Cl. 3 14
TEXAS FAMILY CODE section 1.21, at 9 (1972) 12
TEXAS FAMILY CODE section 2.21, at 17 (1972) 12
TEXAS FAMILY CODE section 1.31, at 11 (1972) 12
1 TEXAS PENAL CODE art. 70, at 149 (1952) 5
1 TEXAS PENAL CODE art. 495, at 553 (1952) 12
2A TEXAS PENAL CODE art. 1183, at 372 (1961) 12
2A TEXAS PENAL CODE art. 1191, at 429 (1961) 17
2A TEXAS PENAL CODE art. 1192, at 433 (1961) 17
2A TEXAS PENAL CODE art. 1193, at 434 (1961) 17
2A TEXAS PENAL CODE art. 1194, at 435 (1961) 17
2A TEXAS PENAL CODE art. 1196, at 436 (1961) 17
3 TEXAS PENAL CODE art. 1628, at 670 (1953) 5

Cases:

Abele v. Markle, 342 F.Supp. 800 (D. Conn. 1972) 3, 5, 9, 12
Abele v. Markle, 452 F.2d 1121 (2d Cir. 1971) 5
Abrams v. Foshee & Wife, 3 Clark 274 (Iowa 1856) 11
Beecham v. Leahy, 287 A.2d 836 (Vt. 1972) 6, 7
Byrn v. New York City Health & Hospital Corp., No. 210 72 (Ct. App. N.Y., 1972) 13, 14
Chaney v. Indiana, No. 1171 S 321 (Ind., July 24, 1972) 16
Clark v. State, 117 Ala. 1, 23 So. 671 (1898) 11
Delgado v. Yandell, 468 S.W.2d 475 (Tex. Civ. App. 1971), *appr. per curiam*, 471 S.W.2d 569 (1971) 12
Eisenstadt v. Baird, 405 U.S. 438 (1972) 4, 8
Griswold v. Connecticut, 381 U.S. 479 (1965) 13
Harris v. State, 28 Tex. App. 308, 12 S.W. 1102 (1889) 11
Keeler v. Superior Court, 2 Cal.3d 619, 470 P.2d 662, 87 Cal. Rptr. 481 (1970) 11
Leal v. C.C. Pitts Sand and Gravel, Inc., 419 S.W.2d 820 (Tex. 1967) 12
McGarvey v. Magee-Women's Hospital, No. 71-196 (W.D.Pa. Mar. 17, 1972) 14
Passley v. State, 194 Ga. 327, 21 S.E.2d 230 (1942) 12
People v. Nixon, Dkt. No. 9579 (Ct. App. 2 Div., Aug. 23, 1972) 10

Poe v. Menghini, 339 F.Supp. 986 (D. Kan. 1972) 6
State v. Barquet, 262 So.2d 431 (1972) 15
State v. Dickinson, 28 Ohio St. 2d 65, 275
N.E.2d 599 (1971) 11
State v. Harness, 280 S.W.2d 11 (Mo. 1955) 12
Thompson v. State, No. 44,071 (Tex. Ct. Crim. App.,
Nov. 2, 1971), *petition for cert. filed*, 40 U.S.L.W. 3532
(U.S. March 20, 1972) 2, 15, 16
United States v. Vuitch, 402 U.S. 62 (1971) 13, 15, 16
Vuitch v. Hardy, Civil No. 71-1129-Y (D.Md. June 22, 1972) 8
Wallace v. State, 7 Tex. App. 570, 10 S.W. 255 (1880) 11
Watson v. State, 9 Tex. App. 237 (Tex. Crim. App. 1880) 10
Y.W.C.A. v. Kugler, 342 F.Supp. 1048 (D.N.J. 1972) 4, 8, 15

Legal Commentary:
Means, *The Phoenix of Abortional Freedom*, 17 N.Y.L.
FORUM 335 (1971) 14

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 70-18, 1972 TERM

JANE ROE, JOHN DOE, MARY DOE, AND
JAMES HUBERT HALLFORD, M.D.,
Appellants

v.

HENRY WADE,
DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

SUPPLEMENTAL BRIEF FOR APPELLANTS

STATEMENT

The instant case was argued before this Court on December 13, 1971. It is a direct appeal from the decision of a three-judge federal panel declaring the Texas abortion law to be unconstitutional but refusing to grant injunctive relief and denying standing to Appellants Doe.

On June 27, 1972, the case was restored to the calendar for reargument. 40 U.S.L.W. 3617. Reargument is scheduled for October 11, 1972.

Several pertinent decisions have been rendered since the submission of Appellants' original brief. This supplemental brief is submitted to inform the Court of those decisions.

REQUEST FOR INJUNCTIVE RELIEF.

As to their request for injunctive relief, Appellants would once again point out that the injunction requested was one against *future* prosecutions only. Appellant Hallford had *not* requested injunctive relief to prevent continuation of the state criminal charge pending against him.

THE CONTINUING SITUATION IN TEXAS.

Despite the District Court holding in June, 1970, that the Texas abortion law is unconstitutional, in November, 1971, the Texas Court of Criminal Appeals (Texas' highest criminal court), in *Thompson v. State*, No. 44,071 (Tex. Ct. Crim. App., Nov. 2, 1971), *petition for cert. filed*, 40 U.S.L.W. 3532 (U.S. March 20, 1972) (No. 71-1200), rendered a decision which directly contradicted that of the District Court. Without interpreting the abortion statute, the Texas court held that the Texas law was not vague. It specifically did not reach the issue of privacy but held that the State has a compelling interest in protecting the fetus through legislation.

Since the District Court refused to grant injunctive relief and since there is now a direct dichotomy between state and federal decisions, Texas physicians continue to refuse to perform abortions for fear of prosecution. During the last nine months of 1971, 1,658 Texas women travelled to New York to obtain abortions. Texas women continue to be unable to obtain abortion procedures in Texas and thereby continue to suffer irreparable injury.

ACTIONS REGARDING ABORTION.

At its 1972 Midyear Meeting, the American Bar Association House of Delegates approved the Uniform Abortion Act as drafted by the National Conference of Commissioners on Uniform State Laws. 58 A.B.A.J. 380 (1972). The Uniform Abortion Act allows termination of pregnancy up to twenty

weeks of pregnancy and thereafter for reasons such as rape, incest, fetal deformity, and the mental or physical health of the woman.

The Rockefeller Commission on Population and the American Future has recommended that the matter of abortion should be left to the conscience of the individual concerned. *Abele v. Markle*, 342 F. Supp. 800, 802 (D. Conn. 1972).

ARGUMENT

I.

RECENT CASES SUPPORT APPELLANTS' CONTENTIONS REGARDING STANDING.

In the oral argument before the three-judge panel, the attorney for Henry Wade, the sole defendant herein, admitted that Appellant Dr. Hallford has standing and that Appellant Roe has standing as an individual and as the representative of the class. (A. 104). The defendent-appellee did not accede standing to John and Mary Doe.

Several recent cases support Appellants' arguments regarding standing.

This Court, in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), held that Appellee Baird had standing to assert the rights of unmarried persons denied access to contraceptives even though he was not a physician or pharmacist and was not an unmarried person denied access to contraceptives.

Just as Baird was allowed to raise the rights of persons who were affected by the statute but who were not subject to prosecution thereunder, here Appellant Hallford should be allowed to raise, in addition to his own constitutional claims, the claims of women who are vitally affected by the Texas abortion law but not subject to prosecution thereunder.

Young Women's Christian Association v. Kugler, 342 F.Supp. 1048 (D.N.J. 1972), declared the New Jersey abortion laws unconstitutional. Such laws prohibited persons from causing miscarriage "without lawful justification."

Saying that "the alleged deprivations of constitutional rights depend upon the contingency of pregnancy," 342 F.Supp. at 1056, the Court dismissed all the women plaintiffs since none had alleged pregnancy. There is no indication that any had alleged status as persons wishing to give advice or assistance to women seeking abortions.

The Court recognized that all the physician plaintiffs, two of whom had lost their licenses to practice medicine and one of whom was incarcerated at the time of the action, had standing to raise the constitutional questions both on behalf of and pertaining to themselves and their women patients.

The plaintiff physicians alleged that they had been forced to turn away patients seeking advice and information about the possibility of obtaining abortions, as have Dr. Hallford and the class he represents in the instant case. Dr. Hallford and his fellow physicians are also subject to prosecution under the law if they should perform an abortion that a jury finds was not for the purpose of saving the life of the woman.

Dr. Hallford should be recognized to have standing to litigate the constitutional claims of his class of physicians and those of women patients.

In *Abele v. Markle,* 342 F.Supp. 800 (D. Conn. 1972), the Connecticut anti-abortion statutes were declared to be unconstitutional. Much like the Texas law, the statutes prohibited all abortions except those necessary to preserve the life of the mother or fetus. Prior to the District Court's consideration of the merits the Circuit Court held that pregnant women and medical personnel desiring to give advice and aid regarding abortions had standing to challenge the statute. *Abele v. Markle,* 452 F.2d 1121 (2 Cir. 1971).

In this Texas case, Appellant Jane Roe was pregnant when the action was filed. Appellants John and Mary Doe in their complaint outlined their desire to actively participate in organizations giving advice and counselling regarding abortions, along with information to specifically assist in securing abortion. (A. 18). Although the Connecticut abortion laws more specifically applied to giving aid, advice, and encouragement to bring about abortion, Texas law is such that Appellants Doe have been effectively stopped from giving such aid, advice, and encouragement for fear of being subjected to prosecution under either 1 TEXAS PENAL CODE art. 70 (1952) as accomplices to the crime of abortion, or 3 TEXAS PENAL CODE art. 1628 (1953) for conspiring to commit the crime of abortion. (A. 19).

Like the Connecticut medical personnel desiring to give advice and aid regarding abortions, Appellants Doe should be recognized to have standing to challenge the Texas law.

In *Poe v. Menghini*, 339 F.Supp. 986 (D. Kan. 1972), the three-judge panel recognized that two women who were pregnant when the action was commenced and a doctor had standing to challenge certain restrictions applicable to the performance of abortions. In the instant case, Appellant Jane Roe, who was pregnant when the action was commenced, and Appellant Dr. Hallford would correspondingly have standing to challenge the Texas abortion laws.

Beecham v. Leahy, 287 A.2d 836 (Vt. 1972), declared unconsitutional the Vermont abortion law which, like Texas law, made abortion a criminal offense unless the same is necessary to preserve the life of the woman. The Vermont statute stated that the woman was not liable to the penalties prescribed by the section.

The plaintiffs in *Beecham* were an unmarried pregnant woman who wanted an abortion and a physician who, except for the law, was willing to terminate the pregnancy but who had not done so and who (unlike Appellant Dr. Hallford) was not the subject of pending state criminal action. The Court held that the unmarried pregnant woman had standing but that the physician did not. There is no indication in the opinion as to whether or not the physician sought to adjudicate the rights of his patients, which other cases have allowed.

Regarding the woman the Court said:

> By reducing her rights to ephemeral status without confronting them, the ability of the plaintiff to produce a case or controversy in the ordinary sense is likewise frustrated. She cannot sue the doctor for an action by him that cannot be compelled. She is not herself subject to legal action, by statutory exemption. Yet a very real wrong, in the eyes of the law, exists. . . . Therefore, . . . we declare that she is entitled to proceed in her action founded on her petition. . . .

287 A.2d at 840. Appellant Jane Roe was similarly found by the lower court to have standing. She, too, was pregnant, had

sought but been unable to find a physician to terminate the pregnancy, was not subject to state prosecution, and yet had suffered a very real wrong.

II.

THE RIGHT TO SEEK AND RECEIVE MEDICAL CARE FOR THE PROTECTION OF HEALTH AND WELL-BEING IS A FUNDAMENTAL PERSONAL LIBERTY.

As shown in the original brief of Appellants, the Texas abortion law effectively denies Appellants Jane Roe and Mary Doe access to health care.

Although under Texas case law it is not a crime for a pregnant woman to terminate her own pregnancy or to persuade someone else to perform an abortion on her, the Texas law effectively denies her the assistance of trained medical personnel in doing what she is otherwise legally allowed to do.

The Supreme Court of Vermont, in *Beecham v. Leahy, supra,* observed that:

> On the one hand the legislation, by specific reference, leaves untouched in the woman herself those rights respecting her own choice to bear children now coming to be recognized in many jurisdictions. . . . *Yet, tragically, unless her life itself is at stake, the law leaves her only to the recourse of attempts at self-induced abortion, uncounselled and unassisted by a doctor, in a situation where medical attention is imperative.*

287 A.2d at 839 (emphasis added).

The woman is guilty of no crime in Texas, although by case law rather than by statute. Tragically, Texas women are effectively prevented from securing the services of a doctor when medical expertise and experience is imperative to avoid such pitfalls as the piercing of the uterine wall and infection. By preventing the availability of medical assistance, the state effectively endangers the health and well-being of citizens in direct contravention of their best interests and fundamental rights.

III.

THE TEXAS ABORTION LAW VIOLATES FUNDAMENTAL RIGHTS OF PRIVACY.

As the opinion of this Court in *Eisenstadt v. Baird, supra,* states:

> If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or begat a child.

405 U.S. 438.

In *Vuitch v. Hardy,* Civil No. 71-1129-Y (D. Md. June 22, 1972), the Court stated: "However, this Court is convinced that a woman does have a constitutionally protected, 'fundamental personal right' to seek an abortion," citing *Griswold* and the above language from *Eisenstadt.*

Y.W.C.A. v. Kugler, supra, resulted in the New Jersey abortion law being declared unconstitutional in part as a violation of rights of privacy.

> The scope of interests found to be constitutionally protected by the Supreme Court demonstrates that it views both the sanctity of the individual's person and his relationships within a family as so vital to our free society that they should be ranked as fundamental, or implicit in the concept of ordered liberty.

342 F.Supp. at 1071.

> Accordingly, we are persuaded that the freedom to determine whether to bear a child and to terminate a pregnancy in its early stages is so significantly related to the fundamental individual and family rights already found to exist in the Constitution that it follows directly in their channel and requires recognition. Whether a constitutional right of privacy in this area is conceptualized as a family right, as in *Griswold,* as a personal and individual right, or as deriving from both sources is of no significance and applies equally to all women regardless of marital status, for the restriction on abortion by the New Jersey statutes immediately involves and interferes with the protected

areas of both family and individual freedom. Hence we hold that a woman has a constitutional right of privacy recognizable under the Ninth and Fourteenth Amendments to determine for herself whether to bear a child or to terminate a pregnancy in its early stages, free from unreasonable interference by the State.

342 F.Supp at 1072.

The fundamental impact of the question of abortion on women was emphasized by the *Abele* Connecticut panel:

> The decision to carry and bear a child has extraordinary ramifications for a woman. Pregnancy entails profound physical changes. Childbirth presents some danger to life and health. Bearing and raising a child demands difficult psychological and social adjustments. The working or student mother must curtail or end her employment or educational opportunities. The mother with an unwanted child may find that it overtaxes her and her family's financial or emotional resources. *Thus, determining whether or not to bear a child is of fundamental importance to a woman.*

342 F.Supp. at 801 (emphasis added).

As the lower Court found in the instant case, the Texas abortion law must be declared unconstitutional because it deprives women of their right, secured by the Ninth and Fourteenth Amendments, to choose whether or not to carry a pregnancy to term.

IV.

THE TEXAS STATUTE DOES NOT ADVANCE ANY STATE INTEREST OF COMPELLING IMPORTANCE IN A MANNER WHICH IS NARROWLY DRAWN.

The legislative purposes that the Texas abortion law was meant to serve are not altogether clear. No legislative history specifically applicable to Texas is available.

Appellee during the oral argument before the lower court said the State has only one interest, that of protecting the

unborn (A. 104-05). Appellee's brief and Dec. 13th argument before this Court advance no other State interest.

It is important to note that Appellee gives no authority whatsoever that even tends to establish that the purpose of the Texas legislature in adopting the abortion law was in fact what Appellee suggests.

On the other hand, Appellants' original brief establishes that the legislative purpose in other states was to protect the pregnant woman from the dangers of antiseptic surgery.

Further *Watson v. State*, 9 Tex. App. 237 (Tex. Crim. App. 1880), states that the *woman* is the *victim* of the crime of abortion.

People v. Nixon, Dkt. No. 9579 (Ct. App. 2 Div., Aug. 23, 1972), involved a challenge to the constitutionality of the Michigan abortion statute making criminal actions to terminate a pregnancy unless the same was necessary to preserve the life of the woman. The Court concluded that the "so-called 'abortion' statute was not intended to protect the 'rights' of the unquickened fetus" but rather that the obvious propose was to protect the pregnant woman.

The Court pointed out that the woman was not subject to prosecution for self-induced abortion and concluded:

> . . . it must be assumed that the harm the statute was attempting to punish ran only to the woman and not to the fetus. If the statute were intended to protect the continued existence of the fetus, then there would be no reason for exempting the woman from prosecution.

Opinion at 4, n.9.

Similarly, since self-abortion is not a crime in Texas, it is not logical to assume that the purpose of the legislature in passing the so-called "abortion" law was to protect the fetus. It is logical that the legislative purpose was to protect the woman and her health.

Appellants' original brief establishes that the Texas abortion law no longer serves to protect the health of the pregnant woman; in fact it is a hindrance to health.

Even if Appellee could establish that the legislative purpose of the Texas abortion law was to protect the life of the unborn, the state certainly cannot meet its burden of proving that the statute now has a compelling interest in such regulation nor that the law is sufficiently narrow.

The fetus, as such, is not and never has been protected in Texas, with the possible exception of the abortion statutes. In Texas, the so-called protections for the "unborn child" are dependent on the live birth of the child. Thus under Texas law, once born a child may have rights retroactive to the time prior to birth but such rights are meant to benefit those who have survived birth.

Under the criminal laws of Texas, the fetus is given little protection. Self-abortion is not a crime, and the pregnant woman who seeks or receives the help of others in terminating her pregnancy is guilty of no crime. Even the severity of the penalty for another having performed an abortion depends upon whether or not the woman consented to the procedure.

To destroy the life of a fetus has never been considered as homicide in Texas. In order to obtain a murder conviction, the state must " . . . prove that the child was born alive; (and) that it had an existence independent of the mother. . . ." *Harris v. State*, 28 Tex. App. 308, 309, 12 S.W. 1102, 1103 (1889). In *Wallace v. State*, 7 Tex. App. 570, 10 S.W. 255 (1880), the mother strangled her child with string. The court overturned her murder conviction, saying that the state failed to prove either that the child was born live or that the actual childbirth process had been completed before the child was killed.

Texas courts are not alone in following the common law rule that a child must be born alive to be the subject of the crime of murder. *State v. Dickinson*, 28 Ohio St. 2d 65, 275 N.E.2d 599 (1971); *Keeler v. Superior Court*, 2 Cal. 3d 619, 470 P.2d 662, 87 Cal. Rptr. 481 (1970); *Clark v. State*, 117 Ala. 1, 23 So. 671 (1898); *Abrams v. Foshee*, 3 Clark 274 (Iowa 1856). In those cases where a person has actually been convicted of a crime for causing the death of a fetus, it has not been under the regular homicide statute but under some special statutory provision,

such as a feticide statute. Most feticide statutes have as one of their essential elements a *malicious intent to kill the mother. Passley v. State,* 194 Ga. 327, 21 S.E.2d 230 (1942); *State v. Harness,* 280 S.W.2d 11 (Mo. 1955). An intent to cause a miscarriage without an intent to kill the woman would not be sufficient to sustain a conviction of feticide. The penalties under such statutes are also generally lighter than those prescribed by the homicide laws.

Viewed from another angle, there are ironical contradictions between some Texas criminal laws and the abortion law. As stated in *Abele v. Markle, supra,* "(t)he statutes force a woman to carry to natural term a pregnancy that is the result of rape or incest. Yet these acts are prohibited by the state at least in part to avoid the offspring of such unions." 342 F.Supp at 804.

Similarly, Texas makes rape and incest criminal offenses, 2A TEXAS PENAL CODE, art. 1183 at 372 (1961), and 1 TEXAS PENAL CODE, art. 495, at 553 (1952), and prohibits the marriage of persons closely related, TEXAS FAMILY CODE section 2.21, at 17 (1971). Persons who have any infectious condition of syphilis or other veneral disease cannot obtain a marriage license. TEXAS FAMILY CODE, sections 1.21, at 9, and 1.31 at 11 (1972).

The fetus gets no more protection under Texas tort laws than it does under Texas criminal laws. The Texas courts did not recognize a right to recover for injuries received prior to birth until 1967 (113 years after the Texas abortion law was enacted) in *Leal v. C.C. Pitts Sand and Gravel, Inc.,* 419 S.W.2d 820 (Tex. 1967). *Leal* involved a wrongful death action brought by the parents of a child who died two days after birth as the result of pre-natal injuries received in an automobile collision. In allowing the wrongful death action, the Texas Supreme Court held that the child, *had it lived,* could have maintained an action for damages for the pre-natal injuries.

In *Delgado v. Yandell,* 468 S.W.2d 475 (Tex. Civ. App. 1971), *appr. per curiam,* 471 S.W.2d 569 (1971), the Texas Supreme Court approved the holding of the Court of Civil Appeals that a cause of action does exist for pre-natal injuries

sustained at any pre-natal stage *provided the child is born alive and survives.* The damages in such a case are not paid to the fetus; they are compensation to a *living* child for having to spend all or a part of his life under a disability caused prior to birth by another's wrongful act.

Thus the claimed "rights" of the fetus in the tort area are actually rights which may only be exercised by a live child after birth or are the right of bereaved potential parents to be compensated for their loss.

Though much has been written concerning the property rights of the fetus, these rights are really legal fictions which have developed to protect the rights of living children. In order to receive the benefit of its supposed rights, the fetus must be born alive. There has never been a case in Texas where a fetus which was stillborn or destroyed through miscarriage or abortion has been treated as a person for the purpose of determining property rights. When certain kinds of inheritances are involved, even unconceived children can be considered to have some property "rights" in that they may receive a legacy on their subsequent birth. *Byrn v. New York City Health & Hospitals Corp.*, No. 210 72 (Ct. App. 1972). However, this has not prevented the United States Supreme Court from finding a constitutional right on the part of a woman to practice contraception. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

There are other areas where Texas does not treat a fetus as a person. For example, under the rules of the Texas Welfare Department, a needy pregnant woman cannot get welfare payments for her unborn child. The state compels the birth of the child, yet does not provide the assistance often needed to produce a healthy child.

Texas does not regard the fetus as a person and has made no attempt to put the fetus on an equal footing with a living child.

Several courts have recently dealt directly with the question of whether the fetus is a person within the meaning of the United States Constitution. Arguably this Court's opinion in

Vuitch implicitly rejected the claim that the fetus is a person under the Fifth and Fourteenth Amendments.

McGarvey v. Magee-Womens Hospital, Civil Action No. 71-196 (W.D.Pa. Mar. 17, 1972), held that the embryo or fetus is not a person or citizen within the meaning of the Fourteenth Amendment or the Civil Rights Act.

In *Byrn v. New York City Health & Hospitals Corp.*, *supra*, the issue was whether children in embryo are and must be recognized as legal persons or entities entitled under the State and Federal Constitutions to a right to life. The Court's conclusion was that the Constitution does not confer or require legal personality for the unborn.

The Appellee has failed to produce any authority for the proposition that the fetus is considered a person under the Constitution. There is evidence in the Constitution that "person" applies only to a live born person. The clause requiring a decennial census says "the whole Number of * * * Persons" in each state must be counted. U.S. Const. Art. I, § 2, Cl. 3. From the first census in 1790 to the present, census takers have counted only those born. Means, *The Phoenix of Abortional Freedom*, 17 N.Y.L. Forum 335, 402-03 (1971).

Although on its face, the Texas abortion law applies any time after conception, the Brief for Appellee submitted to this Court at page 30 states:

> It most certainly seems logical that from the stage of differentiation . . . the fetus implanted in the uterine wall deserves respect as a human life.

Here Appellee seems to suggest that the law should apply instead only after implantation. Yet on page 32 Appellee devotes a paragraph to describing the "child" during the seven to nine days *before* implantation. During oral argument Appellee suggested that Texas hospitals intervene to terminate pregnancy when a rape victim is brought in (Tr. 47-48), although there is no exception for rape in the Texas statute.

Appellee's ambivalence is but one indication that the statute does not evidence a compelling interest which could not be protected by less restrictive means.

V.

THE TEXAS ABORTION LAW IS UNCONSTITUTIONALLY VAGUE.

In *Thompson v. State, supra,* the Texas Court of Criminal Appeals upheld the conviction of a physician who allegedly had performed an abortion. The court held, relying on *United States v. Vuitch,* 402 U.S. 62 (1971), that the Texas abortion law was not vague.

The Court in *Thompson* erred. Whether or not a statute is vague is to be determined from the standpoint of the person who is considering performing an act. The Supreme Court in *Vuitch* emphasized that a doctor's day-to-day task was one of consideration for the *health* of his patients; the District of Columbia statute allowed physicians to act to preserve the life or *health* of patients. Texas, however, allows physicians to act only when necessary to protect *life;* that is not the sort of criteria physicians are accustomed to dealing with. From the physician's standpoint, as the District Court in this case pointed out, there are many uncertainties inherent in the language of the statute. *Vuitch* is not authority for upholding the Texas abortion law.

Further, in *Vuitch* the Court upheld the D. C. statute as interpreted by lower courts to include both mental and physical health. In Texas there has been no interpretation of the Texas statute. *Thompson* does not even discuss application of the statute.

Recent decisions have declared laws in New Jersey and Florida to be unconsitutionally vague. In *Y.W.C.A. v. Kugler, supra,* a federal panel declared vague the New Jersey statute against performing an abortion "without lawful justification." Florida's statute against performing an abortion "unless the same shall have been necessary to preserve the life of the mother" was declared unconstitutionally vague by the Florida Supreme Court in *State v. Barquet,* 262 So.2d 431 (1972).

The Florida court stated that "if the statutes contained a clause reading 'necessary to the preservation of the mother's life *or health*' instead of the clause 'necessary to preserve *the* life,' the statutes could be held constitutional. . . ." 262 So.2d at 433.

Chaney v. Indiana, No. 1171 S 321 (Ind. July 24, 1972), however, rejects the vagueness arguments as to a non-medical person.

VI

THE TEXAS ABORTION LAW PLACES AN UNCONSTITUTIONAL BURDEN OF PROOF ON THE PHYSICIAN.

Appellant's original brief details the unconstitutionality of placing upon the physician charged with allegedly performing an abortion the burden of showing that the procedure was necessary for the purpose of saving the life of the woman. Although the burden of proof issue was not before them, the Texas Court of Criminal Appeals in a footnote in *Thompson, supra,* recognized that the *Vuitch* case does call into question the validity of Texas' statutory scheme as to who has the burden of proof on the exemption.

CONCLUSION

For the reasons stated in Appellants' original brief and this supplemental brief, this Court should reverse the lower court's judgment denying standing to Appellants Doe and denying injunctive relief; declare that the Texas Abortion Statutes, Arts. 1191, 1192, 1193, 1194 and 1196, TEXAS PENAL CODE, violate the United States Constitution; and remand with instructions that a permanent injunction against enforcement of said statutes be entered.

Respectfully submitted,

ROY LUCAS
James Madison Constitutional
Law Institute
230 Twin Peaks Blvd.
San Francisco, California 94114

SARAH WEDDINGTON
JAMES R. WEDDINGTON
709 West 14th
Austin, Texas 78701

LINDA N. COFFEE
2130 First Nat'l Bank Bldg.
Dallas, Texas 75202

FRED BRUNER
ROY L. MERRILL, JR.
Daughterty, Bruner, Lastelick
& Anderson
1130 Mercantile Bank Bldg.
Dallas, Texas 75201

Attorneys for Appellants

FREE COPY

In the

Supreme Court of the United States

REHEARING, OCTOBER TERM, 1972

Supreme Court, U.S.
FILED
OCT 11 1972
MICHAEL RODAK, JR., CLERK

No. 70-18

JANE ROE, JOHN DOE, and MARY DOE,
Appellants,

vs.

JAMES HUBERT HALLFORD, M.D.,
Appellant-Intervenor,

vs.

HENRY WADE,
Appellee.

On Appeal from the United States District Court for the Northern District of Texas.

No. 70-40

MARY DOE, et al., etc.,
Appellants,

vs.

ARTHUR K. BOLTON, Attorney General of the State of Georgia, et al., etc.,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia.

Motion for Leave to File Brief Amici Curiae on Behalf of Organizations and Named Women in Support of Appellants in Each Case, and Brief Amici Curiae.

THE CALIFORNIA COMMITTEE TO LEGALIZE ABORTION
THE SOUTH BAY CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN
ZERO POPULATION GROWTH, INC.
CHERIEL MOENCH JENSEN
LYNETTE PERKES

JOAN K. BRADFORD
987 Laurel Street
San Carlos, California 94070
Attorney for Amici Curiae

PRINTING COMPANY OF CALIFORNIA, 548 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

Page

Motion for Leave to File Brief Amici Curiae on Behalf of Organizations and Named Women in Support of Appellants in Each Case 1

Amici Curiae Brief on Behalf of Organizations and Named Women in Support of Appellants in Each Case 4

Opinions Below 4

Jurisdiction 5

Interest of Amici Curiae 5

Summary of Argument 5

Argument: Laws Which Restrict or Regulate Abortion as a Special Procedure Violate the Thirteenth Amendment by Imposing Involuntary Servitude Without Due Conviction for a Crime 6

I. Under the Thirteenth Amendment a Woman Has the Right to Freedom from the Involuntary Servitude of Pregnancy and Childbearing in the Absence of Due Conviction for a Crime 6

A. Scope and Application of the Thirteenth Amendment 6

B. Involuntary Pregnancy and Childbearing as Involuntary Servitude 9

1. Pregnancy: A State of Physical Servitude 9

a. Changes Due to the Physical Invasion of the Pregnant Woman's Body 9

Page

b. Results of Metabolic Alteration of the Pregnant Woman's Vital System 10

c. Depletion of the Pregnant Woman's Calcium and Iron 11

2. Involuntary Pregnancy 12

a. Contraceptive Failure 12

b. Limitations on the Right to Refuse 14

3. The Thirteenth Amendment Includes Protection Against Involuntary Pregnancy and Childbearing 15

II. There Is No Compelling State Interest to Justify Impairment of the Pregnant Woman's Fundamental Constitutional Right to Be Free from Involuntary Servitude 16

A. The Necessity of Showing a Compelling State Interest 16

B. The Nature of State Interest in Areas of Exception Permitting Limited Imposition of Involuntary Service 17

1. Military Service 17

2. Involuntary Commitment or Hospitalization 18

3. Jury Duty 18

4. Payment and Reporting of Taxes 19

C. The Nature of State Interest in the Abortion Conflict 19

1. The State's Interest in Rights of the Fetus 19

Page

2. The State's Interest in Protecting the Health and Welfare of the Pregnant Woman 25
3. The State's Interest in Promoting Population Growth 26
4. The State's Interest in Punishing Sexual Conduct and Promoting "Public Morality" 27

III. If the Culpability of the Pregnant Woman Is Presumed Rather Than Proved, She Is Denied Due Process Under the Fourteenth Amendment 29

Conclusion 31

TABLE OF AUTHORITIES

Constitutional Provisions	Pages
United States Constitution:	
Amendment XIII	*passim*
Amendment XIV	19-20, 29-30

Statutes

Comstock Act, Stat. Sec. 3893, 42nd Congress, Ch. 3 (1883)	27-28
Georgia Code Ann., Sec. 26-1103 (1969)	20
Georgia Code Ann., Sec. 30-102 (1971)	15
New York Consolidated Laws, Ch. 40, Sec. 1142 (1884)	28
2A Texas Penal Code, art. 1201 (1961)	20
38 U.S.C., Sec. 101 *et seq.* (1958)	18
50 U.S.C. app., Sec. 454 (1967)	18
Uniform Anatomical Gifts Act	22

Cases

Allen v. Hixson, 111 Ga. 460, 36 S.E. 810 (1900)	23
Arver v. United States, 245 U.S. 366 (1918)	18
Bailey v. Alabama, 219 U.S. 219 (1910)	7, 16
Bates v. City of Little Rock, 361 U.S. 516 (1960)	17
Beltran v. Cohen, 303 F. Supp. 889 (N.D. Cal. 1969)	19
Bonner v. Moran, 126 F.2d 121 (D.C. Cir. 1941)	22
California v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969) *cert. denied*, 397 U.S. 915 (1970)	20, 25-26
Cantwell v. Connecticut, 310 U.S. 296 (1940)	17
Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964)	20
Crews v. Lundquist, 361 Ill. 193, 197 N.E. 768 (1935)	19
Civil Rights Cases, 109 U.S. 3 (1883)	6-8, 16
Clyatt v. United States, 197 U.S. 207 (1905)	7

Pages

Deutch v. United States, 367 U.S. 456 (1961) 30

Eisenstadt v. Baird, 405 U.S. 430 (March 22, 1972) 28-30

Gilbert v. Gwin-McCollum Funeral Home, 268 Ala. 372, 106 So. 2d 646 (1958) 23
Griswold v. Connecticut, 381 U.S. 479 (1965) 28

Harper v. Virginia State Board of Education, 383 U.S. 663 (1966) 8
Hodges v. United States, 203 U.S. 1 (1906) 7, 16-17
Hurley v. Eddingfield, 156 Ind. 416, 59 N.E. 1058 (1901) 23

In re Wells' Will, 221 N.Y. Supp. 714 (1927) 20
Irvin v. Dowd, 366 U.S. 717 (1961) 30

Jobson v. Henne, 355 F.2d 129 (1966) 18
Jones v. Mayer, 392 U.S. 409 (1968) 8, 16

Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970) 20
Kramer v. United States, 147 F.2d 756 (6th Cir. 1945) *cert. denied,* 324 U.S. 878 (1945) 18

London v. Atlanta Transit Company, 91 Ga. App. 753, 87 S.E. 2d 103 (1955) 23

McCann v. Babbitz, 310 F. Supp. 293 (E.D. Wis. 1970) (per curiam) *appeal dismissed,* 400 U.S. 1 (1970) (per curiam) 17, 20
McLaughlin v. Florida, 379 U.S. 184 (1964) 17

N.A.A.C.P. v. Alabama, 377 U.S. 288 (1964) 29
N.A.A.C.P. v. Button, 371 U.S. 415 (1963) 17

Pages

O'Keefe v. W. J. Barry Company, 311 Mass. 517, 42 N.E. 2d 267 (1942) 23
Osterlind v. Hill, 263 Mass. 73, 160 N.E. 301 (1928) 23

People v. Sanger, 222 N.Y. 192, 118 N.E. 637 (1918) 28
Pollock v. Williams, 322 U.S. 4 (1944) 7-8

Reese v. United States, 225 F.2d 766 (9th Cir. 1955) 18

Shelton v. Tucker, 364 U.S. 479 (1960) 17, 29
Sherbert v. Verner, 374 U.S. 398 (1963) 17
Skinner v. Oklahoma, 316 U.S. 535 (1942) 31

Taylor v. Georgia, 315 U.S. 25 (1942) 18
Thornhill v. Alabama, 310 U.S. 88 (1940) 29
Toadvine v. Cincinnati N. O. & T. R. Ry., 20 F. Supp. 226 (E.D. Ky. 1937) 23

Union Pacific Rwy. Co. v. Botsford, 141 U.S. 250 (1891) 16
United States v. Bennett, 24 Fed. Case No. 14571 (S. D.N.Y. 1879) 28
United States v. Lumsden, 499 F.2d 154 (9th Cir. 1971) 18
United States v. Rogers, 454 F.2d 601 (7th Cir. 1971) 18

Whitfield v. Whitfield, 89 Ga. 471, 15 S.E. 543 (1892) 15

LEGAL LITERATURE AND COMMENTARY

Avins, *Freedom of Choice in Personal Service Occupations: Thirteenth Amendment Limitations on Antidiscrimination Legislation,* 49 CORNELL L. Q. 228 (1964) 17

Pages

Atkinson, WILLS (2d ed. 1953) 20

Clark, THE LAW OF DOMESTIC RELATIONS (1968) 15
Curran, *A Problem of Consent: Kidney Transplantation*, 34 N.Y.U. L. REV. 891 (1959) 22

Leavy and Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 So. CAL. L. REV. 123 (1962) 26

Means, *The Law of New York Concerning Abortion and the Status of the Fetus, 1664-1968: A Case Study of Cessation of Constitutionality*, 14 N. Y. L. F. 411 (1968) 26

Note, *District of Columbia Hospitalization of the Mentally Ill*, 65 COLUM. L. REV. 1062 (1965) 18
Note, *The New Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1264 (1969) 8

Perkins, CRIMINAL LAW (1957) 26
Prosser, LAW OF TORTS (3d ed. 1964) 20

Richards, *Medical-Legal Problems of Organ Transplantation*, 21 HASTINGS L. J. 77 (1969) 22
RESTATEMENT OF TORTS (SECOND), Section 314 (1965) 23

Sanders and Dukeminier, *Medical Advance and Legal Lag: Hemodialysis and Kidney Transplantation*, 15 U.C.L.A. L. REV. 357 (1968) 22
Sands, *Therapeutic Abortion Act: An Answer to the Opposition*, 13 U.C.L.A. L. REV. 285 (1966) 20

The Failure to Rescue: A Comparative Study, 52 COLUM. L. REV. 631 (1952) 23

Ziff, *Recent Abortion Law Reforms*, 60 J. CRIM. L.C. & P.S. 3 (1969) 20

MEDICAL LITERATURE AND COMMENTARY

Pages

American Medical Association Official Pamphlet, WHAT YOU SHOULD KNOW ABOUT THE PILL (1970) 13

Bumpass and Westoff, *The Perfect Contraceptive Population,* 169 SCIENCE 1177 (1970) 14

Chaudhuri, *Correlation of Toxemia with Anemia of Pregnancy,* 106 AM. J. OBST. & GYNEC. 255 (Jan. 15, 1970) 11

Davis, *The Shield Intrauterine Device,* 106 AM. J. OBST. & GYNEC. 456 (Feb. 1, 1970) 12

Food and Drug Administration Advisory Committee of Obstetrics and Gynecology, F.D.A. REPORT ON ORAL CONTRACEPTIVES (Sept. 1969) 12

Havemann, BIRTH CONTROL (1967) 13

Hern, *Is Pregnancy Really Normal?,* 3 FAMILY PLANNING PERSPECTIVES 7 (Jan. 1971) 9-12

Kinsey, Pomeroy and Martin, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948) 14

Macy and Huncher, *An Evaluation of Maternal Nitrogen and Mineral Needs During Embryonic and Infant Development,* 27 AM. J. OBST. & GYNEC. 878 (1934) 11

Moritz and Thompson, *Septic Abortion,* 95 AM. J. OBST. & GYNEC. 46 (1966) 25

Ober, *Analysis of Surgical Practice at the New York Hospital,* 1808-33 (1970) 25

Oxorn and Foote, HUMAN LABOR AND BIRTH (1968) 10

Pages

Reid, *Assessment and Management of the Seriously Ill Patient Following Abortion,* 199 J.A.M.A. 805 (1967) 25, 26

State of California Department of Public Health, FIFTH ANNUAL REPORT ON THE IMPLEMENTATION OF THE CALIFORNIA THERAPEUTIC ABORTION ACT, A Report to the 1972 Legislature Pursuant to Section 25955.5 of the Health and Safety Code 13

Taylor, OBSTETRICS (1972) 10-11

Tietze, *Mortality with Contraceptive and Induced Abortion,* 45 STUDIES IN FAMILY PLANNING 6 (1969) 13, 25

Williams, *Antepartum Thrombophlebitis Complicated by Hyperuricemia, Uremia and Polyhydramnios,* 105 AM. J. OBST. & GYNEC. 116 (Sept. 1, 1969) 10

OTHER AUTHORITIES

Ehrlich, Paul, THE POPULATION BOMB (1968) 27

Gilmore, *Something Better Than the Pill?,* N.Y. TIMES MAGAZINE, 7, 36 (July 20, 1969) 13

POPULATION AND THE AMERICAN FUTURE, THE REPORT OF THE PRESIDENT'S COMMISSION ON POPULATION GROWTH AND THE FUTURE (March, 1972) 27

United States Department of Commerce, POPULATION CHARACTERISTICS, BIRTH EXPECTATIONS DATA: JUNE 1971, Series P-20, No. 232, Feb. 1972 14

Wilson, Robert A., M.D., FEMININE FOREVER (1966) 24

In the

Supreme Court of the United States

REHEARING, OCTOBER TERM, 1972

No. 70-18

JANE ROE, JOHN DOE, and MARY DOE,
Appellants,
JAMES HUBERT HALLFORD, M.D.,
Appellant-Intervenor,
vs.
HENRY WADE,
Appellee.

On Appeal from the United States District Court for the Northern District of Texas.

No. 70-40

MARY DOE, et al., etc.,
Appellants,
vs.
ARTHUR K. BOLTON, Attorney General of the State of Georgia, et al., etc.,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia.

Motion for Leave to File Brief Amici Curiae on Behalf of Organizations and Named Women in Support of Appellants in Each Case.

The organizations and named individuals whose names are appended here respectfully move for leave to file a brief *amici curiae* in these cases. The attorneys for appellants in both cases and for appellant-intervenor in the

Texas case have consented to the filing of this brief. The respective attorneys for the appellees have not so consented.

THE CALIFORNIA COMMITTEE TO LEGALIZE ABORTION is an organization consisting of approximately 5,000 individuals organized into chapters throughout the State of California and dedicated to the cause of removing the State's intervention in the decisions of pregnant women to obtain abortions. The California Committee to Legalize Abortion engages in activities which include preparation and circulation of petitions, one such initiative petition bearing approximately 300,000 signatures from California citizens requesting that a measure be placed on the California ballot to remove the State's intervention process in current California abortion law.

THE SOUTH BAY CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN is located in the San Francisco Bay Area, California, as an affiliate of the National Organization for Women, a civil rights organization founded in 1966 and with approximately 20,000 members throughout the United States. The South Bay Chapter was founded in 1970 and consists of approximately 300 members dedicated to active work in bringing women into the mainstream of society and affirming a belief in the basic human right to limit one's own reproduction, including women's civil right to abortion.

ZERO POPULATION GROWTH, INC., is a national organization dedicated to achieving population stabilization by voluntary means. Founded in 1969, Zero Population Growth, Inc., (ZPG) has 300,000 members in 300 active chapters throughout the United States. The organization favors the recommendation on abortion contained in the 1972 Report of the President's Commission on Population Growth and the Future.

The concern of *amici*, CHERIEL MOENCH JENSEN and LYNETTE PERKES, stems from their desire to be single whole individuals, unencumbered by a pregnant condition and in

full control of their physical destiny. The necessity of Lynette Perkes to participate fully in her marriage, coupled with the frequency of contraceptive failure (already experienced twice), precludes her right to be secure in a non-pregnant condition. The concern of Cheriel Moench Jensen stems from her need to be as reliable and promising a professional person as the men with whom she must compete. As long as normal married life puts her at constant threat of having her capacity to work and to earn a living suspended by unintended pregnancy and childbearing, she cannot enter into financial or professional commitments with the same confidence as a man.

Each of the organizations and individuals urges upon the Court the position that laws restricting or regulating abortion as a special procedure violate the Thirteenth Amendment by imposing involuntary servitude without due conviction for a crime and without the justification of serving any current national or public need.

Amici believe that this brief raises aspects of constitutional issues before this Court hitherto unexplored by the parties, and that the expressions herein will be of assistance to the Court in the decisions of importance now before it.

For these reasons, we respectfully request leave to file the within brief *Amici Curiae.*

Respectfully submitted,

JOAN K. BRADFORD
Attorney for Movants

IN THE

Supreme Court of the United States

REHEARING, OCTOBER TERM, 1972

No. 70-18

JANE ROE, JOHN DOE, and MARY DOE,
Appellants,
JAMES HUBERT HALLFORD, M.D.,
Appellant-Intervenor,
vs.
HENRY WADE,
Appellee.

On Appeal from the United States District Court for the Northern District of Texas.

No. 70-40

MARY DOE, et al., etc.,
Appellants,
vs.
ARTHUR K. BOLTON, Attorney General of the State of Georgia, et al., etc.,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia.

Amici Curiae Brief on Behalf of Organizations and Named Women in Support of Appellants in Each Case.

OPINIONS BELOW.

The opinions have been stated in appellants' briefs and are not repeated herein.

JURISDICTION.

The jurisdiction has been stated in appellants' briefs and is not repeated herein.

INTEREST OF AMICI CURIAE.

The interest of Amici Curiae has been set forth in the accompanying motion to file this brief and need not be reiterated here.

SUMMARY OF ARGUMENT.

Despite the numerous issues involved in these cases, this brief will address itself only to one, so as to avoid repetition of the arguments presented by appellants and by other briefs of *amici curiae*. We believe that the time is ripe for this Court to announce that the laws which restrict or regulate abortion as a special procedure violate the Thirteenth Amendment by imposing involuntary servitude without due conviction for a crime.

Although the Texas abortion laws permit abortion only in the single instance where the mother's life would be saved and the Georgia laws permit abortion in certain additional categories, both, in the view of *Amici*, involve rights of unwillingly pregnant women that make it appropriate to treat the particular issue, to which this brief addresses itself, as being the same in both cases.

ARGUMENT: LAWS WHICH RESTRICT OR REGULATE ABORTION AS A SPECIAL PROCEDURE VIOLATE THE THIRTEENTH AMENDMENT BY IMPOSING INVOLUNTARY SERVITUDE WITHOUT DUE CONVICTION FOR A CRIME.

I. UNDER THE THIRTEENTH AMENDMENT A WOMAN HAS THE RIGHT TO FREEDOM FROM THE INVOLUNTARY SERVITUDE OF PREGNANCY AND CHILDBEARING IN THE ABSENCE OF DUE CONVICTION FOR A CRIME.

A. Scope and Application of the Thirteenth Amendment.

The Thirteenth Amendment to the Constitution provides:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

The Amendment, by its very language, prohibits both slavery *and* involuntary servitude, and requires due conviction of a crime as a condition precedent to all forms of involuntary servitude regardless of racial contexts.

From the outset, the Amendment has been interpreted by this Court to apply to all persons without regard to race or class, and to guarantee universal freedom in the United States.

The first cases on the Amendment, the early *Civil Rights Cases* of 1883, 109 U.S. 3, interpreted the Amendment as establishing two principles: (1) the prohibition of all forms of involuntary servitude and slavery, and (2) a guarantee of universal freedom to all persons. *The Civil Rights Cases* found that just as the opposite of "slavery" is freedom, so this Amendment, by abolishing the conditions of slavery and involuntary servitude, established "freedom" throughout the United States by implication. This Court construed the Amendment as "establishing and decreeing universal civil and political freedom throughout the United States." (*Id.* at 20)

> By its own unaided force and effect it abolished slavery, and established universal freedom . . . for the amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude should not exist in any part of the United States. (*Id.* at 20)

Application of the Amendment has never been limited to racial contexts. As this Court stated in *Bailey v. Alabama*, 219 U.S. 219, 240-241 (1910):

> While the immediate concern was with African slavery, the Amendment was not limited to that. It was a charter of universal civil freedom for all persons, of whatever race, color, or estate, under the flag. . . . The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude.

The Thirteenth Amendment prohibits many forms of compulsory labor, *i.e.*, involuntary servitude of all kinds. As defined by this Court, involuntary servitude is "a condition of enforced compulsory service of one to another." *Hodges v. United States*, 203 U.S. 1, 16 (1906).

Laws compelling personal service in liquidation of a debt or other obligation are null and void as violations of the Thirteenth Amendment. *Bailey v. Alabama, supra; Clyatt v. United States*, 197 U.S. 207 (1905); *Pollock v. Williams*, 322 U.S. 4 (1944). Statutes imposing criminal penalties on laborers who fail to perform work necessary to pay off advance wages from a prospective employer are void as violative of the Thirteenth Amendment, the undoubted aim of the Amendment being, "not merely to end slavery but to maintain a system of completely free and voluntary labor

throughout the United States." *Pollock v. Williams, supra* at 17.

As conditions and values change, constitutional language takes on new meanings, because constitutional concepts are not static, "not shackled to the political theory of a particular era." *Harper v. Virginia State Board of Education,* 383 U.S. 663, 669 (1966). The Thirteenth Amendment, as revived by this Court with new force in *Jones v. Mayer,* 392 U.S. 409 (1968), reconsidered the early interpretation of the Amendment as set forth in *The Civil Rights Cases* of 1883, *supra.* In *Jones v. Mayer, supra,* the Court stated, at 443:

> At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.

In *Jones v. Mayer, supra,* this Court was not reluctant to recognize within the Thirteenth Amendment the "promise of freedom," turning the focus again from what the Amendment prohibits to what it guarantees, a broader principle of freedom from compulsory service of one person to another. (Note, *The New Thirteenth Amendment: A Preliminary Analysis,* 82 HARVARD L. REV. 1264, 1307 [1969].)

From time to time, this Court has recognized certain exceptions to the Thirteenth Amendment in the interests of serving compelling national or public needs, *e.g.,* military service, jury duty, confinement of the mentally ill (see the cases cited under Section II. B. herein); each time surrounding the exception with safeguards to insure individual rights.

It is the purpose of this brief to show that anti-abortion laws, which force an unwillingly pregnant woman to con-

tinue pregnancy to term, are a form of involuntary servitude without the justification of serving any current national or public need.

B. Involuntary Pregnancy and Childbearing as Involuntary Servitude.

1. PREGNANCY: A STATE OF PHYSICAL SERVITUDE.

Pregnancy is not a mere inconvenience. "The physical and functional alterations of pregnancy involve all the body systems,"[1] displacing body parts, depleting the body of its necessary elements and changing its chemical balance.

The pregnant woman's body is in a state of constant service, providing warmth, nutrients, oxygen and waste disposal for the support of the conceptus.[2] These activities are always to the detriment of the woman's body. They are performed for the benefit of the conceptus alone unless an interest of the pregnant woman is also served thereby, that is, unless the pregnant woman defines the pregnancy as wanted.

a. Changes due to the physical invasion of the pregnant woman's body.

During pregnancy, enlargement of the uterus within the abdominal cavity displaces and compresses the other abdominal contents including the heart, lungs and gastro-intestinal tract. The resulting pressure has a direct effect on circulation of the blood and increase in venous pressure, sometimes leading to irreversible varicose veins and hemorrhoids

---

1. Hern, W., *Is Pregnancy Really Normal?*, 3 FAMILY PLANNING PERSPECTIVES 7 (January, 1971).

2. *Amici* use the term "conceptus" in this section because it is the only medical term which covers the uterine contents in all stages of pregnancy. Hereinbelow, in Section II. C. of this brief, the term "fetus" is used because it is the term of legal familiarity. In all cases, *amici* continue to mean the uterine contents at all stages of pregnancy.

and, with predictable frequency, to disabling thrombophlebitis.[3] The gastro-intestinal tract experiences functional interference causing constipation and displacement of the urinary tract, thus urinary tract infections occur in six to seven per cent of all pregnant women and such infections, in turn, lead to kidney infections. During the second and third months, bladder irritability is quite constant. Tearing and overstretching of the muscles of the pelvic floor occurs frequently during delivery, causing extensive and irreparable damage to the pelvic organs and their supporting connections. Surgery is often required to return these organs to position. Bladder control may be permanently lost.[4] The weight of the contents of the uterus causes sacroiliac strain accompanied by pain and backache, with the effects of the pressure being felt as far as the outermost extremities of the woman's body. The weight causes such pressure on the cervical spine as to result in numbness, tingling and proprioceptive acuity reduction in the hands.[5]

b. Results of metabolic alteration of the pregnant woman's vital systems.

During pregnancy estrogen levels exhibit severe increase, this phenomena accounting for the symptoms of nausea and vomiting occurring in one-half or more of all pregnant women. If this condition is prolonged, hospitalization is required. Evacuation of the contents of the uterus results in immediate and dramatic relief of symptoms. In severe cases blood protein may be destroyed. Bodies of women who

---

3. Hern, *supra*, 8; Taylor, E., OBSTETRICS, 206 (1972); Williams, *Antepartum Thrombophlebitis Complicated by Hyperuricemia, Uremia and Polyhydramnios*, 105 AM. J. OBST. & GYNEC., 116 (Sept. 1, 1969).

4. Hern, *supra*, 8; Oxorn, H. and Foote, W., HUMAN LABOR AND BIRTH, 7, 8, 12 (1968).

5. Taylor, *supra*, 70, 216.

have died from this condition exhibit the symptoms of starvation, acidosis, dehydration and multiple vitamin deficiencies.[6]

The excess progesterone produced by the placenta causes fluid retention, increase in blood pressure, weight gain, irritability, lassitude, severe emotional tension, nervousness, inability to concentrate, and inability to sleep.[7] At least 40 per cent of pregnant women have symptomatic edema, distorting the hands, face, ankles and feet.[8] A woman's lungs respire 45 per cent more air than normal in an attempt to obtain the needed oxygen, but oxygen absorbed is less than normal despite the extra effort of the crowded lungs.[9]

c. Depletion of the pregnant woman's calcium and iron.

Because the conceptus utilizes almost twice as much calcium as the pregnant woman can assimilate from administered and dietary calcium, extra calcium must be drawn from a woman's calcium stores, mostly from her long bones. Thus, the pregnant woman is likely to suffer leg cramps.[10] In young women, permanent bone deformation results.

Total loss of a woman's iron stores during pregnancy and delivery is measured at 680 mg. Thus anemia of pregnancy is high and almost all pregnant women, especially those having repeated pregnancies, require supplementary iron.[11]

---

6. Hern, *supra*, 7; Taylor, *supra*, 186, 187.

7. Hern, 8; Taylor, 73.

8. Taylor, 189.

9. *Id.* at 52.

10. Macy and Hunscher, *An Evaluation of Maternal Nitrogen and Mineral Needs During Embryonic and Infant Development*, 27 Am. J. Obst. & Gynec. 878 (1934).

11. Taylor, 199; Chaudhuri, *Correlation of Toxemia with Anemia of Pregnancy*, 106 Am. J. Obst. & Gynec., 255-258 (Jan. 15, 1970).

Efforts to correct this condition may fail because many pregnant women cannot tolerate iron supplements.

With such extensive effects, can pregnancy be considered as merely a "natural" state of being?[12]

2. INVOLUNTARY PREGNANCY.

Amici ask this Court to consider the lack of options open to the pregnant woman at the time of onset of her pregnancy.

a. Contraceptive failure.

Contraceptives are never foolproof. Any act of intercourse between a fertile man and woman constitutes some risk of conception, no matter what contraceptives are used. One woman in five using the most effective contraceptive available, the combined oral contraceptive "pill," will have one unplanned pregnancy during her 25 reproductively susceptible years.[13] Many women cannot take the "pill" because of its side effects. The second most effective device is the intrauterine shield. With this device in place, one woman in three will have one unwanted pregnancy. (The tolerance rate among women using this device is 96 per cent.[14] Intra-

---

12. See Hern, *supra*, at 5-10.

13. Food and Drug Administration Advisory Committee on Obstetrics and Gynecology, F. D. A. REPORT ON ORAL CONTRACEPTIVES (Sept. 1969). Failure rates are: combined oral contraceptives, 0.7 per cent; sequential oral contraceptives, 1.4 per cent; intrauterine loop, 2.7 per cent; the double-coil intrauterine device, 2.8 per cent. Each average woman has 25 reproductively susceptible years. Multiply 25 years × device failure rate per 100 woman years. Example: 25 years × 1.4 failures per 100 woman years due to sequential pill = 35 per cent chance per woman, meaning one woman in three having one failure during her lifetime due to the use of the sequential pill. Figures for "the pill" include only those failures resulting from the drug properties. They do not include forgetfulness.

14. Davis, *The Shield Intrauterine Device*, 106 AM. J. OBST. & GYNEC. 456 (Feb. 1, 1970).

uterine devices are not normally prescribed for women who have not already given birth.) The death rate associated with the use of either of these devices is about the same—three per 100,000 woman users per year;[15] or put another way, one woman in 1,300 using either of these methods will die as a result. Among women taking the "pill," one in 80 will suffer blood clotting requiring hospitalization.[16]

The diaphragm results in three failures per woman over her 25-year reproductive life span. Other methods (foam, jellies, rhythm, condoms) are far less reliable.[17]

If 100,000 women who do not wish to become pregnant take the pill, three will probably die within the year and 1,000 will become pregnant.

Using these figures as a basis, a far safer method can be postulated. If these 100,000 women use the diaphragm, resulting in 12,000 pregnancies which are then legally terminable with abortion, the total death risk to these 100,000 women then becomes 0.36 per 100,000 women. The laws under consideration do not allow women to reduce their risks in this way.[18]

---

15. Gilmore, *Something Better Than the Pill?*, N.Y. TIMES MAGAZINE, 7, 36 (July 20, 1969).

16. American Medical Association Official Pamphlet, WHAT YOU SHOULD KNOW ABOUT THE "PILL" (1970).

17. Havemann, BIRTH CONTROL, at 58, 59 (1967). Failure rates for the diaphragm = 12 per 100 woman years (three per fertile woman lifetime); the condom = 14 per 100 woman years (3.5 per fertile woman lifetime); withdrawal = 18 per 100 woman years (4.5 per fertile woman lifetime); rhythm = 24 per 100 woman years (6.0 per fertile woman lifetime).

18. State of California Department of Public Health, FIFTH ANNUAL REPORT ON THE IMPLEMENTATION OF THE CALIFORNIA THERAPEUTIC ABORTION ACT, A Report to the 1972 Legislature, pursuant to Section 25955.5 of the Health and Safety Code; Tietze, *Mortality with Contraception and Induced Abortion*, 45 STUDIES IN FAMILY PLANNING 6 (1969).

Westoff[19] reports that one-fifth of all pregnancies studied were unwanted. The magnitude of the problem then is very large, affecting most women in substantial ways.

Under the present state of contraceptive failure, a woman does not have the option of remaining free of pregnancy by making careful use of contraceptives. She is at some risk in using the most effective methods of contraception available.

b. Limitations on the right to refuse.

The average married woman expects to bear two to three children,[20] yet coitus takes place between a couple married during the period of the woman's reproductive years (age 18 to 43) an average of 2,535 times.[21] The frequency of coitus stated in the Kinsey Report is average behavior between married couples. If the woman wishes to remain free of pregnancy once her desired family size is reached, her only sure method of remaining so free of pregnancy is complete abstinence from sexual intercourse. If she embarks on such a course, will the law uphold her decision?

A wife has no legal power to refuse to participate in the intimacies of married life. If she refuses her husband's

---

19. Bumpass and Westoff, *The Perfect Contraceptive Population*, 169 SCIENCE 1177 (1970).

20. United States Dept. of Commerce, CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS, BIRTH EXPECTATIONS DATA: JUNE 1971, 1, Series P-20, No. 232 (Feb. 1972).

21. This figure is derived from data provided in the Kinsey Report, SEXUAL BEHAVIOR IN THE HUMAN MALE, showing average marital coitus taking place with a frequency of 2.6 times per week when the male is age 20, and 1.3 times per week when the male is forty-five. As the figures show a straight line decline, the average weekly frequency rate is 1.95. Thus, 1.95 times per week × 52 weeks per year × 25 fertile years = 2,535 acts of coitus per married woman's fertile lifetime. Kinsey, Pomeroy, and Martin, SEXUAL BEHAVIOR IN THE HUMAN MALE, at 255, data from Fig. 49 (1948).

forced attentions, there is no law to intervene in her behalf. She cannot charge her husband with rape. Indeed, if a married woman attempts to practice abstinence, the laws of most states treat her behavior as a denial of the marital right of the husband. Some jurisdictions construe refusal of sexual relations as desertion and thus ground for divorce. This is the law in Georgia under *Ga. Code Ann.* Sec. 30-102. (See also, *Whitfield v. Whitfield* 89 Ga. 471, 15 S.E. 543 [1892].) In some other jurisdictions, desertion is held to occur upon cessation of sexual relations notwithstanding that the spouses continue to take meals together, converse and in other ways behave as husband and wife.[22] In some other states in which cruelty is a ground, such refusal constitutes cruelty, giving the husband cause for divorce. In the states now recognizing "no-fault" divorce, or dissolution of marriage, the husband no longer needs to plead or prove specific grounds; his dissatisfaction is thus acceptable as sufficient cause for dissolving the marriage.

Under present law, a married woman has two choices: she can attempt to refuse to fulfill the sexual obligations of the marriage and thus risk termination of her marriage; or she can participate in normal marital relations and risk unwanted pregnancy and childbirth. With a choice of either alternative, she risks the consequence of a legally imposed penalty. The woman is left with no non-punishable course of action.

3. THE THIRTEENTH AMENDMENT INCLUDES PROTECTION AGAINST INVOLUNTARY PREGNANCY AND CHILDBEARING.

The women who bear children and the medical experts who assist them testify that pregnancy and childbearing are indeed labor. The fact that many women enter into such labor voluntarily and joyfully does not alter the fact that

22. Clark, THE LAW OF DOMESTIC RELATIONS, 336 (1968).

other women, under other circumstances, find childbearing too arduous, become pregnant through no choice of their own, and are then forced to complete the pregnancy to term by compulsion of state laws prohibiting voluntary abortion.

It is the purpose of the Thirteenth Amendment to prohibit a relationship in which one person or entity limits the freedom of another person. In the absence of a compelling state interest or due conviction for a crime, the state's forcing the pregnant woman through unwanted pregnancy to full term is a denial of her Thirteenth Amendment right to be free from "a condition of enforced compulsory service of one to another." (*Hodges v. United States, supra*). This is the very essence of involuntary servitude in which the personal service of one person is "disposed of or coerced for another's benefit." (*Bailey v. Alabama, supra.*)

II. THERE IS NO COMPELLING STATE INTEREST TO JUSTIFY IMPAIRMENT OF THE PREGNANT WOMAN'S FUNDAMENTAL CONSTITUTIONAL RIGHT TO BE FREE FROM INVOLUNTARY SERVITUDE.

A. The Necessity of Showing a Compelling State Interest.

The Thirteenth Amendment guarantees to every person those fundamental rights which are "the essence of civil freedom." *Jones v. Mayer, supra; The Civil Rights Cases, supra.* In *Union Pacific Railway Company v. Botsford,* 141 U.S. 250, 251 (1891), this Court recognized:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

It is clear that in order to justify the regulation of fundamental private rights, the state must show a compelling need. "Where there is significant encroachment upon

personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates v. City of Little Rock,* 361 U.S. 516, 524 (1960).

The critical issue is whether the state's regulation is "necessary . . . to the accomplishment of a permissible state policy." (*McLaughlin v. Florida,* 379 U.S. 184, 196 [1964]; *NAACP v. Button,* 371 U.S. 415, 438 [1963]; *Sherbert v. Verner,* 374 U.S. 398, 403 [1963]), and whether legislation impinging on constitutionally protected areas is narrowly drawn and not of "unlimited and indiscriminate sweep." *Shelton v. Tucker,* 364 U.S. 479, 490 (1960). See also *Cantwell v. Connecticut,* 310 U.S. 296, 308 (1940); *McCann v. Babbitz,* 310 F. Supp. 293 (E.D. Wis. 1970), (per curiam) *appeal dismissed,* 400 U.S. 1 (1970) (per curiam).

B. The Nature of State Interest in Areas of Exception Permitting the Imposition of Involuntary Service.

The law has recognized certain exceptions to the Thirteenth Amendment, all such exceptions being based on the state's compelling interest in serving the common need. Thus, although the Thirteenth Amendment proscribes a "condition of enforced compulsory service of one to another" (*Hodges v. United States, supra*), services required by the state for the benefit and protection of all citizens do not fall within the meaning of involuntary servitude under the Thirteenth Amendment. Avins, *Freedom of Choice in Personal Service Occupations: Thirteenth Amendment Limitations on Antidiscrimination Legislation,* 49 CORNELL L.Q. 228, 240 (1964).

1. MILITARY SERVICE.

Compulsory military service is not regarded as involuntary servitude, because the draftee's surrender of personal freedom and safety are made in the interests of national

defense, a common need. *Arver v. United States (Selective Draft Law Cases),* 245 U.S. 366 (1918); *United States v. Lumsden,* 449 F.2d 154 (9th Cir. 1971). Nor is the Thirteenth Amendment regarded as violated by assignment of conscientious objectors to work camps or other work assignments as an alternative to military service; again, a common need is served. *Kramer v. United States,* 147 F.2d 756 (6th Cir. 1945), *cert. den.* 324 U.S. 878; *Reese v. United States,* 225 F.2d 766 (9th Cir. 1955); *United States v. Rogers,* 454 F.2d 601 (7th Cir. 1971). However, the draftee is pressed into service only if his physical condition permits such service (*Selective Service Act of 1967,* 50 U.S.C.A. app. Sec. 454 [a]); he is paid for his services (*Id.* Sec. 454 [e]); and is further reimbursed by way of veterans' benefits (38 U.S.C. Sec. 101, *et seq.*).

2. INVOLUNTARY COMMITMENT OR HOSPITALIZATION.

The compulsory commitment of mentally ill individuals who may be harmful to themselves or to society if allowed to remain at large does not violate the Thirteenth Amendment, but only if the commitment procedures contain sufficient procedural safeguards and if the activities required of the individuals are for therapeutic purposes. *Jobson v. Henne,* 355 F.2d 129 (1966). However, if the mental institution requires inmates to perform chores which have no therapeutic purpose or relationship to the inmate's personal needs, the Thirteenth Amendment is violated. *Ibid.* See also *Taylor v. Georgia,* 315 U.S. 25 (1942) and Note, *District of Columbia Hospitalization of the Mentally Ill,* 65 COLUM. L. REV. 1062, 1066-72 (1965).

3. JURY DUTY.

Jury duty does not constitute involuntary servitude; such service rendering effective the government under which

liberty of the citizen may be protected. *Crews v. Lundquist*, 361 Ill. 193, 197 N.E. 768 (1935). But the citizen called for jury duty is excused if personal duties override.

4. PAYMENT AND REPORTING OF TAXES.

Payment and reporting of taxes is not regarded as involuntary servitude because the service is for support of the general welfare and not for another individual. *Beltran v. Cohen*, 303 F. Supp. 889 (N.D. Cal. 1969).

C. The Nature of State Interest in the Abortion Conflict.

The state's restriction or regulation of abortion as a special procedure imposes limitation on the pregnant woman's control of her person and her services. What compelling state interest justifies such impairment of her personal rights? A number of possible reasons have been stated:

1. THE STATE'S INTEREST IN RIGHTS OF THE FETUS.[23]

An argument recently raised is that the state has a compelling interest in protecting the rights of the fetus. This is the legal position taken by those who argue that conception is a dramatic moment in the evolution of a human being, after which the fetus becomes a "person" within the terms of the due process clause of the Fourteenth Amendment, and is so entitled to the constitutional protections afforded any other citizen.

Such argument disregards the nature of the state's interest in the fetus in all contexts other than the modern abortion conflict: *First:* The rights of citizenship con-

23. *Amici* will, in this section, use the term *"fetus"* when referring to the contents of the uterus although the term is medically incorrect. Medically, the term *"embryo"* refers to the organism from conception through the first three months of gestation; the term *"fetus"* refers to the organism from the end of the first three pre-natal months until birth; the term *"conceptus"* covers *in utero* being through all stages of pregnancy. *Amici* use *"fetus"* here, a more familiar legal term.

ferred by the Fourteenth Amendment relate to "all persons *born* or naturalized . . ." (emphasis added). There are no cases holding that fetuses are protected by the Fourteenth Amendment. *Second:* Of all the statutes and rules referred to by proponents of the "right to life" argument, none confers rights on the fetus *in utero;* all such rights exist only in contemplation of live birth or reflect interests of the parents.[24] *Third:* The state does not generally regard as punishable the destruction of the fetus by any person other than the doctor or abortionist. See *Keeler v. Superior Court,* 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970), in which the California Supreme Court held that the assailant of a pregnant woman could not be guilty of murder although a Caesarean section and examination *in utero* revealed that the fetus, of approximately thirty-five weeks, had died of a severely fractured skull and resultant hemorrhaging. The same result would apply in Texas under 2A *Tex. Pen. Code,* art. 1202 (1961) and in Georgia under *Ga. Code Ann.,* Sec. 26-1103.

Some courts and commentators have already analyzed and rejected the idea that the state has any compelling interest in protecting the rights of the fetus. See *California v. Belous, supra; McCann v. Babbitz, supra;* Sands, *Therapeutic Abortion Act: An Answer to the Opposition,* 13 U.C.L.A. L. Rev. 285, 305 (1966); Ziff, *Recent Abortion Law Reforms,* 60 J. Crim. L. C. & P.S. 3 (1969).

Nevertheless, even if the position were accepted, *arguendo,* that the fetus is a "person" or "potential person,"

---

24. See *e.g. In re Wells' Will,* 221 N. Y. Supp. 714 (1927), and *Carroll v. Skloff,* 415 Pa. 47, 202 A.2d 9 (1964), (ownership of property wholly dependent on live birth); Atkinson, Wills, 75 (2d ed. 1953); Prosser, Torts, 356 (3d ed. 1964), (an individual may sue for pre-natal injuries "provided he is born alive"); *California v. Belous,* 71 Cal. 2d 954, 968, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. den.* 397 U.S. 915 (1970), ("All of the statutes and rules relied upon [to support the right to life] require a live birth or reflect the interest of the parents.").

such recognition of the fetus would not provide the state with a compelling interest to justify encroachment upon the pregnant woman's possession and free control of her own person.

Let us assume, for the time being, that the pregnant woman and the fetus she carries within her body have come before the law as equal "persons." The woman desires an abortion. May the state legitimately intervene to prevent the abortion? At the present stage of medical knowledge and ability to control human incubation, the fetus cannot survive and develop into a separate self-sustaining person without contribution of the bodily force of the single female individual who carries that particular fetus within her body. Yet the laws prohibiting and regulating abortion, unlike all other laws in respect of persons, compel this pregnant woman to breathe, process food and donate blood for the sustenance of another human entity, either fully or partially developed. In no other instance does the law compel one individual to donate his/her bodily force to another individual. In no other instance does the law give another human — even a fully developed human — a right to life beyond that which the person himself can sustain.

The law does not give a person in need of blood the right to receive blood from an unwilling donor; the conclusiveness of the law on this subject being so clearly recognized that it is difficult even to imagine testing such a principle in the courts.[25]

25. Notwithstanding the close relationship of parent and living child, there is no legal duty of the parent to contribute blood from his/her body for the donation to the living child. Even the parent of a live hemophiliac child is not required to donate his/her blood —the principle element for keeping the child alive. Nor are parents of living children required to draw any substance from their own bodies for contribution to their children. Mothers are not compelled to breast-feed their babies although medical data indicate that breast-fed babies are healthier.

The law does not give a person whose kidneys or other body parts are not functioning the right to demand another person's kidneys or body parts. The *Uniform Anatomical Gifts Act*, now enacted in forty-four states, recognizes that bodily parts are contributed only by the voluntary act of the donor; and the very titles of the statutes known as anatomical "gift" acts imply that lawmakers have never had any intention of authorizing forcible contributions of bodily parts from one human being to another. Rather than protecting the interests of potential donees in such cases, the state zealously safeguards the rights of potential organ donors. Legislators, courts and commentators, recognizing that there is no obligation, either legally or morally, for one person to supply another, even a close relative who may be dying, with a healthy organ, turn their attention to the issue of informed consent of the potential donor to make sure that he is acting free from any psychological coercion. See *Bonner v. Moran*, 126 F.2d 121 (D.C. Cir. 1941); Curran, *A Problem of Consent: Kidney Transplantation*, 34 N.Y.U. L. Rev. 891 (1959); Richards, *Medical-Legal Problems of Organ Transplantation*, 21 Hastings L. J. 77 (1969); Sanders and Dukeminier, *Medical Advance and Legal Lag: Hemodialysis and Kidney Transplantation*, 15 U.C.L.A. L. Rev. 357 (1968)[26]

26. Sanders and Dukeminier note that the law permits kidney donation only from adult persons fully informed of the risks and consequences; that the use of prisoners as organ donors has been discontinued on the grounds of possible abuse; that kidney transplantations from living donors are illegal in France because of the fear of moral or psychological coercion. The authors state that donors with only one remaining kidney run the risk of shortening their lives should they be afflicted with kidney disease; and conclude by questioning the propriety of allowing any donor to take such risk. Where the life of the kidney donor may be placed in jeopardy by his donation, or where the consent of a minor is involved, courts use extreme care to be sure that knowing and voluntary consent precedes the donation. See *Bonner v. Moran, supra.*

As a general rule the law has traditionally been reluctant to impose liability on a person who has failed to rescue or aid one in peril as such liability would be an unwarranted limitation on personal freedom. *The Failure to Rescue: A Comparative Study,* 52 COLUMBIA L. REV. 631, 632 (1952). A person is not required to jeopardize his own safety to rescue another placed in danger by emergency circumstances. *London v. Atlanta Transit Company* (1955) 91 Ga. App. 753, 87 S. E. 2d 103, 106. This rule has a long history in case law,[27] and has been reaffirmed in the *Restatement of the Law of Torts (Second)* Section 314 (1965): "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him the duty to take such action." And Comment C of the Reporter's Notes states:

> The rule stated in this Section is applicable irrespective of the gravity of the danger to which the other is subjected and the insignificance of the trouble, effort, or expense of giving him aid or protection.

While it may be argued that the continuation of pregnancy is a non-active course, and so lacking in comparison with cases relating to "no duty to act," experts recognize that, once conception has taken place, there is *no* non-active course open to the pregnant woman. To abort takes action; to sustain the fetus also takes action. Even if the life support services which the woman's body brings into performance for sustenance of the fetus are largely automatic and non-voluntary, they are not non-services or non-actions. They are, according to medical experts, arduous, tiring and obstructive of other work. The contractions of childbirth

27. *Toadvine v. Cincinnati, N.O. & T.R. Ry.* (E.D. Ky. 1937), 20 F. Supp. 226; *Allen v. Hixson,* 111 Ga. 460, 36 S.E. 810 (1900); *Hurley v. Eddingfield,* 156 Ind. 416, 59 N.E. 1058 (1901); *Gilbert v. Gwin-McCollum Funeral Home,* 268 Ala. 372, 106 So. 2d 646 (1958); *O'Keefe v. W. J. Barry Company,* 311 Mass. 517, 42 N.E. 2d 267 (1942); *Osterlind v. Hill,* 263 Mass. 73, 160 N.E. 301 (1928).

are literally "labor." They are the most strenuous work of which the human body is capable.

According to Robert A. Wilson, M.D., obstetrician and gynecologist: "The pressure exerted in this act of birth is at least 80 pounds per square inch, a truly astonishing feat of sheer muscular strength."[28]

Abortion laws alone compel the contribution of one individual's organs, blood, breath and life support system for another individual, either fully or partially formed. Unless the law recognizes fetuses as more valuable to the state or more worthy of the state's intervention than other potential donees of bodily organs or unless the state finds the freedom and bodily integrity of pregnant women to be less valuable than that of other potential donors, the state must be assumed to maintain in the abortion conflict at least the same position as it does in any similar conflict between two living persons. That is, whenever one person requires an organ donation, or a pint of blood, or even the temporary use of the other person's lung power for artificial respiration, the potential donor's right to refuse is not measured by the degree of interest the state may take in the life of the potential recipient. Rather, it is measured against the potential donor's right in his/her own bodily integrity.

If the pregnant woman, as potential donor, and the fetus, as potential donee, come before the law as equal "persons," one may not command involuntary servitude of the other; and so the potential donor retains her sovereignty over her body and her right to refuse. Therefore, it follows that the fetus, a potential person, can have no greater right over a potential donor. Unless the state has

---

28. Wilson, Robert A., M.D., (Fellow of the American College of Surgeons Board of Obstetricians-Gynocologists, Diplomate of the International College of Surgeons, Fellow of the International College of Surgeons) describes such measurements in his book FEMININE FOREVER (1966).

some other compelling interest in forcing the donation of the pregnant woman's body to the service of the fetus, the state must stand aside in the abortion conflict; it cannot legitimately intervene in preventing the pregnant woman from withholding her life force from the fetus.

2. THE STATE'S INTEREST IN PROTECTING THE HEALTH AND WELFARE OF THE PREGNANT WOMAN.

Strict control by the state of all surgical procedures, not just abortion, is justifiable in the interests of the health of the persons involved. But state control of abortion otherwise available through modern medical science actually inhibits the health of the mother, and frustrates the very interest the state would protect.

When abortion laws were first adopted in this country, surgery was very dangerous. Aseptic procedures and antibiotics were unknown. Nearly 40 per cent of patients undergoing surgery of all kinds in the early 19th century died. See, *e.g.*, Ober, *Analysis of Surgical Practice at the New York Hospital*, 1808-33 (1970); *California v. Belous, supra*, at 965.

Today, however, it is literally safer for a woman to have an abortion in early pregnancy than to go through childbirth. See *California v. Belous, supra*, at 965. The maternal mortality rate for therapeutic abortion is three per 100,000; the maternal mortality rate connected with pregnancy and childbirth is 20 per 100,000. Tietze, *Mortality with Contraception and Induced Abortion*, 45 STUDIES IN FAMILY PLANNING 6 (1969).

On the other hand, women who cannot obtain therapeutic abortions because of the law are driven to criminal abortionists where mortality and morbidity rates are astronomical. See, *e.g.*, Moritz and Thompson, *Septic Abortion*, 95 AM. J. OBST. & GYNEC. 46 (1966); Reid, *Assessment and Management of the Seriously Ill Patient Following Abor-*

tion, 199 J.A.M.A. 805 (1967). Today, abortion restrictions designed "to protect women from serious risks to life and health in modern times become a scourge." *California v. Belous, supra,* at 967.

Any justification for abortion laws based on protecting the woman's health has long since been rendered obsolete by medical science, and no compelling state interest in this justification can possibly remain.

3. THE STATE'S INTEREST IN PROMOTING POPULATION GROWTH.

Abortion was not a crime at common law unless induced after the fetus had "quickened," *i.e.,* moved in the womb. Perkins, *Criminal Law* (1957) 101. Abortion prior to quickening was outlawed and punished as crime in France, England and the United States at the time when those countries required manpower for armies, settling or colonization, with the harshest anti-abortion laws existing in societies with an overriding interest in producing soldiers for military conquest. See Leavy and Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws,* 35 So. Cal. L. Rev. 123 (1962); Means, *The Law of New York Concerning Abortion and the Status of the Fetus, 1664-1968: A Case Study of Cessation of Constitutionality,* 14 N.Y.L.F. 411 (1968).

In the early history of our country's colonization and settlement, there was a felt need for more persons. Consequently, population growth was encouraged by anti-abortion law, and importation of slaves was allowed.

Unfortunately, our abortion law is dangerously out of date. Many of our laws and customs still reflect the desires of a nation seeking to fill a frontier. These laws, sensible enough at earlier stages of history when man's survival may have depended on encouraging population maintenance and growth, have become foolish and dangerous in the light of changed circumstances.

A state cannot seriously contend today that restrictions on abortion are justified by an overriding state interest in increasing population. See Ehrlich, *The Population Bomb,* 1968. On the contrary, it is accepted government policy to limit family size and to encourage family planning. Such state interest is expressed in *Population and the American Future, The Report of the President's Commission on Population Growth and the Future* (March, 1972) p. 192:

> Recognizing that our population cannot grow indefinitely, and appreciating the advantage of moving now toward the stabilization of population, the Commission recommends that the nation welcome and plan for a stabilized population.

The President's Commission recognizes the acceptability of voluntary abortion as a method of achieving population stability. (*Id.* at pp. 173-174, 177-178).

4. THE STATE'S INTEREST IN PUNISHING SEXUAL CONDUCT AND PROMOTING "PUBLIC MORALITY."

It is often argued that restrictions on abortion discourage sexual promiscuity by deterring pre-marital and extra-marital sex, and thus enhance "public morality." Such arguments must be reviewed in historical perspective.

The Nineteenth Century morality, in which anti-abortion and anti-contraceptive laws first flourished in this country, regarded sex and sexual information as "sinful." The *Comstock Act*[29], which prohibited dissemination of obscene ma-

29. The Comstock Act, Stat. § 3893, 42nd Congress, Ch. 3 (1883): "Whoever . . . shall sell, lend, or give away . . . or shall have in his possession . . . any obscene book, pamphlet, writing, advertisement, circular, print, picture, drawing or other representative figure . . . or any drug or medicine, or any article whatever, for the prevention of conception, or for causing unlawful abortion, or shall advertise the same for sale . . . or shall manufacture, draw or print . . . any of such articles shall be deemed guilty of a misdemeanor . . ."

terials, did not differentiate between medical or technical studies of sexual activity, contraception, abortion, marriage manuals or hard core pornography. The public was to be shielded from all such sexual information.

The first case brought under the *Comstock Act* found a book dealing with sex in marriage to be obscene.[30] A New York statute[31] patterned after the *Comstock Act* served as the basis for conviction of Margaret Sanger when she opened the first birth control clinic in New York and attempted instruction of women regarding their reproductive systems.[32]

In the modern context, such archaic laws have been abridged by judicial decision and legislation recognizing needs for population control, public health and rights of individuals. (See *Griswold v. Connecticut,* 381 U.S. 479 [1965] and *Eisenstadt v. Baird,* 405 U.S. 430 [March 22, 1972].)

There is no evidence that a prohibition on abortion deters "immoral conduct" or even non-marital sex. This Court recently rejected a similar argument in invalidating a Massachusetts statute that prohibited sale of contraceptives to unmarried persons. *Eisenstadt v. Baird, supra.*

> [W]e cannot agree that the deterrence of pre-marital sex may reasonably be regarded as the purpose of the Massachusetts law. . . . It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication . . . (*Id.* at 440.)

In *Eisenstadt v. Baird,* this Court found that a prohibition on dissemination of contraceptives without limitation

---

30. *United States v. Bennett,* 24 Fed. Case No. 14571 (S.D.N.Y. 1879).

31. *N. Y. Consolidated Laws,* Ch. 40 § 1142 (1884).

32. See *People v. Sanger,* 222 N.Y. 192, 118 N.E. 637 (1918).

to specifically criminal conduct swept too broadly. We submit that a prohibition on abortion without limitation to specifically criminal conduct (*e.g.*, fornication, adultery, prostitution) sweeps too broadly, prohibiting abortion for unwanted pregnancy occurring in marriage, or without criminal sexual conduct, as well as that resulting from an unlawful relationship. A statute cannot withstand the challenge of invasion of constitutional rights if it has such overbreadth that it forbids legitimate acts as well as illegitimate ones. *Eisenstadt v. Baird, supra; N.A.A.C.P. v. Alabama,* 377 U.S. 288 (1964); *Shelton v. Tucker, supra; Thornhill v. Alabama,* 310 U.S. 88 (1940).

III. IF THE CULPABILITY OF THE PREGNANT WOMAN IS PRESUMED RATHER THAN PROVED, SHE IS DENIED DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

The very language of the Thirteenth Amendment prohibits subjection to involuntary servitude "except as punishment for crime whereof the party shall have been duly convicted." Yet, the state's subjection of an unwilling woman to the continued pregnancy and childbearing compelled by anti-abortion law is accomplished without defining her substantive crime or providing her with due process in proving her guilt and inflicting her punishment.

It is pointless to argue that the pregnant woman is not the subject of the punishment inflicted upon a doctor/abortionist. Once pregnancy begins, the unwillingly pregnant woman is faced with a governmental mandate that requires her to dedicate her body and her strength to a fetus or, in the alternative, to seek out an illegal abortionist in unhealthful surroundings and thereby risk her health and life. The state, by withholding from the pregnant woman the assistance of competent surgical and medical care for legal abortion, effectively condemns the woman to

the alternative courses of the continued servitude of pregnancy or the dangers of risking her life and health.

What is the woman's crime? Substantive due process requires that it be clearly defined, not vague, not arbitrary. Is her crime that of having engaged in a sexual relationship? If the relationship occurred within marriage, no crime is involved in any state. On the contrary, the woman was compelled by virtue of her married state to submit to her husband. (See Subsection I.B. 2.b. *supra.*) Even if the pregnancy may have occurred as the result of some prohibited non-marital sexual conduct (according to due proof), an anti-abortion law punishing such conduct would be overbroad and beyond the competence of the state. (See *Eisenstadt v. Baird, supra.*) Is her crime that of failing in knowledge of, access to, or effectiveness of contraceptives? Such crime has not been defined by the state.

Regardless of the possible crime that a state might formulate as the basis for a pregnant woman's fault, procedural due process under the Fourteenth Amendment establishes a presumption of innocence which can be overcome only by evidence beyond a reasonable doubt, produced in a courtroom with the safeguards of fair procedure. As this Court stated in *Deutch v. United States:*

> "One of the rightful boasts of Western civilization is that the [prosecution] has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure." *Irvin v. Dowd,* 366 U.S. 717, 729. Among these is the presumption of the defendant's innocence.
>
> (367 U.S. 456, 471 [1961])

Can due process be totally overlooked in regard to individual rights of unwillingly pregnant women?

It is true that, at varying times in our country's history, rights of some individuals have gone unrecognized while urgently felt public needs pressed for stronger recognition. Thus, during the early years of this country's colonization and settlement, the pressing need for more persons to settle and work the land was allowed to override considerations of individual rights. Slaves were imported to work and the females of society were pressed into repeated reproductive service.

Today, this country's population has moved far beyond its needed growth, and current government policy is to encourage population control. Anti-abortion laws have outlived their purpose if regarded in historical perspective. Rights of the individual pregnant woman can no longer be ignored.

The Thirteenth Amendment's promise of freedom has long provided to male citizens the sovereign control of their own bodies.

In 1942, this Court protected the civil right of a male person, even one duly convicted of crime, to control his own reproductive system. *Skinner v. Oklahoma,* 316 U.S. 535. Is it any the less important that this Court protect the right of a female person to control her body and her reproductive system?

CONCLUSION

We respectfully request this Court to recognize that the anti-abortion laws which force an unwillingly pregnant woman to continue pregnancy to term are a form of involuntary servitude without due conviction for a crime and without the justification of serving any national or public need.

Respectfully submitted,

JOAN K. BRADFORD,
Attorney for Amici Curiae.

COPY (D)

FILED
SEP 25 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

REARGUMENT OCTOBER TERM, 1972

NO. 70-40

MARY DOE; Peter G. Bourne; Robert Hatcher; Lillas L. James; James Waters; Corbett Turner; Newton Long; Edward Leader; William H. Biggers; George Violin; Patricia S. Smith; Jennie Williams; Judith Bourne; Susanne Dunaway; Joyce Parks; Lou Ann Irion; Mary Long; J. Emmett Herndon; Samuel L. Williams; Eugene Pickett; Richard Devor; Donald Daughtry; Judith Zorach and Karen Weaver; residents of the State of Georgia; Planned Parenthood Association of Atlanta, Inc., a Georgia corporation; and Georgia Citizens for Hospital Abortion, Inc., a Georgia corporation, for and on behalf of all persons and organizations similarly situated,

Appellants,

VS.

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; Lewis R. Slaton, as District Attorney of Fulton County, Georgia; and Herbert T. Jenkins, as Chief of Police of the City of Atlanta,

Appellees.

On Appeal from the United States District Court For the Northern District of Georgia

SUPPLEMENTAL BRIEF OF THE APPELLANTS

Attorneys for Appellants:
MARGIE PITTS HAMES
Suite 902, 15 Peachtree St., N.E.
Atlanta, Georgia 30303

REBER F. BOULT, JR.
CHARLES MORGAN, JR.
American Civil Liberties Union Foundation, Inc.
52 Fairlie Street
Atlanta, Georgia 30303

Of Counsel:
ELIZABETH ROEDIGER RINDSKOPF
GALE M. SIEGEL
TOBIANE SCHWARTZ

INDEX

Page

Table of Authorities i

Statement of the Case 1

Supplemental Argument 2

I. The Right of Privacy Includes the Right to Terminate an Unwanted Pregnancy 2

II. The Procedural Requirements of the Georgia Abortion Statute Unnecessarily Burden and Restrict a Woman's Constitutional Right of Privacy 3

Conclusion 9

TABLE OF AUTHORITIES

Doe v. *Bolton*, 319 F. Supp. 1048 (N.D.Ga. 1970) 1

Dunn v. *Blumstein*, ____U.S.____, 92 S.Ct. 995 (1972) 3

Eisenstadt v. *Baird*, ____U.S.____, 92 S.Ct. 1029 (1972) 2

Poe v. Menghini, 339 F.Supp. 986 (D.Kan. 1972) 6

Tyler, C., L. Baker, J. Bourne, G. Burger, *Center for Disease Control Abortion Surveillance Report for 1971* (U.S. Department of Health, Education and Welfare, Public Health Service) 5

Vuitch v. *Hardy*, ____F.Supp.____ (D.Md. 1972) (C.A. No. 71-1129-Y June 22, 1972) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971
REARGUMENT OCTOBER TERM, 1972

NO. 70-40

MARY DOE; Peter G. Bourne; Robert Hatcher; Lillas L. James; James Waters; Corbett Turner; Newton Long; Edward Leader; William H. Biggers; George Violin; Patricia S. Smith; Jennie Williams; Judith Bourne; Susanne Dunaway; Joyce Parks; Lou Ann Irion; Mary Long; J. Emmett Herndon; Samuel L. Williams; Eugene Pickett; Richard Devor; Donald Daughtry; Judith Zorach and Karen Weaver; residents of the State of Georgia; Planned Parenthood Association of Atlanta, Inc., a Georgia corporation; and Georgia Citizens for Hospital Abortion, Inc., a Georgia corporation, for and on behalf of all persons and organizations similarly situated,

Appellants,

VS.

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; Lewis R. Slaton, as District Attorney of Fulton County, Georgia; and Herbert T. Jenkins, as Chief of Police of the City of Atlanta,

Appellees.

On Appeal from the United States District Court For the Northern District of Georgia

STATEMENT OF THE CASE

The district court, in its decision reported as *Mary Doe, et al,* v. *Arthur K. Bolton, et al,* 319 F.Supp. 1048 (N.D. Ga. 1970), supplemental opinion, 319 F.Supp. 1057 (N.D. Ga. 1970), found the Georgia abortion statute infringed a woman's constitutional right of privacy to decide if and when she would bear a child. A declaratory judgment was issued in which the court ruled that the right of privacy included the right to terminate an unwanted pregnancy. The court did not invalidate the procedures for

obtaining an abortion and refused to issue an injunction in support of its declaratory judgment. Appellants brought the case here under 28 U.S.C. §1253.

Oral argument was made before this Court on December 13, 1971, and an order for reargument was issued on June 26, 1972.

Appellants reassert each and every argument made in its brief previously filed; this brief is intended only to supplement the prior authorities cited.

SUPPLEMENTAL ARGUMENT

I. THE CONSTITUTIONAL RIGHT OF PRIVACY INCLUDES THE RIGHT TO TERMINATE AN UNWANTED PREGNANCY.

Appellants have previously urged the correctness of the district court's ruling in this case, *i.e.*, the right of privacy includes the right to terminate an unwanted pregnancy. This Court seems to have adopted that view last term in *Eisenstadt* v. *Baird*, ____U.S.____, 92 S.Ct. 1029 (1972). The Court, through Mr. Justice Brennan, said:

> If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. See *Stanley* v. *Georgia*, 394 U.S. 557(1969). See also *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Jacobson* v. *Massachusetts*, 197 U.S. 11,29 (1905). [Emphasis in original.]

Appellants urge that the holding of the *Baird* case be expressly stated to encompass the right to terminate a pregnancy. Since submission of the prior briefs and oral argument in this case several courts, both federal and state, have ruled abortion statutes unconstitutional on the privacy ground. Appellants will not attempt to list or discuss these cases but refer the Court to the *amicus curiae* brief filed contemporaneously by Planned Parenthood Federation of America, Inc., and the American Association of Planned Parenthood Physicians. That brief surveys the recent cases and their holdings.

II. THE PROCEDURAL REQUIREMENTS OF THE GEORGIA ABORTION STATUTE UNNECESSARILY BURDEN AND RESTRICT A WOMAN'S CONSTITUTIONAL RIGHT OF PRIVACY.

Appellants have asserted that the right of privacy involved is a constitutionally protected fundamental right and that a state's restriction thereof must be demonstrated to be "necessary to promote a compelling governmental interest." *Dunn v. Blumstein*, ____U.S.____, 92 S.Ct. 995 (1972). In commenting on the above test the Court stated:

> The key words emphasize a matter of degree: that a heavy burden of justification is on the state, and that statute will be closely scrutinized in light of its asserted purposes.

In discussing the durational residence requirements in that case, the Court stated further:

> It is not sufficient for the State to show that durational residence requirements further a very sub-

> stantial state interest. In pursuing that important interest, the State cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with "precision," . . . and must be "tailored" to serve their legitimate objectives. . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means." [Citations omitted.]

Appellant's prior brief was directed at showing that the procedural requirements left standing by the district court (two consultants, approval by an abortion committee, and required accredited hospital facility) unnecessarily burden and restrict the constitutionally protected right. It is recognized that protecting the health of its citizens is a valid state interest, however, appellants contend there are other reasonable ways to achieve this goal with a lesser burden on the constitutionally protected activity. The procedure upheld by the district court is wholly lacking in adequate safeguards required by minimal due process requirements. The statutory hospital abortion committee is the decision maker as to whether a woman will receive an abortion, yet the woman has no right to make any presentation to the committee, to know the reasons on which the committee's decision is based, or to appeal an adverse decision. The procedure lacks fundamental fairness as to all applicants. The time consuming and cumbersome procedures of the statute and its requirement that abortions be performed only in accredited hospitals effectively manipulate plaintiff's rights out of existence.

Two recent cases deal specifically with similar A.L.I. abortion procedural requirements and the Court's attention is drawn to those analyses of similar statutory provisions.

The statute under attack in *Vuitch* v. *Hardy*, ____F. Supp. ____ (No. 71-1129-Y) (D.Md. June 22, 1972), like the Georgia statute, was modeled after the American Law Institute Model Penal Code. It required that abortions be performed in licensed, accredited hospitals (Joint Commission for the Accreditation of Hospitals) and the abortion must be approved by a "hospital abortion review authority appointed by the hospital."

The case was decided by a single district judge on a petition for writ of habeas corpus. The defendant had been convicted in a state criminal proceeding for performing a nonaccredited hospital abortion.[1] The position in the district court there was that hospitalization is generally not necessary for performance of abortions in the first trimester of pregnancy, that state-regulated clinics have been found to be safe and easily regulated in other states and that many Maryland women have been induced to seek abortions in other states because of costs and scheduling delays caused by the accredited hospital requirement.[2]

---

[1]This decision does not rule on the hospital abortion committee requirement.

[2]It is interesting to note that only two hospitals in Maryland which provide obstetrical and gynecological services were not accredited, while in Georgia approximately 140 hospitals furnishing similar services are not accredited but are licensed. In 1971 Georgia women received 1,579 abortions in Georgia hospitals. For the same year 3,410 Georgia women travelled to New York for abortion services. See C. Tyler, L. Baker, J. Bourne, G. Burger, *Center for Disease Control Abortion Surveillance Report for 1971* (U.S. Department of Health, Education and Welfare, Public Health Service).

It was observed that abortion is a surgical procedure which affects the patient's health, however, the court found that "reasonable alternatives have been shown to exist which would entail less of a burden on the exercise of constitutional rights."

The Court found as a fact that

> . . . the requirement that abortion be performed only in licensed, accredited hospitals does place some burden on Maryland women's rights to seek an abortion, that that burden would be lightened by permitting abortions to be performed in other facilities as well,[3] and that the experience of other states has proved that, with appropriate regulation, facilities other than hospitals can and do protect the health of the woman seeking an abortion as adequately as hospitals do.[4]

The three-judge district court in *Poe* v. *Menghini*, 339 F.Supp. 986(D.Kan. 1972) also invalidated a JCAH accreditation requirement in the Kansas statute (also patterned after the A.L.I. model penal code). There 80 of 169 Kansas hospitals were not accredited, the court stated:

> So substantial a limitation of facilities constitutes a significant encroachment upon the exercise of a fundamental right.

---

[3]Several alternatives were discussed by the court, *e.g.*, use of specialized abortion facilities subject to state licensing and regulatory procedures. It was correctly observed, appellants think, that such facilities might be more susceptible to regulation than hospitals since the regulatory authorities might be hesitant to revoke a hospital's license especially where it was the only health care facility for an area.

[4]See brief of Planned Parenthood filed contemporaneously herewith for discussion of the New York clinical experience.

In discussing whether the state's interest was served by the JCAH requirement, the court made several pertinent observations: First, JCAH has never been concerned with the content of medical practice, rather, its standards are addressed to the physical plant, the organization of the hospital, equipment, etc. Thus, JCAH may help insure adequate personnel and facilities, but it has no bearing on the hospital's abortion policy or the decision making process. Second, the provision classifies abortion services apart from other medical procedures. Because the state interest could be fully protected by a less restrictive requirement, the Court found the accreditation requirement unconstitutional.

An additional infirmity in the accreditation requirement was found by the Kansas court because there the State of Kansas like the State of Georgia[5] purported to delegate authority to adopt standards for abortion services to the Joint Commission. This delegation was found to violate the due process clause of the Fourteenth Amendment.

Appellants here urge this Court to rule that the Georgia hospital accreditation requirement, like that of Maryland and Kansas, places an unnecessary burden and restriction on the exercise of fundamental constitutional right. Since there are reasonable, less restrictive alternatives sufficient to protect the state's interest, the state has not met its "heavy burden of justification" and the accreditation requirement must be invalidated.

The Kansas statute did not have an abortion committee provision, however, the Court did invalidate the requirement that three physicians certify the necessity of an abor-

[5]For argument on this point see Appellant's Brief, p. 12.

tion. Since the certifications were merely by other physicians (possibly a dermatologist or a podiatrist) rather than being limited to a specialty, *e.g.*, psychiatrists when mental health reasons were given, such (certifications) served no health interest. The Court apparently felt that the state's interest was served by preserving the traditional patient-physician relationship and placed reliance on the self-discipline and professional ethics of the medical profession.

With respect to the physician's right to practice their profession and exercise their professional discretion, the Court ruled that the required consultants provision subordinated the woman's attending physician's judgment to that of the other two physicians. Such a requirement unconstitutionally curtailed the availability of abortions and "the physician's right to administer to his patient in accordance with his best judgment." This reasoning is applicable to the Georgia consultants requirement and, of course, when applied to the hospital abortion committee requirement requires a similar result.

CONCLUSION

The judgment of the district court should be reversed insofar as it found no justiciable controversy in the claim of appellant physicians, nurses, social workers, ministers, and family planning and abortion counselling organizations, and the opinion of this Court should expressly declare invalid the Georgia abortion statute and direct the district court to enjoin the future enforcement thereof with respect to abortions performed by physicians duly licensed to practice medicine by Georgia law.

Respectfully submitted,

MARGIE PITTS HAMES
Suite 902, 15 Peachtree Street, N.E.
Atlanta, Georgia 30303

REBER F. BOULT, JR.
CHARLES MORGAN, JR.
American Civil Liberties Union
Foundation, Inc.
52 Fairlie Street
Atlanta, Georgia 30303

OF COUNSEL:

ELIZABETH ROEDIGER RINDSKOPF
GALE M. SIEGEL
TOBIANE SCHWARTZ

CERTIFICATE OF SERVICE

I, Margie Pitts Hames, one of the attorneys for Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, and on behalf of all Appellants, I served the foregoing Supplemental Brief of Appellants on the Appellees by depositing copies of the same in a United States mail box, with first class postage prepaid addressed to counsel of record at their post office addresses:

Harold N. Hill, Jr.
Marion O. Gordon
Dorothy T. Beasley

Attorneys for Arthur K. Bolton
132 Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

Joel Feldman
Attorney for Lewis R. Slaton
Fulton County Courthouse
Atlanta, Georgia 30303

Henry L. Bowden
Ralph H. Witt
Attorneys for Herbert T. Jenkins
2614 First National Bank Building
Atlanta, Georgia 30303

This _____ day of September, 1972.

MARGIE PITTS HAMES
Attorney for Appellant

COPY

IN THE

Supreme Court of the United States

No. 70-18

JANE ROE, *et al.*, *Appellants*,

v.

HENRY WADE, *Appellee*.

On Appeal from the United States District Court
for the Northern District of Texas

BRIEF AMICUS CURIAE OF THE ATTORNEYS GENERAL OF ARIZONA, CONNECTICUT, KENTUCKY, NEBRASKA AND UTAH

GARY K. NELSON
Attorney General of the State of Arizona
State Capitol
Phoenix, Arizona 85007

ROBERT K. KILLIAN
Attorney General of the State of Connecticut
Trinity Street
Hartford, Connecticut 06105

ED W. HANCOCK
Attorney General of the Commonwealth of Kentucky
State Capitol
Frankfort, Kentucky 40601

CLARENCE A. H. MEYER
Attorney General of the State of Nebraska
Department of Justice
Lincoln, Nebraska 68509

VERNON B. ROMNEY
Attorney General of the State of Utah
State Capitol
Salt Lake City, Utah 84114

September 20, 1972

IN THE

Supreme Court of the United States

No. 70-18

JANE ROE, *et al.*, *Appellants*,

v.

HENRY WADE, *Appellee*.

On Appeal from the United States District Court
for the Northern District of Texas

BRIEF AMICUS CURIAE OF THE ATTORNEYS GENERAL OF ARIZONA, CONNECTICUT, KENTUCKY, NEBRASKA AND UTAH

INTEREST OF THE AMICI CURIAE

The *amici* in this brief are the attorneys general of five states in which the statutes governing the performance of abortions are similar to the statute of the State of Texas; and which statutes have also been challenged before three-judge federal courts on constitutional grounds. It is the considered opinion of these *amici*, for reasons more fully explored in this brief, that this matter should be remanded to the United States District Court for the Northern District of Texas, affirming the denial of injunctive relief and vacating the declaratory judgment as to the constitutionality of the Texas abortion statute.

BRIEF

TABLE OF CONTENTS

Page

QUESTION PRESENTED 1

SUMMARY OF ARGUMENT 1

ARGUMENT 1

Declaratory Relief Was Improperly Granted in this Matter 1

CONCLUSION 9

TABLE OF CITATIONS

CASES:

Boyle v. Landry, 401 U.S. 77 (1971) 7, 9

Dombrowski v. Pfister, 380 U.S. 479 (1965) 6, 7, 8

Douglas v. City of Jeannette, 319 U.S. 157 (1943) 4, 5, 6

Ex Parte Young, 209 U.S. 123 (1908) 3, 6

Fenner v. Boykin, 271 U.S. 240 (1926) 2, 3, 3-4, 4

Hague v. C.I.O., 307 U.S. 496 (1939) 5

Railroad Commission v. Pullman Co., 312 U.S. 496 (1941) 2, 3

Samuels v. Mackell, 401 U.S. 66 (1971) 7

Spielman Motor Co. v. Dodge, 295 U.S. 89 (1935) 2, 4

Younger v. Harris, 401 U.S. 37 (1971) 7, 7-8, 9

IN THE

Supreme Court of the United States

No. 70-18

JANE ROE, *et al.*, *Appellants*,

v.

HENRY WADE, *Appellee*.

On Appeal from the United States District Court
for the Northern District of Texas

BRIEF AMICUS CURIAE OF THE ATTORNEYS GENERAL OF ARIZONA, CONNECTICUT, KENTUCKY, NEBRASKA AND UTAH

QUESTION PRESENTED

This case raises an issue of jurisdiction. The jurisdictional question is whether the three-judge federal panel below ought to have refrained from granting declaratory relief in this matter.

SUMMARY OF ARGUMENT

The three-judge federal court below ought to have refrained from granting declaratory relief in this case.

ARGUMENT

DECLARATORY RELIEF WAS IMPROPERLY GRANTED IN THIS MATTER

In this case, the original request for the convention of a three-judge federal court was based on the allegation that certain rights guaranteed by the Constitution of the United States were

infringed upon by the existence of a state statute proscribing the performance of abortions except in certain limited situations. It is submitted that such an allegation, *per se*, deserves careful scrutiny.

In the first place, none of the original plaintiffs had been threatened with criminal prosecution under the challenged statute, no harassment had occurred, and the possibility of prosecution had never even been intimated. It is one thing to call upon the federal judiciary when *enforcement* of a state statute is alleged to interfere with one's alleged constitutionally-protected rights; it is quite another to turn to the federal judiciary with the complaint that the mere *existence* of a state statute interferes with such alleged rights. To call upon the federal judiciary in the latter situation is to seek an advisory opinion.

In the second place, this Court need not be reminded that the mere allegation of interference with one's federal rights does not, of itself, warrant the entrance of the federal judiciary into the arena. This Court has limited the interference of the federal courts to certain specific areas. It is respectfully submitted that the court below ought to have refrained from exercising jurisdiction and, further, that the authority for the entrance of that court into this matter was–and remains–non-existent. For these reasons, these *amici* urge that the case should be remanded to the court below with an order vacating the declaratory judgment which it originally granted.

The doctrine of federal abstention was perhaps most precisely enunciated by Mr. Justice Frankfurter in his careful opinion in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). In that case, speaking of three-judge federal panels, he said that: "(F)ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies. . . ." (at 500). When discussing the possible "friction with state policies" in the area of criminal law, Justice Frankfurter cited *Fenner v. Boykin*, 271 U.S. 240 (1926) and *Spielman Motor Co. v. Dodge*, 295 U.S. 89 (1935). He noted that these and other cases,

> "... reflect a doctrine of abstention appropriate to our federal system whereby the federal courts 'exercising a wise discretion' restrain their authority because of 'a scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary." 312 U.S. at 501.

Fenner v. Boykin, supra, involved a challenge to the constitutionality of a Georgia statute which proscribed various dealings in certain commodities and also proscribed the maintenance of an office where such transactions could be facilitated. Appellants, citizens of another state (which, it is submitted, is of no consequence herein) established such an office and were threatened with arrest and prosecution. They challenged the validity of the Georgia statute upon the ground that it interfered with the free flow of commerce among the States and was thus violative of the federal constitution. This Court affirmed the dismissal below with the observation that *Ex Parte Young,* 209 U.S. 123 (1908) and other cases,

> "... have established the doctrine that when absolutely necessary for protection of constitutional rights, courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done except under extraordinary circumstances where the danger of irreparable loss is both great and immediate. Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the State and must decide when and how this is to be done." 271 U.S. at 243-244.

This Court made the further observation, which is especially telling herein:

> "The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection. The Judicial Code provides ample opportunity for ultimate review here in respect of

> federal questions. An intolerable condition would arise if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some federal court." *Ibid.* at 244.

Amici submit that this last-quoted portion of the decision is worthy of emphasis. To say that the condition would be "intolerable" is to engage in understatement if, even without the least intimation of a possible prosecution and even without the violation necessary to a prosecution, individuals are to be allowed to contest selected portions of the criminal codes of the various States in original Federal court proceedings.

The other case cited by Mr. Justice Frankfurter when discussing the possibility of "friction with State policies" in the area of criminal law is *Spielman Motor Co. v. Dodge, supra.* That case involved a challenge, before a three-judge federal panel, to a New York statute which sanctioned criminal penalties for its violation. The challenge was based on the contention that the statute in question violated the New York Constitution as being an "improper delegation of legislative power" and the Constitution of the United States as "effectuating a deprivation of liberty and property without due process of law. . . ." Therein, Mr. Chief Justice Hughes, speaking for the Court, held that the conditions which would allow the proper interference of a three-judge federal panel in the administration of a State's criminal code, were as follows:

> "We have said that it must appear that 'the danger of irreparable loss is both great and immediate;' otherwise, the accused should first set up his defense in the State court, even though the validity of a Statute is challenged. There is ample opportunity for ultimate review by this Court of federal questions." 295 U.S. at 95-96, citing *Fenner v. Boykin, supra,* at 242-244.

Douglas v. City of Jeannette, 319 U.S. 157 (1943), involved the convention of a three-judge federal court in which certain members of a religious sect sought to restrain the enforcement of a municipal ordinance on the ground that, as applied to them, it

abridged "the guarantees of freedom of speech, press and religion of the First Amendment made applicable to the states by the Fourteenth" (at 159). Jurisdiction therein was alleged to rest on the Constitution and laws of the United States, including the Civil Rights Act of 1871. The right of federal district courts to jurisdiction in actions brought under the Civil Rights Act had previously been established. *Hague v. C.I.O.*, 307 U.S. 496 (1939). However, Chief Justice Stone, speaking for the Court in *Jeannette*, noted that in spite of the authority of the federal district court--and in spite, also, of the certain unconstitutionality of the ordinance–the plaintiffs were entitled to the relief they sought "only if they establish a cause of action in equity," 319 U.S. at 162. He further stated that:

> "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts." *Ibid.*

The Chief Justice observed that imminent prosecution, even under a statute or ordinance allegedly violative of the federal Constitution, did not warrant the interference of the federal courts and said that:

> "Where the threatened prosecution is by State officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury 'both great and immediate' (citing cases)," 319 U.S. at 163-164.

Amici acknowledge the propriety and, often, the necessity of federal court intervention when prosecution, or threatened prosecution, show an immediate danger of irreparable damage to the accused. However, the decisions of this Court, in our reading of them, establish that where prosecution or the threat of

prosecution is absent then, *a fortiori*, the danger of irreparable damage is absent and the intervention of the federal judiciary is unwarranted in such a situation in the administration of state criminal laws.

In *Dombrowski v. Pfister*, 380 U.S. 479 (1965), the convention of the three-judge panel below had been based on the allegation that certain Louisiana statutes were violative of the First and Fourteenth Amendment guarantees securing freedom of expression; and also that the officers charged with enforcement of these laws had engaged in the bad faith harassment of the plaintiffs.

In that case Mr. Justice Brennan, speaking for the Court, noted that:

> "In *Ex Parte Young*, 209 U.S. 123, the fountainhead of federal injunctions against state prosecutions, the Court characterized the power and its proper exercise in broad terms: it would be justified where state officers '. . .threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act violating the Federal Constitution. . . .' 209 U.S. at 156. Since that decision, however, considerations of federalism have tempered the exercise of equitable power for the Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework." 380 U.S. at 483-484.

Mr. Justice Brennan, citing *Douglas v. City of Jeannette*, *supra*, at 164, further observed that the abstention of federal equity courts is warranted where the defendant is not " 'threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith,' " *Ibid.* at 485.

The decision in *Dombrowski* did, of course, narrow the grounds for federal abstention. In that case, however, this Court based this limitation upon the facts that the prosecution–or threatened prosecution–would constitute an undue interference with First and Fourteenth Amendment rights guaranteeing

freedom of expression; and also on the fact that the record presented a sorry display of harassment on the part of the State officers. The decision in *Dombrowski* is readily distinguishable from the case at bar. The main thrust of the the challenge to the Texas abortion statute below was in no real way related to the freedom of expression; and no harassment, prosecution or threat of prosecution was alleged. What was alleged was a *fear* of prosecution should the plaintiffs below engage in actions violative of the Texas criminal law. No where, in the cases decided by this Court, can justification be found for the interference of federal courts of equity in such a situation.

In a recent series of cases, *Younger v. Harris*, 401 U.S. 37 (1971), *Boyle v. Landry*, 401 U.S. 77 (1971),*Samuels v. Mackell*, 401 U.S. 66 (1971), and companion cases, this Court discussed in great detail the grounds for interference by the federal judiciary in the administration of state criminal laws. The actual facts in *Younger* are, of course, different from those in the case at bar in that injunctive relief was sought from a three-judge federal court *after* the plaintiff therein had been indicted in a state criminal proceeding. This Court held that the grant of such injunctive relief was improper. What is most applicable to the instant case challenging the Texas abortion statute, however, is that *Harris*–in his suit seeking federal injunctive relief–was joined by three other individuals. Two of these, "Jim Dan and Diane Hirsch intervened as plaintiffs in the suit, claiming that the prosecution of Harris would inhibit them as members of the Progressive Labor Party, from peacefully advocating the program of their party. . . ." *Younger v. Harris, supra*, at 39. A third individual, "Farrell Broslawsky, an instructor in history at the Los Angeles Valley College, also intervened claiming that the prosecution of Harris made him uncertain as to whether he could teach about the doctrines of Karl Marx or read from the Communist Manifesto as part of his classwork." *Ibid.* at 39-40. As to these three individuals Mr. Justice Black, in speaking for this Court, said:

> "Whatever right Harris, who is being prosecuted under the state syndicalism law may have, Dan, Hirsch and Broslawsky cannot share it with him. If these three had alleged that they would be prosecuted for the conduct they planned to engage in, and if the District Court had

found this allegation to be true–either on the admission of the State's district attorney or on any other evidence–then a genuine controversy might be said to exist. But here appellees Dan, Hirsch and Broslawsky do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible. They claim the right to bring this suit solely because, in the language of their complaint, they 'feel inhibited.' We do not think that this allegation, even if true, is sufficient to bring the equitable jurisdiction of the federal courts into play to enjoin a pending state prosecution. A federal lawsuit to stop a prosecution in a state court is a serious matter. And persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs in such cases." *Ibid.* at 42.

It is submitted that the situation of Intervenor Hallford in the case at bar is similar to that of Harris; while the situation of the original plaintiffs is similar to that of those who joined with Harris in his federal suit. The fact that injunctive relief is sought from a federal court before or after the initiation of criminal proceedings will make little difference if such courts are willing to grant such relief on anything approaching a regular basis. It is submitted that it would subvert the entire thrust of the federal abstention doctrine if individuals, desiring to engage in certain actions which are proscribed by a state criminal statute, are free--even in the absence of any harassment, threat of prosecution or true infringement upon First Amendment guarantees of freedom of expression–to engage the federal courts in an attempt to have every statute which allegedly interferes with their federal rights by its very existence declared unconstitutional.

In speaking of the right of Harris himself to federal injunctive relief, Justice Black noted that it was incorrect to assume that the *Dombrowski* decision made such relief available "without regard to any showing of bad faith or harrassment, whenever a state statute is found 'on its face' to be vague or overly broad, in violation of the First Amendment." *Ibid.* at 50. Neither

harassment nor bad faith prosecution was ever established in the case at bar; nor would the record permit such a finding.

Boyle v. Landry, supra, involved two sets of plaintiffs in an action seeking declaratory and injunctive relief against the enforcement of certain Illinois statutes and ordinances of the City of Chicago. In obviously speaking of those plaintiffs against whom no criminal prosecutions had been instituted Mr. Justice Black, in speaking for the Court, said:

> "It is obvious that the allegations of the complaint in this case fall far short of showing any irreparable injury from threats or actual prosecutions under the intimidation statute or from any other conduct by state or city officials. Not a single one of the citizens who brought this action had ever been prosecuted, charged or even arrested under the particular intimidation statute which the court below held unconstitutional. All the charges of the complaint deal broadly and generally with all the state statutes and city ordinances that the appellees originally challenged. In fact, the complaint contains no mention of any specific threat by any officer or official of Chicago, Cook Country or the State of Illinois to arrest or prosecute any one or more of the plaintiffs under that statute either one time or many times. . . .the normal course of state criminal prosecutions cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future." *Ibid.* at 81.

CONCLUSION

Amici submit that, absent of showing of harassment or bad faith prosecution and absent a showing of true infringement upon the freedom of expression, the grant of anticipatory relief *via* declaratory judgments or injunctions against state criminal statutes on the allegation that the mere existence of the statute supposedly infringes upon federal constitutional rights, runs counter to the concept of "Our Federalism" discussed by Justice Black in *Younger v. Harris, supra,* at 44-47. This Court's granting

of the right of the plaintiffs below to bring an action such as this could not help but encourage undue interference with the administration of the criminal codes of all the states by the local federal courts.

Therefore, these *amici* request, that this matter be remanded to the United State District Court for the Northern District of Texas affirming the denial of injunctive relief and vacating the declaratory judgment granted below.

Respectfully submitted,

GARY K. NELSON
Attorney General of the State of Arizona
State Capitol
Phoenix, Arizona 85007

CLARENCE A. H. MEYER
Attorney General of the State of Nebraska
Department of Justice
Lincoln, Nebraska 68509

ROBERT K. KILLIAN
Attorney General of the State of Connecticut
Trinity Street
Hartford, Connecticut 06105

VERNON B. ROMNEY
Attorney General of the State of Utah
State Capitol
Salt Lake City, Utah 84114

ED W. HANCOCK
Attorney General of the Commonwealth of Kentucky
State Capitol
Frankfort, Kentucky 40601

September 20, 1972

(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ROE ET AL. *v.* WADE, DISTRICT ATTORNEY OF DALLAS COUNTY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

No. 70–18. Argued December 13, 1971—Reargued October 11, 1972—Decided January 22, 1973

A pregnant single woman (Roe) brought a class action challenging the constitutionality of the Texas criminal abortion laws, which proscribe procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. A licensed physician (Hallford), who had two state abortion prosecutions pending against him, was permitted to intervene. A childless married couple (the Does), the wife not being pregnant, separately attacked the laws, basing alleged injury on the future possibilities of contraceptive failure, pregnancy, unpreparedness for parenthood, and impairment of the wife's health. A three-judge District Court, which consolidated the actions, held that Roe and Hallford, and members of their classes, had standing to sue and presented justiciable controversies. Ruling that declaratory, though not injunctive, relief was warranted, the court declared the abortion statutes void as vague and overbroadly infringing those plaintiffs' Ninth and Fourteenth Amendment rights. The court ruled the Does' complaint not justiciable. Appellants directly appealed to this Court on the injunctive rulings, and appellee cross-appealed from the District Court's grant of declaratory relief to Roe and Hallford. *Held:*

1. While 28 U. S. C. § 1253 authorizes no direct appeal to this Court from the grant or denial of declaratory relief alone, review is not foreclosed when the case is properly before the Court on appeal from specific denial of injunctive relief and the arguments as to both injunctive and declaratory relief are necessarily identical. P. 8.

2. Roe has standing to sue; the Does and Hallford do not. Pp. 9–14.

Syllabus

(a) Contrary to appellee's contention, the natural termination of Roe's pregnancy did not moot her suit. Litigation involving pregnancy, which is "capable of repetition, yet evading review," is an exception to the usual federal rule that an actual controversy must exist at review stages and not simply when the action is initiated. Pp. 9–10.

(b) The District Court correctly refused injunctive, but erred in granting declaratory, relief to Hallford, who alleged no federally protected right not assertable as a defense against the good-faith state prosecutions pending against him. *Samuels* v. *Mackell*, 401 U. S. 66.

(c) The Does' complaint, based as it is on contingencies, any one or more of which may not occur, is too speculative to present an actual case or controversy. Pp. 12–14.

3. State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term. Pp. 36–49.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. Pp. 36–47.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. Pp. 43–44.

(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. Pp. 44–48.

4. The State may define the term "physician" to mean only a physician currently licensed by the State, and may proscribe any

Syllabus

abortion by a person who is not a physician as so defined. Pp. 34–35, 48.

5. It is unnecessary to decide the injunctive relief issue since the Texas authorities will doubtless fully recognize the Court's ruling that the Texas criminal abortion statutes are unconstitutional. P. 51.

314 F. Supp. 1217, affirmed in part and reversed in part.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, STEWART, MARSHALL, and POWELL, JJ., joined. BURGER, C. J., and DOUGLAS and STEWART, JJ., filed concurring opinions. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined. REHNQUIST, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 70–18

Jane Roe et al., Appellants,
v.
Henry Wade.

On Appeal from the United States District Court for the Northern District of Texas.

[January 22, 1973]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This Texas federal appeal and its Georgia companion, *Doe* v. *Bolton*, *post* ——, present constitutional challenges to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new thinking about an old issue.

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement free of emotion and of predilection. We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortive procedure over the centuries. We bear in mind, too, Mr. Justice Holmes' admonition in his now vindicated dissent in *Lochner* v. *New York*, 198 U. S. 45, 76 (1905):

> "It [the Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

I

The Texas statutes that concern us here are Arts. 1191–1194 and 1196 of the State's Penal Code.[1] These

[1] "Article 1191. Abortion

"If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

"Art. 1192. Furnishing the means

"Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

"Art. 1193. Attempt at abortion

"If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided

make it a crime to "procure an abortion," as therein defined, or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." Similar statutes are in existence in a majority of the States.[2]

---

it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

"Art. 1194. Murder in producing abortion

"If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

"Art. 1196. By medical advice

"Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

The foregoing Articles, together with Art. 1195, comprise Chapter 9 of Title 15 of the Penal Code. Article 1195, not attacked here, reads:

"Art. 1195. Destroying unborn child

"Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years."

[2] Ariz. Rev. Stat. Ann. § 13–211 (1971); Conn. Pub. Act. No. 1 (May 1972 special session) (in 4 Conn. Leg. Serv. 677 (1972)), and Conn. Gen. Stat. Rev. §§ 53–29, 53–30 (1968) (or unborn child); Idaho Code § 18–1505 (App. to Supp. 1971); Ill. Rev. Stats. c. 38, § 23–1 (1971); Ind. Code § 35–1–58–1 (1971); Iowa Code § 701.1 (1971); Ky. Rev. Stat. § 436.020 (1963); La. Rev. Stat. § 37:1285 (6) (1964) (loss of medical license) (but see § 14–87 (1972 Supp.) containing no exception for the life of the mother under the criminal statute); Me. Rev. Stat. Ann. Tit. 17, § 51 (1964); Mass. Gen. Laws Ann. c. 272, § 19 (1970) (using the term "unlawfully," construed to exclude an abortion to save the mother's life, *Kudish* v. *Bd. of Registration*, 356 Mass. 98, 248 N. E. 2d 264 (1969)); Mich. Comp. Laws § 750.14 (1948); Minn. Stat. § 617.18 (1971); Mo. Rev. Stat. § 559.100 (1969); Mont. Rev. Codes Ann. § 94–401 (1961); Neb. Rev. Stat. § 28–405 (1964); Nev. Rev. Stat. § 200:220 (1967); N. H. Rev. Stat. Ann. § 585.13 (1955); N. J. Stat. Ann. § 2A:87–1 (1969) ("without lawful justification"); N. D. Cent. Code §§ 12–25–

Texas first enacted a criminal abortion statute in 1854. Texas Laws 1854, c. 49, § 1, set forth in 3 Gammel, Laws of Texas, 1502 (1898). This was soon modified into language that has remained substantially unchanged to the present time. See Texas Penal Code of 1857, Arts. 531–536; Paschal's Laws of Texas, Arts. 2192–2197 (1866); Texas Rev. Stat., Arts. 536–541 (1879); Texas Rev. Crim. Stat., Arts. 1071–1076 (1911). The final article in each of these compilations provided the same exception, as does the present Article 1196, for an abortion by "medical advice for the purpose of saving the life of the mother." [3]

01, 12-25-02 (1960); Ohio Rev. Code § 2901.16 (1953); Okla. Stat. Ann., Tit. 21, § 861 (1972–1973 Supp.); Pa. Stat. Ann., Tit. 18, §§ 4718, 4719 (1963) ("unlawful"); R. I. Gen. Laws Ann. § 11-3-1 (1969); S. D. Compiled Laws § 22-17-1 (1967); Tenn. Code Ann. §§ 39-301, 39-302 (1956); Utah Code Ann. §§ 76-2-1, 76-2-2 (1953); Vt. Stat. Ann., Tit. 13, § 101 (1958); W. Va. Code Ann. § 61-2-8 (1966); Wis. Stat. § 940.04 (1969); Wyo. Stat. Ann. §§ 6-77, 6-78 (1957).

[3] Long ago a suggestion was made that the Texas statutes were unconstitutionally vague because of definitional deficiencies. The Texas Court of Criminal Appeals disposed of that suggestion peremptorily, saying only,

"It is also insisted in the motion in arrest of judgment that the statute is unconstitutional and void in that it does not sufficiently define or describe the offense of abortion. We do not concur in respect to this question." *Jackson* v. *State*, 55 Tex. Crim. R. 79, 89, 115 S. W. 262, 268 (1908).

The same court recently has held again that the State's abortion statutes are not unconstitutionally vague or overbroad. *Thompson* v. *State*, — Tex. Crim. App. —, — S. W. 2d — (1971), appeal pending. The court held that "the State of Texas has a compelling interest to protect fetal life"; that Art. 1191 "is designed to protect fetal life"; that the Texas homicide statutes, particularly Art. 1205 of the Penal Code, are intended to protect a person "in existence by actual birth" and thereby implicitly recognize other human life that is not "in existence by actual birth"; that the definition of human life is for the legislature and not the courts; that Art. 1196 "is

II

Jane Roe,[4] a single woman who was residing in Dallas County, Texas, instituted this federal action in March 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes.

Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions"; that she was unable to get a "legal" abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. By an amendment to her complaint Roe purported to sue "on behalf of herself and all other women" similarly situated.

James Hubert Hallford, a licensed physician, sought and was granted leave to intervene in Roe's action. In

---

more definite that the District of Columbia statute upheld in [*United States* v.] *Vuitch*" (402 U. S. 62); and that the Texas statute "is not vague and indefinite or overbroad." A physician's abortion conviction was affirmed.

In n. 2, — Tex. Crim. App., at —, — S. W. 2d, at —, the court observed that any issue as to the burden of proof under the exemption of Art. 1196 "is not before us." But see *Veevers* v. *State*, 172 Tex. Crim. App. 162, 168–169, 354 S. W. 2d 161 (1962). Cf. *United States* v. *Vuitch*, 402 U. S. 62, 69–71 (1971).

[4] The name is a pseudonym.

his complaint he alleged that he had been arrested previously for violations of the Texas abortion statutes and that two such prosecutions were pending against him. He described conditions of patients who came to him seeking abortions, and he claimed that for many cases he, as a physician, was unable to determine whether they fell within or outside the exception recognized by Article 1196. He alleged that, as a consequence, the statutes were vague and uncertain, in violation of the Fourteenth Amendment, and that they violated his own and his patients' rights to privacy in the doctor-patient relationship and his own right to practice medicine, rights he claimed were guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

John and Mary Doe,[5] a married couple, filed a companion complaint to that of Roe. They also named the District Attorney as defendant, claimed like constitutional deprivations, and sought declaratory and injunctive relief. The Does alleged that they were a childless couple; that Mrs. Doe was suffering from a "neural-chemical" disorder; that her physician had "advised her to avoid pregnancy until such time as her condition has materially improved" (although a pregnancy at the present time would not present "a serious risk" to her life); that, pursuant to medical advice, she had discontinued use of birth control pills; and that if she should become pregnant, she would want to terminate the pregnancy by an abortion performed by a competent, licensed physician under safe, clinical conditions. By an amendment to their complaint, the Does purported to sue "on behalf of themselves and all couples similarly situated."

The two actions were consolidated and heard together by a duly convened three-judge district court. The suits thus presented the situations of the pregnant single

[5] These names are pseudonyms.

woman, the childless couple, with the wife not pregnant, and the licensed practicing physician, all joining in the attack on the Texas criminal abortion statutes. Upon the filing of affidavits, motions were made to dismiss and for summary judgment. The court held that Roe and Dr. Hallford, and members of their respective classes, had standing to sue, and presented justiciable controversies, but that the Does had failed to allege facts sufficient to state a present controversy and did not have standing. It concluded that, with respect to the requests for a declaratory judgment, abstention was not warranted. On the merits, the District Court held that the "fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment," and that the Texas criminal abortion statutes were void on their face because they were both unconstitutionally vague and constituted an overbroad infringement of the plaintiffs' Ninth Amendment rights. The court then held that abstention was warranted with respect to the requests for an injunction. It therefore dismissed the Doe complaint, declared the abortion statutes void, and dismissed the application for injunctive relief. 314 F. Supp. 1217 (ND Tex. 1970).

The plaintiffs Roe and Doe and the intervenor Hallford, pursuant to 28 U. S. C. § 1253, have appealed to this Court from that part of the District Court's judgment denying the injunction. The defendant District Attorney has purported to cross appeal, pursuant to the same statute, from the court's grant of declaratory relief to Roe and Hallford. Both sides also have taken protective appeals to the United States Court of Appeals for the Fifth Circuit. That court ordered the appeals held in abeyance pending decision here. We postponed decision on jurisdiction to the hearing on the merits. 402 U. S. 941 (1971).

III

It might have been preferable if the defendant, pursuant to our Rule 20, had presented to us a petition for certiorari before judgment in the Court of Appeals with respect to the granting of the plaintiffs' prayer for declaratory relief. Our decisions in *Mitchell* v. *Donovan*, 398 U. S. 427 (1970), and *Gunn* v. *University Committee*, 399 U. S. 383 (1970), are to the effect that § 1253 does not authorize an appeal to this Court from the grant or denial of declaratory relief alone. We conclude, nevertheless, that those decisions do not foreclose our review of both the injunctive and the declaratory aspects of a case of this kind when it is properly here, as this one is, on appeal under § 1253 from specific denial of injunctive relief, and the arguments as to both aspects are necessarily identical. See *Carter* v. *Jury Commission*, 396 U. S. 320 (1970); *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen*, 362 U. S. 73, 80–81 (1960). It would be destructive of time and energy for all concerned were we to rule otherwise. Cf. *Doe* v. *Bolton*, *post*, —.

IV

We are next confronted with issues of justiciability, standing, and abstention. Have Roe and the Does established that "personal stake in the outcome of the controversy," *Baker* v. *Carr*, 369 U. S. 186, 204 (1962), that insures that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution," *Flast* v. *Cohen*, 392 U. S. 83, 101 (1968), and *Sierra Club* v. *Morton*, 405 U. S. 727, 732 (1972)? And what effect did the pendency of criminal abortion charges against Dr. Hallford in state court have upon the propriety of the federal court's granting relief to him as a plaintiff-intervenor?

A. *Jane Roe.* Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person. For purposes of her case, we accept as true, and as established, her existence; her pregnant state, as of the inception of her suit in March 1970 and as late as May 21 of that year when she filed an alias affidavit with the District Court; and her inability to obtain a legal abortion in Texas.

Viewing Roe's case as of the time of its filing and thereafter until as late as May, there can be little dispute that it then presented a case or controversy and that, wholly apart from the class aspects, she, as a pregnant single woman thwarted by the Texas criminal abortion laws, had standing to challenge those statutes. *Abele* v. *Markle,* 452 F. 2d 1121, 1125 (CA2 1971); *Crossen* v. *Breckenridge,* 446 F. 2d 833, 838–839 (CA6 1971); *Poe* v. *Menghini,* 339 F. Supp. 986, 990–991 (Kans. 1972). See *Truax* v. *Raich,* 239 U. S. 33 (1915). Indeed, we do not read the appellee's brief as really asserting anything to the contrary. The "logical nexus between the status asserted and the claim sought to be adjudicated," *Flast* v. *Cohen,* 392 U. S., at 102, and the necessary degree of contentiousness, *Golden* v. *Zwickler,* 394 U. S. 103 (1969), are both present.

The appellee notes, however, that the record does not disclose that Roe was pregnant at the time of the District Court hearing on May 22, 1970,[6] or on the following June 17 when the court's opinion and judgment were filed. And he suggests that Roe's case must now be moot because she and all other members of her class are no longer subject to any 1970 pregnancy.

[6] The appellee twice states in his brief that the hearing before the District Court was held on July 22, 1970. Appellee's Brief 13. The docket entries, Appendix, at 2, and the transcript, Appendix, at 76, reveal this to be an error. The July date appears to be the time of the reporter's transcription. See Appendix, at 77.

The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950); *Golden* v. *Zwickler, supra; SEC* v. *Medical Committee for Human Rights*, 404 U. S. 403 (1972).

But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). See *Moore* v. *Ogilvie*, 394 U. S. 814, 816 (1969); *Carroll* v. *President and Commissioners*, 393 U. S. 175, 178–179 (1968); *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632–633 (1953).

We therefore agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot.

B. *Dr. Hallford.* The doctor's position is different. He entered Roe's litigation as a plaintiff-intervenor alleging in his complaint that he:

> "In the past has been arrested for violating the Texas Abortion Laws and at the present time stands charged by indictment with violating said laws in the Criminal District Court of Dallas County, Texas to-wit: (1) The State of Texas vs.

James H. Hallford, No. C–69–5307–IH, and (2) The State of Texas vs. James H. Hallford, No. C–69–2524–H. In both cases the defendant is charged with abortion. . . ."

In his application for leave to intervene the doctor made like representations as to the abortion charges pending in the state court. These representations were also repeated in the affidavit he executed and filed in support of his motion for summary judgment.

Dr. Hallford is therefore in the position of seeking, in a federal court, declaratory and injunctive relief with respect to the same statutes under which he stands charged in criminal prosecutions simultaneously pending in state court. Although he stated that he has been arrested in the past for violating the State's abortion laws, he makes no allegation of any substantial and immediate threat to any federally protected right that cannot be asserted in his defense against the state prosecutions. Neither is there any allegation of harassment or bad faith prosecution. In order to escape the rule, articulated in the cases cited in the next paragraph of this opinion, that, absent harassment and bad faith, a defendant in a pending state criminal case cannot affirmatively challenge in federal court the statutes under which the State is prosecuting him, Dr. Hallford seeks to distinguish his status as a present state defendant from his status as a "potential future defendant" and to assert only the latter for standing purposes here.

We see no merit in that distinction. Our decision in *Samuels* v. *Mackell*, 401 U. S. 66 (1971), compels the conclusion that the District Court erred when it granted declaratory relief to Dr. Hallford instead of refraining from so doing. The court, of course, was correct in refusing to grant injuctive relief to the doctor. The reasons supportive of that action, however, are those expressed in *Samuels* v. *Mackell*, *supra*, and in *Younger* v.

Harris, 401 U. S. 37 (1971); *Boyle* v. *Landry*, 401 U. S. 77 (1971); *Perez* v. *Ledesma*, 401 U. S. 82 (1971); and *Byrne* v. *Karalexis*, 401 U. S. 216 (1971). See also *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). We note, in passing, that *Younger* and its companion cases were decided after the three-judge District Court decision in this case.

Dr. Hallford's complaint in intervention, therefore, is to be dismissed.[7] He is remitted to his defenses in the state criminal proceedings against him. We reverse the judgment of the District Court insofar as it granted Dr. Hallford relief and failed to dismiss his complaint in intervention.

C. *The Does.* In view of our ruling as to Roe's standing in her case, the issue of the Does' standing in their case has little significance. The claims they assert are essentially the same as those of Roe, and they attack the same statutes. Nevertheless, we briefly note the Does' posture.

Their pleadings present them as a childless married couple, the woman not being pregnant, who have no desire to have children at this time because of their having received medical advice that Mrs. Doe should avoid pregnancy, and for "other highly personal reasons." But

[7] We need not consider what different result, if any, would follow if Dr. Hallford's intervention were on behalf of a class. His complaint in intervention does not purport to assert a class suit and makes no reference to any class apart from an allegation that he "and others similarly situated" must necessarily guess at the meaning of Art. 1196. His application for leave to intervene goes somewhat further for it asserts that plaintiff Roe does not adequately protect the interest of the doctor "and the class of people who are physicians . . . and the class of people who are . . . patients . . . ." The leave application, however, is not the complaint. Despite the District Court's statement to the contrary, 314 F. Supp., at 1225, we fail to perceive the essentials of a class suit in the Hallford complaint.

they "fear . . . they may face the prospect of becoming parents." And if pregnancy ensues, they "would want to terminate" it by an abortion. They assert an inability to obtain an abortion legally in Texas and, consequently, the prospect of obtaining an illegal abortion there or of going outside Texas to some place where the procedure could be obtained legally and competently.

We thus have as plaintiffs a married couple who have, as their asserted immediate and present injury, only an alleged "detrimental effect upon [their] marital happiness" because they are forced to "the choice of refraining from normal sexual relations or of endangering Mary Doe's health through a possible pregnancy." Their claim is that sometime, in the future, Mrs. Doe might become pregnant because of possible failure of contraceptive measures, and at that time in the future, she might want an abortion that might then be illegal under the Texas statutes.

This very phrasing of the Does' position reveals its speculative character. Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not take place and all may not combine. In the Does' estimation, these possibilities might have some real or imagined impact upon their marital happiness. But we are not prepared to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy. *Younger* v. *Harris*, 401 U. S., at 41–42; *Golden* v. *Zwickler*, 394 U. S., at 109–110 (1969); *Abele* v. *Markle*, 452 F. 2d, at 1124–1125; *Crossen* v. *Breckenridge*, 446 F. 2d, at 839. The Does' claim falls far short of those resolved otherwise in the cases that the Does urge upon us, namely, *Investment Co. Institute* v. *Camp*, 401 U. S. 617 (1971);

Data Processing Service v. *Camp*, 397 U. S. 150 (1970); and *Epperson* v. *Arkansas*, 393 U. S. 97 (1968). See also *Truax* v. *Raich*, *supra*.

The Does therefore are not appropriate plaintiffs in this litigation. Their complaint was properly dismissed by the District Court, and we affirm that dismissal.

V

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, see *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972); *id.*, at 460 (WHITE, J., concurring); or among those rights reserved to the people by the Ninth Amendment, *Griswold* v. *Connecticut*, 381 U. S., at 486 (Goldberg, J., concurring). Before addressing this claim, we feel it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws.

VI

It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.

1. *Ancient attitudes.* These are not capable of precise determination. We are told that at the time of the Persian Empire abortifacients were known and that criminal abortions were severely punished.[8] We are also told, however, that abortion was practiced in Greek times as well as in the Roman Era,[9] and that "it was resorted to without scruple." [10] The Ephesian, Soranos, often described as the greatest of the ancient gynecologists, appears to have been generally opposed to Rome's prevailing free-abortion practices. He found it necessary to think first of the life of the mother, and he resorted to abortion when, upon this standard, he felt the procedure advisable.[11] Greek and Roman law afforded little protection to the unborn. If abortion was prosecuted in some places, it seems to have been based on a concept of a violation of the father's right to his offspring. Ancient religion did not bar abortion.[12]

2. *The Hippocratic Oath.* What then of the famous Oath that has stood so long as the ethical guide of the medical profession and that bears the name of the great Greek (460(?)–377(?) B. C.), who has been described as the Father of Medicine, the "wisest and the greatest

---

[8] A. Castiglioni, A History of Medicine 84 (2d ed. 1947), E. Krumbhaar, translator and editor (hereinafter "Castiglioni").

[9] J. Ricci, The Genealogy of Gynaecology 52, 84, 113, 149 (2d ed. 1950) (hereinafter "Ricci"); L. Lader, Abortion 75–77 (1966) (hereinafter "Lader"); K. Niswander, Medical Abortion Practices in the United States, in Abortion and the Law 27, 38–40 (D. Smith, editor, 1967); G. Williams, The Sanctity of Life 148 (1957) (hereinafter "Williams"); J. Noonan, An Almost Absolute Value in History, in The Morality of Abortion 1, 3–7 (J. Noonan ed. 1970) (hereinafter "Noonan"); E. Quay, Justifiable Abortion—Medical and Legal Foundations, II, 49 Geo. L. J. 395, 406–422 (1961) (hereinafter "Quay").

[10] L. Edelstein, The Hippocratic Oath 10 (1943) (hereinafter "Edelstein"). But see Castiglioni 227.

[11] Edelstein 12; Ricci 113–114, 118–119; Noonan 5.

[12] Edelstein 13–14.

practioner of his art," and the "most important and most complete medical personality of antiquity," who dominated the medical schools of his time, and who typified the sum of the medical knowledge of the past? [13] The Oath varies somewhat according to the particular translation, but in any translation the content is clear: "I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion," [14] or "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy." [15]

Although the Oath is not mentioned in any of the principal briefs in this case or in *Doe* v. *Bolton, post*, it represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day. Why did not the authority of Hippocrates dissuade abortion practice in his time and that of Rome? The late Dr. Edelstein provides us with a theory: [16] The Oath was not uncontested even in Hippocrates' day; only the Pythagorean school of philosophers frowned upon the related act of suicide. Most Greek thinkers, on the other hand, commended abortion, at least prior to viability. See Plato, *Republic*, V, 461; Aristotle, *Politics*, VII, 1335 b 25. For the Pythagoreans, however, it was a matter of dogma. For them the embryo was animate from the moment of conception, and abortion meant destruction of a living being. The abortion clause of the Oath, therefore, "echoes Pythagorean doctrines," and "[i]n no other stratum of Greek opinion were such

[13] Castiglioni 148.

[14] *Id.*, at 154.

[15] Edelstein 3.

[16] *Id.*, at 12, 15–18.

views held or proposed in the same spirit of uncompromising austerity." [17]

Edelstein then concludes that the Oath originated in a group representing only a small segment of Greek opinion and that it certainly was not accepted by all ancient physicians. He points out that medical writings down to Galen (130–200 A. D.) "give evidence of the violation of almost every one of its injunctions." [18] But with the end of antiquity a decided change took place. Resistance against suicide and against abortion became common. The Oath came to be popular. The emerging teachings of Christianity were in agreement with the Pythagorean ethic. The Oath "became the nucleus of all medical ethics" and "was applauded as the embodiment of truth." Thus, suggests Dr. Edelstein, it is "a Pythagorean manifesto and not the expression of an absolute standard of medical conduct." [19]

This, it seems to us, is a satisfactory and acceptable explanation of the Hippocratic Oath's apparent rigidity. It enables us to understand, in historical context, a long accepted and revered statement of medical ethics.

3. *The Common Law.* It is undisputed that at the common law, abortion performed *before* "quickening"—the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy [20]—was not an indictable offense.[21] The ab-

[17] *Id.*, at 18; Lader 76.

[18] Edelstein 63.

[19] *Id.*, at 64.

[20] Dorland's Illustrated Medical Dictionary 1261 (24th ed. 1965).

[21] E. Coke, Institutes III *50 (1648); 1 W. Hawkins, Pleas of the Crown c. 31, § 16 (1762); 1 Blackstone, Commentaries *129–130 (1765); M. Hale, Pleas of the Crown 433 (1778). For discussions of the role of the quickening concept in English common law, see Lader 78; Noonan 223–226; C. Means, The Law of New York Concerning Abortion and the Status of the Foetus, 1664–1968: A Case

sence of a common law crime for pre-quickening abortion appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins. These disciplines variously approached the question in terms of the point at which the embryo or fetus became "formed" or recognizably human, or in terms of when a "person" came into being, that is, infused with a "soul" or "animated." A loose consensus evolved in early English law that these events occurred at some point between conception and live birth.[22] This was "mediate animation." Although

---

of Cessation of Constitutionality, 14 N. Y. L. Forum 411, 418–428 (1968) (hereinafter "Means I"); L. Stern, Abortion: Reform and the Law, 59 J. Crim. L. C. & P. S. 84 (1968) (hereinafter "Stern"); Quay 430–432; Williams 152.

[22] Early philosophers believed that the embryo or fetus did not become formed and begin to live until at least 40 days after conception for a male, and 80 to 90 days for a female. See, for example, Aristotle, Hist. Anim. 7.3.583b; Gen. Anim. 2.3.736, 2.5.741; Hippocrates, Lib. de Nat. Puer., No. 10. Aristotle's thinking derived from his three-stage theory of life: vegetable, animal, rational. The vegetable stage was reached at conception, the animal at "animation," and the rational soon after live birth. This theory, together with the 40/80 day view, came to be accepted by early Christian thinkers.

The theological debate was reflected in the writings of St. Augustine, who made a distinction between *embryo inanimatus*, not yet endowed with a soul, and *embryo animatus*. He may have drawn upon Exodus xxi, 22. At one point, however, he expresses the view that human powers cannot determine the point during fetal development at which the critical change occurs. See Augustine, De Origine Animae 4.4 (Pub. Law 44.527). See also Reany, The Creation of the Human Soul, c. 2 and 83–86 (1932); Huser, The Crime of Abortion in Common Law 15 (Catholic Univ. of America, Canon Law Studies No. 162, Washington, D. C. 1942).

Galen, in three treatises related to embryology, accepted the thinking of Aristotle and his followers. Quay 426–427. Later, Augustine on abortion was incorporated by Gratian into the Decretum, published about 1140. Decretum Magistri Gratiani 2.32.2.7 to 2.32.2.10,

Christian theology and the canon law came to fix the point of animation at 40 days for a male and 80 days for a female, a view that persisted until the 19th century, there was otherwise little agreement about the precise time of formation or animation. There was agreement, however, that prior to this point the fetus was to be regarded as part of the mother and its destruction, therefore, was not homicide. Due to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40–80 day view, and perhaps to Acquinas' definition of movement as one of the two first principles of life, Bracton focused upon quickening as the critical point. The significance of quickening was echoed by later common law scholars and found its way into the received common law in this country.

Whether abortion of a *quick* fetus was a felony at common law, or even a lesser crime, is still disputed. Bracton, writing early in the 13th century, thought it homicide.[23] But the later and predominant view, following the great common law scholars, has been that

---

in 1 Corpus Juris Canonici 1122, 1123 (2d ed. Friedberg ed. 1879). Gratian, together with the decretals that followed, were recognized as the definitive body of canon law until the new Code of 1917.

For discussions of the canon law treatment, see Means I, at 411–412; Noonan, 20–26; Quay 426–430; see also Noonan, Contraception: A History of Its Treatment by the Catholic Theologians and Canonists 18–29 (1965).

[23] Bracton took the position that abortion by blow or poison was homicide "if the foetus be already formed and animated, and particularly if it be animated." 2 H. Bracton, De Legibus et Consuetudinibus Angliae 279 (Twiss ed. 1879), or, as a later translation puts it, "if the foetus is already formed or quickened, especially if it is quickened." II Bracton, On the Laws and Customs of England 341 (Thorne ed. 1968). See Quay 431; see also 2 Fleta 60–61 (Book I, c. 23) (Selden Society ed. 1955).

it was at most a lesser offense. In a frequently cited passage, Coke took the position that abortion of a woman "quick with childe" is "a great misprision and no murder." [24] Blackstone followed, saying that while abortion after quickening had once been considered manslaughter (though not murder), "modern law" took a less severe view.[25] A recent review of the common law precedents argues, however, that those precedents contradict Coke and that even post-quickening abortion was never established as a common law crime.[26] This is of some importance because while most American courts ruled, in holding or dictum, that abortion of an unquickened fetus was not criminal under their received common law,[27] others followed Coke in stating that abor-

---

[24] E. Coke, Institutes III *50 (1648).

[25] 1 Blackstone, Commentaries *129–130 (1765).

[26] C. Means, The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?, 17 N. Y. L. Forum 335 (1971) (hereinafter "Means II"). The author examines the two principal precedents cited marginally by Coke, both contrary to his dictum, and traces the treatment of these and other cases by earlier commentators. He concludes that Coke, who himself participated as an advocate in an abortion case in 1601, may have intentionally misstated the law. The author even suggests a reason: Coke's strong feelings against abortion, coupled with his determination to assert common law (secular) jurisdiction to assess penalties for an offence that traditionally had been an exclusively ecclesiastical or canon law crime. See also Lader 78–79, who notes that some scholars doubt the common law ever was applied to abortion; that the English ecclesiastical courts seem to have lost interest in the problem after 1527; and that the preamble to the English legislation of 1803, 43 Geo. 3, c. 58, § 1, at 203, referred to in the text, *infra*, states that "no adequate means have been hitherto provided for the prevention and punishment of such offenses."

[27] *Commonwealth* v. *Bangs*, 9 Mass. 387, 388 (1812); *Commonwealth* v. *Parker*, 50 Mass. (9 Met.) 263, 265–266 (1845); *State* v. *Cooper*, 22 N. J. L. 52, 58 (1849); *Abrams* v. *Foshee*, 3 Iowa 274, 278–280 (1856); *Smith* v. *Gaffard*, 31 Ala. 45, 51 (1857); *Mitchell*

tion of a quick fetus was a "misprision," a term they translated to mean "misdemeanor." [28] That their reliance on Coke on this aspect of the law was uncritical and, apparently in all the reported cases, dictum (due probably to the paucity of common law prosecutions for post-quickening abortion), makes it now appear doubtful that abortion was ever firmly established as a common law crime even with respect to the destruction of a quick fetus.

4. *The English statutory law.* England's first criminal abortion statute, Lord Ellenborough's Act, 43 Geo. 3, c. 58, came in 1803. It made abortion of a quick fetus, § 1, a capital crime, but in § 2 it provided lesser penalties for the felony of abortion before quickening, and thus preserved the quickening distinction. This contrast was continued in the general revision of 1828, 9 Geo. 4, c. 31, § 13, at 104. It disappeared, however, together with the death penalty, in 1837, 7 Will. 4 & 1 Vic., c. 85, § 6, at 360, and did not reappear in the Offenses Against the Person Act of 1861, 24 & 25 Vic., c. 100, § 59, at 438, that formed the core of English anti-abortion law until the liberalizing reforms of 1967. In 1929 the Infant Life (Preservation) Act, 19 & 20 Geo. 5, c. 34, came into being. Its emphasis was upon the destruction of "the life of a child capable of being born alive." It made a willful act performed with the necessary intent a felony. It contained a proviso that

---

v. *Commonwealth*, 78 Ky. 204, 210 (1879); *Eggart* v. *State*, 40 Fla. 527, 532, 25 So. 144, 145 (1898); *State* v. *Alcorn*, 7 Idaho 599, 606, 64 P. 1014, 1016 (1901); *Edwards* v. *State*, 79 Neb. 251, 252, 112 N. W. 611, 612 (1907); *Gray* v. *State*, 77 Tex. Crim. R. 221, 224, 178 S. W. 337, 338 (1915); *Miller* v. *Bennett*, 190 Va. 162, 169, 56 S. E. 2d 217, 221 (1949). Contra, *Mills* v. *Commonwealth*, 13 Pa. 631, 633 (1850); *State* v. *Slagle*, 83 N. C. 630, 632 (1880).

[28] See *Smith* v. *State*, 33 Me. 48, 55 (1851); *Evans* v. *People*, 49 N. Y. 86, 88 (1872); *Lamb* v. *State*, 67 Md. 524, 533, 10 A. 208 (1887).

one was not to be found guilty of the offense "unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother."

A seemingly notable development in the English law was the case of *Rex* v. *Bourne*, [1939] 1 K. B. 687. This case apparently answered in the affirmative the question whether an abortion necessary to preserve the life of the pregnant woman was excepted from the criminal penalties of the 1861 Act. In his instructions to the jury Judge Macnaghten referred to the 1929 Act, and observed, p. 691, that that Act related to "the case where a child is killed by a willful act at the time when it is being delivered in the ordinary course of nature." *Id.*, at 91. He concluded that the 1861 Act's use of the word "unlawfully," imported the same meaning expressed by the specific proviso in the 1929 Act even though there was no mention of preserving the mother's life in the 1861 Act. He then construed the phrase "preserving the life of the mother" broadly, that is, "in a reasonable sense," to include a serious and permanent threat to the mother's *health*, and instructed the jury to acquit Dr. Bourne if it found he had acted in a good faith belief that the abortion was necessary for this purpose. *Id.*, at 693–694. The jury did acquit.

Recently Parliament enacted a new abortion law. This is the Abortion Act of 1967, 15 & 16 Eliz. 2, c. 87. The Act permits a licensed physician to perform an abortion where two other licensed physicians agree (a) "that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated," or (b) "that there is a substantial risk that if the child were born it would

suffer from such physical or mental abnormalities as to be seriously handicapped." The Act also provides that, in making this determination, "account may be taken of the pregnant woman's actual or reasonably forseeable environment." It also permits a physician, without the concurrence of others, to terminate a pregnancy where he is of the good faith opinion that the abortion "is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman."

5. *The American law.* In this country the law in effect in all but a few States until mid-19th century was the pre-existing English common law. Connecticut, the first State to enact abortion legislation, adopted in 1821 that part of Lord Ellenborough's Act that related to a woman "quick with child." [29] The death penalty was not imposed. Abortion before quickening was made a crime in that State only in 1860.[30] In 1828 New York enacted legislation [31] that, in two respects, was to serve as a model for early anti-abortion statutes. First, while barring destruction of an unquickened fetus as well as a quick fetus, it made the former only a misdemeanor, but the latter second-degree manslaughter. Second, it incorporated a concept of therapeutic abortion by providing that an abortion was excused if it "shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose." By 1840, when Texas had received the common law,[32] only eight American States

---

[29] Conn. Stat., Tit. 20, § 14 (1821).

[30] Conn. Pub. Acts, c. 71, § 1 (1860).

[31] N. Y. Rev. Stat., pt. IV, c. I, Tit. II, Art. 1, § 9, at 661, and Tit. VI, § 21, at 694 (1829).

[32] Act of January 20, 1840, § 1, set forth in 2 Gammel, Laws of Texas 177–178 (1898); see *Grigsby* v. *Reib*, 105 Tex. 597, 600, 153 S. W. 1124, 1125 (1913).

had statutes dealing with abortion.[33] It was not until after the War Between the States that legislation began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening but were lenient with it before quickening. Most punished attempts equally with completed abortions. While many statutes included the exception for an abortion thought by one or more physicians to be necessary to save the mother's life, that provision soon disappeared and the typical law required that the procedure actually be necessary for that purpose.

Gradually, in the middle and late 19th century the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased. By the end of the 1950's, a large majority of the States banned abortion, however and whenever performed, unless done to save or preserve the life of the mother.[34] The exceptions, Alabama and the District of Columbia, permitted abortion to preserve the mother's health.[35] Three other States permitted abortions that were not "unlawfully" performed or that were not "without lawful justification," leaving interpretation of those standards to the courts.[36] In the past several years, however, a trend toward liberaliza-

---

[33] The early statutes are discussed in Quay 435–438. See also Lader 85–88; Stern 85–86; and Means II 375–376.

[34] Criminal abortion statutes in effect in the States as of 1961, together with historical statutory development and important judicial interpretations of the state statutes, are cited and quoted in Quay 447–520. See Note, A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems, 1972 Ill. L. Forum 177, 179, classifying the abortion statutes and listing 25 States as permitting abortion only if necessary to save or preserve the mother's life.

[35] Ala. Code, Tit. 14, § 9 (1958); D. C. Code Ann. § 22–201 (1967).

[36] Mass. Gen. Laws Ann., c. 272, § 19 (1970); N. J. Rev. Stat. Ann. 2A:87–1 (1969); Pa. Stat. Ann., Tit. 18, §§ 4718, 4719 (1963).

tion of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code, § 230.3,[37] set forth as Appendix B to the opinion in *Doe* v. *Bolton, post* ——.

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country

[37] Fourteen States have adopted some form of the ALI statute. See Ark. Stat. Ann. §§ 41-303 to 41-310 (Supp. 1971); Calif. Health and Safety Code §§ 25950-25955.5 (West Supp. 1972); Colo. Rev. Stats. Ann. §§ 40-2-50 to 40-2-53 (Perm. Cum. Supp. 1967); Del. Code Ann., Tit. 24, §§ 1790-1793 (Supp. 1972); Florida Law of Apr. 13, 1972, c. 72-196, 1972 Fla. Sess. Law Serv., at 380-382; Ga. Code §§ 26-1201 to 26-1203 (1972); Kan. Stat. Ann. § 21-3407 (Supp. 1971); Md. Ann. Code, Art. 43, §§ 137-139 (Repl. 1971); Miss. Code Ann. § 2223 (Supp. 1972); N. M. Stat. Ann. §§ 40A-5-1 to 40A-5-3 (Repl. 1972); N. C. Gen. Stat. § 14-45.1 (Supp. 1971); Ore. Rev. Stat. §§ 435.405 to 435.495 (1971); S. C. Code Ann. §§ 16-82 to 16-89 (Supp. 1971); Va. Code Ann. §§ 18.1-62 to 18.1-62.3 (Supp. 1972). Mr. Justice Clark described some of these States as having "led the way." Religion, Morality and Abortion: A Constitutional Appraisal, 2 Loyola U. (L. A.) L. Rev. 1, 11 (1969).

By the end of 1970, four other States had repealed criminal penalties for abortions performed in early pregnancy by a licensed physician, subject to stated procedural and health requirements. Alaska Stat. § 11.15.060 (1970); Haw. Rev. Stat. § 453-16 (Supp. 1971); N. Y. Penal Code § 125.05 (McKinney Supp. 1972-1973); Wash. Rev. Code §§ 9.02.060 to 9.02.080 (Supp. 1972). The precise status of criminal abortion laws in some States is made unclear by recent decisions in state and federal courts striking down existing state laws, in whole or in part.

well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.

6. *The position of the American Medical Association.* The anti-abortion mood prevalent in this country in the late 19th century was shared by the medical profession. Indeed, the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period.

An AMA Committee on Criminal Abortion was appointed in May 1857. It presented its report, 12 Trans. of the Am. Med. Assn. 73–77 (1859), to the Twelfth Annual Meeting. That report observed that the Committee had been appointed to investigate criminal abortion "with a view to its general suppression." It deplored abortion and its frequency and it listed three causes "of this general demoralization":

> "The first of these causes is a wide-spread popular ignorance of the true character of the crime—a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening.
>
> "The second of the agents alluded to is the fact that the profession themselves are frequently supposed careless of foetal life . . . .
>
> "The third reason of the frightful extent of this crime is found in the grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being. These errors, which are sufficient in most instances to prevent conviction, are based, and only based, upon mistaken and exploded medical dogmas. With strange inconsistency, the law fully acknowledges the foetus in utero and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it,

and to its life as yet denies all protection." *Id.*, at 75–76.

The Committee then offered, and the Association adopted, resolutions protesting "against such unwarrantable destruction of human life," calling upon state legislatures to revise their abortion laws, and requesting the cooperation of state medical societies "in pressing the subject." *Id.*, at 28, 78.

In 1871 a long and vivid report was submitted by the Committee on Criminal Abortion. It ended with the observation, "We had to deal with human life. In a matter of less importance we could entertain no compromise. An honest judge on the bench would call things by their proper names. We could do no less." 22 Trans. of the Am. Med. Assn. 258 (1871). It proffered resolutions, adopted by the Association, *id.*, at 38–39, recommending, among other things, that it "be unlawful and unprofessional for any physician to induce abortion or premature labor, without the concurrent opinion of at least one respectable consulting physician, and then always with a view to the safety of the child—if that be possible," and calling "the attention of the clergy of all denominations to the perverted views of morality entertained by a large class of females—aye, and men also, on this important question."

Except for periodic condemnation of the criminal abortionist, no further formal AMA action took place until 1967. In that year the Committee on Human Reproduction urged the adoption of a stated policy of opposition to induced abortion except when there is "documented medical evidence" of a threat to the health or life of the mother, or that the child "may be born with incapacitating physical deformity or mental deficiency," or that a pregnancy "resulting from legally established statutory or forcible rape or incest may constitute a threat to the mental or physical health of the

patient," and two other physicians "chosen because of their recognized professional competence have examined the patient and have concurred in writing," and the procedure "is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals." The providing of medical information by physicians to state legislatures in their consideration of legislation regarding therapeutic abortion was "to be considered consistent with the principles of ethics of the American Medical Association." This recommendation was adopted by the House of Delegates. Proceedings of the AMA House of Delegates, 40–51 (June 1967).

In 1970, after the introduction of a variety of proposed resolutions, and of a report from its Board of Trustees, a reference committee noted "polarization of the medical profession on this controversial issue"; division among those who had testified; a difference of opinion among AMA councils and committees; "the remarkable shift in testimony" in six months, felt to be influenced "by the rapid changes in state laws and by the judicial decisions which tend to make abortion more freely available;" and a feeling "that this trend will continue." On June 25, 1970, the House of Delegates adopted preambles and most of the resolutions proposed by the reference committee. The preambles emphasized "the best interests of the patient," "sound clinical judgment," and "informed patient consent," in contrast to "mere acquiescence to the patient's demand." The resolutions asserted that abortion is a medical procedure that should be performed by a licensed physician in an accredited hospital only after consultation with two other physicians and in conformity with state law, and that no party to the procedure should be required to violate personally held moral principles.[38] Proceedings

[38] "Whereas, Abortion, like any other medical procedure, should not be performed when contrary to the best interests of the patient

of the AMA House of Delegates 221 (June 1970). The AMA Judicial Council rendered a complementary opinion.[39]

7. *The position of the American Public Health Association.* In October 1970, the Executive Board of the APHA adopted Standards for Abortion Services. These were five in number:

"a. Rapid and simple abortion referral must be readily available through state and local public

---

since good medical practice requires due consideration for the patient's welfare and not mere acquiescence to the patient's demand; and

"Whereas, The standards of sound clinical judgment, which, together with informed patient consent should be determinative according to the merits of each individual case; therefore be it

"*RESOLVED*, That abortion is a medical procedure and should be performed only by a duly licensed physician and surgeon in an accredited hospital acting only after consultation with two other physicians chosen because of their professional competency and in conformance with standards of good medical practice and the Medical Practice Act of his State; and be it further

"*RESOLVED*, That no physician or other professional personnel shall be compelled to perform any act which violates his good medical judgment. Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles. In these circumstances good medical practice requires only that the physician or other professional personnel withdraw from the case so long as the withdrawal is consistent with good medical practice." Proceedings of the AMA House of Delegates 221 (June 1970).

[39] "The Principles of Medical Ethics of the AMA do not prohibit a physician from performing an abortion that is performed in accordance with good medical practice and under circumstances that do not violate the laws of the community in which he practices.

"In the matter of abortions, as of any other medical procedure, the Judicial Council becomes involved whenever there is alleged violation of the Principles of Medical Ethics as established by the House of Delegates."

health departments, medical societies, or other nonprofit organizations.

"b. An important function of counseling should be to simplify and expedite the provision of abortion services; it should not delay the obtaining of these services.

"c. Psychiatric consultation should not be mandatory. As in the case of other specialized medical services, psychiatric consultation should be sought for definite indications and not on a routine basis.

"d. A wide range of individuals from appropriately trained, sympathetic volunteers to highly skilled physicians may qualify as abortion counselors.

"e. Contraception and/or sterilization should be discussed with each abortion patient." Recommended Standards for Abortion Services, 61 Am. J. Pub. Health 396 (1971).

Among factors pertinent to life and health risks associated with abortion were three that "are recognized as important":

"a. the skill of the physician,

"b. the environment in which the abortion is performed, and above all

"c. the duration of pregnancy, as determined by uterine size and confirmed by menstrual history." *Id.*, at 397.

It was said that "a well-equipped hospital" offers more protection "to cope with unforeseen difficulties than an office or clinic without such resources. . . . The factor of gestational age is of overriding importance." Thus it was recommended that abortions in the second trimester and early abortions in the presence of existing medical complications be performed in hospitals as inpatient procedures. For pregnancies in the first trimester, abortion in the hospital with or without overnight

stay "is probably the safest practice." An abortion in an extramural facility, however, is an acceptable alternative "provided arrangements exist in advance to admit patients promptly if unforeseen complications develop." Standards for an abortion facility were listed. It was said that at present abortions should be performed by physicians or osteopaths who are licensed to practice and who have "adequate training." *Id.*, at 398.

8. *The position of the American Bar Association.* At its meeting in February 1972 the ABA House of Delegates approved, with 17 opposing votes, the Uniform Abortion Act that had been drafted and approved the preceding August by the Conference of Commissioners on Uniform State Laws. 58 A. B. A. J. 380 (1972). We set forth the Act in full in the margin.[40] The

[40] "UNIFORM ABORTION ACT

"SECTION 1. [*Abortion Defined; When Authorized.*]

"(a) 'Abortion' means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.

"(b) An abortion may be performed in this state only if it is performed:

"(1) by a physician licensed to practice medicine [or osteopathy] in this state or by a physician practicing medicine [or osteopathy] in the employ of the government of the United States or of this state, [and the abortion is performed [in the physician's office or in a medical clinic, or] in a hospital approved by the [Department of Health] or operated by the United States, this state, or any department, agency, or political subdivision of either;] or by a female upon herself upon the advice of the physician; and

"(2) within [20] weeks after the commencement of the pregnancy [or after [20] weeks only if the physician has reasonable cause to believe (i) there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the physical or mental health of the mother, (ii) that the child would be born with grave physical or mental defect, or (iii) that the pregnancy resulted from rape or incest, or illicit intercourse with a girl under the age of 16 years of age].

"SECTION 2. [*Penalty.*] Any person who performs or procures an abortion other than authorized by this Act is guilty of a [felony]

Conference has appended an enlightening Prefatory Note.[41]

VII

Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence.

---

and, upon conviction thereof, may be sentenced to pay a fine not exceeding [$1,000] or to imprisonment [in the state penitentiary] not exceeding [5 years], or both.

"SECTION 3. [*Uniformity of Interpretation.*] This Act shall be construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states which enact it.

"SECTION 4. [*Short Title.*] This Act may be cited as the Uniform Abortion Act.

"SECTION 5. [*Severability.*] If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

"SECTION 6. [*Repeal.*] The following acts and parts of acts are repealed:

"(1)

"(2)

"(3)

"SECTION 7. [*Time of Taking Effect.*] This Act shall take effect————————."

[41] "This Act is based largely upon the New York abortion act following a review of the more recent laws on abortion in several states and upon recognition of a more liberal trend in laws on this subject. Recognition was given also to the several decisions in state and federal courts which show a further trend toward liberalization of abortion laws, especially during the first trimester of pregnancy.

"Recognizing that a number of problems appeared in New York, a shorter time period for 'unlimited' abortions was advisable. The time period was bracketed to permit the various states to insert a figure more in keeping with the different conditions that might exist among the states. Likewise, the language limiting the place or places in which abortions may be performed was also bracketed to account for different conditions among the states. In addition, limitations on abortions after the initial 'unlimited' period were placed

It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct. Texas, however, does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously.[42] The appellants and *amici* contend, moreover, that this is not a proper state purpose at all and suggest that, if it were, the Texas statutes are overbroad in protecting it since the law fails to distinguish between married and unwed mothers.

A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman.[43] This was particularly true prior to the development of antisepsis. Antiseptic techniques, of course, were based on discoveries by Lister, Pasteur, and others first announced in 1867, but were not generally accepted and employed until about the turn of the century. Abortion mortality was high. Even after 1900, and perhaps until as late as the development of antibiotics in the 1940's, standard modern techniques such as dila-

---

in brackets so that individual states may adopt all or any of these reasons, or place further restrictions upon abortions after the initial period.

"This Act does not contain any provision relating to medical review committees or prohibitions against sanctions imposed upon medical personnel refusing to participate in abortions because of religious or other similar reasons, or the like. Such provisions, while related, do not directly pertain to when, where, or by whom abortions may be performed; however, the Act is not drafted to exclude such a provision by a state wishing to enact the same."

[42] See, for example, *YWCA* v. *Kugler*, 342 F. Supp. 1048, 1074 (N. J. 1972); *Abele* v. *Markle*, 342 F. Supp. 800, 805–806 (Conn. 1972) (Newman, J., concurring), appeal pending; *Walsingham* v. *Florida*, 250 So. 2d 857, 863 (Ervin, J., concurring) (Fla. Supp. 1972); *State* v. *Gedicke*, 43 N. J. L. 86, 80 (Sup. St. 1881); Means II, at 381–382.

[43] See C. Haagensen & W. Lloyd, A Hundred Years of Medicine 19 (1943).

tion and curettage were not nearly so safe as they are today. Thus it has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.

Modern medical techniques have altered this situation. Appellants and various *amici* refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth.[44] Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the area of health and medical standards do remain. The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal "abortion mills" strengthens, rather

[44] Potts, Postconception Control of Fertility, 8 Int'l J. of G. & O. 957, 967 (1970) (England and Wales); Abortion Mortality, 20 Morbidity and Morality, 208, 209 (July 12, 1971) (U. S. Dept. of HEW, Public Health Service) (New York City); Tietze, United States: Therapeutic Abortions, 1963–1968, 59 Studies in Family Planning 5, 7 (1970); Tietze, Mortality with Contraception and Induced Abortion, 45 Studies in Family Planning 6 (1969) (Japan, Czechoslovakia, Hungary); Tietze & Lehfeldt, Legal Abortion in Eastern Europe, 175 J. A. M. A. 1149, 1152 (April 1961). Other sources are discussed in Lader 17–23.

than weakens, the State's interest in regulating the conditions under which abortions are performed. Moreover, the risk to the woman increases as her pregnancy continues. Thus the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.

The third reason is the State's interest—some phrase it in terms of duty—in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception.[45] The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

Parties challenging state abortion laws have sharply disputed in some courts the contention that a purpose of these laws, when enacted, was to protect prenatal life.[46] Pointing to the absence of legislative history to support the contention, they claim that most state laws were designed solely to protect the woman. Because medical advances have lessened this concern, at least

---

[45] See Brief of Amicus National Right to Life Foundation; R. Drinan, The Inviolability of the Right to Be Born, in Abortion and the Law 107 (D. Smith, editor, 1967); Louisell, Abortion, The Practice of Medicine, and the Due Process of Law, 16 UCLA L. Rev. 233 (1969); Noonan 1.

[46] See, *e. g.*, *Abele* v. *Markle*, 342 F. Supp. 800 (Conn. 1972), appeal pending.

with respect to abortion in early pregnancy, they argue that with respect to such abortions the laws can no longer be justified by any state interest. There is some scholarly support for this view of original purpose.[47] The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus.[48] Proponents of this view point out that in many States, including Texas,[49] by statute or judicial interpretation, the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another.[50] They claim that adoption of the "quickening" distinction through received common law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception.

It is with these interests, and the weight to be attached to them, that this case is concerned.

VIII

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back

---

[47] See discussions in Means I and Means II.

[48] See, *e. g.*, *State* v. *Murphy*, 27 N. J. L. 112, 114 (1858).

[49] *Watson* v. *State*, 9 Tex. App. 237, 244–245 (1880); *Moore* v. *State*, 37 Tex. Crim. R. 552, 561, 40 S. W. 287, 290 (1897); *Shaw* v. *State*, 73 Tex. Crim. R. 337, 339, 165 S. W. 930, 931 (1914); *Fondren* v. *State*, 74 Tex. Crim. R. 552, 557, 169 S. W. 411, 414 (1914); *Gray* v. *State*, 77 Tex. Crim. R. 221, 229, 178 S. W. 337, 341 (1915). There is no immunity in Texas for the father who is not married to the mother. *Hammett* v. *State*, 84 Tex. Crim. R. 635, 209 S. W. 661 (1919); *Thompson* v. *State*, — Tex. Crim. R. — (1971), appeal pending.

[50] See *Smith* v. *State*, 33 Me. 48, 55 (1851); *In re Vince*, 2 N. J. 443, 450, 67 A. 2d 141, 144 (1949). A short discussion of the modern law on this issue is contained in the Comment to the ALI's Model Penal Code § 207.11, at 158 and nn. 35–37 (Tent. Draft No. 9, 1959).

perhaps as far as *Union Pacific R. Co.* v. *Botsford*, 141 U. S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts the Court or individual Justices have indeed found at least the roots of that right in the First Amendment, *Stanley* v. *Georgia*, 394 U. S. 557, 564 (1969); in the Fourth and Fifth Amendments, *Terry* v. *Ohio*, 392 U. S. 1, 8–9 (1968), *Katz* v. *United States*, 389 U. S. 347, 350 (1967), *Boyd* v. *United States*, 116 U. S. 616 (1886), see *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J. dissenting); in the penumbras of the Bill of Rights, *Griswold* v. *Connecticut*, 381 U. S. 479, 484–485 (1965); in the Ninth Amendment, *id.*, at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967), procreation, *Skinner* v. *Oklahoma*, 316 U. S. 535, 541–542 (1942), contraception, *Eisenstadt* v. *Baird*, 405 U. S. 438, 453–454 (1972); *id.*, at 460, 463–465 (WHITE, J., concurring), family relationships, *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944), and child rearing and education, *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925), *Meyer* v. *Nebraska*, *supra*.

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amend-

ment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these, appellants and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellants' arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, is unpersuasive. The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore,

cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905) (vaccination); *Buck* v. *Bell*, 274 U. S. 200 (1927) (sterilization).

We therefore conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

We note that those federal and state courts that have recently considered abortion law challenges have reached the same conclusion. A majority, in addition to the District Court in the present case, have held state laws unconstitutional, at least in part, because of vagueness or because of overbreadth and abridgement of rights. *Abele* v. *Markle*, 342 F. Supp. 800 (Conn. 1972), appeal pending; *Abele* v. *Markle*, — F. Supp. — (Conn. Sept. 20, 1972), appeal pending; *Doe* v. *Bolton*, 319 F. Supp. 1048 (ND Ga. 1970), appeal decided today, *post* —; *Doe* v. *Scott*, 321 F. Supp. 1385 (ND Ill. 1971), appeal pending; *Poe* v. *Menghini*, 339 F. Supp. 986 (Kan. 1972); *YWCA* v. *Kugler*, 342 F. Supp. 1048 (NJ 1972); *Babbitz* v. *McCann*, 310 F. Supp. 293 (ED Wis. 1970), appeal dismissed, 400 U. S. 1 (1970); *People* v. *Belous*, 71 Cal. 2d 954, 458 P. 2d 194 (1969), cert. denied, 397 U. S. 915 (1970); *State* v. *Barquet*, 262 S. 2d 431 (Fla. 1972).

Others have sustained state statutes. *Crossen* v. *Attorney General*, 344 F. Supp. 587 (ED Ky. 1972), appeal pending; *Rosen* v. *Louisiana State Board of Medical Examiners*, 318 F. Supp. 1217 (ED La. 1970), appeal pending; *Corkey* v. *Edwards*, 322 F. Supp. 1248

(WDNC 1971), appeal pending; *Steinberg* v. *Brown*, 321 F. Supp. 741 (ND Ohio 1970); *Doe* v. *Rampton*, — F. Supp. — (Utah 1971), appeal pending; *Cheaney* v. *Indiana*, — Ind. —, 285 N. E. 2d 265 (1972); *Spears* v. *State*, 257 So. 2d 876 (Miss. 1972); *State* v. *Munson*, — S. D. —, 201 N. W. 2d 123 (1972), appeal pending.

Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach.

Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest." *Kramer* v. *Union Free School District*, 395 U. S. 621, 627 (1969); *Shapiro* v. *Thompson*, 394 U. S. 618, 634 (1969), *Sherbert* v. *Verner*, 374 U. S. 398, 406 (1963), and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. *Griswold* v. *Connecticut*, 381 U. S. 479, 485 (1965); *Aptheker* v. *Secretary of State*, 378 U. S. 500, 508 (1964); *Cantwell* v. *Connecticut*, 310 U. S. 296, 307–308 (1940); see *Eisenstadt* v. *Baird*, 405 U. S. 438, 460, 463–464 (1972) (WHITE, J., concurring).

In the recent abortion cases, cited above, courts have recognized these principles. Those striking down state laws have generally scrutinized the State's interest in protecting health and potential life and have concluded that neither interest justified broad limitations on the reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy. Courts sustaining state laws

have held that the State's determinations to protect health or prenatal life are dominant and constitutionally justifiable.

IX

The District Court held that the appellee failed to meet his burden of demonstrating that the Texas statute's infringement upon Roe's rights was necessary to support a compelling state interest, and that, although the defendant presented "several compelling justifications for state presence in the area of abortions," the statutes outstripped these justifications and swept "far beyond any areas of compelling state interest." 314 F. Supp., at 1222–1223. Appellant and appellee both contest that holding. Appellant, as has been indicated, claims an absolute right that bars any state imposition of criminal penalties in the area. Appellee argues that the State's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest. As noted above, we do not agree fully with either formulation.

A. The appellee and certain *amici* argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment. The appellant conceded as much on reargument.[51] On the other hand, the appellee conceded on reargument [52] that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.

The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment con-

[51] Tr. of Rearg. 20–21.

[52] Tr. of Rearg. 24.

tains three references to "person." The first, in defining "citizens," speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the Constitution: in the listing of qualifications for representatives and senators, Art. I, § 2, cl. 2, and § 3, cl. 3; in the Apportionment Clause, Art. I, § 2, cl. 3;[53] in the Migration and Importation provision, Art. I, § 9, cl. 1; in the Emolument Clause, Art. I, § 9, cl. 8; in the Electors provisions, Art. II, § 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, § 1, cl. 5; in the Extradition provisions, Art. IV, § 2, cl. 2, and the superseded Fugitive Slave cl. 3; and in the Fifth, Twelfth, and Twenty-second Amendments as well as in §§ 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application.[54]

---

[53] We are not aware that in the taking of any census under this clause, a fetus has ever been counted.

[54] When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?

There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out, n. 49, *supra*, that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed

All this, together with our observation, *supra*, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn.[55] This is in accord with the results reached in those few cases where the issue has been squarely presented. *McGarvey* v. *Magee-Womens Hospital*, 340 F. Supp. 751 (WD Pa. 1972); *Byrn* v. *New York City Health & Hospitals Corp.*, 31 N. Y. 2d 194, 286 N. E. 2d 887 (1972), appeal pending; *Abele* v. *Markle*, — F. Supp. — (Conn. Sept. 20, 1972), appeal pending. Compare *Cheaney* v. *Indiana*, — Ind. —, 285 N. E. 265, 270 (1972); *Montana* v. *Rogers*, 278 F. 2d 68, 72 (CA7 1960), aff'd *sub nom. Montana* v. *Kennedy*, 366 U. S. 308 (1961); *Keeler* v. *Superior Court*, — Cal. —, 470 P. 2d 617 (1970); *State* v. *Dickinson*, 23 Ohio App. 2d 259, 275 N. E. 2d 599 (1970). Indeed, our decision in *United States* v. *Vuitch*, 402 U. S. 62 (1971), inferentially is to the same effect, for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection.

This conclusion, however, does not of itself fully answer the contentions raised by Texas, and we pass on to other considerations.

B. The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if

---

by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?

[55] Cf. the Wisconsin abortion statute, defining "unborn child" to mean "a human being from the time of conception until it is born alive," Wis. Stat. § 940.04 (6) (1969), and the new Connecticut statute, Public Act No. 1, May 1972 Special Session, declaring it to be the public policy of the State and the legislative intent "to protect and preserve human life from the moment of conception."

one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary, 478–479, 547 (24th ed. 1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt, Griswold, Stanley, Loving, Skinner, Pierce,* and *Meyer* were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics.[56] It appears to be the predominant, though not the unanimous, attitude of the Jewish faith.[57] It may be taken to represent also the position of a large segment of the Protestant community,

[56] Edelstein 16.

[57] Lader 97–99; D. Feldman, Birth Control in Jewish Law 251–294 (1968). For a stricter view, see I. Jakobovits, Jewish Views on Abortion, in Abortion and the Law 124 (D. Smith ed. 1967).

insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family.[58] As we have noted, the common law found greater significance in quickening. Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception or upon live birth or upon the interim point at which the fetus becomes "viable," that is, potentially able to live outside the mother's womb, albeit with artificial aid.[59] Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.[60] The Aristotelian theory of "mediate animation," that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th century, despite opposition to this "ensoulment" theory from those in the Church who would recognize the existence of life from the moment of conception.[61] The latter is now, of course, the official belief of the Catholic Church. As one of the briefs *amicus* discloses, this is a view strongly held by many non-Catholics as well, and by many physicians. Substantial problems for precise definition of this view are posed, however, by new embryological data that purport to indicate that conception is a "process" over time, rather than an event, and by new medical techniques such as menstrual extraction, the "morning-after" pill,

[58] Amicus Brief for the American Ethical Union et al. For the position of the National Council of Churches and of other denominations, see Lader 99–101.

[59] L. Hellman & J. Pritchard, Williams Obstetrics 493 (14th ed. 1971); Dorland's Illustrated Medical Dictionary 1689 (24th ed. 1965).

[60] Hellman & Pritchard, *supra*, n. 58, at 493.

[61] For discussions of the development of the Roman Catholic position, see D. Callahan, Abortion: Law, Choice and Morality 409–447 (1970); Noonan 1.

implantation of embryos, artificial insemination, and even artificial wombs.[62]

In areas other than criminal abortion the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. For example, the traditional rule of tort law had denied recovery for prenatal injuries even though the child was born alive.[63] That rule has been changed in almost every jurisdiction. In most States recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few courts have squarely so held.[64] In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries.[65] Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potential-

---

[62] See D. Brodie, The New Biology and the Prenatal Child, 9 J. Fam. L. 391, 397 (1970); R. Gorney, The New Biology and the Future of Man, 15 UCLA L. Rev. 273 (1968); Note, Criminal Law—Abortion—The "Morning-After" Pill and Other Pre-Implantation Birth-Control Methods and the Law, 46 Ore. L. Rev. 211 (1967); G. Taylor, The Biological Time Bomb 32 (1968); A. Rosenfeld, The Second Genesis 138–139 (1969); G. Smith, Through a Test Tube Darkly: Artificial Insemination and the Law, 67 Mich. L. Rev. 127 (1968); Note, Artificial Insemination and the Law, U. Ill. L. F. 203 (1968).

[63] Prosser, Handbook of the Law of Torts 335–338 (1971); 2 Harper & James, The Law of Torts 1028–1031 (1956); Note, 63 Harv. L. Rev. 173 (1949).

[64] See cases cited in Prosser, *supra*, n. 62, at 336–338; Annotation, Action for Death of Unborn Child, 15 A. L. R. 3d 992 (1967).

[65] Prosser, *supra*, n. 62, at 338; Note, The Law and the Unborn Child, 46 Notre Dame Law. 349, 354–360 (1971).

ity of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians *ad litem*.[66] Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.

X

In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatment there, and that it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling."

With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now established medical fact, referred to above at p. 34, that until the end of the first trimester mortality in abortion is less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent

[66] D. Louisell, Abortion, The Practice of Medicine, and the Due Process of Law, 16 UCLA L. Rev. 233, 235–238 (1969); Note, 56 Iowa L. Rev. 994, 999–1000 (1971); Note, The Law and the Unborn Child, 46 Notre Dame Law. 349, 351–354 (1971).

that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period except when it is necessary to preserve the life or health of the mother.

Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The

statute, therefore, cannot survive the constitutional attack made upon it here.

This conclusion makes it unnecessary for us to consider the additional challenge to the Texas statute asserted on grounds of vagueness. See *United States* v. *Vuitch*, 402 U. S. 62, 67–72 (1971).

XI

To summarize and to repeat:

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a *life saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

2. The State may define the term "physician," as it has been employed in the preceding numbered paragraphs of this Part XI of this opinion, to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined.

In *Doe* v. *Bolton*, *post*, procedural requirements contained in one of the modern abortion statutes are con-

sidered. That opinion and this one, of course, are to be read together.[67]

This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and example of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day. The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

XII

Our conclusion that Art. 1196 is unconstitutional means, of course, that the Texas abortion statutes, as a unit, must fall. The exception of Art. 1196 cannot be

[67] Neither in this opinion nor in *Doe* v. *Bolton, post*, do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases, and the Texas and the Georgia statutes on their face take no cognizance of the father. We are aware that some statutes recognize the father under certain circumstances. North Carolina, for example, 1B N. C. Gen. Stat. § 14–45.1 (Supp. 1971), requires written permission for the abortion from the husband when the woman is a married minor, that is, when she is less than 18 years of age, 41 N. C. A. G. 489 (1971); if the woman is an unmarried minor, written permission from the parents is required. We need not now decide whether provisions of this kind are constitutional.

stricken separately, for then the State is left with a statute proscribing all abortion procedures no matter how medically urgent the case.

Although the District Court granted plaintiff Roe declaratory relief, it stopped short of issuing an injunction against enforcement of the Texas statutes. The Court has recognized that different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other. *Zwickler* v. *Koota,* 389 U. S. 241, 252–255 (1967); *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965). We are not dealing with a statute that, on its face, appears to abridge free expression, an area of particular concern under *Dombrowski* and refined in *Younger* v. *Harris,* 401 U. S., at 50.

We find it unnecessary to decide whether the District Court erred in withholding injunctive relief, for we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional.

The judgment of the District Court as to intervenor Hallford is reversed, and Dr. Hallford's complaint in intervention is dismissed. In all other respects the judgment of the District Court is affirmed. Costs are allowed to the appellee.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 70–18 AND 70–40

Jane Roe et al., Appellants, 70–18 v. Henry Wade.	On Appeal from the United States District Court for the Northern District of Texas.
Mary Doe et al., Appellants, 70–40 v. Arthur K. Bolton, as Attorney General of the State of Georgia, et al.	On Appeal from the United States District Court for the Northern District of Georgia.

[January 22, 1973]

MR. CHIEF JUSTICE BURGER, concurring.

I agree that, under the Fourteenth Amendment to the Constitution, the abortion statutes of Georgia and Texas impermissibly limit the performance of abortions necessary to protect the health of pregnant women, using the term health in its broadest medical context. See *Vuitch* v. *United States*, 402 U. S. 62, 71–72 (1971). I am somewhat troubled that the Court has taken notice of various scientific and medical data in reaching its conclusion; however, I do not believe that the Court has exceeded the scope of judicial notice accepted in other contexts.

In oral argument, counsel for the State of Texas informed the Court that early abortive procedures were routinely permitted in certain exceptional cases, such as nonconsensual pregnancies resulting from rape and incest. In the face of a rigid and narrow statute, such as that of Texas, no one in these circumstances should be placed in a posture of dependence on a prosecutorial policy or prosecutorial discretion. Of course,

States must have broad power, within the limits indicated in the opinions, to regulate the subject of abortions, but where the consequences of state intervention are so severe, uncertainty must be avoided as much as possible. For my part, I would be inclined to allow a State to require the certification of two physicians to support an abortion, but the Court holds otherwise. I do not believe that such a procedure is unduly burdensome, as are the complex steps of the Georgia statute, which require as many as six doctors and the use of a hospital certified by the JCAH.

I do not read the Court's holding today as having the sweeping consequences attributed to it by the dissenting Justices; the dissenting views discount the reality that the vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health. Plainly, the Court today rejects any claim that the Constitution requires abortion on demand.

SUPREME COURT OF THE UNITED STATES

Nos. 70–18 AND 70–40

Jane Roe et al., Appellants, 70–18 *v.* Henry Wade.	On Appeal from the United States District Court for the Northern District of Texas.
Mary Doe et al., Appellants, 70–40 *v.* Arthur K. Bolton, as Attorney General of the State of Georgia, et al.	On Appeal from the United States District Court for the Northern District of Georgia.

[January 22, 1973]

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court,[1] I add a few words.

The questions presented in the present cases go far beyond the issues of vagueness, which we considered in *United States* v. *Vuitch*, 402 U. S. 62. They involve the right of privacy, one aspect of which we considered in *Griswold* v. *Connecticut*, 381 U. S. 479, 484, when we held that various guarantees in the Bill of Rights create zones of privacy.[2]

[1] I disagree with the dismissal of Dr. Hallford's complaint in intervention in *Roe* v. *Wade*, because my disagreement with *Younger* v. *Harris*, 401 U. S. 37, revealed in my dissent in that case, still persists and extends to the progeny of that case.

[2] There is no mention of privacy in our Bill of Rights but our decisions have recognized it as one of the fundamental values those amendments were designed to protect. The fountainhead case is *Boyd* v. *United States*, 116 U. S. 616, holding that a federal statute which authorized a court in tax cases to require a taxpayer to produce his records or to concede the Government's allegations offended the Fourth and Fifth Amendments. Justice Bradley, for the Court, found that the measure unduly intruded

The *Griswold* case involved a law forbidding the use of contraceptives. We held that law as applied to married people unconstitutional:

> "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Id.*, 486.

The District Court in *Doe* held that *Griswold* and related cases "establish a constitutional right to privacy broad enough to encompass the right of a woman to terminate an unwanted pregnancy in its early stages, by obtaining an abortion." 319 F. Supp., at 1054.

The Supreme Court of California expressed the same view in *People* v. *Belous*,[3] 71 Cal. 2d 954, 963.

---

into the "sanctity of a man's home and the privacies of life." *Id.*, 630. Prior to *Boyd, in Kilbourn* v. *Thompson*, 103 U. S. 168, 195, Mr. Justice Miller held for the Court that neither House of Congress "possesses the general power of making inquiry into the private affairs of the citizen." Of *Kilbourn* Mr. Justice Field later said, "This case will stand for all time as a bulwark against the invasion of the right of the citizen to protection in his private affairs against the unlimited scrutiny of investigation by a congressional committee." *In re Pacific Ry. Comm'n*, 32 F. 231, 253 (cited with approval in *Sinclair* v. *United States*, 279 U. S. 263, 293). Mr. Justice Harlan, also speaking for the Court in *Interstate Commerce Comm'n* v. *Brimson*, 154 U. S. 447, 478, thought the same was true of administrative inquiries, saying the Constitution did not permit a "general power of making inquiry into the private affairs of the citizen." In a similar vein were *Harriman* v. *Interstate Commerce Comm'n*, 211 U. S. 407; *United States* v. *Louisville & Nashville R. R.*, 236 U. S. 318, 335; and *Federal Trade Comm'n* v. *American Tobacco Co.*, 264 U. S. 298.

[3] The California abortion statute, held unconstitutional in the *Belous* case made it a crime to perform or help perform an abortion "unless the same is necessary to preserve [the mother's] life." 71 Cal. 2d, at 959.

The Ninth Amendment obviously does not create federally enforceable rights. It merely says, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." But a catalogue of these rights includes customary, traditional, and time-honored rights, amenities, privileges, and immunities that come within the sweep of "the Blessings of Liberty" mentioned in the preamble to the Constitution. Many of them in my view come within the meaning of the term "liberty" as used in the Fourteenth Amendment.

First is the autonomous control over the development and expression on one's intellect, interests, tastes, and personality.

These are rights protected by the First Amendment and in my view they are absolute, permitting of no exceptions. See *Terminiello* v. *Chicago*, 337 U. S. 77; *Roth* v. *United States*, 354 U. S. 476, 508 (dissent); *Kingsley Pictures Corp.* v. *Regents*, 360 U. S. 684, 697 (concurring); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 293 (Black, J., concurring in which I joined). The Free Exercise Clause of the First Amendment is one facet of this constitutional right. The right to remain silent as respects one's own beliefs, *Watkins* v. *United States*, 354 U. S. 178, 196–199, is protected by the First and the Fifth. The First Amendment grants the privacy of first-class mail, *United States* v. *Van Leeuwen*, 397 U. S. 249, 253. All of these aspects of the right of privacy are "rights retained by the people" in the meaning of the Ninth Amendment.

Second is freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children.

These rights, unlike those protected by the First Amendment, are subject to some control by the police

power. Thus the Fourth Amendment speaks only of "unreasonable searches and seizures" and of "probable cause." These rights are "fundamental" and we have held that in order to support legislative action the statute must be narrowly and precisely drawn and that a "compelling state interest" must be shown in support of the limitation. *E. g., Kramer* v. *Union Free School Dist.*, 395 U. S. 621 (1969); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969); *Carrington* v. *Rash*, 380 U. S. 89 (1965); *Sherbert* v. *Verner*, 374 U. S. 398 (1963); *NAACP* v. *Alabama ex rel. Patterson*.

The liberty to marry a person of one's own choosing, *Loving* v. *Virginia*, 388 U. S. 1; the right of procreation, *Skinner* v. *Oklahoma*, 316 U. S. 535; the liberty to direct the education of one's children, *Pierce* v. *Society of Sisters*, 268 U. S. 510, and the privacy of the marital relation, *Griswold* v. *Connecticut*, *supra*, are in this category.[4]

[4] My Brother STEWART, writing in the present cases, says that our decision in *Griswold* reintroduced substantive due process that had been rejected in *Ferguson* v. *Skrupa*, 372 U. S. 726. *Skrupa* involved legislation governing a business enterprise; and the Court in that case, as had Mr. Justice Holmes on earlier occasions, rejected the idea that "liberty" within the meaning of the Due Process Clause of the Fourteenth Amendment was a vessel to be filled with one's personal choices of values, whether drawn from the *laissez faire* school, from the socialistic school, or from the technocrats. *Griswold* involved legislation touching on the marital relation and involving the conviction of a licensed physician for giving married people information concerning contraception. There is nothing specific in the Bill of Rights that covers that item. Nor is there anything in the Bill of Rights that in terms protects the right of association or the privacy in one's association. Yet we found those rights in the periphery of the First Amendment. *NAACP* v. *Alabama*, 357 U. S. 449, 462. Other peripheral rights are the right to educate one's children as one chooses, *Pierce* v. *Society of Sisters*, 268 U. S. 510, and the right to study the German language. *Meyer* v. *Nebraska*, 262 U. S. 390. These decisions, with all respect, have nothing to do with substantive due process. One may think they

Only last Term in *Eisenstadt* v. *Baird*, 405 U. S. 438, another contraceptive case, we expanded the concept of *Griswold* by saying:

> "It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

This right of privacy was called by Mr. Justice Brandeis the right "to be let alone." *Olmstead* v. *United States*, 277 U. S. 438, 478. That right includes the privilege of an individual to plan his own affairs, for, "outside of areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases." *Kent* v. *Dulles*, 357 U. S. 116, 126.

Third is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf.

---

are not peripheral rights to other rights that are expressed in the Bill of Rights. But that is not enough to bring into play the protection of substantive due process.

There are of course those who have believed that the reach of due process in the Fourteenth Amendment included all of the Bill of Rights but went further. Such was the view of Mr. Justice Murphy and Mr. Justice Rutledge. See *Adamson* v. *California*, 332 U. S. 46, 123, 124 (dissenting). Perhaps they were right; but it is a bridge that neither I nor those who joined the Court opinion in *Griswold* crossed.

These rights, though fundamental, are likewise subject to regulation on a showing of "compelling state interest." We stated in *Papachristou* v. *City of Jacksonville*, 405 U. S. 156, 164, that walking, strolling, and wandering "are historically part of the amenities of life as we have known them." As stated in *Jacobson* v. *Massachusetts*, 197 U. S. 11, 29:

> "There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will."

In *Union Pac. Ry. Co.* v. *Botsford*, 141 U. S. 250, 252, the Court said,

> "The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow."

In *Terry* v. *Ohio*, 392 U. S. 1, 8–9, the Court in speaking of the Fourth Amendment stated

> "This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the Governor closeted in his study to dispose of his secret affairs."

Katz v. *United States*, 389 U. S. 347, 350, emphasizes that the Fourth Amendment

> "protects individual privacy against certain kinds of governmental intrusion."

In *Meyer* v. *Nebraska*, 262 U. S. 390, 399, the Court said:

> "Without doubt, it [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowl-

edge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

The Georgia statute is at war with the clear message of these cases—that a woman is free to make the basic decision whether to bear an unwanted child. Elaborate argument is hardly necessary to demonstrate that child birth may deprive a woman of her preferred life stye and force upon her a radically different and undesired future. For example, rejected applicants under the Georgia statute are required to endure the discomforts of pregnancy; to incur the pain, higher mortality rate, and aftereffects of childbirth; to abandon educational plans; to sustain loss of income; to forgo the satisfactions of careers; to tax further mental and physical health in providing childcare; and, in some cases, to bear the lifelong stigma of unwed motherhood, a badge which may haunt, if not deter, later legitimate family relationships.

Such a holding is, however, only the beginning of the problem. The State has interests to protect. Vaccinations to prevent epidemics are one example, as *Jacobson* holds. The Court held that compulsory sterilization of imbeciles afflicted with hereditary forms of insanity or imbecility is another. *Buck* v. *Bell*, 274 U. S. 200. Abortion affects another. While childbirth endangers the lives of some women, voluntary abortion at any time and place regardless of medical standards would impinge on a rightful concern of society. The woman's health is part of that concern; as is the life of the fetus after quickening. These concerns justify the State in treating the procedure as a medical one.

One difficulty is that this statute as construed and applied apparently does not give full sweep to the "psycho-

logical as well as physical well-being" of women patients which saved the concept "health" from being void for vagueness in *United States* v. *Vuitch, supra,* at 72. But apart from that, Georgia's enactment has a constitutional infirmity because, as stated by the District Court, it "limits the number of reasons for which an abortion may be sought." I agree with the holding of the District Court, "This the State may not do, because such action unduly restricts a decision sheltered by the Constitutional right to privacy." 319 F. Supp., at 1056.

The vicissitudes of life produce pregnancies which may be unwanted, or which may impair "health" in the broad *Vuitch* sense of the term, or which may imperil the life of the mother, or which in the full setting of the case may create such suffering, disclocations, misery, or tragedy as to make an early abortion the only civilized step to take. These hardships may be properly embraced in the "health" factor of the mother as appraised by a person of insight. Or they may be part of a broader medical judgment based on what is "appropriate" in a given case, though perhaps not "necessary" in a strict sense.

The "liberty" of the mother, though rooted as it is in the Constitution, may be qualified by the State for the reasons we have stated. But where fundamental personal rights and liberties are involved, the corrective legislation must be "narrowly drawn to prevent the supposed evil," *Cantwell* v. *Connecticut,* 310 U. S. 296, 307, and not be dealt with in an "unlimited and indiscriminate" manner. *Shelton* v. *Tucker,* 364 U. S. 479, 490. And see *Talley* v. *California,* 362 U. S. 60. Unless regulatory measures are so confined and are addressed to the specific areas of compelling legislative concern, the police power would become the great leveller of constitutional rights and liberties.

There is no doubt that the State may require abortions to be performed by qualified medical personnel. The legitimate objective of preserving the mother's health clearly supports such laws. Their impact upon the woman's privacy is minimal. But the Georgia statute outlaws virtually all such operations—even in the earliest stages of pregnancy. In light of modern medican evidence suggesting that an early abortion is safer healthwise than childbirth itself,[5] it cannot be seriously urged that so comprehensive a ban is aimed at protecting the woman's health. Rather, this expansive proscription of all abortions along the temporal spectrum can rest only on a public goal of preserving both embryonic and fetal life.

The present statute has struck the balance between the woman and the State's interests wholly in favor of the latter. I am not prepared to hold that a State may equate, as Georgia has done, all phases of maturation preceding birth. We held in *Griswold* that the States may not preclude spouses from attempting to avoid the joinder of sperm and egg. If this is true, it is difficult to perceive any overriding public necessity

---

[5] Many studies show that it is safer for a woman to have a medically induced abortion than to bear a child. In the first 11 months of operation of the New York abortion law, the mortality rate associated with such operations was six per 100,000 operations. Abortion Mortality, 20 Morbidity and Mortality 208, 209 (1971) (U. S. Department of Health, Education, and Welfare, Public Health Service). On the other hand, the maternal mortality rate associated with childbirths other than abortions was 18 per 100,000 live births. Tietze, Mortality with Contraception and Induced Abortion, 45 Studies in Family Planning 6 (1969). See also C. Tietze & H. Lehfeldt, Legal Abortion in Eastern Europe 175 J. A. M. A. 1149, 1152 (1961); V. Kolblova, Legal Abortion in Czechoslovakia, 196 J. A. M. A. 371 (1966); Mehland, Combating Illegal Abortion in the Socialist Countries of Europe, 13 World Med. J. 84 (1966).

which might attach precisely at the moment of conception. As Mr. Justice Clark has said: [6]

> "To say that life is present at conception is to give recognition to the potential, rather than the actual. The unfertilized egg has life, and if fertilized, it takes on human proportions. But the law deals in reality, not obscurity—the known rather than the unknown. When sperm meets egg, life may eventually form, but quite often it does not. The law does not deal in speculation. The phenomenon of life takes time to develop, and until it is actually present, it cannot be destroyed. Its interruption prior to formation would hardly be homicide, and as we have seen, society does not regard it as such. The rites of Baptism are not performed and death certificates are not required when a miscarriage occurs. No prosecutor has ever returned a murder indictment charging the taking of the life of a fetus.[7] This would not be the case if the fetus constituted human life."

In summary, the enactment is overbroad. It is not closely correlated to the aim of preserving pre-natal life. In fact, it permits its destruction in several cases, including pregnancies resulting from sex acts in which unmarried females are below the statutory age of consent. At the same time, however, the measure broadly proscribes aborting other pregnancies which may cause severe

---

[6] Religion, Morality and Abortion: A Constitutional Appraisal, 2 Loy. U. (L. A.) L. Rev. 1, 10 (1969).

[7] In *Keeler* v. *Superior Court*, 2 Cal. 3d 619, 470 P. 2d 617, the California Supreme Court held in 1970 that the California murder statute did not cover the killing of an unborn fetus, even though the fetus be "viable" and that it was beyond judicial power to extend the statute to the killing of an unborn. It held that the child must be "born alive before a charge of homicide can be sustained." 2 Cal. 3d, at 639.

mental disorders. Additionally, the statute is overbroad because it equates the value of embryonic life immediately after conception with the worth of life immediately before birth.

III

Under the Georgia Act the mother's physician is not the sole judge as to whether the abortion should be performed. Two other licensed physicians must concur in his judgment.[8] Moreover, the abortion must be performed in a licensed hospital;[9] and the abortion must be approved in advance by a committee of the medical staff of that hospital.[10]

Physicians, who speak to us in *Doe* through an *amicus* brief, complain of the Georgia Act's interference with their practice of their profession.

The right of privacy has no more conspicuous place than in the physician-patient relationship, unless it be in the priest-penitent relation.

It is one thing for a patient to agree that her physician may consult with another physician about her case. It is quite a different matter for the State compulsorily to impose on that physician-patient relationship another layer or, as in this case, still a third layer of physicians. The right of privacy—the right to care for one's health and person and to seek out a physician of one's own choice protected by the Fourteenth Amendment—becomes only a matter of theory not a reality, when a multiple physician approval system is mandated by the State.

The State licenses a physician. If he is derelict or faithless, the procedures available to punish him or to deprive him of his license are well known. He is en-

[8] See § 26–1202 (b)(3).
[9] See § 26–1202 (b)(4).
[10] Section 26–1202 (b)(5).

titled to procedural due process before professional disciplinary sanctions may be imposed. See *In re Ruffalo*, 390 U. S. 544. Crucial here, however, is state-imposed control over the medical decision whether pregnancy should be interrupted. The good-faith decision of the patient's chosen physician is overridden and the final decision passed on to others in whose selection the patient has no part. This is a total destruction of the right of privacy between physician and patient and the intimacy of relation which that entails.

The right to seek advice on one's health and the right to place his reliance on the physician of his choice are basic to Fourteenth Amendment values. We deal with fundamental rights and liberties, which, as already noted, can be contained or controlled only by discretely drawn legislation that preserves the "liberty" and regulates only those phases of the problem of compelling legislative concern. The imposition by the State of group controls over the physician-patient relation is not made on any medical procedure apart from abortion, no matter how dangerous the medical step may be. The oversight imposed on the physician and patient in abortion cases denies them their "liberty," *viz.*, their right of privacy, without any compelling, discernable state interest.

Georgia has constitutional warrant in treating abortion as a medical problem. To protect the woman's right of privacy, however, the control must be through the physician of her choice and the standards set for his performance.

The protection of the fetus when it has acquired life is a legitimate concern of the State. Georgia's law makes no rational, discernible decision on that score.[11] For un-

[11] See Rochat, Tyler, and Schoenbucher, An Epidemiological Analysis of Abortion in Georgia, 61 Am. J. of Public Health 541 (1971).

der the Act the developmental stage of the fetus is irrelevant when pregnancy is the result of rape or when the fetus will very likely be born with a permanent defect or when a continuation of the pregnancy will endanger the life of the mother or permanently injure her health. When life is present is a question we do not try to resolve. While basically a question for medical experts, as stated by Mr. Justice Clark,[12] it is, of course, caught up in matters of religion and morality.

In short, I agree with the Court that endangering the life of the woman or seriously and permanently injuring her health are standards too narrow for the right of privacy that are at stake.

I also agree that the superstructure of medical supervision which Georgia has erected violates the patient's right of privacy inherent in her choice of her own physician.

---

[12] Religion, Morality and Abortion: A Constitutional Appraisal, 2 Loy. U. (L. A.) L. Rev. 1, 10 (1969).

SUPREME COURT OF THE UNITED STATES

No. 70–18

Jane Roe et al., Appellants, v. Henry Wade. | On Appeal from the United States District Court for the Northern District of Texas.

[January 22, 1973]

MR. JUSTICE STEWART, concurring.

In 1963, this Court, in *Ferguson* v. *Skrupa*, 372 U. S. 726, purported to sound the death knell for the doctrine of substantive due process, a doctrine under which many state laws had in the past been held to violate the Fourteenth Amendment. As Mr. Justice Black's opinion for the Court in *Skrupa* put it: "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Id.*, at 730.[1]

Barely two years later, in *Griswold* v. *Connecticut*, 381 U. S. 479, the Court held a Connecticut birth control law unconstitutional. In view of what had been so recently said in *Skrupa*, the Court's opinion in *Griswold* understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision. Yet, the Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the Constitution.[2] So it was clear

[1] Only Mr. Justice Harlan failed to join the Court's opinion, 372 U. S., at 733.

[2] There is no constitutional right of privacy, as such. "[The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of

to me then, and it is equally clear to me now, that the *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the "liberty" that is protected by the Due Process Clause of the Fourteenth Amendment.[3] As so understood, *Griswold* stands as one in a long line of pre-*Skrupa* cases decided under the doctrine of substantive due process, and I now accept it as such.

"In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Board of Regents* v. *Roth*, 408 U. S. 564, 572. The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the "liberty" protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights. See *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 238–239; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535; *Meyer* v. *Nebraska*, 262 U. S. 390, 399–400. Cf. *Shapiro* v. *Thompson*, 394 U. S. 618, 629–630; *United States* v. *Guest*, 383 U. S. 745, 757–758; *Carrington* v. *Rash*, 380 U. S. 89, 96; *Aptheker* v. *Secretary of State*, 378 U. S. 500, 505; *Kent* v. *Dulles*, 357 U. S. 116, 127; *Bolling* v. *Sharpe*, 347 U. S. 497, 499–500; *Truax* v. *Raich*, 239 U. S. 33, 41.

---

the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States." *Katz* v. *United States*, 389 U. S. 347, 350–351 (footnotes omitted).

[3] This was also clear to Mr. Justice Black, 381 U. S., at 507 (dissenting opinion); to Mr. Justice Harlan, 381 U. S., at 499 (opinion concurring in the judgment); and to MR. JUSTICE WHITE, 381 U. S., at 502 (opinion concurring in the judgment). See also Mr. Justice Harlan's thorough and thoughtful opinion dissenting from dismissal of the appeal in *Poe* v. *Ullman*, 367 U. S. 497, 522.

As Mr. Justice Harlan once wrote: "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe v. Ullman,* 367 U. S. 497, 543 (opinion dissenting from dismissal of appeal) (citations omitted). In the words of Mr. Justice Frankfurter, "Great concepts like . . . 'liberty' . . . were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." *National Mutual Ins. Co.* v. *Tidewater Transfer Co., Inc.,* 337 U. S. 582, 646 (dissenting opinion).

Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. *Loving* v. *Virginia,* 388 U. S. 1, 12; *Griswold* v. *Connecticut, supra; Pierce* v. *Society of Sisters, supra; Meyer* v. *Nebraska, supra.* See also *Prince* v. *Massachusetts,* 321 U. S. 158, 166; *Skinner* v. *Oklahoma,* 316 U. S. 535, 541. As recently as last Term, in *Eisenstadt* v. *Baird,* 405 U. S. 438, 453, we recognized "the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person

as the decision whether to bear or beget a child." That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy. "Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private school protected in *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), or the right to teach a foreign language protected in *Meyer* v. *Nebraska*, 262 U. S. 390 (1923)." *Abele* v. *Markle*, — F. Supp. —, — (Conn. 1972).

Clearly, therefore, the Court today is correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment.

It is evident that the Texas abortion statute infringes that right directly. Indeed, it is difficult to imagine a more complete abridgment of a constitutional freedom than that worked by the inflexible criminal statute now in force in Texas. The question then becomes whether the state interests advanced to justify this abridgment can survive the "particularly careful scrutiny" that the Fourteenth Amendment here requires.

The asserted state interests are protection of the health and safety of the pregnant woman, and protection of the potential future human life within her. These are legitimate objectives, amply sufficient to permit a State to regulate abortions as it does other surgical procedures, and perhaps sufficient to permit a State to regulate abortions more stringently or even to prohibit them in the late stages of pregnancy. But such legislation is not before us, and I think the Court today has thoroughly demonstrated that these state interests cannot

constitutionally support the broad abridgment of personal liberty worked by the existing Texas law. Accordingly, I join the Court's opinion holding that that law is invalid under the Due Process Clause of the Fourteenth Amendment.

SUPREME COURT OF THE UNITED STATES

Nos. 70–18 AND 70–40

Jane Roe et al., Appellants, 70–18 *v.* Henry Wade.	On Appeal from the United States District Court for the Northern District of Texas.
Mary Doe et al., Appellants, 70–40 *v.* Arthur K. Bolton, as Attorney General of the State of Georgia, et al.	On Appeal from the United States District Court for the Northern District of Georgia.

[January 22, 1973]

MR. JUSTICE WHITE, with whom MR. JUSTICE REHNQUIST joins, dissenting.

At the heart of the controversy in these cases are those recurring pregnancies that pose no danger whatsoever to the life or health of the mother but are nevertheless unwanted for any one or more of a variety of reasons—convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc. The common claim before us is that for any one of such reasons, or for no reason at all, and without asserting or claiming any threat to life or health, any woman is entitled to an abortion at her request if she is able to find a medical advisor willing to undertake the procedure.

The Court for the most part sustains this position: During the period prior to the time the fetus becomes viable, the Constitution of the United States values the convenience, whim or caprice of the putative mother more than the life or potential life of the fetus; the Constitution, therefore, guarantees the right to an abortion as against any state law or policy seeking to protect

the fetus from an abortion not prompted by more compelling reasons of the mother.

With all due respect, I dissent. I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus on the one hand against a spectrum of possible impacts on the mother on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review which the Constitution extends to this Court.

The Court apparently values the convenience of the pregnant mother more than the continued existence and development of the life or potential life which she carries. Whether or not I might agree with that marshalling of values, I can in no event join the Court's judgment because I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States. In a sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ, I cannot accept the Court's exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to exterminate it. This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.

It is my view, therefore, that the Texas statute is not constitutionally infirm because it denies abortions to those who seek to serve only their convenience rather than to protect their life or health. Nor is this plaintiff, who claims no threat to her mental or physical health, entitled to assert the possible rights of those women whose pregnancy assertedly implicates their health. This, together with *United States* v. *Vuitch*, 402 U. S. 62 (1971), dictates reversal of the judgment of the District Court.

Likewise, because Georgia may constitutionally forbid abortions to putative mothers who, like the plaintiff in this case, do not fall within the reach of § 26–1202 (a) of its criminal code, I have no occasion, and the District Court had none, to consider the constitutionality of the procedural requirements of the Georgia statute as applied to those pregnancies posing substantial hazards to either life or health. I would reverse the judgment of the District Court in the Georgia case.

SUPREME COURT OF THE UNITED STATES

No. 70–18

Jane Roe et al., Appellants,
v.
Henry Wade.

On Appeal from the United States District Court for the Northern District of Texas.

[January 22, 1973]

MR. JUSTICE REHNQUIST, dissenting.

The Court's opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship. While its opinion thus commands my respect, I find myself nonetheless in fundamental disagreement with those parts of it which invalidate the Texas statute in question, and therefore dissent.

I

The Court's opinion decides that a State may impose virtually no restriction on the performance of abortions during the first trimester of pregnancy. Our previous decisions indicate that a necessary predicate for such an opinion is a plaintiff who was in her first trimester of pregnancy at some time during the pendency of her law suit. While a party may vindicate his own constitutional rights, he may not seek vindication for the rights of others. *Moose Lodge* v. *Irvis*, 407 U. S. 163 (1972); *Sierra Club* v. *Morton*, 405 U. S. 727 (1972). The Court's statement of facts in this case makes clear, however, that the record in no way indicates the presence of such a plaintiff. We know only that plaintiff Roe at the time of filing her complaint was a pregnant woman; for aught that appears in this record, she may have been in her *last* trimester of pregnancy as of the date the complaint was filed.

Nothing in the Court's opinion indicates that Texas might not constitutionally apply its proscription of abor-

tion as written to a woman in that stage of pregnancy. Nonetheless, the Court uses her complaint against the Texas statute as a fulcrum for deciding that States may impose virtually no restrictions on medical abortions performed during the *first* trimester of pregnancy. In deciding such a hypothetical lawsuit the Court departs from the longstanding admonition that it should never "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York and Philadelphia Steamship Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885). See also *Ashwander* v. *TVA*, 297 U. S. 288, 345 (1936) (Brandeis, concurring).

II

Even if there were a plaintiff in this case capable of litigating the issue which the Court decides, I would reach a conclusion opposite to that reached by the Court. I have difficulty in concluding, as the Court does, that the right of "privacy" is involved in this case. Texas by the statute here challenged bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not "private" in the ordinary usage of that word. Nor is the "privacy" which the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution which the Court has referred to as embodying a right to privacy. *Katz* v. *United States*, 389 U. S. 347 (1967).

If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. I agree with the statement of MR. JUSTICE STEWART in

his concurring opinion that the "liberty," against deprivation of which without due process the Fourteenth Amendment protects, embraces more than the rights found in the Bill of Rights. But that liberty is not guaranteed absolutely against deprivation, but only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 491 (1955). The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit on legislative power to enact laws such as this, albeit a broad one. If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective under the test stated in *Williamson, supra*. But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors which the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.

The Court eschews the history of the Fourteenth Amendment in its reliance on the "compelling state interest" test. See *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 179 (1972) (dissenting opinion). But the Court adds a new wrinkle to this test by transposing it from the legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to this case arising under the Due Process Clause of the Fourteenth Amendment. Unless I misapprehend the consequences of this transplanting of the "compelling state interest test," the Court's opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it.

While the Court's opinion quotes from the dissent of Mr. Justice Holmes in *Lochner* v. *New York*, 198 U. S. 45 (1905), the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case. As in *Lochner* and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be "compelling." The decision here to break the term of pregnancy into three distinct terms and to outline the permissible retrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.

The fact that a majority of the States, reflecting after all the majority sentiment in those States, have had restrictions on abortions for at least a century seems to me as strong an indication there is that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934). Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the "right" to an abortion is not so universally accepted as the appellants would have us believe.

To reach its result the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment. As early as 1821, the first state law dealing directly with abortion was enacted by the Connecticut legislature. Conn. Stat. Tit. 22, §§ 14, 16 (1821). By the time of the adoption of the Fourteenth Amendment in 1868 there were at least 36 laws

enacted by state or territorial legislatures limiting abortion.[1] While many States have amended or updated their laws, 21 of the laws on the books in 1868 remain

---

[1] States having enacted abortion laws prior to the adoption of the Fourteenth Amendment in 1868:

1. Alabama—Ala. Acts, c. 6, § 2 (1840–1841).

2. Arizona—Howell Code, c. 10, § 45 (1865).

3. Arkansas—Ark. Rev. Stat., c. 44, div. III, Art. II, § 6 (1838).

4. California—Cal. Sess. Stats., c. 99, § 45, at 233 (1849–1850).

5. Colorado (Terr.)—Colo. Gen. Laws of Terr. of Colo., 1st Sess., § 42, at 296–297 (1861).

6. Connecticut—Conn. Stat. Tit. 22, §§ 14, 16, at 152, 153 (1821). By 1868 this statute had been replaced by another abortion law. Conn. Pub. Acts, c. LXXI, §§ 1, 2, at 65 (1860).

7. Florida—Fla. Acts 1st Sess., c. 1637, III, § 10, § 11, VIII, § 9, § 10, § 11, as amended now in Fla. Stat. Ann. §§ 782.09, 782.10, 797.01, 797.02, 782.16 (1944).

8. Georgia—Ga. Pen. Code §§ 56, 57, 58, 67, 68, 69 (1833).

9. Kingdom of Hawaii—Hawaii Pen. Code §§ 1, 2, 3 (1850).

10. Idaho (Terr.)—Idaho (Terr.) Laws §§ 33, 34, 42, at 435 (1863).

11. Illinois—Ill. Rev. Code §§ 40, 41, 46, at 130, 131 (1827). By 1868 this statute had been replaced by a subsequent enactment. Ill. Pub. Laws §§ 1, 2, 3, at 89 (1867).

12. Indiana—Ind. Rev. Stat. §§ 1, 3, at 224 (1838). By 1868 this statute had been superseded by a subsequent enactment. Ind. Laws c. LXXXI, § 2 (1859).

13. Iowa (Terr.)—Iowa (Terr.) Stat. 1st Legis., 1st Sess., § 18, at 145 (1838). By 1868 this statute had been superseded by a subsequent enactment. Iowa (Terr.) Rev. Stat. §§ 10, 13 (1843).

14. Kansas (Terr.)—Kan. (Terr.) Stat. c. 48, §§ 9, 10, 39 (1855). By 1868 this statute had been superseded by a subsequent enactment. Kan. Gen. Laws c. 28, §§ 9, 10 (1859).

15. Louisiana—La. Rev. Stat. § 24, at 138 (1856).

16. Maine—Me. Rev. Stat. c. 160, §§ 11, 12, 13, 14 (1840).

17. Maryland—Md. Laws c. 179, § 2, at 318 (1868).

18. Massachusetts—Mass. Acts & Resolves c. 27 (1845).

19. Michigan—Mich. Rev. Stat. c. 153, §§ 32, 33, 34, at 662 (1846).

20. Minn. (Terr.)—Minn. (Terr.) Rev. Stat. c. 100, §§ 10, 11, at 493 (1851).

[*Footnote 1 continued on p. 6*]

in effect today.[2] Indeed, the Texas statute struck down today was, as the majority notes, first enacted in 1857 and "has remained substantially unchanged to the present time." *Ante*, at —.

---

21. Mississippi—Miss. Code §§ 8, 9, at 958 (1848).
22. Missouri—Mo. Rev. Stat. Art. II, §§ 9, 10, 36, at 168 (1835).
23. Montana (Terr.)—Mont. (Terr.) Laws § 41, at 184 (1864).
24. Nevada (Terr.)—Nev. (Terr.) Laws c. 28, § 42, at 63 (1861).
25. New Hampshire—N. H. Laws c. 743, § 1, at 708 (1848).
26. New Jersey—N. J. Laws, at 266 (1849).
27. New York—N. Y. Rev. Stat. pt. IV, c. I, Tit. II, §§ 8, 9, at 550 (1828). By 1868 this statute had been superseded by subsequent enactments. N. Y. Laws c. 260, §§ 1, 2, 3, 4, 5, 6, at 285 (1845); N. Y. Laws c. 22, § 1, at 19 (1846).
28. Ohio—Ohio Gen. Stat. §§ 111 (1), 112 (2), at 252 (1841).
29. Oregon—Ore. Gen. Laws, Crim. Code, c. 43, § 509, at 528 (1845–1864).
30. Pennsylvania—Pa. Laws No. 374, §§ 87, 88, 89 (1860).
31. Texas—Tex. Gen. Stat. Dig. c. VII, Arts. 531–536, at 524 (Oldham & White 1859).
32. Vermont—Vt. Acts No. 33, § 1 (1846). By 1868 this statute had been amended by a subsequent enactment. Vt. Acts No. 57, §§ 1, 3 (1867).
33. Virginia—Va. Acts Tit. II, c. 3, § 9, at 96 (1848).
34. Washington (Terr.)—Wash. (Terr.) Stats. c. II, §§ 37, 38, at 81 (1854).
35. West Virginia—Va. Acts. Tit. II, c. 3, § 9, at 96 (1848).
36. Wisconsin—Wis. Rev. Stat. c. 133, §§ 10, 11 (1849). By 1868 this statute had been superseded by a subsequent enactment. Wis. Rev. Stat. c. 164, §§ 10, 11; c. 169, §§ 58, 59 (1858).

[2] Abortion laws in effect in 1868 and still applicable as of August 1970:

1. Arizona (1865).
2. Connecticut (1860).
3. Florida (1868).
4. Idaho (1863).
5. Indiana (1838).
6. Iowa (1843).
7. Maine (1840).
8. Massachusetts (1845).
9. Michigan (1846).

[*Footnote 2 continued on p. 7*]

There apparently was no question concerning the validity of this provision or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.

III

Even if one were to agree that the case which the Court decides were here, and that the enunciation of the substantive constitutional law in the Court's opinion were proper, the actual disposition of the case by the Court is still difficult to justify. The Texas statute is struck down *in toto*, even though the Court apparently concedes that at later periods of pregnancy Texas might impose these selfsame statutory limitations on abortion. My understanding of past practice is that a statute found to be invalid as applied to a particular plaintiff, but not unconstitutional as a whole, is not simply "struck down" but is instead declared unconstitutional as applied to the fact situation before the Court. *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Street* v. *New York*, 394 U. S. 576 (1969).

For all of the foregoing reasons, I respectfully dissent.

---

10. Minnesota (1851).
11. Missouri (1835).
12. Montana (1864).
13. Nevada (1861).
14. New Hampshire (1848).
15. New Jersey (1849).
16. Ohio (1841).
17. Pennsylvania (1860).
18. Texas (1859).
19. Vermont (1867).
20. West Virginia (1848).
21. Wisconsin (1858).

(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DOE ET AL. *v.* BOLTON, ATTORNEY GENERAL OF GEORGIA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

No. 70–40. Argued December 13, 1971—Reargued October 11, 1972—Decided January 22, 1973

Georgia law proscribes an abortion except as performed by a duly licensed Georgia physician when necessary in "his best clinical judgment" because continued pregnancy would endanger a pregnant woman's life or injure her health; the fetus would likely be born with serious defects; or the pregnancy resulted from rape. § 26–1202 (a) of Ga. Criminal Code. In addition to a requirement that the patient be a Georgia resident and certain other requirements, the statutory scheme poses three procedural conditions in § 26–1202 (b): (1) that the abortion be performed in a hospital accredited by the Joint Committee on Accreditation of Hospitals (JCAH); (2) that the procedure be approved by the hospital staff abortion committee; and (3) that the performing physician's judgment be confirmed by independent examinations of the patient by two other licensed physicians. Appellant Doe, an indigent married Georgia citizen, who was denied an abortion after eight weeks of pregnancy for failure to meet any of the § 26–1202 (a) conditions, sought declaratory and injunctive relief, contending that the Georgia laws were unconstitutional. Others joining in the complaint included Georgia-licensed physicians (who claimed that the Georgia statutes "chilled and deterred" their practices), registered nurses, clergymen, and social workers. Though holding that all the plaintiffs had standing, the District Court ruled that only Doe presented a justiciable controversy. In Doe's case the court gave declaratory, but not injunctive, relief, invalidating as an infringement of privacy and personal liberty the limitation to the three situations specified in § 26–1202 (a) and certain other provisions but holding that the State's interest in health protection

Syllabus

and the existence of a "*potential* of independent human existence" justified regulation through § 26–1202 (b) of the "manner of performance as well as the quality of the final decision to abort." The appellants, claiming entitlement to broader relief, directly appealed to this Court. *Held:*

1. Doe's case presents a live, justiciable controversy and she has standing to sue, *Roe* v. *Wade*, *ante*, p. —, as do the physician-appellants (who, unlike the physician in *Wade*, were not charged with abortion violations), and it is therefore unnecessary to resolve the issue of the other appellants' standing. Pp. 7–9.

2. A woman's constitutional right to an abortion is not absolute. *Roe* v. *Wade*, *supra*. P. 9.

3. The requirement that a physician's decision to perform an abortion must rest upon "his best clinical judgment" of its necessity is not unconstitutionally vague, since that judgment may be made in the light of *all* the attendant circumstances. *United States* v. *Vuitch*, 402 U. S. 62, 71–72. Pp. 10–12.

4. The three procedural conditions in § 26–1202 (b) violate the Fourteenth Amendment. Pp. 12–19.

(a) The JCAH accreditation requirement is invalid, since the State has not shown that only hospitals (let alone those with JCAH accreditation) meet its interest in fully protecting the patient; and a hospital requirement failing to exclude the first trimester of pregnancy would be invalid on that ground alone, see *Roe* v. *Wade*, *supra*. Pp. 12–15.

(b) The interposition of a hospital committee on abortion, a procedure not applicable as a matter of state criminal law to other surgical situations, is unduly restrictive of the patient's rights, which are already safeguarded by her personal physician. Pp. 15–17.

(c) Required acquiescence by two co-practitioners also has no rational connection with a patient's needs and unduly infringes on her physician's right to practice. Pp. 17–19.

5. The Georgia residence requirement violates the Privileges and Immunities Clause by denying protection to persons who enter Georgia for medical services there. Pp. 19–20.

6. Appellants' equal protection argument centering on the three procedural conditions in § 26–1202 (b), invalidated on other grounds, is without merit. P. 20.

7. No ruling is made on the question of injunctive relief. *Cf. Roe* v. *Wade*, *supra*. P. 20.

319 F. Supp. 1048, modified and affirmed.

Syllabus

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, STEWART, MARSHALL, and POWELL, JJ., joined. BURGER, C. J., and DOUGLAS, J., filed concurring opinions. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined. REHNQUIST, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 70–40

Mary Doe et al., Appellants,
v.
Arthur K. Bolton, as Attorney General of the State of Georgia, et al.

On Appeal from the United States District Court for the Northern District of Georgia.

[January 22, 1973]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

In this appeal the criminal abortion statutes recently enacted in Georgia are challenged on constitutional grounds. The statutes are §§ 26–1201 through 26–1203 of the State's Criminal Code, formulated by Georgia Laws, 1968 Session, 1249, 1277–1280. In *Roe* v. *Wade*, *ante* —, we today have struck down, as constitutionally defective, the Texas criminal abortion statutes that are representative of provisions long in effect in a majority of our States. The Georgia legislation, however, is different and merits separate consideration.

I

The statutes in question are reproduced as Appendix A, *post* —.[1] As the appellants acknowledge,[2] the 1968 statutes are patterned upon the American Law Institute's Model Penal Code, § 230.3 (Proposed Official Draft, 1962), reproduced as Appendix B, *post* —. The ALI proposal has served as the model for recent legislation in approximately one-fourth of our States.[3] The new

[1] The portions italicized in Appendix A are those held unconstitutional by the District Court.

[2] Appellants' Brief 25 n. 5; Tr. of Oral Arg. 9.

[3] See *Roe* v. *Wade*, *ante* — n. 37.

Georgia provisions replaced statutory law that had been in effect for more than 90 years. Georgia Laws 1876, No. 130, § 2, at 113.[4] The predecessor statute paralleled the Texas legislation considered in *Roe* v. *Wade, ante*, and made all abortions criminal except those necessary "to preserve the life" of the pregnant woman. The new statutes have not been tested on constitutional grounds in the Georgia state courts.

Section 26–1201, with a referenced exception, makes abortion a crime, and § 26–1203 provides that a person convicted of that crime shall be punished by imprisonment for not less than one nor more than 10 years. Sec-

[4] The active provisions of the 1876 statute were:

"Section I. *Be it enacted, etc.*, That from and after the passage of this Act, the wilful killing of an unborn child, so far developed as to be ordinarily called 'quick,' by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be guilty of a felony, and punishable by death or imprisonment for life, as the jury trying the case may recommend.

"Sec. II. *Be it further enacted*, That every person who shall administer to any woman pregnant with a child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or mother be thereby produced, be declared guilty of an assault with intent to murder.

"Sec. III. *Be it further enacted*, That any person who shall wilfully administer to any pregnant woman any medicine, drug or substance, or anything whatever, or shall employ any instrument or means whatever, with intent thereby to procure the miscarriage or abortion of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished as prescribed in section 4310 of the Revised Code of Georgia."

It should be noted that the second section, in contrast to the first, makes no specific reference to quickening. The section was construed, however, to possess this line of demarcation. *Taylor* v. *State*, 105 Ga. 846, 33 S. E. 190 (1899).

tion 26–1202 (a) states the exception and removes from § 1201's definition of criminal abortion, and thus makes noncriminal, an abortion "performed by a physician duly licensed" in Georgia when, "based upon his best clinical judgment . . . an abortion is necessary because

> "(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health, or
>
> "(2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect, or
>
> "(3) The pregnancy resulted from forcible or statutory rape." [5]

Section 26–1202 also requires, by numbered subdivisions of its subsection (b), that, for an abortion to be authorized or performed as a noncriminal procedure, additional conditions must be fulfilled. These are (1) and (2) residence of the woman in Georgia; (3) reduction to writing of the performing physician's medical judgment that an abortion is justified for one or more of the reasons specified by § 26–1202 (a), with written concurrence in that judgment by at least two other Georgia-licensed physicians, based upon their separate personal medical examinations of the woman; (4) performance of the abortion in a hospital licensed by the State Board of Health and also accredited by the Joint Commission on Accreditation of Hospitals; (5) advance approval by an abortion committee of not less than three members of the hospital's staff; (6) certifications in a rape situation; and (7), (8), and (9) maintenance and confidentiality of records. There is a provision (subsection (c)) for judi-

[5] In contrast with the ALI model, the Georgia statute makes no specific reference to pregnancy resulting from incest. We were assured by the State at reargument that this was because the statute's reference to "rape" was intended to include incest. Tr. of Rearg. 32.

cial determination of the legality of a proposed abortion on petition of the judicial circuit law officer or of a close relative, as therein defined, of the unborn child, and for expeditious hearing of that petition. There is also a provision (subsection (e)) giving a hospital the right not to admit an abortion patient and giving any physician and any hospital employee or staff member the right, on moral or religious grounds, not to participate in the procedure.

II

On April 16, 1970, Mary Doe,[6] 23 other individuals (nine described as Georgia-licensed physicians, seven as nurses registered in the State, five as clergymen, and two as social workers), and two nonprofit Georgia corporations that advocate abortion reform, instituted this federal action in the Northern District of Georgia against the State's attorney general, the district attorney of Fulton County, and the chief of police of the city of Atlanta. The plaintiffs sought a declaratory judgment that the Georgia abortion statutes were unconstitutional in their entirety. They also sought injunctive relief restraining the defendants and their successors from enforcing the statutes.

Mary Doe alleged:

> "(1) She was a 22-year-old Georgia citizen, married, and nine weeks pregnant. She had three living children. The two older ones had been placed in a foster home because of Doe's poverty and inability to care for them. The youngest, born July 19, 1969, had been placed for adoption. Her husband had recently abandoned her and she was forced to live with her indigent parents and their eight children. She and her husband, however, had become recon-

[6] Appellants by their complaint, Appendix 7, allege that the name is a pseudonym.

ciled. He was a construction worker employed only sporadically. She had been a mental patient at the State Hospital. She had been advised that an abortion could be performed on her with less danger to her health than if she gave birth to the child she was carrying. She would be unable to care for or support the new child.

"(2) On March 25, 1970, she applied to the Abortion Committee of Grady Memorial Hospital, Atlanta, for a therapeutic abortion under § 26–1202. Her application was denied 16 days later, on April 10, when she was eight weeks pregnant, on the ground that her situation was not one described in § 26–1202 (a).[7]

"(3) Because her application was denied, she was forced either to relinquish 'her right to decide when and how many children she will bear' or to seek an abortion that was illegal under the Georgia statutes. This invaded her rights of privacy and liberty in matters related to family, marriage, and sex, and deprived her of the right to choose whether to bear children. This was a violation of rights guaranteed her by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. The statutes also denied her equal protection and procedural due process and, because they were unconstitutionally vague, deterred hospitals and doctors from performing abortions. She sued 'on her own behalf and on behalf of all others similarly situated.' "

The other plaintiffs alleged that the Georgia statutes "chilled and deterred" them from practicing their respective professions and deprived them of rights guaranteed

[7] In answers to interrogatories Doe stated that her application for an abortion was approved at Georgia Baptist Hospital on May 5, 1970, but that she was not approved as a charity patient there and had no money to pay for an abortion. Appendix 64.

by the First, Fourth, and Fourteenth Amendments. These plaintiffs also purported to sue on their own behalf and on behalf of others similarly situated.

A three-judge district court was convened. An offer of proof as to Doe's identity was made, but the court deemed it unnecessary to receive that proof. The case was then tried on the pleadings and interrogatories.

The District Court, *per curiam*, 319 F. Supp. 1048 (ND Ga. 1970), held that all the plaintiffs had standing but that only Doe presented a justiciable controversy. On the merits, the court concluded that the limitation in the Georgia statute of the "number of reasons for which an abortion may be sought," *id.*, at 1056, improperly restricted Doe's rights of privacy articulated in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), and of "personal liberty," both of which it thought "broad enough to include the decision to abort a pregnancy," *id.*, at 1055. As a consequence, the court held invalid those portions of §§ 26–1202 (a) and (b)(3) limiting legal abortions to the three situations specified; § 26–1202 (b)(6) relating to certifications in a rape situation; and § 26–1202 (c) authorizing a court test. Declaratory relief was granted accordingly. The court, however, held that Georgia's interest in protection of health, and the existence of a "*potential* of independent human existence" (emphasis in original), *id.*, at 1055, justified state regulation of "the manner of performance as well as the quality of the final decision to abort," *id.*, at 1056, and it refused to strike down the other provisions of the statutes. It denied the request for an injunction, *id.*, at 1057.

Claiming that they were entitled to an injunction and to broader relief, the plaintiffs took a direct appeal pursuant to 28 U. S. C. § 1253. We postponed decision on jurisdiction to the hearing on the merits. 402 U. S. 941 (1971). The defendants also purported to appeal, pur-

suant to § 1253, but their appeal was dismissed for want of jurisdiction. 402 U. S. 936 (1971). We are advised by the defendant-appellees, Brief 42, that an alternative appeal on their part is pending in the United States Court of Appeals for the Fifth Circuit. The extent, therefore, to which the District Court decision was adverse to the defendants, that is, the extent to which portions of the Georgia statutes were held to be unconstitutional, technically is not now before us.[8] *Swarb* v. *Lennox*, 405 U. S. 191, 201 (1972).

III

Our decision in *Roe* v. *Wade, ante* —, establishes (1) that, despite her pseudonym, we may accept as true, for this case, Mary Doe's existence and her pregnant state on April 16, 1970; (2) that the constitutional issue is substantial; (3) that the interim termination of Doe's and all other Georgia pregnancies in existence in 1970 has not rendered the case moot; and (4) that Doe presents a justiciable controversy and has standing to maintain the action.

Inasmuch as Doe and her class are recognized, the question whether the other appellants—physicians, nurses, clergymen, social workers, and corporations—present a justiciable controversy and have standing is perhaps a matter of no great consequence. We conclude, however, that the physician-appellants, who are Georgia-licensed doctors consulted by pregnant women, also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes. The physician is the one against whom these criminal statutes directly operate in the event he procures an

[8] What we decide today obviously has implications for the issues raised in the defendants' appeal pending in the Fifth Circuit.

abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief. *Crossen* v. *Breckenridge*, 446 F. 2d 833, 839–840 (CA6 1971); *Poe* v. *Menghini*, 339 F. Supp. 986, 990–991 (Kans. 1972).

In holding that the physicians, while theoretically possessed of standing, did not present a justiciable controversy, the District Court seems to have relied primarily on *Poe* v. *Ullman*, 367 U. S. 497 (1961). There a sharply divided Court dismissed an appeal from a state court on the ground that it presented no real controversy justifying the adjudication of a constitutional issue. But the challenged Connecticut statute, deemed to prohibit the giving of medical advice on the use of contraceptives, had been enacted in 1879, and, apparently with a single exception, no one had ever been prosecuted under it. Georgia's statute, in contrast, is recent and not moribund. Furthermore, it is the successor to another Georgia abortion statute under which, we are told,[9] physicians were prosecuted. The present case, therefore, is closer to *Epperson* v. *Arkansas*, 393 U. S. 97 (1968), where the Court recognized the right of a school teacher, though not yet charged criminally, to challenge her State's anti-evolution statute. See also *Griswold* v. *Connecticut*, 381 U. S., at 481.

The parallel claims of the nurse, clergy, social worker, and corporation-appellants are another step removed and as to them, the Georgia statutes operate less directly. Not being licensed physicians, the nurses and the others are in no position to render medical advice. They would be reached by the abortion statutes only in their capacity

[9] Tr. of Oral Arg. 21–22.

as accessories or as counselor-conspirators. We conclude that we need not pass upon the status of these additional appellants in this suit, for the issues are sufficiently and adequately presented by Doe and the physician-appellants, and nothing is gained or lost by the presence or absence of the nurses, the clergymen, the social workers, and the corporations. See *Roe* v. *Wade*, *ante*, at ——.

IV

The appellants attack on several grounds those portions of the Georgia abortion statutes that remain after the District Court decision: undue restriction of a right to personal and marital privacy; vagueness; deprivation of substantive and procedural due process; improper restriction to Georgia residents; and denial of equal protection.

A. *Roe* v. *Wade*, *ante*, sets forth our conclusion that a pregnant woman does not have an absolute constitutional right to an abortion on her demand. What is said there is applicable here and need not be repeated.

B. The appellants go on to argue, however, that the present Georgia statutes must be viewed historically, that is, from the fact that prior to the 1968 Act an abortion in Georgia was not criminal if performed to "preserve the life" of the mother. It is suggested that the present statute, as well, has this emphasis on the mother's rights, not on those of the fetus. Appellants contend that it is thus clear that Georgia has given little, and certainly not first, consideration to the unborn child. Yet it is the unborn child's rights that Georgia asserts in justification of the statute. Appellants assert that this justification cannot be advanced at this late date.

Appellants then argue that the statutes do not adequately protect the woman's right. This is so because

it would be physically and emotionally damaging to Doe to bring a child into her poor "fatherless" [10] family, and because advances in medicine and medical techniques have made it safer for a woman to have a medically induced abortion than for her to bear a child. Thus, "a statute which requires a woman to carry an unwanted pregnancy to term infringes not only on a fundamental right of privacy but on the right to life itself." Brief 27.

The appellants recognize that a century ago medical knowledge was not so advanced as it is today, that the techniques of antisepsis were not known, and that any abortion procedure was dangerous for the woman. To restrict the legality of the abortion to the situation where it was deemed necessary, in medical judgment, for the preservation of the woman's life was only a natural conclusion in the exercise of the legislative judgment of that time. A State is not to be reproached, however, for a past judgmental determination made in the light of then-existing medical knowledge. It is perhaps unfair to argue, as the appellants do, that because the early focus was on the preservation of the woman's life, the State's present professed interest in the protection of embryonic and fetal life is to be downgraded. That argument denies the State the right to readjust its views and emphases in the light of the advanced knowledge and techniques of the day.

C. Appellants argue that § 26–1202 (a) of the Georgia statute, as it has been left by the District Court's decision, is unconstitutionally vague. This argument centers in the proposition that, with the District Court's having stricken the statutorily specified reasons, it still remains a crime for a physician to perform an abortion except when, as § 26–1202 (a) reads, it is "based upon his best clinical judgment that an abortion is necessary." The

[10] Appellants' Brief 25.

appellants contend that the word "necessary" does not warn the physician of what conduct is proscribed; that the statute is wholly without objective standards and is subject to diverse interpretation; and that doctors will choose to err on the side of caution and will be arbitrary.

The net result of the District Court's decision is that the abortion determination, so far as the physician is concerned, is made in the exercise of his professional, that is, his "best clinical" judgment in the light of *all* the attendant circumstances. He is not now restricted to the three situations originally specified. Instead, he may range farther afield wherever his medical judgment, properly and professionally exercised, so dictates and directs him.

The vagueness argument is set at rest by the decision in *United States* v. *Vuitch*, 402 U. S. 62, 71–72 (1971), where the issue was raised with respect to a District of Columbia statute making abortions criminal "unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine." That statute has been construed to bear upon psychological as well as physical well-being. This being so, the Court concluded that the term "health" presented no problem of vagueness. "Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered." 402 U. S., at 72. This conclusion is equally applicable here. Whether, in the words of the Georgia statute, "an abortion is necessary," is a professional judgment that the Georgia physician will be called upon to make routinely.

We agree with the District Court, 319 F. Supp., at 1058, that the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-

being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.

D. The appellants next argue that the District Court should have declared unconstitutional three procedural demands of the Georgia statute: (1) that the abortion be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals: [11] (2) that the procedure be approved by the hospital staff abortion committee; and (3) that the performing physician's judgment be confirmed by the independent examinations of the patient by two other licensed physicians. The appellants attack these provisions not only on the ground that they unduly restrict the woman's right of privacy, but also on procedural due process and equal protection grounds. The physician-appellants also argue that, by subjecting a doctor's individual medical judgment to committee approval and to confirming consultations, the statute impermissibly restricts the physician's right to practice his profession and deprives him of due process.

1. *JCAH Accreditation.* The Joint Commission on Accreditation of Hospitals is an organization without governmental sponsorship or overtones. No question whatever is raised concerning the integrity of the organization or the high purpose of the accreditation process.[12]

[11] We were advised at reargument, Tr. of Rearg. 10, that only 54 of Georgia's 159 counties have a JCAH accredited hospital.

[12] Since its founding, JCAH has pursued the "elusive goal" of defining the "optimal setting" for "quality of service in hospitals." JCAH, Accreditation Manual for Hospitals, Foreward (Dec. 1970). The Manual's Introduction states the organization's purpose to establish standards and conduct accreditation programs that will afford quality medical care "to give patients the optimal benefits that medical science has to offer." This ambitious and admirable goal is illustrated by JCAH's decision in 1966 "to raise and strengthen the

That process, however, has to do with hospital standards generally and has no present particularized concern with abortion as a medical or surgical procedure.[13] In Georgia there is no restriction of the performance of non-abortion surgery in a hospital not yet accredited by the JCAH so long as other requirements imposed by the State, such as licensing of the hospital and of the operating surgeon, are met. See Georgia Code §§ 88–1901 (a) and 88–1905 (1971) and 84–907 (Supp. 1971). Furthermore, accreditation by the Commission is not granted until a hospital has been in operation at least one year. The Model Penal Code, § 230.3, Appendix B hereto, contains no requirement for JCAH accreditation. And the Uniform Abortion Act (Final Draft, August 1971),[14] approved by the American Bar Association in February 1972, contains no JCAH accredited hospital specification.[15] Some courts have held that a JCAH accredita-

---

standards from their present level of minimum essential to the level of optimum achievable . . . ." Some of these "optimum achievable" standards required are: disclosure of hospital ownership and control; a dietetic service and written dietetic policies; a written disaster plan for mass emergencies; a nuclear medical services program; facilities for hematology, chemistry, microbiology, clinical microscopy, and sero-immunology; a professional library and document delivery service; a radiology program; a social services plan administered by a qualified social worker; and a special care unit.

[13] "The Joint Commission neither advocates nor opposes any particular position with respect to elective abortions." Letter dated July 9, 1971, from John L. Brewer, M. D., Commissioner, JCAH, to the Rockefeller Foundation. Brief for *amici*, American College of Obstetricians and Gynecologists, et al., p. A–3.

[14] See *Roe* v. *Wade, ante* —, n. 40.

[15] Some state statutes do not have the JCAH accreditation requirement. Alaska Stat. § 11.15.060 (1970); Hawaii Rev. Stat. § 453.16 (Supp. 1971); N. Y. Penal Code § 125.05.3 (McKinney Supp. 1972–1973). Washington has the requirement but couples it with the alternative of "a medical facility approved . . . by the state board of health." Wash. Rev. Code § 9.02.070 (Supp. 1972). Florida's new statute has a similar provision. Law of Apr. 13, 1972, c.

tion requirement is an overbroad infringement of fundamental rights because it does not relate to the particular medical problems and dangers of the abortion operation. *Poe* v. *Menghini*, 339 F. Supp. 986, 993–994 (Kan. 1972); *People* v. *Barksdale*, 96 Cal. Rptr. 265, 273–274 (Cal. App. 1971).

We hold that the JCAH accreditation requirement does not withstand constitutional scrutiny in the present context. It is a requirement that simply is not "based on differences that are reasonably related to the purposes of the Act in which it is found." *Morey* v. *Doud*, 354 U. S. 457, 465 (1957).

This is not to say that Georgia may not or should not, from and after the end of the first trimester, adopt standards for licensing all facilities where abortions may be performed so long as those standards are legitimately related to the objective the State seeks to accomplish. The appellants contend that such a relationship would be lacking even in a lesser requirement that an abortion be performed in a licensed hospital, as opposed to a facility, such as a clinic, that may be required by the State to possess all the staffing and services necessary to perform an abortion safely (including those adequate to handle serious complications or other emergency, or arrangements with a nearby hospital to provide such services). Appellants and various *amici* have presented us with a mass of data purporting to demonstrate that some facilities other than hospitals are entirely adequate to perform abortions if they possess these qualifications.

72–196, § 1 (2). Others contain the specification. Ark. Stat. Ann. §§ 41–303 to 41–310 (Supp. 1971); Cal. Health and Safety Code §§ 25950–25955.5 (West Supp. 1972); Colo. Rev. Stats. Ann. §§ 40–2–50 to 40–2–53 (Perm. Cum. Supp. 1967); Kan. Stat. Ann. § 21–3047 (Supp. 1971); Md. Ann. Code Art. 43, §§ 137–139 (Repl. 1971). Cf. Del. Code Ann. §§ 1790–1793 (Supp. 1970) specifying "a nationally recognized medical or hospital accreditation authority," § 1790 (a).

The State, on the other hand, has not presented persuasive data to show that only hospitals meet its acknowledged interest in insuring the quality of the operation and the full protection of the patient. We feel compelled to agree with appellants that the State must show more than it has in order to prove that only the full resources of a licensed hospital, rather than those of some other appropriately licensed institution, satisfy these health interests. We hold that the hospital requirement of the Georgia law, because it fails to exclude the first trimester of pregnancy, see *Roe* v. *Wade, ante,* p. —, is also invalid. In so holding we naturally express no opinion on the medical judgment involved in any particular case, that is, whether the patient's situation is such that an abortion should be performed in a hospital rather than in some other facility.

2. *Committee Approval.* The second aspect of the appellants' procedural attack relates to the hospital abortion committee and to the pregnant woman's asserted lack of access to that committee. Relying primarily on *Goldberg v. Kelly,* 397 U. S. 254 (1970), concerning the termination of welfare benefits, and *Wisconsin* v. *Constantineau,* 400 U. S. 433 (1971), concerning the posting of an alcoholic's name, Doe first argues that she was denied due process because she could not make a presentation to the committee. It is not clear from the record, however, whether Doe's own consulting physician was or was not a member of the committee or did or did not present her case, or, indeed, whether she herself was or was not there. We see nothing in the Georgia statute that explicitly denies access to the committee by or on behalf of the woman. If the access point alone were involved, we would not be persuaded to strike down the committee provision on the unsupported assumption that access is not provided.

Appellants attack the discretion the statute leaves to the committee. The most concrete argument they ad-

vance is their suggestion that it is still a badge of infamy "in many minds" to bear an illegitimate child, and that the Georgia system enables the committee members' personal views as to extramarital sex relations, and punishment therefor, to govern their decisions. This approach obviously is one founded on suspicion and one that discloses a lack of confidence in the integrity of physicians. To say that physicians will be guided in their hospital committee decisions by their predilections on extramarital sex unduly narrows the issue to pregnancy outside marriage. (Doe's own situation did not involve extramarital sex and its product.) The appellants' suggestion is necessarily somewhat degrading to the conscientious physician, particularly the obstetrician, whose professional activity is concerned with the physical and mental welfare, the woes, the emotions, and the concern of his female patients. He, perhaps more than anyone else, is knowledgeable in this area of patient care, and he is aware of human frailty, so-called "error," and needs. The good physician—despite the presence of rascals in the medical profession, as in all others, we trust that most physicians are "good"—will have a sympathy and an understanding for the pregnant patient that probably is not exceeded by those who participate in other areas of professional counseling.

It is perhaps worth noting that the abortion committee has a function of its own. It is a committee of the hospital and it is composed of members of the institution's medical staff. The membership usually is a changing one. In this way its work burden is shared and is more readily accepted. The committee's function is protective. It enables the hospital appropriately to be advised that its posture and activities are in accord with legal requirements. It is to be remembered that the hospital is an entity and that it, too, has legal rights and legal obligations.

Saying all this, however, does not settle the issue of the constitutional propriety of the committee require-

ment. Viewing the Georgia statute as a whole, we see no constitutionally justifiable pertinence in the structure for the advance approval by the abortion committee. With regard to the protection of potential life, the medical judgment is already completed prior to the committee stage, and review by a committee once removed from diagnosis is basically redundant. We are not cited to any other surgical procedure made subject to committee approval as a matter of state criminal law. The woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it are substantially limited by this statutorily imposed overview. And the hospital itself is otherwise fully protected. Under § 26–1202 (e) the hospital is free not to admit a patient for an abortion. It is even free not to have an abortion committee. Further, a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure. These provisions obviously are in the statute in order to afford appropriate protection to the individual and to the denominational hospital. Section 26–1202 (e) affords adequate protection to the hospital and little more is provided by the committee prescribed by § 26–1202 (b)(5).

We conclude that the interposition of the hospital abortion committee is unduly restrictive of the patient's rights and needs that, at this point, have already been medically delineated and substantiated by her personal physician. To ask more serves neither the hospital nor the State.

3. *Two-Doctor Concurrence.* The third aspects of the appellants' attack centers on the "time and availability of adequate medical facilities and personnel." It is said that the system imposes substantial and irrational roadblocks and "is patently unsuited" to prompt determination of the abortion decision. Time, of course, is critical in abortion. Risks during the first trimester of pregnancy are admittedly lower than during later months.

The appellants purport to show by a local study [16] of Grady Memorial Hospital (serving indigent residents in Fulton and DeKalb Counties) that the "mechanics of the system itself forced . . . discontinuation of the abortion process" because the median time for the workup was 15 days. The same study shows, however, that 27% of the candidates for abortion were already 13 or more weeks pregnant at the time of application, that is, they were at the end of or beyond the first trimester when they made their applications. It is too much to say, as appellants do, that these particular persons "were victims of [a] system over which they [had] no control." If higher risk was incurred because of abortions in the second rather than the first trimester, much of that risk was due to delay in application, and not to the alleged cumbersomeness of the system. We note, in passing, that appellant Doe had no delay problem herself; the decision in her case was made well within the first trimester.

It should be manifest that our rejection of the accredited hospital requirement and, more important, of the abortion committee's advance approval eliminates the major grounds of the attack based on the system's delay and the lack of facilities. There remains, however, the required confirmation by two Georgia-licensed physicians in addition to the recommendation of the pregnant woman's own consultant (making under the statute, a total of six physicians involved, including the three on the hospital's abortion committee). We conclude that this provision, too, must fall.

The statute's emphasis, as has been repetitively noted, is on the attending physician's "best clinical judgment

---

[16] L. Baker & M. Freeman, Abortion Surveillance at Grady Memorial Hospital Center for Disease Control (June and July 1971) (U. S. Dept. of HEW, PHS).

that an abortion is necessary." That should be sufficient. The reasons for the presence of the confirmation step in the statute are perhaps apparent, but they are insufficient to withstand constitutional challenge. Again, no other voluntary medical or surgical procedure for which Georgia requires confirmation by two other physicians has been cited to us. If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. If he fails in this, professional censure or deprivation of his license are available remedies. Required acquiescence by co-practitioners has no rational connection with a patient's needs and unduly infringes on the physician's right to practice. The attending physician will know when a consultation is advisable—the doubtful situation, the need for assurance when the medical decision is a delicate one, and the like. Physicians have followed this routine historically and know its usefulness and benefit for all concerned. It is still true today that "[r]eliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he [the physician] possesses the requisite qualifications." *Dent* v. *West Virginia*, 129 U. S. 114, 122–123 (1889). See *United States* v. *Vuitch*, 402 U. S., at 71.

E. The appellants attack the residency requirement of the Georgia law, §§ 26–1202 (b)(1) and (b)(2), as violative of the right to travel stressed in *Shapiro* v. *Thompson*, 394 U. S. 618, 629–631 (1969), and other cases. A requirement of this kind, of course, could be deemed to have some relationship to the availability of post-procedure medical care for the aborted patient.

Nevertheless, we do not uphold the constitutionality of the residence requirement. It is not based on any policy of preserving state-supported facilities for Georgia residents, for the bar also applies to private hospitals and to privately retained physicians. There is no intimation,

either, that Georgia facilities are utilized to capacity in caring for Georgia residents. Just as the Privileges and Immunities Clause, Const. Art. IV, § 2, protects persons who enter other States to ply their trade, *Ward* v. *Maryland*, 79 U. S. (12 Wall.) 418, 430 (1870); *Blake* v. *McClung*, 172 U. S. 239, 248–256 (1898), so must it protect persons who enter Georgia seeking the medical services that are available there. See *Toomer* v. *Witsell*, 334 U. S. 385, 396–397 (1948). A contrary holding would mean that a State could limit to its own residents the general medical care available within its borders. This we could not approve.

F. The last argument on this phase of the case is one that often is made, namely, that the Georgia system is violative of equal protection because it discriminates against the poor. The appellants do not urge that abortions should be performed by persons other than licensed physicians, so we have no argument that because the wealthy can better afford physicians, the poor should have non-physicians made available to them. The appellants acknowleged that the procedures are "nondiscriminatory in . . . express terms" but they suggest that they have produced invidious discriminations. The District Court rejected this approach out of hand. 319 F. Supp., at 1056. It rests primarily on the accreditation and approval and confirmation requirements, discussed above, and on the assertion that most of Georgia's counties have no accredited hospital. We have set aside the accreditation, approval, and confirmation requirements, however, and with that, the discrimination argument collapses in all significant aspects.

V

The appellants complain, finally, of the District Court's denial of injunctive relief. A like claim was made in *Roe* v. *Wade, ante*. We declined decision there insofar

as injunctive relief was concerned, and we decline it here. We assume that Georgia's prosecutorial authorities will give full recognition to the judgment of this Court.

In summary, we hold that the JCAH accredited hospital provision and the requirements as to approval by the hospital abortion committee, as to confirmation by two independent physicians, and as to residence in Georgia are all violative of the Fourteenth Amendment. Specifically, the following portions of § 26–1202 (b), remaining after the District Court's judgment, are invalid:

(1) Subsections (1) and (2).

(2) That portion of Subsection (3) following the words "such physician's judgment is reduced to writing."

(3) Subsections (4) and (5).

The judgment of the District Court is modified accordingly and, as so modified, is affirmed. Costs are allowed to the appellants.

APPENDIX A

Criminal Code of Georgia

(The italicized portions are those held unconstitutional by the District Court)

CHAPTER 26–12. ABORTION.

26–1201. Criminal Abortion. Except as otherwise provided in section 26–1202, a person commits criminal abortion when he administers any medicine, drug or other substance whatever to any woman or when he uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion.

26–1202. Exception. (a) Section 26–1201 shall not apply to an abortion performed by a physician duly licensed to practice medicine and surgery pursuant to Chapter 84–9 or 84–12 of the Code of Georgia of 1933, as amended, based upon his best clinical judgment that an abortion is necessary *because:*

(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or

(2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or

(3) The pregnancy resulted from forcible or statutory rape.

(b) No abortion is authorized or shall be performed under this section unless each of the following conditions is met;

(1) The pregnant woman requesting the abortion certifies in writing under oath and subject to the penalties of false swearing to the physician who proposes to perform the abortion that she is a bona fide legal resident of the State of Georgia.

(2) The physician certifies that he believes the woman is a bona fide resident of this State and that he has no information which should lead him to believe otherwise.

(3) Such physician's judgment is reduced to writing and concurred in by at least two other physicians duly licensed to practice medicine and surgery pursuant to Chapter 84–9 of the Code of Georgia of 1933, as amended, who certify in writing that based upon their separate personal medical examinations of the pregnant woman, the abortion is, in their judgment, necessary *because of one or more of the reasons enumerated above.*

(4) Such abortion is performed in a hospital licensed by the State Board of Health and accredited by the Joint Commission on Accreditation of Hospitals.

(5) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose.

(6) If the proposed abortion is considered necessary because the woman has been raped, the woman makes a written statement under oath, and subject to the penalties of false swearing, of the date, time and place of the rape and the name of the rapist, if known. There must be attached to this statement a certified copy of any report of the rape made by any law enforcement officer or agency and a statement by the solicitor general of the judicial circuit where the rape occurred or allegedly occurred that, according to his best information, there is probable cause to believe that the rape did occur.

(7) Such written opinions, statements, certificates, and concurrences are maintained in the permanent files of such hospital and are available at all reasonable times to the solicitor general of the judicial circuit in which the hospital is located.

(8) A copy of such written opinions, statements, certificates, and concurrences is filed with the Director of the State Department of Public Health within ten (10) days after such operation is performed.

(9) All written opinions, statements, certificates, and concurrences filed and maintained pursuant to paragraphs (7) and (8) of this subsection shall be confidential records and shall not be made available for public inspection at any time.

(c) *Any solicitor general of the judicial circuit in which an abortion is to be performed under this section, or any person who would be a relative of the child within the second degree of consanguinity, may petition the superior court of the county in which the abortion is to be performed for a declaratory judgment whether the performance of such abortion would violate any constitutional or other legal rights of the fetus. Such solicitor general may also petition such court for the purpose of taking issue with compliance with the requirements of this section. The physician who proposes to perform the abortion and the pregnant woman shall be respondents. The petition shall be heard expeditiously and if the court adjudges that such abortion would violate the constitutional or other legal rights of the fetus, the court shall so declare and shall restrain the physician from performing the abortion.*

(d) If an abortion is performed in compliance with this section, the death of the fetus shall not give rise to any claim for wrongful death.

(e) Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the

purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b) (5). A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person.

26–1203. Punishment. A person convicted of criminal abortion shall be punished by imprisonment for not less than one nor more than 10 years.

APPENDIX B

American Law Institute

MODEL PENAL CODE

Section 230.3. Abortion.

(1) *Unjustified Abortion.* A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.

(2) *Justifiable Abortion.* A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable. [Additional exceptions from the requirement of hospitalization may be incorporated here to take account of situations in sparsely settled areas where hospitals are not generally accessible.]

(3) *Physicians' Certificates; Presumption from Non-Compliance.* No abortion shall be performed unless two physicians, one of whom may be the person performing the abortion, shall have certified in writing the circumstances which they believe to justify the abortion. Such certificate shall be submitted before the abortion to the hospital where it is to be performed and, in the case of abortion following felonious intercourse, to the prosecuting attorney or the police. Failure to comply with any

of the requirements of this Subsection gives rise to a presumption that the abortion was unjustified.

(4) *Self-Abortion.* A woman whose pregnancy has continued beyond the twenty-sixth week commits a felony of the third degree if she purposely terminates her own pregnancy otherwise than by a live birth, or if she uses instruments, drugs or violence upon herself for that purpose. Except as justified under Subsection (2), a person who induces or knowingly aids a woman to use instruments, drugs or violence upon herself for the purpose of terminating her pregnancy otherwise than by a live birth commits a felony of the third degree whether or not the pregnancy has continued beyond the twenty-sixth week.

(5) *Pretended Abortion.* A person commits a felony of the third degree if, representing that it is his purpose to perform an abortion, he does an act adapted to cause abortion in a pregnant woman although the woman is in fact not pregnant, or the actor does not believe she is. A person charged with unjustified abortion under Subsection (1) or an attempt to commit that offense may be convicted thereof upon proof of conduct prohibited by this Subsection.

(6) *Distribution of Abortifacients.* A person who sells, offers to sell, possesses with intent to sell, advertises, or displays for sale anything specially designed to terminate a pregnancy, or held out by the actor as useful for that purpose, commits a misdemeanor, unless:

(a) the sale, offer or display is to a physician or druggist or to an intermediary in a chain of distribution to physicians or druggists; or

(b) the sale is made upon prescription or order of a physician; or

(c) the possession is with intent to sell as authorized in paragraphs (a) and (b); or

(d) the advertising is addressed to persons named in paragraph (a) and confined to trade or professional channels not likely to reach the general public.

(7) *Section Inapplicable to Prevention of Pregnancy.* Nothing in this Section shall be deemed applicable to the prescription, administration or distribution of drugs or other substances for avoiding pregnancy, whether by preventing implantation of a fertilized ovum or by any other method that operates before, at or immediately after fertilization.

SUPREME COURT OF THE UNITED STATES

No. 70-40

Mary Doe et al., Appellants, *v.* Arthur K. Bolton, as Attorney General of the State of Georgia, et al.	On Appeal from the United States District Court for the Northern District of Georgia.

[January 22, 1973]

MR. JUSTICE REHNQUIST, dissenting.

The holding in *Roe* v. *Wade, ante,* that state abortion laws can withstand constitutional scrutiny only if the States can demonstrate a compelling state interest apparently compels the Court's close scrutiny of the various provisions in Georgia's abortion statute. Since, as indicated by my dissent in *Wade,* I view the compelling state interest standard as an inappropriate measure of the constitutionality of state abortion laws, I respectfully dissent from the majority's holding.

FILE COPY

Supreme Court, U. S.
FILED
FEB 15 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 70-18, 1971 Term

JANE ROE, JOHN DOE, MARY DOE, AND JAMES HUBERT HALLFORD, M.D.,
Appellants,

v.

HENRY WADE, DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

PETITION FOR REHEARING

JOHN L. HILL
ATTORNEY GENERAL OF TEXAS
JOHN M. BARRON
FIRST ASSISTANT ATTORNEY GENERAL
LARRY F. YORK
EXECUTIVE ASSISTANT ATTORNEY GENERAL
JOE DIBRELL
ASSISTANT ATTORNEY GENERAL
Attorneys for Respondent
HENRY WADE
CRIMINAL DISTRICT ATTORNEY
Dallas, Texas
Supreme Court Building
Austin, Texas 78711

INDEX

Page

ARGUMENT 1

I. THE SUPREME COURT ERRED IN SUBSTITUTING ITS SOCIAL BELIEFS FOR THE JUDGMENT OF THE TEXAS LEGISLATURE, WHICH SUBSTITUTION AMOUNTS TO A REVIVAL OF THE DOCTRINE OF SUBSTANTIVE DUE PROCESS, EARLIER DISCARDED BY THE COURT IN *FERGUSON V. SKRUPA*, 372 U.S. 726 (1963) 1

II. THE SUPREME COURT ERRED IN FAILING TO EXTEND TO UNBORN CHILDREN PROTECTION, EQUAL TO THAT OF THE MOTHER, UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION 5

CONCLUSION 8

TABLE OF AUTHORITIES

Byrn v. New York City Health & Hospitals Corp., 286 N.E.2d 887 (1972) 6

Cheaney v. Indiana, 285 N.E.2d 265 (1972) 7

Dred Scott v. Sanford, 60 U.S. 393, 621 (1856) 4

Ferguson v. Skrupa, 372 U.S. 726 (1963) 2

Keeles v. Superior Court, 470 P.2d 617 (Cal. 1970) 8

McGarvey v. Magee-Womens Hospital, 340 F.Supp. 751, 754 (W.D.Pa. 1972) 6

Montana v. Kennedy, 366 U.S. 308 (1961) 7

State v. Dickinson, 275 N.E.2d 599 (Ohio 1970) 8

Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955) .. 2

IN THE

SUPREME COURT OF THE UNITED STATES

No. 70-18, 1971 Term

JANE ROE, JOHN DOE, MARY DOE, AND JAMES HUBERT HALLFORD, M.D.,
Appellants,

v.

HENRY WADE, DISTRICT ATTORNEY OF DALLAS COUNTY, TEXAS,
Appellee.

PETITION FOR REHEARING

Pursuant to Section 1 of Rule 58 of this Court, Respondent, [redacted] respectfully prays for a rehearing of the decision and judgment of the Court insofar as it declares the Texas abortion statutes unconstitutional.

Respondent urges two points as grounds for rehearing:

I.

THE SUPREME COURT ERRED IN SUBSTITUTING ITS SOCIAL BELIEFS FOR THE JUDGMENT OF THE TEXAS LEGISLATURE, WHICH SUBSTITUTION AMOUNTS TO A REVIVAL OF THE DOCTRINE OF SUBSTANTIVE DUE PROCESS, EARLIER DISCARDED BY THE COURT IN *FERGUSON V. SKRUPA*, 372 U.S. 726 (1963).

The constitutional test traditionally applied by this Court to social legislation such as the Texas abortion statutes, is whether or not such laws have a "rational

relation to a valid state objective." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955). While all may not agree with the objectives of the Texas statutes, this Court may not constitutionally substitute its judgment for the collective wisdom of the people of Texas, speaking through their legislature, unless it chooses to revive the doctrine of "substantive due process," said by this Court to have been laid to rest forever in *Ferguson v. Skrupa*, 372 U.S. 726 (1963):

> "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), outlawing "yellow dog" contracts, Coppage v. Kansas, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441 (1915), setting minimum wages for women, Adkins v. Children's Hospital, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1923), and fixing the weight of loaves of bread, Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 44 S.Ct. 412, 68 L.Ed. 813 (1924). This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time, particularly by Mr. Justice Holmes and Mr. Justice Brandeis. Dissenting from the Court's invalidating a state statute which regulated the resale price of theatre and other tickets, Mr. Justice Holmes said,
>
> 'I think the proper course is to recognize that a state Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious

meanings by reading into them conceptions of public policy that the particular Court may happen to entertain.'

And in an earlier case he had emphasized that, 'The criterion of constitutionality is not whether we believe the law to be for the public good.'

"The doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned * * * with the wisdom, need, or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' It is now settled that States 'have power to legislative against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law."

The theological, philosophical, medical, and legal worlds are divided on just when the fetus can be considered to be "human." For the Court to enter the controversy and to deny that the Texas statutes have any "rational relation" to a "valid state objective" is simply to accept as rational those philosophies comporting with the Court's views, and to condemn as irrational all others.

The comments of Mr. Justice Curtis, dissenting in

the *Dred Scott* decision, seem apropos here:

> "When such a method of interpretation of the Constitution obtains, in place of a republican government, with limited and defined powers, we have a government which is merely an exponent of the will of Congress or what, in my opinion, would not be preferable, an exponent of the individual political opinions of the members of this Court." *Dred Scott v. Sanford*, 60 U.S. 393, 621 (1856).

The State's abortion statutes relate logically and rationally to the State's objective—preservation of fetal human life and preservation of the mother's health. Surely the prevention of the extinguishment of the life of a human fetus, is a "valid state objective." The embryo is a fully potential human being from the moment of conception. For the Court to find a basis for its far-reaching decision in unduly narrow definitions of "person" and "life," is to avoid the basic moral and legal issue before the Court. The fetus and the mother are entitled to protection of law, in *all* stages of development.

The question here is not one of postponement of life, but one of the taking of life. The State's "valid objective" in trying to prevent the intentional taking of that life in *all* stages of development cannot be subordinated to a vaguely defined "right of privacy" or to this Court's own social and economic beliefs.

After discussing attitudes of various groups from man's dim beginnings to the present (none of which were in evidence), the Court discards all considerations except the (not unanimous) medical view that abortions performed prior to the end of the first trimester are none less dangerous than normal childbirth, so that at that time the State obtained a "compelling interest" in the pregnancy. If that single consideration

is to define "compelling interest," then, presumably, as medical science continues to advance, and as the dangers of abortions—and all surgical procedures—continue to decrease, one might well find, in twenty years, that the "compelling" point has moved up to five months, or six, or seven months, or has disappeared completely.

Selection of the third trimester—being the period of "viability"—as the time during which the State may proscribe abortions, except for reasons of the mother's health, likewise has little basis in logic. To say that a State may prohibit the killing of a fetus *only* after the fetus has gained the ability to live outside the womb is to deny the fact that the process from conception to birth is a continuum, and that the incident of "viability" truly has no more to do with "rational relation to valid state objective" than does the appearance of a discernible heartbeat, or a host of other (early) developmental features. Few mothers or fathers, who badly wanted children, would be much consoled by the knowledge that their unwanted miscarriage had occurred in the second trimester—before "viability"—their loss is that of a human life, with the potential to be born and live outside the womb, as well as within.

II.

THE SUPREME COURT ERRED IN FAILING TO EXTEND TO UNBORN CHILDREN PROTECTION, EQUAL TO THAT OF THE MOTHER, UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

That the fetus is "alive" from the moment of conception is not now disputed. That it is "human"—in appearance as well as potential—cannot be denied. The fetus is a "person," within the meaning of the

Constitution and its Amendments, and is entitled to be protected *equally* with the life and health of the mother.

It has long been clear in the law that an unborn child may inherit or take under a will; that recovery may be had for injuries suffered by the unborn child prior to birth; that he may recover for the death of his father, even though that death occurs prior to the birth of the child; and that the unborn child has a host of other legal rights which would hardly be accorded a merely biological lump.

This Court cites *McGarvey v. Magee-Womens Hospital*, 340 F.Supp. 751 (W.D.Pa. 1972) for the proposition that a fetus is not a "person" within the meaning of the Fourteenth Amendment. But that court saw the question before it somewhat differently (emphasis ours):

> "The narrow question is whether *we* will afford fetal life constitutional protection." 340 F.Supp. 751, 754.

Then, making it clear that the Court was not passing on the issue of whether a fetus is a "person," but rather passing on the issue of whether a *court*, instead of a *legislature*, should determine the question, the Court said:

> "One need not be a strict constructionist to answer this in the negative, for to answer otherwise would be to create a new administrative jungle in the name of a civil right never heretofore conceived. *This is a problem for the legislatures of the various states. They must decide the problems in the light of moral issues, the conflicting rights of mother and child, the extent of medical knowledge and the interests of the state.*" (emphasis ours) 340 F.Supp. 751, 754.

This Court also cites *Byrn v. New York City Health*

& Hospitals Corp., 286 N.E.2d 887 (1972) as holding the fetus not to be a "person" within the meaning of the Constitution. But in that case, the Court of Appeals of New York, being asked to enjoin application of the New York statute allowing abortions in limited instances, stated:

> "There are, then, real issues in this litigation, but they are not legal or justiciable. They are issues outside the law unless the legislature should provide otherwise. The Constitution does not confer or require legal personality for the unborn; the legislature may, or it may do something less, as it does in limited abortion statutes, and provide some protection far short of conferring leagl personality." 286 N.E.2d 887, 890.

Clearly, that Court felt that the judgment was to be made by the legislature of the State of New York, and, having been made, should not be disturbed by the courts, on the basis of some court-imposed theory of personality.

As Mr. Justice Jasen said, concurring:

> "As Judge Breitel's opinion [the majority opinion] recognizes, the formidable task of resolving this issue is not for the courts. Rather, the extent to which fetal life should be protected 'is a value judgment not committed to the discretion of judges but reposing instead in the representative branch of government.' *Corkey v. Edwards*, 322 F.Supp. 1248, 1254 (D.C.N.C. 1971, appeal pending)." 286 N.E.2d 887, 891.

The other cases cited by this Court in reaching its conclusion that a fetus is not a "person" can hardly be seen as controlling on the question. *Cheaney v. Indiana*, 285 N.E.2d 265 (1972) merely upholds a state criminal conviction for committing an abortion. *Montana v. Kennedy*, 366 U.S. 308 (1961) deals merely with whether citizenship is determined by place of birth or

by place of conception. *Keeles v. Superior Court*, 470 P.2d 617 (Cal. 1970) merely holds that an unborn, but viable, fetus is not a "human being" within the meaning of a California state statute on murder. *State v. Dickinson*, 275 N.E.2d 599 (Ohio 1970) deals only with whether death of a fetus might be considered "vehicular homicide," under an Ohio statute.

In short, the issue of whether a fetus is a "person," entitled to equal protection under law, has not been decided elsewhere, except where courts have (rightfully) held that that is a decision for the representative branch of government.

This Court is now squarely presented with the question, and should hold that a fetus is a "person," entitled to protection of life, under the Equal Protection Clause of the Fourteenth Amendment, equal to the protection of life afforded to the mother, and to all other persons.

WHEREFORE, premises considered, Respondent moves the Court to grant the rehearing herein prayed for.

Respectfully submitted,

JOHN L. HILL
ATTORNEY GENERAL OF TEXAS

JOHN M. BARRON
FIRST ASSISTANT ATTORNEY GENERAL

LARRY F. YORK
EXECUTIVE ASSISTANT ATTORNEY GENERAL

JOE DIBRELL
ASSISTANT ATTORNEY GENERAL

Attorneys for Respondent

Supreme Court Building
Austin, Texas 78711

HENRY WADE
CRIMINAL DISTRICT ATTORNEY
Dallas, Texas

CERTIFICATE OF COUNSEL

I certify that the within Petition for Rehearing is presented in good faith and not for delay.

LARRY F. YORK
EXECUTIVE ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

This is to certify that on the 14th day of February, 1973, copies of this Petition for Rehearing were mailed, postage prepaid to counsel of record for the Petitioner.

LARRY F. YORK
EXECUTIVE ASSISTANT ATTORNEY GENERAL

TABLE OF AUTHORITIES

CASES

Page

Abele v. Markle, 342 F.Supp. 800 (Conn. 1972), appeal pending; *Abele v. Markle*, ____ F.Supp. ____, (Conn. Sept. 20, 1972), appeal pending 7

Garrett v. State, 125 Ga. App. 743 (1972) 7

Shadwick v. Tampa, 407 U.S. 345 (1972) 8

United States v. Vuitch, 402 U.S. 62 (1971) 11

OTHER

Ga. Laws 1964, pp. 499, 581, 584 (Ga. Code Ann. § 88-1702[e]; § 88-1709[a]) 8

Law Window, National Cathedral, Washington, D.C. 9

Ratner, "Fetology: The Smallest Patients," Vol. 8, No. 2, *Child and Family Quarterly* (Oak Park, Illinois), reprint of article in "The Sciences" October 1968, New York Academy of Sciences 6

IN THE

Supreme Court of the United States

TERM, 1971

NO. 70-40

MARY DOE; Peter G. Bourne; Robert Hatcher; Lillas L. James; James Waters; Corbett Turner; Newton Long; Edward Leader; William H. Biggers; George Violin; Patricia S. Smith; Jennie Williams; Judith Bourne; Susanne Dunaway; Joyce Parks; Lou Ann Irion; Mary Long; J. Emmett Herndon; Samuel L. Williams; Eugene Pickett; Richard Devor; Donald Daughtry; Judith Zorach and Karen Weaver; residents of the State of Georgia; Planned Parenthood Association of Atlanta, Inc., a Georgia corporation; and Georgia Citizens for Hospital Abortion, Inc., a Georgia corporation, for and on behalf of all persons and organizations similarly situated,

Appellants,

VS.

ARTHUR K. BOLTON, as Attorney General of the State of Georgia; Lewis R. Slaton, as District Attorney of Fulton County, Georgia; and Herbert T. Jenkins, as Chief of Police of the City of Atlanta,

Appellees.

On Appeal from the United States District Court For the Northern District of Georgia

PETITION FOR REHEARING

COME NOW the Appellees herein and petition this Honorable Court for a rehearing in the above-styled cause which was decided on January 22, 1973. The reasons therefor are given below.

REASONS FOR GRANTING REHEARING

1.

Appellees have had no opportunity to show at what gestational stage the State interest in guarding the health of the mother warrants state regulation of abortion.

The abortion techniques used today are of relatively recent origin in medical practice and are not yet widely used outside of those states which liberally allow abortions. The Court has recognized that the State has a compelling interest in the health of the mother, and it selected the end of the first trimester as the point at which the State's interest may constitutionally be implemented. The single factor which the Court used to prohibit the states, as a constitutional matter, from exercising their concern with maternal health in the first trimester of pregnancy, was the maternal mortality rate (*Roe v. Wade*, No. 70-18, Slip Opinion, p. 47). The pivot is the judicially recognized "fact" that "mortality in abortion is less than mortality in normal childbirth." Even if this is true, it amounts to the Court choosing *sua sponte* a single medical comparative gauge of which to take judicial notice, without considering whether that "fact" is a matter of common knowledge, generally known and accepted, and without taking into account other medical and scientific facts which may justify State regulation of abortion or even cast a duty on the State to circumscribe such procedures for the health, safety, and welfare of pregnant women.

The point is that the Appellees had no opportunity at any stage in this case to present evidence which would show that the State's regulatory scheme regarding abortion is reasonably related to, and even demanded by hazards to, maternal health in the first trimester. The mor-

tality rate is not the only significant factor in assuring protection of maternal health. Just as the Court found too narrow the allowance of abortions to preserve the mother's "life" and ruled that her health also be served in the abortion decision, so the Court has overlooked the State's concern with her health both *within* the early stages of pregnancy and *afterwards* as she experiences the results of first trimester abortion; in these regards the State is concerned with a great deal more than just whether she lives or dies as a direct and immediate result of abortion. Hence, the exclusive emphasis on mortality constricts the legitimate arena of State concern with maternal health to the question only of life and death.

For example, Appellees should have the right to show that the State can require abortions to be done in a safe setting and to prescribe the location in terms of what is desirable to protect the patient, over and above what a lone doctor feels is adequate or expeditious. We are dealing here with a procedure long considered outlawed and which has suddenly become legal. Complications both immediate and long term are highly speculative, and the need for post-care availability is often unforeseen and unforeseeable. Later complications and the effects on the physical and mental well-being of the pregnant woman who undergoes an abortion procedure will not be known absent enforceable reporting procedures. Secondly, they will be beyond the State's reach to safeguard against if the State is constitutionally forbidden from restricting early-term abortions but for the minimal requirement that they be done by physicians.

The record is devoid of evidence as to what is justifiable in this respect, as to what is "reasonably related" to the compelling state interest recognized by the Court

and contemporaneously captured in the Court's judicial concept of medical wisdom and knowledge.

2.

Appellees have had no opportunity to show by evidence in a traditional judicial trial setting at what gestational stage the separate life of the fetus is "meaningful" *medically;* in addition, the Court overlooked the significance of Georgia's legal recognition of meaningful human life as found in case law and statute.

The Court has taken judicial notice of innumerable facts and factors, some which are expressly referred to in the Court's decision and some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter-evidence since they form the foundation for the Court's opinion and compromising dichotomy of constitutional stages of fetal growth. With no opportunity for Appellees to demonstrate the factual basis, in terms of current medical science, that its interest attaches at a particular point in the natural development of a human fetus, the Court has seized upon the convenient point of "viability" and crystallized constitutional command which bars State action.

The Constitution does not prohibit the State from exerting the power to protect rights retained by the people, that is, the right to determine for legal purposes what is a "person" insofar as the gray area of prenatal life is concerned. Nor does it prohibit the State from determining at what degree a living human entity may be protected on behalf of itself and of society.

Basic rights are the original and inviolate property of the people, flowing from natural law, whereas constitutions are only the mechanical means of organizing a government and thus merely guarantee and recognize such fundamental rights. The right of a living human fetus to develop to birth, which right cannot be said to attach constitutionally no sooner than "viability" as that term is judicially defined, is a natural right which exists even without a Constitution.

The Court has recognized that fetal life is a continuum. Thus before a point is selected at which our government by judicial fiat must be blindfolded to its existence, the Court should have every benefit of a complete record and the representation by a guardian ad litem for that fetal entity and for its natural right to develop to birth. The presumption in this regard should be on the side of life so that its fullest defenses may be aired.

What the Court has done is to compel the State to condone the killing of prenatal infants and even to encourage it by loose controls. The Court, but not the Constitution, compels the State to denounce the fetus for what it is, despite the legal status and recognition which the State accords to the prenatal infant in a wide variety of laws which conceive of a child *en ventre sa mere* as a child *in esse*.

The Court has adjudged that the State can protect the human fetus only when it "presumably has the capability of meaningful life outside the mother's womb." *Roe v. Wade*, No. 70-18, Slip Opinion p. 48. Medically, however, the fetus may be a patient whose life is sought to be saved at a point far earlier than "viability" and indeed, from the time his existence in the mother's womb is

known. The separate human entity is protectible from the earliest knowledge of pregnancy, by treatment to the fetus-harboring female so as to make her pregnancy as durable as possible.[1] The Court has selected a point in time at which states may protect fetal life, without any record of facts upon which to base the conclusion that only at "viability", as that term is defined by the Court, do the people of a state have the authority to demand caution before a prenatal infant is destroyed. Not only did the Court set a new constitutional standard, but at the same moment the Court applied the standard without giving Appellees notice or an opportunity to present evidence with respect to the point of gestation at which such standards, if they be correct as a matter of law in the first place, should be applied. "Viability", "meaningful life" or existence, "fetal life": all presumably have medical meaning which should be subject to medical testimony before a decision of constitutional import becomes solidified in concrete. These concepts are not even necessarily the appropriate ones. Without medical testimony, for example, the Court abandoned the concept of "quickening" as being a valid point of recognition of the fetus as a separate and protectible entity.[2]

The Court's phrase "potential human life" should also be subject to medical scrutiny if it is to have a judicial meaning in medical spheres. In the medical concept of "life", with its current body of technological knowledge,

---

[1] See Ratner, "Fetology: the Smallest Patients", Vol. 8, No. 2, *Child and Family Quarterly* (Oak Park, Illinois), reprint of article in "The Sciences" October 1968, New York Academy of Sciences.

[2] Mr. Justice Douglas would apparently recognize this earlier event. In speaking of the "rightful concern of society," he stated in his concurring opinion that: "The woman's health is part of that concern; as is the life of the fetus after quickening." *Roe v. Wade*, No. 70-18, and *Doe v. Bolton*, No. 70-40, concurring opinion p. 7.

including such advances as fetal electrocardiography and fetal electroencephalography, legal "life" should not be cemented at an event in a judicial conclusion which does not have the benefit of medical evidence. The "potential human life" concept is questionable, for example, because the healthy first trimester fetus has a high *probability* of birth rather than merely a "potentiality."

In this regard, the records in some of the other cases pending before the Court may have more complete records which shed greater light on this momentous question than does the meager record in the instant case, made by a solitary hearing of less than three hours duration. See, *e.g.*, *Abele v. Markle*, 342 F.Supp. 800 (Conn. 1972), appeal pending; *Abele v. Markle*, ____ F.Supp. ____ (Conn. Sept. 20, 1972), appeal pending.

In addition, Georgia's recognition of meaningful life has already been legally determined to attach far earlier than the Court-established "viability" of twenty-four weeks or twenty-eight weeks. An example is the case of *Garrett v. State*, 125 Ga. App. 743 (1972), wherein the court upheld a judgment granting weekly child support for an unborn child, separate and apart from a lump sum payment to the pregnant wife. The court discussed the defendant's obligation to support his *children*. Illustrative also is the legal definition in Georgia of a "live birth", which birth requires a certificate of birth registration:

> "The complete expulsion or extraction from its mother of a product of human conception, irrespective of the duration of pregnancy, which, after such expulsion or extraction, breathes or shows any other evidence of life such as beating of the heart, pulsation

> of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached." Ga.L. 1964, pp. 499, 581, 584 (Ga. Code Ann. § 88-1702[e]; § 88-1709[a]).

This is obviously not related only to a point exceeding "viability". See also the examples referred to in Appellees' Brief, pp. 62-65, and in Appellees' list of "Late Authorities", pp. 2-3.

At any rate, the Appellees should have an opportunity to present evidence and testimony to support the State's claim of medically and scientifically sound interest in requiring a cautious approach to the extinguishment of fetal life.

3.

"Person" is not defined in the United States Constitution, which this Court has repeatedly recognized as a dynamic document. In *Shadwick v. Tampa*, 407 U.S. 345 (1972), Mr. Justice Powell stated:

> "But our federal system warns of converting desirable practices into constitutional commandments. It recognizes in plural and diverse state activity one key to national innovativeness and vitality." *Id.* at 353-354.

Medical technology and biological knowledge have advanced far beyond that which existed when the Constitution was written. The Constitution did not freeze into 1789 concepts the meaning of "person" or the stage at which the people might be persuaded to protect fetal life.

4.

The Court has overlooked the State's compelling interest in protecting the dignity of human life, which is separate and apart from the interest in protecting the individual fetus. The State has a compelling interest as part of its police power to uphold and bear witness to the moral fiber of its citizenry. As Oliver Wendell Holmes is reported to have said:

> "The law is the witness and external deposit of our moral life."[1]

The Court here made a value judgment which should be left to the people through their duly elected representatives or even, where they so choose, through referendum. The interest in protecting the concept of the sacredness of human life and the natural rights which follow its emergence, underlies the interest in protecting fetal life and is at the root of the State's expressed desire to curb killing. This fundamental consideration is the basis for the conservative system of checks and the multiple consideration of the abortion decision which the Georgia statutory scheme envisioned, because it recognized that medicine was not here dealing with an appendix or other part of a person's body but rather with a separate and to a great degree independent human entity.

The concept that the entity was a part of the mother was long ago abandoned by science; it is undeniable that the entity is merely harbored in the mother who carries it. Certainly it is dependent on her, but dependence is relative and cannot be used to measure the value of human

[1] Law Window, National Cathedral, Washington, D.C.

life nor to determine when "life" begins. A born infant, for example, is utterly dependent and would die if not cared for. Our astronauts would similarly die if not tied by their "umbilical cord" to the life-sustaining moonship or oxygen supply. Each individual needs a particular type of environment for its existence, and the unborn infant needs the environment supplied by the mother's womb (or an artificial womb when that becomes available), and this need should not be required to subordinate the living fetus in all cases where the mother's broadly defined "health" is involved.

The people of the State of Georgia have made a value judgment based on medical and other scientific facts as well as a number of other legitimate factors which relate to the concept of human life. The State has balanced the interest of the non-wanting *pregnant* mother and the natural rights of the human fetus whose dependence may find a substitute at birth, and has through its legislation achieved a balance which gives credence and standing to both, in a humane and entirely workable scheme. The interest of the State in protecting maternal mental and physical health and life, and on the other hand its interest in protecting existing human fetuses who are within the realm of legitimate control, have been struck in a delicate balance which takes into account not only abortion laws but also adoption laws, child care laws, public health capabilities, etc. The Court's substituted value judgment should not, therefore, be foisted upon the people of the State without an opportunity at least to give evidence of the factual basis supporting their legislative efforts to strike the balance as they have done.

5.

The decision fails to allow the State to acknowledge the interests of the unborn fetus at any stage before birth.

The Court stated that the interest of the State in protecting fetal life is lawful at and after "viability." But the qualifier swallows up the concession and renders it substantially identical to the unregulated decision in the first trimester. The Court announced that:

> "If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period except when it is necessary to preserve the life or health of the mother." *Roe v. Wade*, No. 70-18, Slip Opinion, p. 48.

The "health" of the mother comports a broad spectrum of considerations, as the Court adopted the many-faceted approach of the District Court and related it to the wide concept of "health" approved in *United States v. Vuitch*, 402 U.S. 62, 71-72 (1971). (See *Doe v. Bolton*, No. 70-40, Slip Opinion p. 11). Consequently, the 38-week-old fetus, who could live outside of his mother's womb without so much as the aid of an incubator, may be destroyed if his mother's mental health would better be "preserved" without the "psychological" experience of childbirth or the "distress" associated with an "unwanted" child. (See *Roe v. Wade*, No. 70-18, Slip Opinion, p. 38). Not only does this completely avoid the alternative of adoption, it demonstrates the overbroad restriction which the Court's mandate fixes on the State. Because of the all-consuming exception, the unborn "viable" child is no better off, as a matter of law, than the first-trimester child who can be aborted if his mother's physician deems that it is necessary for her, in his best clinical judgment. She,

being the sole patient with whom he is concerned, will be hard put to find that her "health" will not in some measure be affected if her desire to abort is not fulfilled.

The dilemma posed by this conflict should be resolved upon rehearing or remand.

CONCLUSION

For any or all of the reasons stated, this Petition for Rehearing should be granted, or the opinion should be withdrawn until the Court has fully examined those cases pending before it which come with more complete factual records, or the case should be remanded for the taking of evidence in light of the Court's views.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

HAROLD N. HILL, JR.
Deputy Assistant
Attorney General

COURTNEY WILDER STANTON
Assistant Attorney General

DOROTHY T. BEASLEY
Assistant Attorney General
Attorneys For
Arthur K. Bolton

MORRIS ROSENBERG
Attorney For Lewis R. Slaton

HENRY L. BOWDEN
RALPH H. WITT
Attorneys For
Herbert T. Jenkins

Please serve:

DOROTHY T. BEASLEY
132 Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

Fulton County
Courthouse
Atlanta, Georgia 30303

2614 First National
Bank Bldg.
Atlanta, Ga. 30303

CERTIFICATE OF COUNSEL

I certify that this Petition is presented in good faith and not for delay.

DOROTHY T. BEASLEY

CERTIFICATE OF SERVICE

I, DOROTHY T. BEASLEY, Attorney of Record for Appellee Arthur K. Bolton, and a member of the Bar of the Supreme Court of the United States, hereby certify that on behalf of all Appellees and in accordance with the Rules of the Supreme Court of the United States, I served the foregoing "Petition for Rehearing" on the Appellants by depositing copies of the same in a United States mail-box, with first class postage prepaid, addressed to counsel of record at their post office address:

Margie Pitts Hames
Suite 822, 15 Peachtree Street, N.E.
Atlanta, Georgia 30303

Reber Boult, Jr.
Charles Morgan, Jr.
American Civil Liberties Union Foundation, Inc.
52 Fairlie Street
Atlanta, Georgia 30303

Elizabeth Roediger Rindskopf
Gale M. Siegel
185 Central Avenue, S.W.
Atlanta, Georgia 30303

Tobiane Schwartz
153 Pryor Street, S.W.
Atlanta, Georgia 30303

This ____ day of February, 1973.

DOROTHY T. BEASLEY

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
ARGUMENT	2
CONCLUSION	6
CERTIFICATE OF SERVICE	6

TABLE OF CITATIONS

Cases

Barbier v. Connolly, 113 U.S. 27 (1885) 4

Doe v. Bolton, ... U.S. ..... (1973) 2, 4

Jacobson v. Massachusetts, 197 U.S. 11 (1905) 4

Jones v. City of Portland, 245 U.S. 217 (1917) 3

Lochner v. New York, 198 U.S. 45 (1905) 2-3

Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1945) 4

Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947) 2

Roe v. Wade, ... U.S. ..... (1973) 2, 4, 5

Constitutional Provisions

United States Constitution:

Fourteenth Amendment ..... Passim

In The

Supreme Court of the United States

October Term, 1972

No. 70-18

JANE ROE, ET AL.,

Appellants,

v.

HENRY WADE.

On Appeal from the United States District Court for the Northern District of Texas

and

No. 70-40

MARY DOE, ET AL.,

Appellants,

v.

ARTHUR K. BOLTON, AS ATTORNEY GENERAL OF THE STATE OF GEORGIA, ET AL.

On Appeal from the United States District Court for the Northern District of Georgia

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING

INTEREST OF AMICUS CURIAE

Since the law of the Commonwealth of Virginia relating to abortions parallels the provisions of the Georgia statute

struck down in *Doe* v. *Bolton,* ..... U.S. ..... (1973), the issues presented in that case and in *Roe* v. *Wade,* ..... U.S. ..... (1973), are of great importance to the people of Virginia.

ARGUMENT

The principle of separation of powers is fundamental to the very existence of constitutional government as established in the United States. The unique place and character of judicial review in our governmental framework are found in the "delicacy of that function, particularly in view of possible consequences for others . . .; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process . . .; withal in the paramount importance of constitutional adjudication in our system." *Rescue Army* v. *Municipal Court of Los Angeles,* 331 U.S. 549, 571 (1947).

In deciding *Roe* v. *Wade,* ..... U.S. ..... (1973), the Court recognized at page 1 and page 44 of the slip opinion the "sensitive and emotional nature of the abortion controversy," the "vigorous opposing views, even among physicians," the "deep and seemingly absolute convictions that the subject inspires," and the wide divergence of opinion on the "difficult question of when life begins." Nevertheless, as Mr. Justice Holmes stated in his now famous dissent in *Lochner* v. *New York,* 198 U.S. 45, 75 (1905):

> "This case is decided upon [a] . . . theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up

> my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."

It is not the function of the Supreme Court of the United States under the authority of the Fourteenth Amendment to supervise the legislation of the States in the exercise of the police power beyond protecting against exertions of such authority in the enactment and enforcement of laws of an arbitrary character, having no reasonable relation to the execution of lawful purposes. *Jones* v. *City of Portland*, 245 U.S. 217, 224 (1917). And as Mr. Justice Rehnquist recognized on page 4 of the slip opinion in his dissent in *Roe*, "adoption of the compelling state interest standard will inevitably require the Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward is 'compelling.' The decision here to break the term of pregnancy into three distinct terms and to outline the permissible restrictions the state may impose in each one, . . . , partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment."

Neither the Fourteenth Amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed its "police power," to prescribe reasonable regulations to pro-

mote the health, peace, morals, education and good order of the people. *Barbier* v. *Connolly,* 113 U.S. 27, 31 (1885). This power is one of the least limitable of the powers of government. *Queenside Hills Realty Co.* v. *Saxl,* 328 U.S. 80, 83 (1945). No better words can be used to describe the concept of the police power of the State, than selected passages from the case of *Jacobson* v. *Massachusetts,* 197 U.S. 11, 24-26 (1905), in which the Court upheld the validity of the Massachusetts statute requiring vaccination against smallpox:

> "The authority of the State to enact this statute is to be referred to what is commonly called the police power —a power which the State did not surrender when becoming a member of the Union under the Constitution. . . . According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. . . . The mode or manner in which those results are to be accomplished is within the discretion of the State; . . . [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. . . . This court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State. . . .' " (Citations omitted.)

The Court's holdings in *Roe, supra,* and its companion case, *Doe* v. *Bolton,* ..... U.S. ..... (1973), are an unprecedented and unwarranted intrusion by the judiciary into the power and responsibility of the legislature to protect the public health, safety, welfare and morals of its citizens. The Court's decisions in these cases precludes the State from

adopting a theory of life which a substantial number of its citizens accepts. Contrary to Mr. Justice Holmes' admonition, the Court has adopted the socio-medical-legal theory that "life" is too insubstantial to allow the State under the Constitution to grant protection from arbitrary destruction visited upon embryonic life prior to the time of viability. "[A] legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone." *Roe, supra,* at 35 (slip opinion). Moreover, it is "unfair to argue that because the early focus was on preservation of the woman's life, the State's present professed interest in the protection of embryonic and fetal life is to be downgraded. That argument denies the State the right to readjust its views and emphases in the light of the advanced knowledge and techniques of the day." *Doe, supra,* at 10 (slip opinion).

CONCLUSION

For the foregoing reasons, the Commonwealth of Virginia, respectfully submits that this Court should grant appellees petitions for rehearing in the cases of *Roe* v. *Wade* and *Doe* v. *Bolton,* decided January 22, 1973.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
By: ANDREW P. MILLER
Attorney General

ANDREW P. MILLER
Attorney General of Virginia

JOHN W. CREWS
PAUL L. GERGOUDIS
Assistant Attorneys General

CERTIFICATE OF SERVICE

I certify that on or before the 16th day of February, 1973, I mailed by Airmail three copies of the foregoing Brief to Margie Pitts Hames, Suite 822, 15 Peachtree Street, N.E., Atlanta, Georgia 30303; Reber Boult, Jr., Charles Morgan, Jr., ACLU, Foundation, Inc., 52 Fairlie Street, Atlanta, Georgia 30303; Elizabeth R. Rindskopf, Gale M. Siegel, 185 Central Avenue, S.W., Atlanta, Georgia 30303; Tobiane Schwartz, 153 Pryor Street, S.W., Atlanta, Georgia 30303. All parties required to be served have been served.

JOHN W. CREWS

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

RECEIVED
1973
OFFICE OF THE CLERK
SUPREME COURT

Nos. 70-40, 70-18

DOE, *et al*,

v.

BOLTON, ATTORNEY GENERAL OF GEORGIA, *et al*, *Appellees.*

and

ROE, *et al*, *Appellants*

v.

WADE, DISTRICT ATTORNEY OF DALLAS COUNTY, *Appellee.*

1973
MICHAEL RODAK, JR., CLERK

Appeals from the United States District Courts for the Northern District of Georgia and the Northern District of Texas, respectively

BRIEF OF STATE OF CONNECTICUT, AMICUS CURIAE, IN SUPPORT OF PETITIONS FOR REHEARING FILED BY THE STATES OF GEORGIA and TEXAS

STATE'S ATTORNEYS

By: GEORGE D. STOUGHTON
Chief Assistant State's Attorney
For Hartford County
95 Washington Street
Hartford, Connecticut 06106

ATTORNEY GENERAL
ROBERT K. KILLIAN

By: DANIEL R. SCHAEFER
Assistant Attorney General
30 Trinity Street
Hartford, Connecticut 06115

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 70-40, 70-18

DOE, *et al*,

Appellants

v.

BOLTON, ATTORNEY GENERAL
OF GEORGIA, *et al*,

Appellees.

and

ROE, *et al*,

Appellants

v.

WADE, DISTRICT ATTORNEY
OF DALLAS COUNTY,

Appellee.

Appeals from the United States District Courts for the Northern District of Georgia and the Northern District of Texas, respectively

---

BRIEF OF STATE OF CONNECTICUT, AMICUS CURIAE, IN SUPPORT OF PETITIONS FOR REHEARING FILED BY THE STATES OF GEORGIA and TEXAS

The State of Connecticut, as Amicus Curia, pursuant to Rule 42 of the Revised Rules of the United States Supreme Court, joins with the States of Georgia and Texas in support of their petitions for rehearing which are to be filed by February 16, 1973 and respectfully urges its favorable consideration on the following grounds:

1. The Attorney General and State's Attorneys of Connecticut are Appellants in appeals involving related issues concerning the constitutionality of state anti-abortion laws. *Markle v. Abele*, No. 72-56 and 72-730, docketed July 10, 1972 and November 16, 1972, respectively.

2. The Connecticut case (No. 72-730) is believed to be the only one involving the constitutional issue of abortion wherein an evidentiary record has been made.

3. The evidence in the Connecticut case demonstrates that an unborn child is an alive, separate and distinct human being from the time the child is conceived.

4. This evidence was wholly uncontradicted.

5. The evidence included cases where a number of "previable" children were delivered alive as a result of induced abortion in New York City and then died.

6. The evidence also included at least one case where a child was delivered as a result of induced abortion and survived.

7. Your Amicus respectfully urges that this evidence may be of great assistance to the Court in resolving the question of when human life begins from the standpoint of medical science.

8. Evidence that there is a substantial margin of error in ascertaining a length of pregnancy is also in the record. In New York City there have been many abortions performed beyond the statutory limit of gestation.

9. Evidence as to unreported complications and deaths resulting from legalized abortion in New York City was also presented.

10. Your Amicus respectfully submits that the method of judicial notice taken in the Georgia and Texas cases wherein

no evidentiary record was made may not be appropriate in a case such as Connecticut's where there is a record of medical evidence.

11. The instant cases in which the petitions for rehearing have been filed are of great public moment. Your Amicus respectfully submits that it is essential that the judgments therein be based upon scientific evidence which has not yet been presented to this Court.

WHEREFORE, your Amicus respectfully urges this Court to grant the petitions filed by the States of Georgia and Texas for rehearing those cases and any other cases that are similarly situated. They respectfully submit that the ends of justice would best be served in such a rehearing by proceeding on the basis of plenary hearing in the Connecticut case where there is a record which speaks for itself.

Dated at Hartford, Connecticut, this 15th day of February, A.D., 1973.

Respectfully submitted,

STATE'S ATTORNEYS

By: GEORGE D. STOUGHTON
Chief Assistant State's Attorney
For Hartford County
95 Washington Street
Hartford, Connecticut 06106

ATTORNEY GENERAL
ROBERT K. KILLIAN

By: DANIEL R. SCHAEFER
Assistant Attorney General
30 Trinity Street
Hartford, Connecticut 06115

CERTIFICATE OF SERVICE

I, Daniel R. Schaefer, Attorney for Appellants, certify that a copy of the foregoing Brief of State of Connecticut, Amicus Curiae, In Support of Petitions for Rehearing Filed by the States of Georgia and Texas, was mailed, via U.S. Mail, Postage Prepaid, this 15th day of February, 1973, to the following counsel of record: Marjorie Pitts Hames, Suite 822, 15 Peach Street, N.E., Atlanta, Georgia 30303; Reber Boult, Jr., and Charles Morgan, Jr., American Civil Liberties Foundation, Inc., 52 Fairlie Street, Atlanta, Georgia 30303; Elizabeth R. Rindskop and Gale M. Siegel, 185 Central Avenue, S.W., Atlanta, Georgia 30303; Tobiane Schwarth, 153 Prior Street, S.W., Atlanta, Georgia 30303; and Mrs. Dorothy Beasley, 132 Judicial Building, 40 Capitol Square, Atlanta, Georgia 30334, all counsel of record in the case of *Doe, et al* v. *Bolton, et al* No. 70-40; and to Mrs. Sarah Weddington, and James Weddington, 709 W. 14th Street, Austin, Texas 78701; Norman Dorsen, New York University Law School, Washington Square, New York, New York 10003; Robert C. Flowers, Asst. Atty. General, Capitol Station, P.O. Box 12548, Austin, Texas 78711; Henry Wade, Dallas County Court House, Dallas, Texas 75202; Roy Lucas, James Madison Constitutional Law Institute, 4 Patchin Place, New York, N.Y. 10011; Linda N. Coffee, 2130 First National Bank Building, Dallas, Texas 75202; Fred Bruner, and Ray L. Merrill, Jr., 1130 Mercantile Bank Building, Dallas, Texas 75201, all counsel of record in the case of *Roe* v. *Wade*, No. 70-18.

DANIEL R. SCHAEFER
Assistant Attorney General